

Competition in
Professional
Services

solicitors & barristers

The Competition Authority is undertaking a study across a range of eight professions in the construction, legal and medical sectors of the Irish economy. The specific professions being reviewed are engineers, architects, dentists, optometrists, veterinary surgeons, medical practitioners, solicitors and barristers

December 2006



The Competition Authority
An tÚdarás Iomaíochta

EXECUTIVE SUMMARY	III
1. INTRODUCTION	1
BACKGROUND TO THE REPORT	3
THE CONSULTATION PROCESS	3
SCOPE OF THE REPORT	4
METHODOLOGY OF THE REPORT	5
CURRENT CONTEXT OF THE REPORT	8
STRUCTURE OF THE REPORT	9
2. AN OVERVIEW OF THE LEGAL PROFESSION	13
THE ROLE AND FUNCTIONS OF SOLICITORS	13
THE ROLE AND FUNCTIONS OF BARRISTERS	14
REGULATION OF THE LEGAL PROFESSION IN IRELAND	15
PROVISION OF LEGAL SERVICES IN IRELAND BY FOREIGN-QUALIFIED LAWYERS	17
COMPLAINTS	18
LEGAL SERVICES OMBUDSMAN	20
REPRESENTATIVE BODIES	21
RELEVANT MARKETS FOR LEGAL SERVICES	21
DEMAND FOR LEGAL SERVICES	22
PUBLIC SECTOR DEMAND FOR LEGAL SERVICES AND THE CRIMINAL LEGAL AID SYSTEM	24
SUPPLY OF LEGAL SERVICES	25
LAWYERS' INCOMES	27
PAYING FOR LEGAL SERVICES	28
3. REGULATORY REFORM	33
CURRENT REGULATORY STRUCTURE	34
COMPLAINTS AND THE PROPOSED LEGAL SERVICES OMBUDSMAN	35
RATIONALE OFFERED FOR RETAINING THE STATUS QUO	37
INTERNATIONAL EXPERIENCE	38
4. RESTRICTIONS ON OFFERING LEGAL SERVICES	51
THE LAW SOCIETY'S MONOPOLY ON TRAINING SOLICITORS	52
THE KING'S INNS' MONOPOLY ON TRAINING BARRISTERS	58
IRISH COMPETENCY REQUIREMENT FOR SOLICITORS AND BARRISTERS	64
RESTRICTIONS ON THE PROVISION OF LEGAL SERVICES IN IRELAND BY FOREIGN-QUALIFIED LAWYERS	66
RESTRICTIONS ON SWITCHING BETWEEN THE TWO BRANCHES OF THE LEGAL PROFESSION	69
RESTRICTIONS ON EMERGING PROFESSIONS	72

Executive Summary

1. The Competition Authority has concluded that the legal profession is in need of substantial reform. The profession is permeated with unnecessary and disproportionate restrictions on competition which should be removed so that consumers can benefit from greater competition in legal services. The Competition Authority's 29 recommendations are in line with previous recommendations made by other independent bodies which have not been implemented. Bodies that have made recommendations in the past include the Restrictive Practices Commission (1982), the Fair Trade Commission (1990) and the OECD (2001). The recommendations are also in line with the reform of the legal profession that has taken place, and is taking place, in other common-law countries, such as England, Wales, Northern Ireland, Australia and New Zealand.
2. The Competition Authority recommends comprehensive new legislation – a Legal Services Bill – to address the competition concerns identified in this report. The legislation would establish an independent Legal Services Commission with overall responsibility for regulating the legal profession and the market for legal services. The Legal Services Commission would be an independent, transparent and accountable body, involving a wider group of stakeholders than the current model of self-regulation. The Law Society and the Bar Council would continue to have a role in the day-to-day regulation of the profession but would be required to separate their representative and regulatory functions. A new regulatory structure of this type is required to meet the principles of good regulation established by the Government and to address adequately the risk associated with self-regulation. Currently, the Law Society and the Bar Council face a conflict of interest between their mandate to represent the interests of their members and their role in protecting consumers and the public interest.
3. Other key elements of the Legal Services Bill would be the removal of the Law Society's and King's Inns' role of setting standards for the provision of legal education - which has facilitated their monopolies in this area - and the introduction of the profession of conveyancers in Ireland. The Law Society and King's Inns and any other institutions that wish to provide training for solicitors or barristers should be required to apply to the Legal Services Commission for approval to do so. Conveyancers would be qualified to provide conveyancing services only and have the same consumer protection regulation as solicitors.
4. Overall, the legal profession is in need of root and branch reform reflecting the important need to create a modern system of regulation that is proportionate, accountable, transparent, flexible and reflects the needs of consumers. In the interim, there is much the legal profession can do itself to initiate reform for the benefit of consumers. Indeed the Bar Council has made changes in response to the Competition Authority's Preliminary Report on the Legal Profession, published in February 2005. The Law Society and Kings Inns, while not responding directly to the issues raised in the Preliminary Report, have introduced some changes to the way barristers and solicitors are trained. However, much more needs to be done. In particular, the Competition Authority recommends that:
 - The Law Society and the Bar Council should develop and actively provide useful and accessible information for consumers on their rights and key features of legal services. They should develop a "Consumer Information" page on their websites;
 - The Bar of Ireland should allow unlimited direct access to barristers for legal advice.
5. Legal services are essential for access to justice, a fundamental value in society, and for the operation of the entire economy. 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. Excessive legal fees and inefficient business methods increase the cost of living and the cost of doing business in Ireland and negatively affect Ireland's competitiveness.
6. Irish consumers, businesses and organisations paid just over €1 billion for legal services in 2003. This is equivalent to almost 1% of everything bought or sold in the country (GDP). This underestimates the impact of the sector on the economy as a whole. Legal services provide part of the fundamental infrastructure of an economy and are the essential backbone for contracts in trade, property and employment.

7. The Competition Authority finds that competition in legal services is severely hampered by many unnecessary restrictions permeating the legal profession. These restrictions emanate mainly from the regulatory rules and practices of the Law Society, the Bar Council and the Honorable Society of King's Inns but also from the relevant legislation. For example:
 - There are a number of unnecessary restrictions on becoming a solicitor or barrister. For example, those wishing to enter either branch of the legal profession must do so by way of a training school monopoly;
 - The legal profession in Ireland is organised into a highly rigid business model: access to barristers for legal advice is limited to a few approved clients, barristers cannot form partnerships or chambers or represent their employers in court;
 - There is no profession of "conveyancers" in Ireland, as in other common-law countries, and this limits competition in conveyancing services;
 - Consumers seeking legal services are not given relevant information to help them choose services that best meet their needs;
 - Known anti-consumer practices - such as barristers charging fees in proportion to one another and solicitors charging fees as a percentage of the award their client receives - have continued unchecked;
 - The title of Senior Counsel is inclined to distort rather than facilitate competition;
 - There is a near blanket ban on advertising by barristers and some unnecessary restrictions on solicitor advertising;
 - Consumers wishing to switch to another solicitor or barrister face unnecessary obstacles.
8. The Law Society, the Bar Council and the King's Inns have not sufficiently promoted the interests of consumers of legal services. They have failed to provide consumers with necessary information for dealing with the legal profession. They have also placed unnecessary limits on how consumers access legal services and on who can become a solicitor or barrister. They have presided over restrictions on competition which may have benefits for lawyers, by sheltering them from competition, but which harm consumers. The overall effect of the myriad restrictions on competition in legal services has been to limit access, choice and value for money for those wishing to enter the legal profession and those purchasing legal services.
9. The Competition Authority makes recommendations in this report to remedy all of these issues.

Legal Services Commission

10. The Competition Authority's key recommendation is that regulation of the legal profession and legal services should be overseen by a Legal Services Commission. This would be an independent, transparent and accountable body, involving a wider group of stakeholders than the current model of self-regulation.
11. The current regulatory framework for the legal profession in Ireland raises the potential for conflicts of interest between the commercial interests of lawyers and the interests of consumers of legal services. Barristers are totally self-regulated via the Bar Council, and solicitors are largely self-regulated via the Law Society, with minimal independent oversight in some areas. The Bar Council and the Law Society are also the representative bodies for barristers and solicitors respectively, and in that role, lobby for and promote the interests of the legal profession. In their role as regulators of the legal profession, the Bar Council and the Law Society must ensure that the legal

profession operates to the benefit of consumers. These two roles can come into conflict. Housing them in the same organisation lacks transparency.

12. Under the new model for regulation proposed by the Competition Authority, the Law Society and the Bar Council would still have a role to play in the regulation of the profession but would be required to separate this role completely and distinctly from that of representing their members.
13. A new regulatory structure of this type is required to meet the principles of good regulation established by the Government and to address adequately the risk associated with self-regulation. Independent regulation of the legal profession would be consistent with reform towards greater transparency, accountability and consumer-focused regulation in other professions and sectors in Ireland (for example, financial services and the medical professions) and in the legal profession internationally. Most recently, a Bill has been introduced in England and Wales for the creation of an independent regulator of the legal profession.
14. The establishment of a Legal Services Commission would complement the establishment of a Legal Services Ombudsman which has been proposed by Government. The role of the Ombudsman is to provide an independent forum for complaints about breaches of the rules by lawyers; the Commission would provide independent scrutiny of the rules themselves. These two reforms go hand in hand.

Training Solicitors and Barristers

15. Entry into the legal profession in Ireland is controlled by those already in the profession. The Law Society and the Honorable Society of King's Inns control who may train to be a solicitor or barrister respectively, and the location and format of that training.
16. This situation has resulted in these bodies having a monopoly in the markets for training solicitors and barristers respectively. Potential trainee solicitors and barristers have no choice as to the format in which they can pursue their training - full-time/part-time/weekends - as there is only one choice on offer. This arrangement has the potential to exclude suitable candidates from pursuing a career as a solicitor or barrister, particularly individuals who do not have the means to finance full-time study for substantial periods of time. Other jurisdictions use a number of schools for training lawyers. For example, in the Australian State of New South Wales the Legal Profession Admissions Board recognises 10 accredited law schools and 7 providers of practical legal training.
17. The Competition Authority strongly recommends the removal of the Law Society's and King's Inns' role of setting standards for the provision of legal education. This role should instead be given to the Legal Services Commission. The Law Society and King's Inns and any other institutions that wish to provide training for solicitors or barristers should be required to apply to the Legal Services Commission for approval to do so. Competition between solicitor and barrister training schools will drive efficiency in the market and push course fees to competitive levels. This reform will ensure that an appropriate number of training places are available to match demand for legal services and that competition in legal services is not restrained.
18. The Competition Authority further recommends a new system for the recognition of non-EU lawyers' qualifications, a new way of encouraging lawyers to be competent in the Irish language, and that lawyers should be more readily able to switch between the solicitors' and barristers' branches of the profession.

Business Structures

19. The legal profession in Ireland is currently required to follow a highly rigid business model:
 - A consumer or organisation wishing to avail of legal services may retain a solicitor directly but not a barrister. Where they wish to retain a barrister, the solicitor retains the barrister on behalf of his/her client.¹
 - Barristers must operate as sole practitioners.
 - Solicitors may enter partnerships, but only with other solicitors.
 - Some firms have solicitors and barristers as employees. Employed solicitors can represent their employers in court, but employed barristers cannot.
20. Though this model of delivering legal services may suit many clients, it should not be the only way of delivering legal services. Relaxing some of the rules enforcing this model will allow solicitors and barristers the opportunity to deliver their services in other ways which are more suitable, more efficient and more cost-effective for their clients.
21. First, the Competition Authority strongly recommends that the Bar Council's current Direct Access Scheme – whereby certain approved clients are allowed to approach barristers directly for legal advice - should be extended to all members of the public. The option of going directly to a barrister for legal advice should not be reserved to a few approved clients. Doing so imposes an additional cost on other clients who are obliged to retain a solicitor in order to access legal advice from a barrister. From a competition perspective, direct access to barristers for litigation would also be desirable but is not recommended at this time.
22. Second, barristers should be permitted to operate in partnerships and not be confined to operating as sole traders. Allowing barristers to form partnerships would allow them to benefit from the economies and efficiencies derived from shared costs, shared work, shared risk and shared professional reputation. Clients would benefit from a choice of service delivery that suits their needs. Also, groups of barristers who share premises and overheads, but not fee income (i.e. they are groups of sole traders), should be allowed to advertise themselves as a group.
23. Third, the Competition Authority recommends that barristers in employment be allowed to represent their employer in court. The current restriction preventing this forces businesses and organisations to engage the services of an outside barrister, through a solicitor, and reduces the supply of available barristers. It is also at odds with the fact that solicitors can represent their employers in court. Removing the restriction will promote competition between barristers.
24. Other restrictions on the business structures used by lawyers to deliver their services, such as multi-disciplinary practices, raise regulatory issues. These issues encompass public policy issues not limited to competition and require further examination by a larger group of stakeholders. The Competition Authority recommends that these issues be explored by the Legal Services Commission.

Conveyancing

25. Transferring the ownership of a house, apartment or piece of land from one person to another is known as conveyancing. Legally anyone can do it for themselves, if they have the necessary time, knowledge and confidence. However, most people prefer to employ a professional.

¹ Some organisations may go directly to barristers for legal advice.

26. In Ireland, solicitors are the only professionals allowed to provide conveyancing services. In Britain and Australia, specialist professionals known as “conveyancers”, or “licensed conveyancers”, also offer conveyancing services and are regulated to protect consumers in a similar fashion to solicitors.
27. The Competition Authority strongly recommends the introduction of a similar profession of conveyancers in Ireland. This would lead to downward pressure on conveyancing fees and more consumer-focused and innovative ways of providing these services, such as use of the internet and offering services outside normal business hours without any reduction in the level of consumer protection. The UK’s Department for Constitutional Affairs says that, while conveyancers have secured only 5% by value of the market for conveyancing, the average cost of conveyancing a £65,000 house fell by 25% between 1989 and 1998.² Licensed conveyancers in England have comprehensive websites, give on-line quotes and operate outside normal business hours.

Legal Fees

28. Consumers should be able to make informed decisions about which lawyer to choose and at what rates. Currently, there is limited information available to consumers of legal services about fees and costs prior to engaging the services of a lawyer. The lack of transparency in the price of legal services makes it difficult for consumers to shop around for legal services. If consumers cannot compare the prices for legal services there is little incentive for lawyers to compete on price.
29. In addition, the lack of information available to consumers of legal services has facilitated the persistence of a number of anti-consumer practices in the legal profession. In particular:
- Consumers do not always receive a letter laying out actual or estimated charges on retaining a solicitor, even though they have a legal right to such a letter;
 - Solicitors still frequently charge fees based on a percentage of the value of the assets being sold or disputed though this is not necessarily in the client’s interest;
 - Although it is prohibited by law to base legal fees on the monetary award a client receives in a case, evidence from two different independent sources shows that the principal determinant of legal fees in contentious issues is the size of the award;
 - Junior counsel generally charge a fee equal to two-thirds of the senior counsel’s fee, regardless of the work done by each barrister, despite the fact that this practice was identified as anti-competitive in an independent report on the legal profession 16 years ago.³
30. These features and practices can affect all buyers of legal services, even well-informed repeat buyers, but they are particularly likely to occur when the consumer is unaware of their effects. The Law Society and the Bar Council have failed to provide sufficient information for consumers of legal services about the legal profession generally and the charging of fees specifically. Neither has a section for consumers on its website. This contrasts with the efforts of regulators in other sectors of the economy, for example, the Commission for Communications Regulation and the Financial Regulator.
31. The Competition Authority strongly recommends that the Law Society and the Bar Council develop and actively provide useful and accessible information for consumers on their rights and on key features of legal services. They should develop a “Consumer Information” page on their websites.

² Department for 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.

³ Fair Trade Commission (1990).

32. The Competition Authority recommends that the statutory requirement on solicitors to provide fee letters be made more prescriptive to ensure that solicitors' clients get a useful insight into the cost they face for legal services. Failure to provide fee letters should be subject to a meaningful penalty. The Competition Authority also recommends that the Bar Council should oblige barristers to provide similar fee information.
33. The practice whereby junior counsel charge a fee at two-thirds that of the senior counsel's fee in a case (without reference to work done) is anti-competitive and anti-consumer. It is vital that consumers are made aware that junior counsel need not charge a fee at two-thirds that of the senior's in a case. The Competition Authority also recommends that the Bar Council, as the regulator of barristers, should point out to its members that the practice is anti-competitive.
34. The Competition Authority makes further recommendations regarding the State's system of taxation of costs to ensure that the practices outlined above are no longer accepted by the State's system for adjudicating on legal costs.
35. Finally, the Competition Authority recommends that, as the largest buyer of legal services, the State considers introducing competitive tendering for legal services.

Advocating in Court

36. Barristers who have practised for a certain number of years may be appointed by Government as "Senior Counsel". The title is intended to be a quality mark, indicating that the barrister has extensive experience and a high level of legal knowledge, skill and judgment in the field of advocacy.
37. In reality, the title of Senior Counsel 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. The title has the potential to distort the market for legal services, by leading solicitors and their clients to believe, without adequate justification, that in engaging senior counsel they are always engaging a lawyer who excels in his field or that other practising barristers are not of the same calibre.
38. The Competition Authority recommends that the Government establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing it.
39. Solicitors have the right to advocate in every court in Ireland, in competition with barristers, but are inhibited from exercising this right by two restrictions. First, solicitors are not allowed to hold the title of Senior Counsel, irrespective of their ability to provide advocacy services. Second, solicitors are prohibited from being the lead advocate where for example a team of both barrister(s) and solicitor(s) is representing a client in court. The Competition Authority recommends that solicitors be eligible for the title of Senior Counsel, as is the case in Britain, and that they be allowed be lead counsel when advocating in court with a barrister. Removing these unnecessary restrictions will encourage greater competition in advocacy services.

Advertising

40. In Ireland, advertising by barristers is severely restricted by the rules of the Bar Council. The only advertising permitted is the placing of barristers' names and specialisations on the Bar Council's website and in the Law Society's Law Directory. The UK, in contrast, allows barristers to advertise subject to a few limitations. The restrictions on advertising by barristers in Ireland are disproportionate and limit competition. Allowing barristers to advertise becomes more important in the context of widening direct access to barristers for legal advice.

41. Solicitors are not prevented from advertising; the restrictions that are in place relate more to the manner and content of the advertisements. There are a number of unnecessary restrictions contained in the Law Society's Regulations on advertising. These restrictions can impinge on the ability of firms to undertake effective and/or innovative advertising campaigns. In particular, the Law Society's regulations prevent a solicitor advertising that he/she has specialist knowledge of a certain area of law.
42. The Competition Authority recommends, for both barrister and solicitor advertising, that the existing rules should be reformed. Truthful and objective advertising gives clients useful information and helps them to choose among competing lawyers. Advertising should be controlled in a more pro-consumer manner by way of rules that focus on preventing factually inaccurate advertising or advertising which would bring the administration of justice into disrepute.

Switching lawyers

43. If a client wishes to switch solicitor, for example in response to poor quality of service, the solicitor has the right to withhold the client's file until the client has paid the solicitor's bill, even if the bill is disputed. As a practical matter, full payment may not be possible to achieve in a short space of time and, in the interim, the client is disadvantaged with possibly serious consequences. For example, a consumer who believes his/her current solicitor is putting their case in jeopardy, or is failing to act in a timely manner, cannot take his/her business elsewhere.
44. This special protection for solicitors against bad debts does not exist for any other profession in Ireland and is an unnecessary restriction on competition between solicitors and on consumers' rights. While it is proper that solicitors should be paid for work they have done, this can be achieved either through dispute resolution channels or by enforcement of the contract they have with their client through the courts, as all other suppliers of professional services have to do. Of all professionals, solicitors are best placed to pursue clients for monies owed to them as they can self-supply the legal service.
45. Consumers of legal services, especially small infrequent buyers, are in a far more vulnerable position. There is little that a client, or a new solicitor acting on their behalf, can do to compel the first solicitor to relinquish the file in a timely manner. Delays in legal matters can cause significant financial and other harm to clients even if they eventually receive a favourable outcome. The Competition Authority recommends legislative change to remove solicitors' rights over their clients' files.
46. Prior to March 2006, the Bar's Code of Conduct precluded a barrister from taking over a case from another barrister until that other barrister had been paid. In response to the Competition Authority's concerns, the Bar removed this restriction in March 2006.

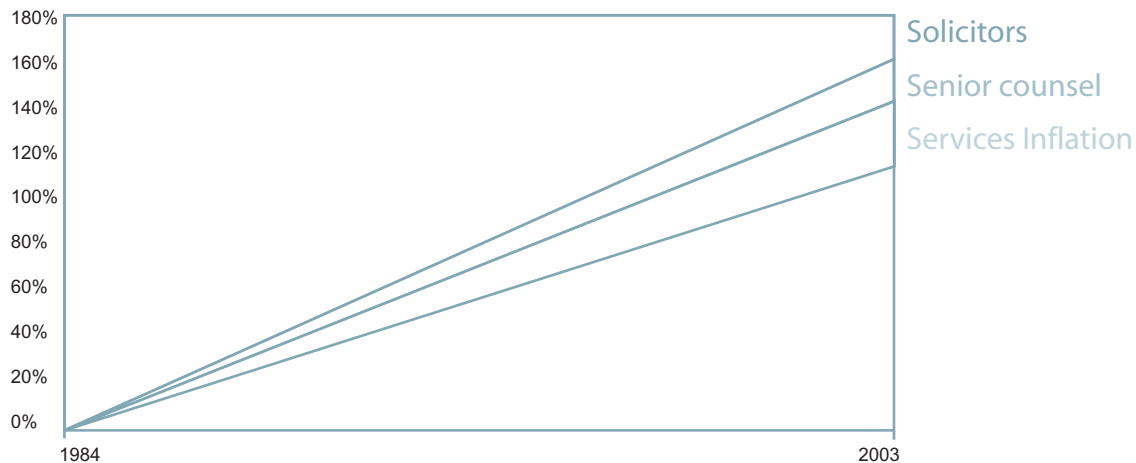
Restrictions on New Barristers

47. In its Preliminary Report on solicitors and barristers, the Competition Authority recommended the abolition of the rules of the Bar's Code of Conduct that prohibited practising barristers from having other part-time employment and from acting for a former employer for a specified period after commencing practice at the Bar. These rules made it more difficult for new barristers to make a living and reduced the competitive threat they posed to established barristers. The Bar implemented these recommendations in March 2006.

The Market for Legal Services

48. As of July 2006 there are 8,907 lawyers in Ireland, 7,242 solicitors and 1,665 barristers⁴. Other common-law countries have more lawyers per head of population than Ireland.
49. The level of solicitors' fees in the High Court increased by 4.2% above general inflation annually over the period 1984 to 2003 while the level of senior counsel fees in the High Court increased by 3.3% above general inflation annually over the same period. The figure below shows how the increase in legal fees for solicitors and senior counsel was significantly above general inflation in services in the Irish economy over the period 1984 to 2003.⁵

Inflation in Legal Fees in High Court Cases, 1884-2003



Source: Report of the Legal Costs Working Group; Central Statistics Office.

50. Compared with other professions, such as architects, engineers and accountants, lawyers earn relatively high incomes. The average gross income for lawyers in 2002 was approximately €164,000.
51. Barristers are totally self-regulated through the Bar Council. Solicitors are largely self-regulated through the Law Society with minimal independent oversight in some areas.

Recommendations

52. The following recommendations add up to a comprehensive piece of legislation – a Legal Services Bill - to address adequately the concerns identified in the report and to provide for a competitive legal services market in Ireland. The Competition Authority has also identified changes and initiatives that the Law Society and the Bar Council can make for the benefit of consumers of legal services. The recommendations come with a proposed timetable for implementation; a Legal Services Bill by June 2008 and a number of changes and initiatives by the profession in the interim. This timetable is based on the Competition Authority's experience of the timeframe involved in preparing similar legislation and making changes to the Bar's Code of Conduct etc.

⁴ Source: The Law Society and the Bar Council.

⁵ Source: *Report of the Legal Costs Working Group*, November 2005.

Recommendation 1:	Establish an independent Legal Services Commission to oversee the regulation of legal services
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission ("LSC"), an independent statutory body with responsibility for regulation of both branches of the legal profession. The Legal Services Commission would delegate many regulatory functions to existing and possibly new self-regulatory bodies.</p> <p>The Legal Services Commission would be given explicit authority to make new regulations and would have the power to veto the rules of self-regulatory bodies. The Legal Services Commission would undertake research and analysis of the market for legal services to identify priority areas for reform and also to set guidelines for the assessment of costs in contentious matters.</p> <p>The Head of the Legal Services Commission, and also a majority of its members, should not be practicing members of the legal profession.</p> <p>Self-regulatory bodies would not be permitted to exercise representative functions.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 2:	Have an independent body to set standards for solicitor training and approve institutions that wish to provide such training
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should remove the Law Society's role of setting standards for the provision of legal education. This role should instead be given to an independent body such as the Legal Services Commission.</p> <p>The Law Society and any other institution that wishes to provide training for solicitors should be required to apply to the Legal Services Commission for approval to do so.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 3:	An independent body should set standards for barrister training and approve institutions that wish to provide such training
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should give an independent body, such as the Legal Services Commission, the task of setting standards for the provision of legal education.</p> <p>The Honorable Society of King's Inns and any other institution that wishes to provide training for barristers should be required to apply to the Legal Services Commission for approval to do so.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>

Recommendation 4:	The existing basic Irish competency requirement should be abolished and replaced by a voluntary system of high level Irish language training
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should introduce legislation to repeal sections 3 and 4 of the Legal Practitioners Qualification Act 1929.	Minister for Justice, Equality and Law Reform June 2008
The Law Society and the Honorable Society of King's Inns should publish criteria for a voluntary system whereby solicitors and barristers who wish to represent clients in Irish, or who have a particular interest in Irish, could be trained and examined to a high and consistent standard. Institutions other than the Law Society and King's Inns should be permitted to provide such courses and examinations.	The Law Society Honorable Society of King's Inns December 2007
Recommendation 5:	The current system of reciprocity in recognition of legal training of non-EEA lawyers should be replaced by mirroring the existing provisions for EEA lawyers
Details of Recommendation	Action By
Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 98/5/EC for non-EEA lawyers who wish to practise in the State under their home title.	Minister for Justice, Equality and Law Reform June 2008
Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 89/48/EC for non-EEA lawyers who wish to practise in the State as an Irish solicitor or barrister.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 6:	Remove unnecessary barriers to switching between the branches of solicitor and barrister
Details of Recommendation	Action By
The Law Society and the Bar Council should ensure that all unnecessary barriers are removed for lawyers wishing to switch from one branch of the legal profession to the other.	Law Society June 2007 Bar Council Implemented July 2006

Recommendation 7:	Allow qualified persons other than solicitors to provide conveyancing services
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should bring forward legislation to permit qualified persons other than solicitors to provide conveyancing services.</p> <p>Persons wishing to provide conveyancing services should be required to be registered as "conveyancers" by a Conveyancers' Council of Ireland with responsibility for regulating the training, qualification and operation of conveyancers.</p> <p>Conveyancers should be required to abide by a code of ethics, to have professional indemnity insurance and to contribute to a compensation fund in order to ensure the greatest possible degree of consumer protection.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 8:	Allow unlimited direct access to barristers for legal advice
Details of Recommendation	Action By
<p>Permit unlimited direct access to barristers for legal advice.</p>	<p>The Bar Council</p> <p>December 2007</p>
Recommendation 9:	The Legal Services Commission should undertake research in the area of direct access
Details of Recommendation	Action By
<p>The Legal Services Commission should be given the power to undertake research in any area of the market where reform may be beneficial for consumers or the functioning of the market.</p> <p>The Legal Services Commission should undertake research in the area of direct access to barristers for contentious issues.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>

Recommendation 10:	Barristers sharing premises should be allowed to promote themselves as a group
Details of Recommendation	Action By
Barristers who share premises and costs should be permitted to hold themselves out as practicing as a group.	The Bar Council December 2007
Recommendation 11:	Barristers should be allowed to form partnerships
Details of Recommendation	Action By
Barristers should be allowed to offer their services in partnerships, subject to appropriate regulation.	The Bar Council December 2007
Recommendation 12:	The Legal Services Commission should undertake research in relation to business structures
Details of Recommendation	Action By
The Legal Services Commission should be given the power to undertake research in any area of the legal services market where reform may be beneficial for consumers or the functioning of the market. The Legal Services Commission should examine alternative business structures so that solicitors and barristers have the greatest possible freedom in choosing their preferred structure.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 13:	Allow employed barristers to represent their employers in court
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, the amending of Rules 2.6, 2.7 and 8.3 of the Code of Conduct of the Bar of Ireland to allow barristers in employment to represent their employers in court.	The Bar Council December 2007
Recommendation 14:	Establish objective criteria for awarding the title of Senior Counsel
Details of Recommendation	Action By
The Government should establish objective criteria for the awarding, monitoring and withdrawing of the title of Senior Counsel.	The Minister for Justice, Equality and Law Reform June 2007

Recommendation 15:	Remove restrictions on solicitors advocating in court
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland the amendment of Rule 11.1 of the Bar's Code of Conduct to remove the restriction on solicitors holding the title of Senior Counsel.	The Bar Council December 2007
The Bar Council should propose to the Bar of Ireland that Rule 7.4 of the Bar's Code of Conduct, which stipulates that a barrister shall only be led by a barrister, be abolished.	The Bar Council December 2007
The Government should, (where it awards the title of Senior Counsel and on the basis of transparent criteria consistent with recommendation 14) award the title to both barristers and solicitors.	The Government June 2007
Recommendation 16:	Remove unnecessary restrictions on barristers' ability to advertise
Details of Recommendation	Action By
The Bar Council should promulgate regulations permitting advertising so long as it does not: <ul style="list-style-type: none"> • Give false or misleading information; or, • Bring the administration of justice into disrepute, or otherwise be considered in bad taste 	The Bar Council December 2007
The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 17:	Remove unnecessary restrictions on solicitors' ability to advertise
Details of Recommendation	Action By
The Law Society should amend its Regulations to enable the designation of solicitors as specialists and to allow such solicitors to advertise as specialists.	The Law Society December 2007
The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.	Minister for Justice, Equality and Law Reform June 2008

Recommendation 18:	Remove the unnecessary restriction on switching barrister
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland that it amend Rule 7.5 of its Code of Conduct which prevents one barrister taking over a case from another until satisfied that the first barrister has been paid.	The Bar Council Implemented March 2006
Recommendation 19:	Remove the unnecessary restriction on switching solicitor
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should introduce legislation to prohibit a solicitor from retaining a client's file pending payment from the client.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 20:	Permit practising barristers to exercise part-time occupations
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.6 of the Code of Conduct and/or new rules to enable part-time employment in other professions.	The Bar Council Implemented March 2006
Recommendation 21:	Allow new barristers to act for former employers
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.15 of the Code of Conduct to enable barristers to be engaged by previous employers.	The Bar Council Implemented March 2006
Recommendation 22:	Advise barristers that the practice whereby junior counsel charge fees at two-thirds of senior counsel's fee is anti-competitive
Details of Recommendation	Action By
The Bar Council should formally advise barristers that the practice of junior counsel marking a fee, without reference to work done, at two-thirds of the senior counsel's fee, is anti-competitive and must cease.	The Bar Council March 2007

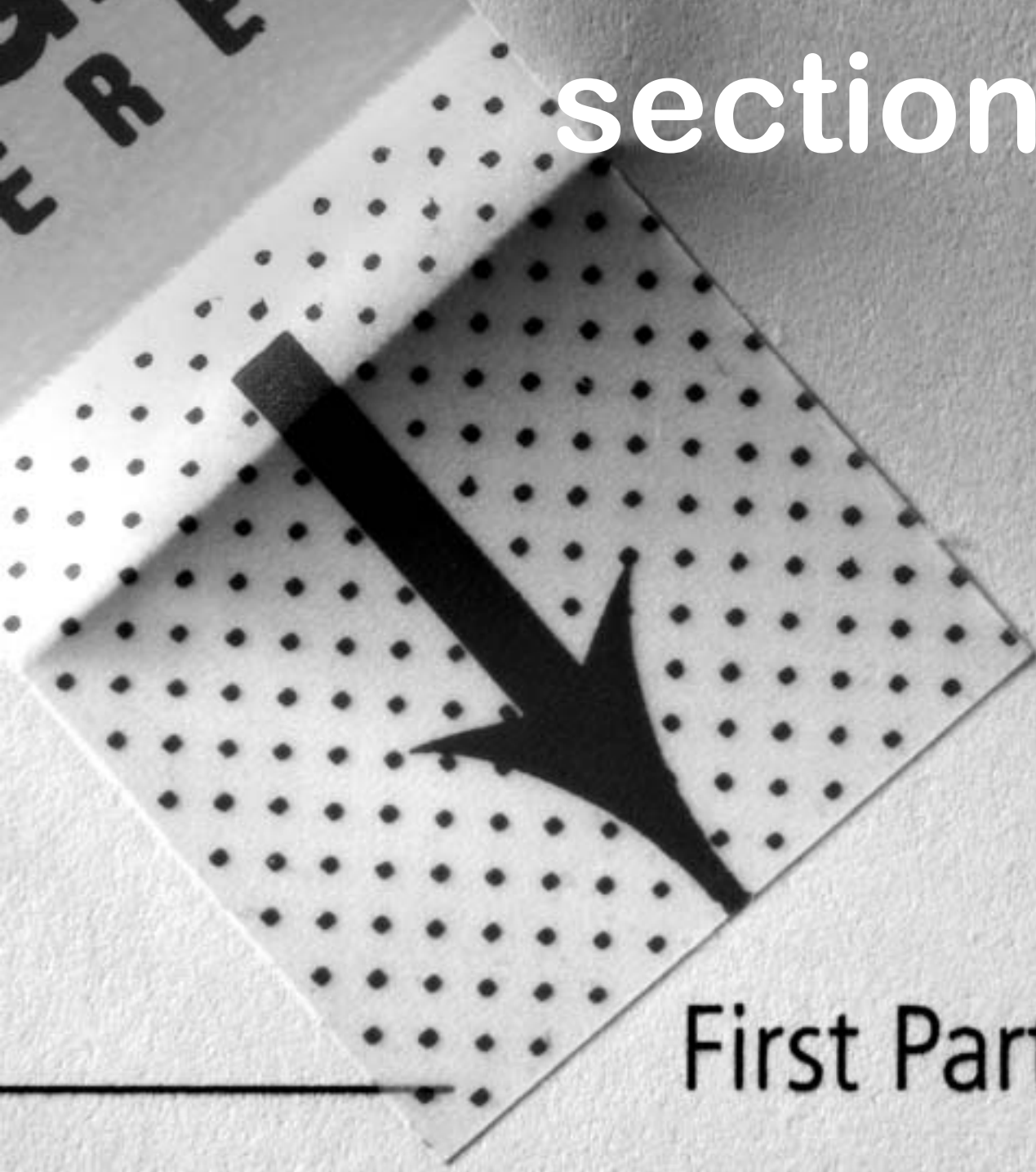
Recommendation 23:	Provide useful information for consumers
Details of Recommendation	Action By
(a) The Law Society should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.	The Law Society June 2007
(b) The Bar Council should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.	The Bar Council June 2007
Recommendation 24:	Require solicitors to issue meaningful fee or fee estimate letters
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should bring forward legislation:	Minister for Justice, Equality and Law Reform
(a) requiring solicitors to issue more detailed and accurate fee letters;	June 2008
(b) outlining a meaningful sanction for solicitors who fail to provide clients with an appropriate fee letter.	
Recommendation 25:	Require barristers to issue meaningful fee or fee estimate letters
Details of Recommendation	Action By
The Bar of Ireland should:	The Bar Council
(a) Amend Rule 12.6 of its Code of Conduct by removing the words "on request" from the second line thereof;	June 2007
(b) Amend its Code of Conduct to require that barristers' fee information letters provide the same level of information as the Section 68 letters recommended by the Legal Costs Working Group.	
Recommendation 26:	Legal costs should be assessed on the basis of work done
Details of Recommendation	Action By
Legal costs should be primarily assessed on the basis of the work undertaken by individual lawyers and not primarily on the basis of the size of the award as is currently the case.	Taxing Masters and County Registrars Immediate

Recommendation 27:	Cease the practice of taxing junior counsel fees at two-thirds of the senior counsel.
Details of Recommendation	Action By
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.	Taxing Masters and County Registrars Immediate
Recommendation 28:	Persons other than solicitors should be eligible for appointment to the Legal Costs Assessment Office
Details of Recommendation	Action By
Appropriately qualified persons should be eligible for appointment to the proposed Legal Costs Assessment Office.	Minister for Justice, Equality and Law Reform
Recommendation 29:	Examine the possibility of introducing competitive tendering for the provision of legal services
Details of Recommendation	Action By
The Department of Justice, Equality and Law Reform should (a) identify those legal services purchased by the State where competitive tendering would be an appropriate form of procurement; and (b) examine systems of competitive tendering for the provision of legal services operating in other jurisdictions with a view to introducing such a system in Ireland.	Department of Justice, Equality and Law Reform December 2008

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Second Party: _____

1. INTRODUCTION

- 1.1 The legal profession in Ireland is in need of substantial reform. This report contains 29 recommendations designed to maximise the benefits of competition for consumers of legal services.
- 1.2 The Competition Authority's recommendations are in line with previous, and as yet unimplemented, recommendations made by other independent bodies, following their analysis of competition in the profession.⁶ They are also in line with reform of the legal profession that has taken place and is taking place in other common-law countries, such as England, Wales, Northern Ireland, Australia and New Zealand.
- 1.3 The recommendations in this report come with a proposed timetable for implementation. This timetable is based on the Competition Authority's experience of the timeframe involved in preparing legislation generally and making changes to the Bar's Code of Conduct etc. The recommendations for legislative change - addressed to the Minister for Justice, Equality and Law Reform - envisage a Legal Services Bill in June 2008. This is a challenging but achievable suggested timeframe reflecting the importance of the concerns identified in the report. The recommendations to the Bar Council, Law Society and others are given a tighter timeframe, reflecting their ability to directly put changes into effect.

Background to the report

- 1.4 The Competition Authority aims to ensure that competition works well for consumers. One of the Competition Authority's functions under section 30 of the *Competition Act 2002* is 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".
- 1.5 This report is part of a wider study of a number of professions. Following an OECD Report⁷ in 2001, which suggested that competition in the professional services sector in Ireland could be stronger, the Competition Authority commenced a study of selected professions. The professions chosen were: engineers, architects, dentists, optometrists, veterinary surgeons, medical practitioners, solicitors and barristers.
- 1.6 The initial process of the study involved a research phase and report by Indecon International Economic Consultants. Their report "*Indecon's Assessment of Restrictions in the Supply of Professional Services*" was published in March 2003.⁸
- 1.7 The Competition Authority has published final reports on the engineering profession (December 2004), the architects' profession (March 2006), and the optometry profession (June 2006). A preliminary report on the dental profession was published in December 2005.⁹

The Consultation Process

- 1.8 The Competition Authority published its Preliminary Report on the legal profession in February 2005. The document presented preliminary analysis and recommendations designed to enhance competition to the benefit of consumers of legal services. The Competition Authority sought submissions on the facts, analysis and preliminary recommendations in the report from all interested parties.

6 *Report of Enquiry into the Effects on Competition of the Restrictions on Conveyancing and the Restrictions on Advertising by Solicitors*, Restrictive Practices Commission, 1982; *Report of Study into Restrictive Practices in the Legal Profession*, Fair Trade Commission, 1990; *Regulatory Reform in Ireland*, OECD, 2001.

7 *Regulatory Reform in Ireland*, OECD, 2001.

8 See www.tca.ie/professions.html

9 See www.tca.ie/professions.html for full details of these reports.

- 1.9 The consultation was carried out publicly in the interests of fairness, consistency and transparency. The Competition Authority sought responses to the Preliminary Report in general and to its preliminary recommendations in particular. Respondents, in compiling their submissions, were asked to identify obstacles to the implementation of preliminary recommendations and also identify potential side effects, either positive or negative, that might arise. Where the preliminary recommendations referred to various options the Competition Authority invited comments on the practical implications of each option.
- 1.10 The Preliminary Report also contained specific questions for consultation. Some of the questions focused on practical and implementation issues, while others sought further information to confirm or enhance the Competition Authority's knowledge of the market for legal services.
- 1.11 Several parties provided responses and were consulted by the Competition Authority in the preparation of this final report.¹⁰ In addition, the Competition Authority met with a wide variety of interested parties in preparing its Preliminary Report and this final report. In particular it has received comments and had discussions with the Law Society, Bar Council and Honorable Society of King's Inns, the three bodies with regulatory (and, in the case of the Bar Council and Law Society, representative functions) for the legal profession in the State.

Scope of the Report

- 1.12 Legal services are one part of the whole vast edifice that is the Irish legal justice system. Headed by an independent, constitutionally-appointed judiciary which administers justice in courts established by law, and adhering to the principle that presumes every man to be innocent until proven guilty, the Irish legal justice system is one which prides itself on its accessibility to every citizen. Indeed, access to this justice system, to vindicate legal rights and to defend against allegations of breaches of the law is an essential right of the Irish citizen. Thus, access to justice has broad implications for social and family relationships, as well as for the comfort and security of being able to rely on the rule of law which is fundamental to a democratic society. As in almost every democratic society governed by the rule of law, the legal profession plays an important role in Ireland.
- 1.13 There are many aspects to ensuring that access to justice is real, and not simply a theory. There must, for example, be sufficient judges to ensure that cases can be heard speedily and efficiently. There must be some means of assessing the suitability of judges, and ensuring as far as possible that they are independent and unprejudiced. There must be sufficient well-trained legal practitioners to ensure that good legal advice is available to all those who wish to avail themselves of the justice system. Also, the system must be available to all: to those who cannot afford to pay as well as to those who can.
- 1.14 It is very clear that not all of these different facets of a good legal system can be addressed by the existence of competition in the provision of legal services, or by the enforcement of competition law where that enforcement is necessary. Competition has no relevance to the work of the judiciary, for example. Although competition in the provision of legal services is only one of the components necessary for the proper working of the legal system, it is an important one. A competitive market for legal services ensures that legal services are provided as efficiently and effectively as the current judicial and legal systems will allow. Competition also provides downward pressure on the price of legal services, an important aspect of promoting access to legal advice. Overall, this report is cognisant of the special features of the legal services market and the recommendations herein are designed to promote the positive features, such as access to legal advice and pro bono work, in addition to promoting competition. The report does not purport to provide a comprehensive framework for deciding on all necessary changes to the legal profession and the court system in Ireland.

¹⁰ A list of submissions received is attached at Appendix 1.

1.15 In Ireland, the legal profession has two types of lawyer - solicitors and barristers - who together have a monopoly in the supply of professional legal services.¹¹ Solicitors and barristers have distinct but often overlapping functions:

- Solicitors 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 act primarily as advocates before the courts where they represent litigating parties and plead their cases.

With limited exceptions, a client cannot engage a barrister directly, but must go through the intermediary of a solicitor who will instruct a barrister on the client's behalf.¹² 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.

1.16 Solicitors and barristers tend to refer to themselves as two "branches" of one profession. Though it is possible that their services constitute separate relevant markets, and solicitors and barristers may be considered to be two separate professions, the close relationship between the services of solicitor and barrister necessitates that they be examined together. In this context, it is appropriate to refer to the market for legal services provided by both solicitors and barristers.

1.17 This report does not consider the overall effect on competition of having a mandatory solicitor/barrister distinction between lawyers. Nor does it consider how the particular features of Ireland's court system and the rule whereby "costs follow the event" might impact on competition. Rather, it focuses on restrictions on competition in the market for legal services that result from legislation, regulation and the rules of the Bar Council, Law Society and the Honorable Society of King's Inns governing who can become a lawyer and how solicitors and barristers must operate. It also assesses certain practices in the legal profession which have no basis in law or regulation but which serve to dampen competition between lawyers.

Methodology of the Report

1.18 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 therefore only be imposed if there are clear benefits from restricting competition that outweigh the costs and the regulation is targeted to minimise market distortions.¹³ This is part of the basis for the Government's White Paper "Regulating Better" and the roll-out of Regulatory Impact Analysis across the State.¹⁴

1.19 The White Paper sets out six principles that all forms of regulation¹⁵ should meet; regulations should be necessary, effective, proportionate, consistent, accountable and transparent. However, in Ireland Regulatory Impact Analysis only applies to newly proposed regulations. Reviewing existing laws and regulations is a more long-term task and the Competition Authority's study of competition in professional services informs that work. Existing laws and regulations were not subjected to Regulatory Impact Analysis at the time of their introduction and, to an extent, the task is to apply the better regulation principles retrospectively to the regulation. Implicit in the "Regulating Better" White Paper is an acknowledgement that the status quo should not automatically be presumed to be the best model. Rather, the better regulation principles imply that, whether considering proposed regulations or past regulations, the burden to show that the benefits of the regulation outweigh the costs should rest with those seeking the restrictions or defending existing ones.

11 The United Kingdom and certain parts of Australia also have this model of legal profession.

12 Since May 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 for advice only. The scheme does not extend to contentious matters (e.g. court appearances).

13 These benefits include public policy goals other than economic benefits.

14 Regulatory Impact Analysis is the process by which proposed regulations are assessed against the principles of *Regulating Better*.

15 The term regulation in this context should be considered in its broadest sense to include all forms of legislative and regulatory rules as well as rules imposed by bodies with regulatory functions.

- 1.20 The purpose of this report is to identify any regulations or practices that may restrict competition within the legal profession; to evaluate any consumer or other benefits claimed to exist from any such restrictions; and to consider whether the restrictions are necessary or proportionate to achieve real benefits.
- 1.21 Where, in any particular case, the restriction on competition is not supported by a valid objective or does not in fact deliver the benefits claimed, the Competition Authority recommends that the restriction in question be abolished. Where, on the other hand, the objectives are valid, as is often the case, the restrictions on competition are assessed to test whether they are necessary or proportional to achieving the objectives. If the objectives can still be attained in the absence of the restriction on competition, or can be attained by less restrictive means, the Competition Authority makes recommendations for change accordingly. If not, or if it is not clear what less restrictive means are available, the Competition Authority makes no recommendation or, alternatively, recommends that the issue be reviewed in the future.
- 1.22 Where the Competition Authority makes recommendations, it conducts a preliminary analysis of the likely effects of the implementation of its recommendation, both the practical effects and the potential for unintended consequences. It does this by consulting widely on a set of preliminary recommendations (see “*The Consultation Process*” above), and exploring different options with key stakeholders. This ensures that the final recommendations made are appropriate and targeted to achieve the objective of removing unnecessary restrictions on competition. Nonetheless, where the Competition Authority recommends new regulations, they should be subject to a Regulatory Impact Analysis (RIA) by the appropriate body.
- 1.23 In some cases the Competition Authority makes no final recommendation but instead recommends that the issue be taken up by an independent body with a broader group of stakeholders (the Legal Services Commission recommended in Chapter 3). This is because the issues raise competition concerns but the solutions are complex and raise other public policy issues which require further analysis and the input of expert persons other than competition experts and the legal profession.
- 1.24 An important element of the methodology outlined above concerns evidence-based analysis. Policy-making based on evidence is superior to policies based on what seems to be “a good idea”. Again, this principle is implicit in the “*Regulating Better*” White Paper. The chapters of this report that deal with restrictions on competition outline the evidence relating to the restriction concerned by referring to examples of the effects of the restriction on lawyers and on consumers of legal services in Ireland, the experience of regulation of other professions and sectors in Ireland, and the experience of other jurisdictions in regulating the legal profession. With regard to legal fees and incomes, the Competition Authority has also collected data to give empirical evidence of how the market for legal services operates.
- 1.25 In their submissions following the Competition Authority’s Preliminary Report, the Law Society, the Bar Council and the Honorable Society of King’s Inns all criticise the Competition Authority’s reasoning as “*a priori*”¹⁶ and insist that the Competition Authority provide evidence of deliberate anti-competitive intent, or of the exact level of harm to consumers being caused by each restriction on competition. The view in these submissions is that the status quo should remain intact unless and until specific detriment to consumers has been shown. This view is flawed in a number of respects.
- 1.26 First, consistent with the “*Regulating Better*” White Paper, the status quo should not automatically be presumed to be desirable. Markets and societies are constantly in a state of flux and the laws, regulations and regulatory structures that existed at one time are often not appropriate in another era. Indeed, the Bar’s recent changes to its Code of Conduct, the announcement by the Government of its intention to establish a Legal Services Ombudsman together with a new system for the taxation of legal costs, and the Law Society’s and King’s Inns’

16 *A priori*: Proceeding from a known or assumed cause to a necessarily related effect; deductive.

agreement with some recommendations in the Preliminary Report, all confirm that this is the case. All of the changes implemented or announced since the Preliminary Report was published, are moves away from the status quo and towards the model of regulation proposed in the Preliminary Report. Regulatory policy has, or should have, as an objective the promotion of flexibility and the ability of the regulated industry to evolve and innovate. This is as true of the regulatory structures and institutions governing a sector as it is of the rules and regulations they make.

- 1.27 Second, the submissions ask that the Competition Authority quantify the exact inefficiencies associated with each restriction on competition identified and the exact benefit to consumers of lifting the restriction. This, of course, is an impossible task, as indeed it has been in other industries. For example, no one could have quantified exactly the efficiency gains to be made by Aer Lingus or the exact fall in air travel prices that would follow the introduction of competition to the airline industry in Ireland. The same is true of King's Inns' monopoly on training barristers; with no other school of legal training against which to benchmark King's Inns, it is impossible to know whether the school is efficient or inefficient or to what extent. Similarly, the effect of each restriction on competition in the market for legal services is impossible to quantify. What is possible, however, is to give indicators of the impact of restrictions or lifting restrictions based on analyses of other jurisdictions where these restrictions have been removed and consumers have benefited – for example the introduction of licensed conveyancers or relaxation of advertising restrictions - and such evidence underpins this report.
- 1.28 The belief that the exact effects on competition of a restriction can be quantified assumes that suppliers only compete on price. This is incorrect. Lawyers compete with one another on a variety of terms including quality of legal services and delivery of the service (efficiency, timeliness, flexibility, method of delivery), and increasing competition in the legal profession will affect all of these parameters. The effects of a restriction on competition will typically be qualitative in nature as well as impacting on the price of legal services. The evidence provided in this report relates to all parameters.
- 1.29 Furthermore, it is the cumulative effect of a number of restrictions on competition that is the valid question. Again it is impossible to know the likely legal fees and quality of service that would prevail in the absence of the restrictions identified in this report - but it is important to note that the more restrictions that are removed, the more opportunity there is for consumers to reap the benefits of competition.
- 1.30 Third, the submissions take an inappropriate approach to the kind of reasoning and evidence that is appropriate for this report. The Bar Council makes explicit reference in its submission to previous competition law court cases. This report is about achieving a future regulatory environment for the legal profession that protects the legal system and the general public without unnecessarily harming competition to the detriment of consumers. It is not a legal submission to a court regarding a breach of the *Competition Act 2002* at a particular point in time. Even in legal cases regarding competition law, the court does not require proof that competition is a good thing in general and cartels are bad. Nor does the court require the Competition Authority to prove the exact harm caused by a particular cartel as the competitive price that would have prevailed in the absence of a cartel is unknown.¹⁷
- 1.31 Overall, it is important to note that the removal or relaxation of the restrictions on competition specified in this report does not always imply forced 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 in this report are removed, any features of the current system that are efficient will still be retained. For instance, allowing barristers to advertise does not mean they will be obliged to do so; if the word-of-mouth model is an efficient one, barristers will be free to retain it. Similarly, if greater direct access to barristers is allowed, barristers may still choose not to take part in such a scheme.

¹⁷ Such estimates may nevertheless be made to aid the court in its decision on the level of the fine or damages to be applied where a breach of the Competition Act has been found.

Current Context of the Report

- 1.32 The Competition Authority published its Preliminary Report on the legal profession in March 2005. Since then, a number of events have served to change the environment in which the Competition Authority makes its recommendations for reform.
- 1.33 First, in response to the Preliminary Report the Bar Council proposed a number of changes to the Bar's Code of Conduct and these were adopted by the Bar in March 2006. The rules that prohibited practising barristers from having other part-time employment and from acting for a former employer for a specified period after commencing practice at the Bar have been abolished. Barristers may now share facilities, premises and costs of practice, though they are still prohibited from carrying on their practices in partnerships or chambers. The rule restricting a barrister from "taking over" a case until any previously engaged barrister has been paid in full has also been abolished. Though not recommended in the Preliminary Report, the Bar Council changed the composition of the Barristers' Professional Conduct Tribunal, which deals with complaints from the public and solicitors against barristers, so that barristers are no longer in the majority. Also, the Bar Council has made it easier for solicitors to become barristers.
- 1.34 Second, the Preliminary Report recommended that King's Inns should issue criteria pursuant to which it would recognise Barrister-at-Law degrees awarded by other educational providers for the purposes of entry to the barristers' profession, within six months of the publication of the Preliminary Report. To date it has not done so, although it has altered its rules to facilitate the recognition of postgraduate diplomas in law offered by other third level institutions for the purposes of being eligible for the King's Inns degree course. If any such diplomas are approved it will provide an alternative means for non-law graduates to qualify to take the Entrance Examination to the degree course. King's Inns' own Diploma in Legal Studies is currently the subject of a major review with a report to be submitted to Council¹⁸ in the latter half of 2006. In recent discussions with the Competition Authority, King's Inns has said that it recognises that its full-time Barrister-at-Law degree course does not allow people to combine work and study and has indicated that it intends to offer the degree course on a modular basis, in addition to the full-time option, to facilitate those working full-time who wish to qualify as barristers. King's Inns has also indicated that it is open to the possibility of running elements of a modular course in locations outside Dublin. Finally, King's Inns has amended its rules to make it easier for solicitors to become barristers by simplifying the transition from solicitor to barrister.
- 1.35 Third, the Preliminary Report recommended that the Law Society should issue criteria pursuant to which it would recognise solicitor training by other educational providers for the purposes of entry to the solicitors' profession, within six months of the publication of the Preliminary Report. To date it has not done so, although it has begun offering its own training course in Cork through University College Cork (as of September 2006).
- 1.36 Fourth, the Legal Costs Working Group, set up by the Minister for Justice, Equality and Law Reform in response to the level of concern over legal fees in Ireland, issued its final report in November 2005. The Group made a number of wide ranging recommendations for reform of the profession and the State's system for arbitration on legal costs. The Minister subsequently announced his intention to implement the recommendations of the Legal Costs Working Group in full and an implementation body has been set up to look at the practicalities of implementing the recommendations.¹⁹
- 1.37 Fifth, in January 2006, the Government announced its decision to create a Legal Services Ombudsman to whom complaints to the Bar Council and the Law Society can be appealed.²⁰ Both the Law Society and the Bar Council have welcomed this step as complementary to their own reviews of complaints against solicitors and barristers. The establishment of a Legal Services Ombudsman will not alter the initial procedure for making

¹⁸ The Council is the executive body of King's Inns.

¹⁹ Address by Minister for Justice, Equality and Law Reform at the Historical Society, Trinity College Dublin - "*That regulation of the legal profession should be reformed*", 1st January 2006 available at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSO6KXFX7-en>

²⁰ Press Release by the Department of Justice, Equality and Law Reform, 10th January 2006, available at www.justice.ie

complaints; a complainant must in the first instance submit their complaint to the Law Society or the Bar Council, it is only if they are dissatisfied with the handling of such a complaint they can go to the Ombudsman.

- 1.38 These proposed reforms are complementary to the work of the Competition Authority. Appendix 4 of this report provides details of how the structural reforms recommended by the Legal Costs Working Group and the Competition Authority, and the proposal to establish a Legal Services Ombudsman, would complement one another in practice.
- 1.39 Sixth, in May 2006 a draft Legal Services Bill was published in the UK setting out substantial reform of the regulation of the legal profession in England and Wales.²¹ The Bill follows an independent analysis of the regulatory framework of the legal profession in England and Wales known as the Clementi Report,²² which was accepted by the UK Government and adopted in a White Paper entitled "The Future of Legal Services: Putting Consumers First", in October 2005.²³
- 1.40 The Bill requires "Front Line Regulators", like the Bar Council and the Law Society, to separate their regulatory and representative functions. A new oversight regulator called the Legal Services Board will be created; it will be independent of Government and providers of legal services. The Legal Services Board will authorise the Front Line Regulators ("FLR"s) to carry out the day to day regulation of the profession provided they meet certain standards. However, legislation will provide the Legal Services Board with power to issue regulatory guidance to FLRs; to direct an FLR to take a specific regulatory action; to strike down or amend rules of an FLR; and to remove the authorisation of an FLR in a particular area or areas of regulation. The Bill also provides for the establishment of a more powerful body for dealing with complaints about members of the legal profession.
- 1.41 The changes to the regulatory structures proposed in England and Wales mirror reforms that have already taken place in Australia. Northern Ireland has also conducted a review of the regulatory framework for the legal profession.
- 1.42 Finally, in March 2006 the New Zealand Parliament voted the *Lawyers and Conveyancing Act* into law, creating a new profession of licensed conveyancer.²⁴ The law brings an end to the monopoly which lawyers have had in New Zealand in transferring property and adds New Zealand to the list of other jurisdictions that have introduced this profession: England and Wales, Scotland and Australia.

Structure of the Report

- 1.43 This report contains a general overview of the legal profession followed by a detailed examination of the restrictions limiting competition in the market for legal services and the features of the profession which discourage competition. The remainder of this report is structured as follows:
- Chapter 2 describes the legal profession in Ireland, including a description of what lawyers do, the demand for and supply of legal services and an outline of the regulatory environment in which lawyers operate;
 - Chapter 3 deals with regulatory reform, specifically with the dual roles of regulation and representation held by both the Bar Council and the Law Society, and the resulting potential for conflicts of interest;
 - Chapter 4 analyses restrictions on offering legal services, including the monopolies in solicitor and barrister training and restrictions on who can provide conveyancing services;

21 <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf>

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

23 "The Future of Legal Services: Putting Consumers First", Department for Constitutional Affairs, October 2005, available at <http://www.dca.gov.uk/legalsys/fo/wp.pdf>

24 http://www.ghostdigest.co.za/code/A_885.html

- Chapter 5 deals with issues relating to restrictions on rivalry in the profession, including restrictions on advertising and restrictions on access to barristers. Chapter 5 also examines the different business models used in the operation of legal practices;
- Chapter 6 analyses restrictions and practices in the legal profession that directly impact on legal fees and price competition in the legal profession; and,
- Chapter 7 provides an overall conclusion on competition in legal services.

section 2



2. AN OVERVIEW OF THE LEGAL PROFESSION

Summary

- 2.1 This chapter outlines the services provided by the two branches of the legal profession in Ireland (i.e. solicitors and barristers), describes how to become a solicitor or a barrister and explains the regulatory and commercial environment in which the profession operates.
- 2.2 Most solicitors work in private practice offering services directly to the public such as conveyancing, probate and the provision of legal advice and representation to their clients. Other solicitors are “in-house” solicitors, employed for example by the State or by business.
- 2.3 Barristers specialise in court advocacy and the provision of legal advice and opinions. Except in limited circumstances, clients cannot access barristers directly but need to go through a solicitor. Barristers in private practice may only operate as sole traders and may not incorporate or form partnerships. There are a small number of barristers employed by businesses or the State who do not have the right to represent clients in the courts.
- 2.4 Solicitors are regulated by the Law Society, which is also the solicitors’ representative body. It is unlawful for a person to use the title “solicitor” or to practise as a solicitor without being registered by the Law Society. Barristers are regulated by the Bar Council, which also acts as the barristers’ representative body. Apart from a few limited cases, barristers and solicitors are the only persons recognised in the Irish courts as representatives of persons involved in legal cases.²⁵
- 2.5 The Law Society is both the regulator of training for solicitors and the sole provider of training to become a solicitor in Ireland. The Honorable Society of King’s Inns determines the standards for becoming a barrister and is the sole provider of the training to become a barrister in Ireland.
- 2.6 Ireland spends 0.9% of its total GDP each year on legal services.²⁶ In 2003, this amounted to just over €1 billion. As of July 2006 there are 8,907 lawyers in Ireland, 7,242 solicitors and 1,665 barristers.²⁷ Other common-law countries have more lawyers per head of population than Ireland.
- 2.7 The State is a major buyer of legal services in Ireland as a purchaser of legal services on behalf of those entitled to free legal aid and as a purchaser of legal services for itself, e.g. legal advice or the services of barristers in various Tribunals of Inquiry.

The Role and Functions of Solicitors

- 2.8 Solicitors provide various legal services to the public and to the business community including:
 - Providing legal advice about matters such as buying or selling property or drafting a will;
 - Acting as agent or representative in commercial transactions, for example mergers;
 - Providing legal advice and representation in relation to family law issues or disputes or disagreements with another party such as an employer or neighbour;

²⁵ In certain limited circumstances other representatives such as family members are permitted in the lower courts.

²⁶ Source: analysis of data from the Central Statistics Office provided to the Competition Authority by Dr Vincent Hogan, Department of Economics, UCD.

²⁷ Source: The Law Society and the Bar Council.

- Providing legal advice in relation to taking or defending a legal case, for example in the event of a road traffic accident or an accident at work;
- Managing a court case on behalf of a client by acting as representative in dealings with the other party;
- Briefing a barrister on behalf of a client; and
- Representing clients in court - typically only the lower courts, such as the District Court and the Circuit Court, and very rarely in the High Court and the Supreme Court.

2.9 Solicitors can be divided into those in private practice, i.e. those who offer their services to the public for a fee, and those who are employed as “in-house” solicitors.²⁸ In-house solicitors are usually employed by businesses or the State.²⁹ In-house solicitors provide legal services to their employers only.

2.10 While the Main Street firm, found in most towns and providing mainly conveyancing, probate and litigation services, is an accurate picture of many solicitor practices, this model has little in common with the larger solicitors’ firms usually based in Dublin. These large firms offer a wide range of specialised services tailored to meet the demands of commercial clients, ranging from construction law, to mergers and acquisitions work, to advice on financial services or taxation.

The Role and Functions of Barristers

2.11 Barristers are lawyers who specialise in advocating in court for their clients and giving legal opinions. They represent just under 20% of the total number of lawyers in Ireland.

2.12 The main functions of barristers are:

- Drafting legal opinions, for example on whether or not a person has a “good case”;
- Preparing court documents for exchange between the parties in a case³⁰;
- Negotiating settlements; and
- Representing clients in court.

2.13 Advocacy, which is the pleading of a case in court on behalf of a client, is not required in all cases. Many cases are settled between the parties before a court hearing.

2.14 Legal opinions may be sought in the context of litigation or in respect of specialised legal matters.

2.15 Barristers cannot be engaged directly by clients, except in limited circumstances.³¹ Instead, solicitors engage barristers on the client’s behalf.

²⁸ Indecon’s Assessment of Restrictions in the Supply of Professional Services, published in March 2003, estimated that about 90% of practising solicitors were engaged in private practice. Available at www.tca.ie/professions.html

²⁹ State employers of “in-house” solicitors include the Office of the Chief State Solicitor, the Director of Public Prosecutions, the Competition Authority and the Revenue Commissioners. In addition, a number of qualified solicitors are employed by Government departments and State bodies in general grades.

³⁰ Such documents are known as “writs” or “pleadings”.

³¹ Since 1990 the Bar Council has operated a scheme of “Direct Professional Access” for approved organisations (known as “approved professional bodies”). Under this scheme, members of the approved professional bodies can approach barristers directly for advice in relation to non-contentious matters. The scheme does not extend to contentious matters such as court appearances. Full details on the operation of the scheme can be found on the Bar Council’s website www.lawlibrary.ie

- 2.16 Barristers can be divided into practising barristers and employed barristers. Practising barristers must operate as independent sole traders. Employed barristers are employed by companies or by the State, in particular the Office of the Attorney General and occasionally by the larger solicitors' firms, where they act as consultants. Employed barristers cannot represent their employers, or any other client, before the courts.³⁴
- 2.17 Practising barristers can be divided into junior and senior counsel, the latter commonly known as "SCs".³⁴ The title of "Senior Counsel" is awarded by the State as a mark of distinction in quality of services. Senior counsel typically command higher fees. Approximately 16% of barristers hold the title of Senior Counsel.³⁵
- 2.18 Junior counsel prepare court documents and usually plead cases before the courts³⁶. Although junior counsel generally appear alone in the Circuit Court it is not uncommon for solicitors to engage a Senior Counsel to lead junior counsel in High Court and Supreme Court cases. In these instances, junior counsel draft the documents while senior counsel conduct the bulk of the case before the court (although the senior may ask the junior to undertake some of the legal argument also).
- 2.19 Barristers in independent private practice are subject to the "cab rank" rule. This rule provides that barristers requested to work on a case must take the case on, if they are available, subject to their usual fees. The purpose of the cab rank rule is to ensure that clients are ensured access to the courts by the representative of their choice, no matter how unpopular their cause.

Regulation of the Legal Profession in Ireland

Solicitors

- 2.20 The Solicitors Acts 1954-2002 set out the framework for the regulation and education of solicitors in Ireland. Under this legislation significant powers are given to the Law Society; which is permitted to make regulations governing the conduct and discipline of solicitors, set educational standards and provide professional education.³⁷
- 2.21 The Law Society is governed by a Council, which comprises 48 elected and nominated members of the profession. A number of the Law Society's sub-committees, known as Standing Committees, have a minority of lay appointees.
- 2.22 The Law Society is subject to some oversight when making regulations. Regulations must be laid before both Houses of the Oireachtas³⁸ and the approval of the Minister for Justice, Equality and Law Reform is required for the Law Society to pass regulations governing advertising by solicitors. The Law Society's regulatory powers are 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.³⁹ The Law Society also monitors and controls the behaviour of solicitors through its Professional Code of Conduct, to which solicitors are obliged to adhere.
- 2.23 In order to receive a practising certificate a solicitor must pay the Law Society an annual registration fee and an annual contribution to the Solicitors' Compensation Fund. In 2006, the registration fee was €1,359 while the contribution to the Compensation Fund was €400. The Law Society also charges an optional annual membership fee for representation services of €85. Lower fees apply for solicitors who have been admitted to practice for less than three years.⁴⁰

33 Employed barristers are not allowed to be members of the "Law Library", which is necessary to have a "right of audience" before the courts.

34 Senior Counsel are also described as Members of the "Inner Bar", with junior counsel forming the "Outer Bar" of regular "Barristers-at-Law".

35 There are 271 Senior Counsel out of a total of 1,665 barristers. Source: The Bar Council.

36 The District Court and the Circuit Court are known as the lower courts while the High Court and the Supreme Court are known as the Superior Courts.

37 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.

38 Both the *Solicitors Act 1954* and the *Solicitors (Amendment) Act 1994* provide that all regulations made under these Acts must be laid before the Houses of the Oireachtas.

39 Section 66 of the *Solicitors Act 1954* as amended by section 76 of the *Solicitors (Amendment) Act 1994*.

40 For solicitors admitted less than three years previously the fees for 2006 were: Registration Fee €1,085; Compensation Fund contribution €400; Membership Fee €55.

- 2.24 Apart from its regulatory functions, the Law Society is the only provider of professional education for trainee solicitors. The 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.
- 2.25 The Solicitors' Disciplinary Tribunal and the President of the High Court also have a role in the regulatory framework.

Barristers

- 2.26 Barristers are wholly self-regulated. There are no statutes or government-imposed controls governing their conduct, discipline or education. The Bar Council of Ireland regulates practising barristers, while the Honorable Society of King's Inns controls entry into the profession and is the monopoly provider of the professional course leading to the qualification of Barrister-at-Law. Only holders of the Barrister-at-Law 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.⁴¹
- 2.27 The Bar Council is composed entirely of barristers, elected annually from among the members of the Bar. 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.⁴²
- 2.28 Barristers who wish to "engage in practice" (i.e. give legal advice, draft pleadings and represent clients in court) must, at the time of their call to the Bar, give an undertaking to the Chief Justice 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, on payment of an annual subscription fee.⁴³
- 2.29 The Honorable Society of King's Inns, which was established in 1541, determines the standards for becoming a barrister. To date, King's Inns has chosen to do this by way of self-provision of the only course of training in Ireland recognised for qualification as a barrister. This course is provided in Dublin. In 2004 the course changed from a two-year part-time course to a one-year full-time course. The Honorable Society of King's Inns is governed solely by barristers and members of the judiciary.

How to become a solicitor

- 2.30 The Law Society of Ireland regulates who may become a solicitor, how and where. To become a solicitor in Ireland, one must complete courses in the Law Society's school in Dublin, as well as undertaking practical apprenticeship work.
- 2.31 A potential trainee must first pass the Law Society's entrance examination to its professional practice courses. In addition, if the trainee is not a university graduate, or does not hold some equivalent qualification, he or she must pass a preliminary examination before being permitted to sit the entrance examination.⁴⁴
- 2.32 Before commencing the professional practice courses, the trainee solicitor must also obtain a two-year in-office training contract with a qualified solicitor. He/she may then take the 8 month Professional Practice Course I (PPC I) in the Law Society's school in Blackhall Place in Dublin before commencing 11 months of in-office

41 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 or she has acquired the B.L. degree and gone through the ceremony known as the "call to the Bar", at which the Chief Justice presides.

42 The term "practising barrister" is defined in the Bar's Code of Conduct in a manner that excludes barristers in employment.

43 There is no single subscription fee to join the Law Library. Instead the fee varies according to the length of time that the barrister has been a member of the Law Library with newly-qualified barristers currently paying a once-off fee of €1,500 and an annual fee of €1,460 which increases gradually with each year of practice to a maximum of €5,500 after 12 years.

44 The majority of trainees will have completed a law degree first. Most trainees without law degrees will first take some form of preparatory course to equip them with the required legal background.

training. He/she returns to Blackhall Place for the 3 month Professional Practice Course II (PPC II), after which there is a further 10 months of in-office training. At the end of this process, which takes 32 months, the trainee is qualified to be enrolled as a solicitor. The stages necessary for qualification as a solicitor are set out in Appendix 5.

How to become a barrister

- 2.33 The Honorable Society of King's Inns regulates who may become a barrister, how and where. To become a barrister, one must pass the Barrister-at-Law degree provided at King's Inns' school in Dublin, and be called to the Bar by the Chief Justice.
- 2.34 To be admitted to the Barrister-at-Law degree course provided by King's Inns a potential trainee must hold an approved law degree from a third level education institution or the Diploma in Legal Studies (the latter is provided only by King's Inns), before he/she can sit the entrance examination for a place on the degree course.⁴⁵ The Diploma in Legal Studies is taught over two years on a part-time basis. The Barrister-at-Law degree course was recently changed from a two-year part-time course to a one-year full-time course. The stages necessary for qualification as a barrister are set out in Appendix 5.
- 2.35 After completing professional training, a new barrister who intends to practise at the Bar must undertake a one or two year apprenticeship with an established barrister. This is known as "pupillage" or "devilling" for a "Master", during which period the "pupil" or "devil" is not paid, but follows the Master to obtain practical training.
- 2.36 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/her Master. The level of assistance and training provided by different Masters varies greatly.⁴⁶ Helpful Masters enable new barristers to build up their own practices, in part by helping them to obtain useful contacts within the profession.

Provision of legal services in Ireland by foreign-qualified lawyers

- 2.37 There are different requirements for foreign-trained lawyers who wish to offer legal services in Ireland, depending on their country of qualification.
- 2.38 Under EU Directives 98/5/EC⁴⁷ and 89/48/EC⁴⁸ lawyers qualified in European Economic Area (EEA)⁴⁹ Member States can practise in Ireland, either under their home country designation or as Irish solicitors or barristers. These Directives were implemented into Irish law by the *European Communities (Lawyer's Establishment) Regulations 2003*.⁵⁰

45 A number of changes have recently been made to the Education Rules of King's Inns as they relate to approved law degrees and post graduate diplomas in law. Further details on these changes and their effects are set out in Chapter 4.

46 Views of barristers met as part of the Competition Authority's enquiries.

47 Council Directive 98/5/EC allows a lawyer, who is a national of an EEA Member State, and authorised to practise in an EEA Member State, to 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 practise under his home title. After a period of three years the visiting lawyer may choose to take out the local qualification and cannot be required to pass any examination or test in order to do so.

48 Council Directive 89/48/EC allows EEA lawyers to qualify in a Member State other than that in which they originally qualified without undertaking full professional education in the second Member State. Under this Directive the Law Society and the King's Inns, as the competent authorities in the State, may require EEA qualified lawyers to satisfy their requirements in relation to their knowledge of Irish law and practice before qualifying as an Irish solicitor or barrister.

49 The members of the European Economic Area are the 25 Member States of the EU, Iceland, Lichtenstein and Norway.

50 S.I. No. 732 of 2003. The Regulations have made it easier for lawyers qualified in an EEA Member State to practise on a permanent basis in another EEA Member State.

2.39 Lawyers qualified outside the EEA 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. Alternatively, if their country has reciprocity arrangements with Ireland, they must pass a transfer test.⁵¹

2.40 The provision of services in Ireland by lawyers trained outside the EU is considered in greater detail in chapter 4.

Complaints

2.41 Both the Law Society and the Bar Council, in their capacity as regulators, operate mechanisms by which complaints against practising solicitors and barristers can be dealt with and which are outlined below. The *Civil Law (Miscellaneous Provisions) Bill 2006*,⁵² will change the current system by establishing a Legal Services Ombudsman to oversee the handling of complaints by the Law Society and the Bar Council.

Complaints against solicitors

2.42 The Law Society's Complaints Scheme is provided for under the *Solicitors (Amendment) Act 1994* and caters for three types of complaints: inadequate service, excessive fees and misconduct. Complaints may be made either to the Law Society or the Solicitors' Disciplinary Tribunal, or to both.

2.43 The Law Society, through its Complaints and Client Relations section, investigates complaints concerning inadequate service, excessive fees and misconduct.

2.44 Table 1 below gives a breakdown of the numbers of complaints to the Law Society by category in the period 1998-2006.

Table 1: Complaints by category 1998-2006⁵³

Year	Inadequate professional service ⁵⁴	Overcharging	Misconduct
1998	273	96	744
1999	290	82	725
2000	371	97	658
2001	456	87	551
2002	449	105	485
2003	444	88	563
2004	482	76	551
2005	491	86	655
2006 ⁵⁵	546	600	818

Source: The Law Society.

2.45 Complaints against solicitors may be made by members of the public or by other solicitors. Since 2001, the Law Society when recording complaints it receives has distinguished between complaints made by solicitors and by members of the public.

51 In the case of solicitors, there are four reciprocal agreements in place between the Law Society and other regulatory bodies: three with State Bar Associations in the United States of America – California, New York and Pennsylvania and one with New Zealand. There are no reciprocal arrangements for barristers between King's Inns and similar bodies in any other country.

52 Published on 20th April 2006.

53 Note: Figures are compiled for the period 1st September to 31st August annually.

54 The most common reason for complaint in the category "inadequate professional service" is delay.

55 According to the Law Society, the very large increase in complaints in the period September 2005 to September 2006 reflects the controversy surrounding complaints of overcharging by solicitors in Residential Institutions Redress Board cases.

2.46 Table 2 below gives a breakdown of the source of complaints against solicitors for the period 2001-2006.

Table 2: Source of complaints to the Law Society 2001-2006			
Year	Complaints made by solicitors	Complaints made by members of the public	Total
2001	217	877	1094
2002	258	781	1039
2003	268	827	1095
2004	276	833	1109
2005	344	888	1232
2006	265	1699	1964

Source: The Law Society

2.47 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 individual unconnected with the legal profession. The Independent Adjudicator is appointed by the Law Society.⁵⁶

2.48 Contacts with the Competition Authority from members of the public after the publication of the Preliminary Report suggested that clients are wary of complaining to the Law Society, as they feel that, given its representative role, it may safeguard the interests of the solicitor over those of the client.

2.49 The Solicitors' Disciplinary Tribunal has the power to investigate allegations of misconduct against a solicitor or a trainee solicitor. Applications to the Tribunal are made either by the Law Society or directly by members of the public. The Tribunal consists of 30 members appointed by the President of the High Court, 20 of whom are solicitors of not less than ten years standing and 10 of whom are non-solicitors. The Tribunal can itself impose sanctions, including a direction to pay restitution up to an amount not exceeding €15,000 to an aggrieved party, or can make a recommendation to the President of the High Court that a solicitor be suspended or struck off.

Table 3: Source of applications to the Solicitors Disciplinary Tribunal 2003-2005			
Year	Applications by the Law Society	Applications by members of the public	Total
2003	45	38	83
2004	24	27	51
2005	52	18	70

Source: Solicitors' Disciplinary Tribunal Chairman's Report 2005

Complaints against barristers

2.50 The Bar Council's Professional Practices Committee assists barristers in the interpretation of the Code of Conduct and provides practical guidance and rulings where necessary and appropriate. The Professional Practices Committee can also be a complainant to the Barristers Professional Conduct Tribunal on its own initiative. Complaints of misconduct from members of the public and from solicitors about barristers are considered by the Barristers' Professional Conduct Tribunal. The Barristers' Professional Conduct Tribunal

⁵⁶ The current Independent Adjudicator is Ms Lenore Mrkwicka.

comprises four practising barristers and five non-lawyers, one nominated by the Irish Business and Employers Confederation (IBEC), one nominated by the Irish Congress of Trade Unions (ICTU) and the remainder nominated by the Bar Council. The Tribunal can impose penalties, including recommending the disbarring of a barrister. It cannot order that redress be paid to the client.

2.51 Table 4 below gives a breakdown of the numbers and categories of complaints to the Barrister's Professional Conduct Tribunal in the period 2001-2006 while Table 5 gives details of the outcome of complaints to the Tribunal in the same period.

Table 4: Complaints 2001-2006⁵⁷

Year	Number of complaints	Upheld	Not Upheld	Withdrawn	Ongoing
2001	20	2	13	5	0
2002	20	3	7	10	0
2003	23	3	14	5	1
2004	19	3	10	4	2
2005	20	1	14	1	4
2006	13	1	1	1	10

Source: The Bar Council.

Table 5: Outcome of complaints to the Barrister's Professional Conduct Tribunal 2001-2006⁵⁸

Year	Number of complaints	Upheld	Not Upheld	Withdrawn	Ongoing
2001	20	2	13	5	0
2002	18	3	7	8	0
2003	23	3	14	5	1
2004	19	3	10	4	2
2005	20	1	14	1	4
2006	13	1	1	1	10

Source: The Bar Council.

Legal Services Ombudsman

2.52 The Civil Law (Miscellaneous Provisions) Bill 2006⁵⁹ provides for the establishment of a Legal Services Ombudsman to oversee the handling of complaints by clients of solicitors and barristers by the Law Society and the Bar Council, respectively. The Ombudsman will effectively subsume the existing office of Independent Adjudicator in relation to complaints against solicitors and will carry out similar functions in respect of both solicitors and barristers.

2.53 The key functions of the Ombudsman will be:

- To provide a forum for review for clients of solicitors and barristers who are dissatisfied with the handling of a complaint made to the Law Society or the Bar Council;

57 Note: Figures for 2006 are compiled to end October.

58 Note: Figures for 2006 are compiled to end October.

59 Published on 20th April 2006.

- To oversee the complaints procedures in place in the Law Society and Bar Council by examining a random selection of complaints each year;
- To monitor and report annually to the Minister for Justice, Equality and Law Reform and the Oireachtas on the adequacy of the admissions policies of both professions, particularly with regard to the numbers admitted.

Representative Bodies

2.54 Both the Law Society and the Bar Council act as representative bodies for their respective branches of the legal profession, in addition to carrying out their regulatory roles. In addition to these bodies there are smaller representative associations such as the Dublin Solicitors Bar Association and the State Solicitors Association.

Relevant Markets for Legal Services

- 2.55 A solicitor can provide all the services provided by a barrister, but barristers are not permitted to provide all the services offered by solicitors. For example, barristers are not allowed to hold clients' funds. However, although there is some overlap between the services provided by solicitors and barristers, using a barrister to provide these services is not really an option for the vast majority of clients who can only access barristers through solicitors, and would thus be incurring additional costs.
- 2.56 Solicitors can represent clients in court; in practice they tend not to offer representational services in the higher courts, i.e. the High Court and the Supreme Court. There are a number of possible reasons for this: solicitors depend on ready access by their clients whereas barristers tend to spend the majority of their time in court; solicitors provide a wide variety of legal services whereas barristers specialise in advocacy and are therefore considered to be expert in this area of legal work.
- 2.57 There may or may not be separate markets for solicitors' services and barristers' services. It is also possible that separate markets may exist for specialists in certain aspects of law, for example criminal law, commercial law or defamation. The purpose of this study is to examine restrictions which affect competition between solicitors, between barristers, and between solicitors and barristers. Such restrictions ultimately affect the end users of legal services. It is not necessary therefore to make a definitive determination on the relevant market and accordingly this report will refer to the market for legal services which includes all the services provided by solicitors and by barristers.
- 2.58 The concentration of legal service suppliers within the profession is relatively low. Barristers must operate as sole practitioners and even among solicitor practices concentration is not high.⁶⁰ The largest 100 solicitor firms in Ireland employ less than one third of solicitors. Within different segments, 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.
- 2.59 The low level of concentration suggests that competition issues within the profession are more likely to arise from regulatory structures than from concentration in the market.
- 2.60 The relevant geographic market for legal services is likely to be the State, although where solicitors' services are concerned, individuals and small businesses will in practice tend to search close to where they are located when seeking a solicitor. The loyalty of some clients toward specific solicitors may mean some clients will travel to use certain solicitors.

⁶⁰ 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.

- 2.61 Those requiring specialist commercial legal services, for example large business clients, will generally use the services of one of the larger solicitors' firms specialising in commercial law. Some business clients use solicitors' firms from the UK. This indicates that for commercial law the geographic spread of the market may be international. The restrictions on recognition of non-EEA lawyers referred to earlier, potentially limit expansion by foreign law firms into the State.
- 2.62 The relevant geographic market for barristers' services is generally the State. While barristers are usually based near the higher courts, and are hence located mainly in Dublin and Cork, they may be briefed by a solicitor from anywhere in 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.

Demand for Legal Services

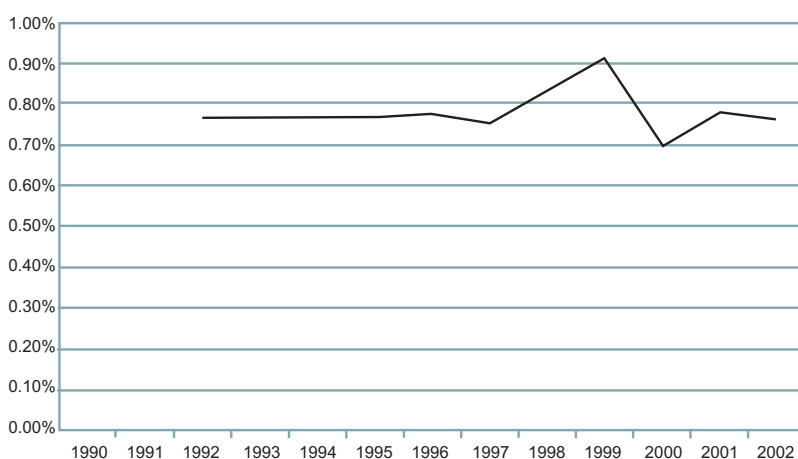
- 2.63 Demand for legal services comes from individual consumers, from businesses and other corporate bodies and from the State. Individual members of the public are usually infrequent buyers of solicitors' services,⁶¹ normally only requiring legal services when buying or selling property, if they suffer or cause personal injury or need advice on probate or family law. This relatively rare use of solicitors, allied to the sometimes complex nature of legal services, means that many individual buyers are not well informed as to what legal services they need, how much these services cost, and the relative merits of different providers.
- 2.64 Due to the nature of legal services it is difficult to judge the quality of the service provided by a lawyer, even after it has been delivered, or to compare the quality of the services offered by different lawyers. Infrequent buyers choose solicitors in a variety of ways. They may use a 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.
- 2.65 More frequent buyers, including many business clients, are usually better informed about the services they purchase. Regular business clients tend to have clear ideas of what services they want and from whom. Businesses with in-house lawyers are particularly knowledgeable buyers. Some business clients divide their custom between firms. Large clients are important to solicitors' firms, and consequently such clients can, and do, use their buyer power to obtain service on good terms.
- 2.66 Both individual and business clients can easily switch from solicitor to solicitor between different transactions. However, it is more difficult for the client to switch during the course of a transaction, for instance, during a conveyance or mid-way through litigation. This difficulty arises because solicitors have a legal right to withhold the transfer of a client's file to another solicitor if payment is outstanding or disputed. A solicitor may hold the file on the transaction and refuse to return it to the client, or transfer it to the new solicitor, until payment has been received for the work to date. This issue is examined in more detail in Chapter 5.
- 2.67 Advocacy, involving representing a client in court, is not required in every legal case, as many cases settle before a court hearing. Even where advocacy services are required a solicitor may, on occasions, not engage a barrister but represent the client himself/herself in court. Clients may also engage barristers to provide opinions on specialised legal matters, irrespective of whether or not a case goes to court.
- 2.68 Reputation plays a large part in distinguishing between barristers and, consequently, in the selection of a barrister. The public perception is that having a superior advocate, even if only marginally better, is crucial to success in litigation and this may indeed be the case. This can lead to the solicitors for one side of a case "barristering up" to the level of barristers engaged by the other side, for fear of not being seen to do the best for

61 A survey of consumers in "Indecon's Assessment of Restrictions in the Supply of Professional Services", March 2003, found that 51 per cent of those surveyed had not used a solicitor in the previous five years.

their client. Barristers with the title Senior Counsel tend to be in demand for High Court and Supreme Court cases, with each side having at least one and sometimes two “SCs” in court.

- 2.69 The amount spent on legal services in Ireland has risen significantly over the past ten years and was approximately €1 billion in 2003, up from approximately €320 million in 1992.⁶²
- 2.70 As a proportion of total expenditure in the economy, expenditure on legal services has remained relatively constant at just under one per cent of Gross Domestic Product (GDP), as shown in Figure 1 below.⁶³ During this time, expenditure on legal services has kept pace with the growth in GDP, which has increased by an average of nearly seven per cent per year.

Figure 1: Expenditure on Legal Services as Percentage of GDP



Source: Analysis of data from the Central Statistics Office provided to the Competition Authority by Dr Vincent Hogan, Department of Economics, UCD

- 2.71 Demand for legal services varies depending on the area of law involved. There is no current information in relation to the proportion of fee income generated by the various areas of law, although a survey conducted for the Law Society in 1999 indicated that personal injury (33%) and conveyancing (31%) were the major contributors to solicitors' incomes. There is no equivalent information in relation to barristers, but it is likely that criminal law constitutes a higher share of fee income for barristers than for solicitors⁶⁴ and conveyancing a lower share. Survey data from the Indecon Report suggests that half of the demand for barristers' services stems from private individuals, the other half from corporate clients and the State.⁶⁵
- 2.72 The volume of personal injury litigation has grown considerably over the past 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.

62 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 services 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 2003. The sample size is approximately 30% of the entire sector.

63 Note that, after a large increase 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 is common for periods both before and after 1999.

64 There are, however, some solicitors whose practices consist almost entirely of criminal law.

65 Table 5.3: Indecon's Assessment of Restrictions in the Supply of Professional Services, March 2003.

2.73 Litigation costs add, on average, in excess of 40% to the cost of compensation in personal injury cases.⁶⁶ In an analysis of non-compensation costs⁶⁷ in personal injury cases for the years 1996-2003 the Irish Insurance Federation found that, for all types of claims, non-compensation costs had risen from 35.5% in 1996 to 45.9% in 2003. A breakdown for various classes of claims is given in Table 6 below.

Table 6: Non-compensation costs as a percentage of compensation 1996-2003

Class of claim	Non-compensation costs as a percentage of compensation 1996	Non-compensation costs as a percentage of compensation 2003
Motor claims involving injury	34.5%	41.5%
Employer's liability	42.2%	51.7%
Public liability claims involving injury	52.7%	65.3%

2.74 The increase in insurance premiums, in part due to the volume of personal injuries claims, and the increase in non-compensation costs 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.⁶⁸ The High Court judgement 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.⁶⁹

2.75 Despite the possibility that the demand for legal services in the area of personal injuries may fall, the general belief among the legal profession is that the demand for other 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.

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

2.76 The State is a major purchaser of legal services, both on behalf of those entitled to legal aid and also on its own behalf. For most criminal matters, the State effectively sets both prosecution and defence fees. This arises from the State's role as the prosecutorial body and from accused citizens' constitutional right to legal representation.

2.77 The State also purchases legal services for the many Tribunals of Inquiry set up in recent years. Large numbers of barristers have represented the State and witnesses before the Tribunals.⁷⁰ The State initially negotiated daily fees commensurate with a barrister's usual "brief fee". (The brief fee is the fee paid to the barrister for being engaged on a case, plus a "refresher" for each day that the case continues; the brief fee will usually constitute almost all the total fee paid to the barrister.) As the Tribunals have exceeded the length of the typical court case, the result has been that some barristers have received unusually large fees.

2.78 Given the role of the State as a major buyer of legal services, it is important that it use its buyer power more effectively than it has previously. Recently, the State has attempted to do this in relation to Tribunals and has announced that it is now paying lower rates in an effort to obtain better value for money.⁷¹

2.79 To further improve value for money in the provision of legal services, the State should examine the benefits of introducing competitive tendering which is currently being considered in the UK.⁷² Competitive tendering, with

66 See *Final Report of the Motor Insurance Advisory Board*, published April 2002.

67 Non-compensation costs are costs and disbursements paid to other parties such as solicitors, barristers and experts.

68 In its first Annual Report, published in September 2005, the PIAB stated that the average cost of settling claims was ten per cent of the amount awarded, compared to up to 46% under the old system. A similar result was achieved in 2005. Source: PIAB Annual Report 2005, 11th October 2006.

69 [2005] IEHC 100. This judgement has been appealed to the Supreme Court by the PIAB. At the time of writing the appeal is still awaiting hearing.

70 Demand comes not only from the State but also from the individuals involved in the Tribunals.

71 In July 2004 the Government decided to apply a new, lower scale of legal fees to any new tribunals and inquiries established on or after 1st September 2004. The Government subsequently decided, in September 2004, that the new scale would also be applied to existing tribunals and inquiries. However, at that time there was no statutory power to reduce the fees payable to lawyers in existing tribunals and inquiries. Section 39 of the Tribunals of Inquiry Bill 2005, which is currently being considered by the Oireachtas, gives the Government the power to apply the new scale of fees to existing tribunals and inquiries.

72 For details of a recent consultation process on London Criminal Competitive Tendering see www.legalservices.gov.uk/criminal/lcct/lcct.asp. Also Lord Carter's Review of Legal Aid Procurement at www.legalaidprocurementreview.gov.uk.

tenders evaluated on the basis of quality and price, would encourage suppliers of legal services to innovate and become more efficient.

Supply of Legal Services

2.80 Some legal services can be provided by persons other than solicitors and barristers; for example accountants may provide advice on legal aspects of taxation. For the most part, however, individuals and businesses requiring legal advice or representation must use a solicitor or barrister.⁷³ This report focuses on the supply of legal services by the legal profession.

2.81 In July 2006 there were 8,907 lawyers in Ireland, consisting of 1,665 barristers and 7,242 solicitors.⁷⁴ The number of lawyers has increased in recent years. In 1992 there were 4,617 lawyers, consisting of 809 barristers and 3,808 solicitors – slightly more than half the current levels.

2.82 Despite the increase in numbers, Table 6 below indicates that the ratio of lawyers to population in Ireland remains lower than in several other common-law jurisdictions.

Table 7: Lawyers per 1,000 population⁷⁵

Jurisdiction	Lawyers per 1,000 population
Ireland	2.1
England and Wales	2.5
New Zealand ⁷⁶	2.3
Victoria (Australia)	2.8

2.83 Within each branch of the legal profession there is a high degree of supply substitutability between different areas of law. Lawyers specialising 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.

Solicitors

2.84 Solicitors in private practice operate either as sole practitioners, with other solicitors in partnerships, or as associate solicitors i.e. non-partner members of a firm. Partnerships range in size from two solicitors to fifty or more. Solicitors' firms usually employ assistant or "associate" solicitors, legal executives and administrative staff. Solicitors are not allowed to carry on business as a limited liability company, so sole practitioners or the partners in a firm are personally liable.

2.85 There are currently over 7,000 solicitors practising in Ireland, mostly in private practices. Approximately 70% of solicitors' 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 "main 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, family law or some criminal work, though

⁷³ For example, section 58 of the Solicitors Act 1954 provides that only solicitors in private practice can offer conveyancing services to the public for payment.

⁷⁴ 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.

⁷⁵ 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 approximately 210 lawyers per 100,000 people consists of approximately 172 solicitors and 39 barristers for every 100,000 people.

⁷⁶ 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.

advice on any legal matter is usually supplied if requested. Services may be outsourced to a barrister, who may provide a specialised legal opinion in a particular area of law.

- 2.86 Another category can be loosely identified as 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 solicitors' 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.
- 2.87 Large law firms, typically with more than thirty solicitors, predominantly 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.
- 2.88 In common with firms run by other professionals, solicitors' 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 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.
- 2.89 In the period 1994-2001 an average of 70 new law firms were created per year and 20 firms closed every year, meaning that the total number of firms increased by around 50 per year.⁷⁷ In July 2006 there were approximately 2,100 law firms in Ireland.⁷⁸

Barristers

- 2.90 Barristers in independent private practice are permitted to work as sole traders only.
- 2.91 It can be difficult for new barristers to establish themselves. The drop-out rate among newly qualified barristers is relatively high; the Bar Council estimates that approximately 15% of new barristers leave the Bar within five years. This is consistent with figures that show that a significant proportion of junior counsel have low earnings from providing legal services.⁷⁹
- 2.92 As of July 2006 there were 1,665 barristers who were members of the Law Library, 1,394 of whom were practising as junior counsel and 271 of whom were practising as senior counsel.⁸⁰
- 2.93 As barristers specialise in advocacy, 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 and administrative facilities.
- 2.94 Some barristers practise outside Dublin "on circuit" and represent clients in the Circuit Court and in the High Court when it is on circuit.⁸¹ Some barristers, who decide to practise mainly in the south of Ireland, locate in offices in Cork in response to demand for their services. According to the Bar Council, 86 barristers reside in Cork and 119 others throughout the country, with most barristers residing in Dublin.

77 Tables 4.15 and 4.17, Chapter 4 *Indecon's Assessment of Restrictions in the Supply of Professional Services*.

78 Source: The Law Society.

79 See Table 9 later in this chapter.

80 Source: The Bar Council.

81 Twice yearly the High Court sits at various venues around Ireland.

Lawyers' Incomes

- 2.95 Compared with other professions, such as architects, engineers and accountants, lawyers earn relatively high incomes. Of the 10,562 people who earned more than €200,000 in Ireland in 2002, solicitors and barristers accounted for 12% - or 1,248 – of the total, ahead of all other professions.⁸² The average income for lawyers in 2002 was approximately €164,000.⁸³
- 2.96 Incomes in the legal profession are characterised by huge variation around the average. A large number of lawyers earn incomes that are much lower than the average and a small number of lawyers earn much higher incomes. This variation is particularly strong for barristers. The wide range of incomes earned within the profession is indicated by the fact that median income for lawyers (the income level at which half of those in the profession are earning more and half are earning less) is much lower than the average income, at approximately €92,000.
- 2.97 Table 8 provides more detail regarding the incomes of lawyers within different groups in 2002. It shows the proportion of lawyers that earned over €100,000 and over €52,000 (twice the average industrial wage for that year).
- 2.98 Solicitors who are owners or partners of law firms tend to have relatively high income levels, with roughly 35% of owners and partners earning more than €420,000. The income of solicitors who are owners or partners in firms is made up of salaries and profits. It is not possible to breakdown the relative contribution of these two components of solicitors' incomes. The average earnings of owners or partners of law firms who work on a full-time basis are likely to be higher than the figures given below which include the earnings of part-time practitioners.

Table 8: Incomes by category of lawyers 2002

Category	Average Income	Median Income	% with income over €52,000	€100,000
All lawyers	€164,023	€92,280	71	47
Solicitors: Owners & Partners	€209,891	€140,254	82	64
Solicitors: Associates	€62,984	€52,063	50	11
Employed solicitors	€72,480	€48,258	40	23
Junior Counsel	€120,893	€77,366	63	37
Senior Counsel	€329,915	€251,600	81	76

Source: Revenue Commissioners

82 Information contained in answer to a Parliamentary Question PQ32135/05 answered on 27th October 2005. Other high earning professions were: medical practitioners (1,216), accountants (420), dental practitioners (186), architects/engineers (154), and pharmacists (95). The percentage of lawyers earning more than €200,000 was, at 14%, proportionally greater than the percentage of pharmacists (6%), dentists (11%), medical practitioners (7%) and accountants (1.3%).

83 Source: Revenue Commissioners. Income figures used in this Report were derived from survey data obtained by the Revenue Commissioners. A random sample of nearly 40% 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 6 will slightly underestimate actual figures.

- 2.99 On average, associate solicitors earn one third of the amount earned by 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. Solicitors employed in non-legal firms tend to earn somewhat more than associates.⁸⁴
- 2.100 Junior counsels' average earnings were nearly €121,000 per year in 2002, although there is a very large degree of variation in incomes. More than one third of junior counsel earn more than €100,000, while the top fifteen per cent earn more than €200,000. In contrast, the median income is €77,366 (less than two-thirds of the average income for junior counsel). Nearly 30% of junior counsel earn less than €40,000 per year, and ten per cent earn less than €20,000. This illustrates that, while some barristers do extremely well, others do not earn large amounts.
- 2.101 As Table 9 shows, incomes of junior barristers are significantly lower in their early years of practice. In fact, half of the number of barristers with less than four years experience earn less than €30,335 per year.⁸⁵

Table 9: Incomes for junior counsel by years of experience 2002

Experience (years)	Average Income	Median Income	% with income over	
			€52,000	€100,000
0-3	€40,130	€30,335	33	0
4-6	€70,128	€47,521	44	12
7-9	€81,422	€63,487	60	24
10-12	€152,089	€95,473	71	47
13+	€168,170	€126,290	76	59

- 2.102 There is less variation in the incomes of senior counsel than other types of lawyers, with the average income of this group being just under €330,000. Fewer than 25% of senior counsel earn under €100,000, with the top ten per cent earning more than €500,000 per year.

Paying for Legal Services

- 2.103 Lawyers generally invoice clients after all legal services relating to the transaction/issue/case at hand are complete.⁸⁶ In some cases invoices may be extremely detailed but most will be sparse, with the bulk of the total amount falling under the title of "professional fee". For certain legal services, the solicitor will hold a client's funds and may deduct fees directly from the funds.
- 2.104 The amount of legal services work required in a particular case is often not ascertainable at the outset, and so solicitors and barristers generally don't quote a fixed price. Similar situations arise regarding services provided by health professionals, who typically charge an hourly or per session fee until the patient is recovered. Many solicitors in private practice charge an hourly fee. This may not, however, always be appropriate as, unlike health professionals, much legal work is done outside of meetings with clients.
- 2.105 Submissions indicate that many solicitors are reluctant to provide fee quotations over the phone. This may be reasonable in some situations, but it should be possible to quote a fee in advance for tasks such as conveyancing or probate. Once a client has arrived at a solicitor's office, he has already incurred some costs

⁸⁴ The sample size for this category was relatively small. This may make the results for this group less reliable.

⁸⁵ Source: Revenue Commissioners

⁸⁶ There is considerable variation in how clients are billed. Corporate clients or frequent users of legal services may have accounts with monthly bills. Even then, however, specific legal tasks may be billed for separately, and will generally elicit a quotation.

and, once there, may be reluctant to go to other solicitors' offices to compare prices. Refusing to give quotations over the phone increases buyers' search costs and this limits competition.

- 2.106 When a business or individual engages a solicitor, they often don't know the price of the service they are purchasing. 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.⁸⁷ There is no penalty for solicitors who do not provide a Section 68 letter, however, and the Law Society does not advertise the requirement to consumers of legal services.
- 2.107 Barristers are not required to provide similar information to solicitors who engage them on behalf of clients. It is not common practice for solicitors to shop around for the best value barrister's services on behalf of their client. Where both junior and senior counsel are engaged by a solicitor, it is common practice for junior counsel to charge two-thirds of the fee charged by senior counsel, regardless of the amount of work done by each barrister.⁸⁸
- 2.108 Irish consumers have become more price conscious regarding certain legal services, and, particularly for conveyancing, it is now common for clients to call a number of solicitors to seek fee quotations. The work required to complete most conveyancing work is generally easy to estimate and solicitors now frequently quote a fixed price, rather than the more traditional price of a percentage of the value of the property being sold.
- 2.109 Some lawyers take litigation cases on a "no foal no fee" basis. This means that the client does not pay his lawyer's fees if his case is unsuccessful.
- 2.110 Contingency fees, where the legal fees charged for litigation depend upon the size of the award won by the client, are illegal in Ireland. Despite this, empirical evidence gathered by both the Competition Authority⁸⁹ and the Legal Costs Working Group⁹⁰ suggests that, in practice, legal fees for litigation are highly related to the size of the award to the client and that the system of taxation effectively cements this relationship.
- 2.111 The Central Statistics Office does not collect data in relation to fees charged for legal services and it is therefore very difficult to get information on the cost of the various services provided by solicitors and barristers.
- 2.112 Since the Competition Authority published its Preliminary Report, the Legal Costs Working Group has issued its final report containing information about the price of legal services in High Court cases.⁹¹ The Legal Costs Working Group found that the level of solicitors' fees in the High Court increased by 4.2% in real terms annually over the period 1984 to 2003 while the level of senior counsel fees in the High Court increased by 3.3% in real terms annually over the same period. Figure 2 below shows how the increase in legal fees for solicitors and senior counsel compares to the general inflation in services in the Irish economy from 1984 to 2003.

87 Section 68 of the *Solicitors (Amendment) Act 1994*.

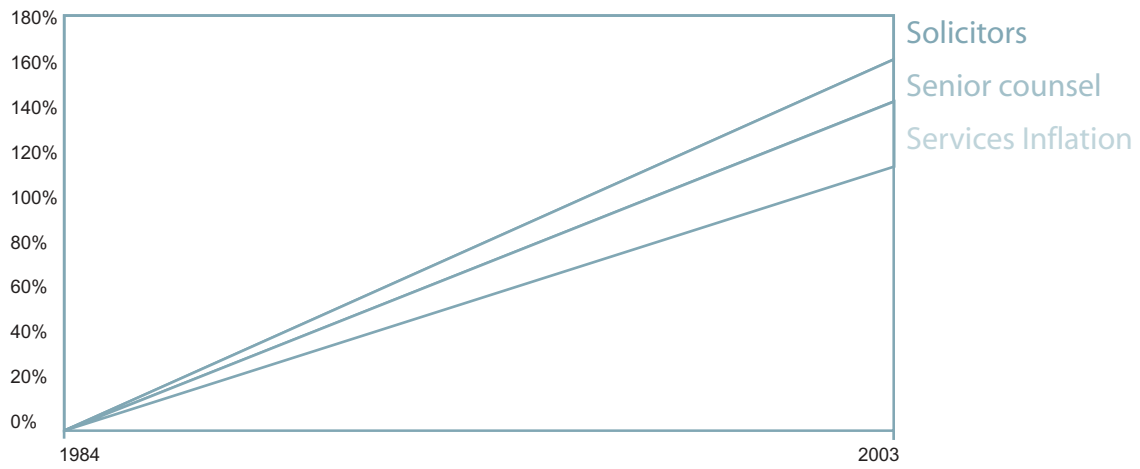
88 "*Report of the Legal Costs Working Group*", 7 November 2005, para 3.19.

89 See Chapter 6.

90 "*Report of the Legal Costs Working Group*", 7 November 2005, para 3.23. The Legal Costs Working Group was established by the Minister for Justice, Equality and Law Reform in 2004 and asked to look at the way in which legal costs are determined and assessed and to make recommendations which would, in the Group's view, lead to a reduction in the costs associated with civil litigation. The Group reported in November 2005. Its report is available at www.justice.ie.

91 "*Report of the Legal Costs Working Group*", 7 November 2005, para 3.22.

Figure 2: Inflation in Legal Fees in High Court Cases, 1884-2003



Source: Report of the Legal Costs Working Group; Central Statistics Office.

2.113 The issues of legal fees and taxation are discussed in further detail in Chapter 6.

A black and white photograph showing the lower half of several people walking on a set of stone stairs. The person in the foreground on the left is wearing a dark coat and dark trousers, and is carrying a large, light-colored (likely white) hard-shell suitcase. The person on the right is also in dark clothing and is walking slightly behind and to the right. The background is out of focus, showing more of the stairs and possibly other people. The overall mood is professional and busy.

section 3

3. REGULATORY REFORM

Summary

- 3.1 The regulatory framework for the legal profession is in need of reform. The Competition Authority recommends the establishment of an independent Legal Services Commission with overall responsibility for regulating the legal profession and the market for legal services. Independent regulation of the legal profession would be consistent with moves towards greater transparency, accountability and consumer-focused regulation in other professions and sectors in Ireland, such as health care professions and financial services. Independent regulatory oversight of the legal profession is also a trend internationally, most recently in England and Wales with the introduction of a Bill providing for an independent Legal Services Board.
- 3.2 The current regulatory framework for the legal profession in Ireland raises the potential for conflicts – between the commercial interests of lawyers and the interests of consumers of legal services. Barristers are totally self-regulated and solicitors are largely self-regulated with minimal independent oversight in some areas. The Bar Council and the Law Society are the representative bodies for barristers and solicitors respectively and in that capacity lobby for and promote the interests of the legal profession. Also, in their role as regulators of the legal profession, the Bar Council and the Law Society must ensure that the legal profession operates to the benefit of consumers. These two roles can conflict and housing them in the same organisation lacks transparency. When the interests of the profession and consumers collide, consumers lose out if the regulatory body imposes disproportionate regulations or fails to remove regulations which offer no protection for consumers but shelter the profession from competition.
- 3.3 Competition in legal services in the State has been and continues to be severely hampered by unnecessary restrictions permeating the legal profession. These restrictions emanate mainly from the regulatory rules and practices of the Law Society, the Bar Council and the Honorable Society of King's Inns but also from the relevant legislation.
- There are a number of unnecessary restrictions on becoming a solicitor or barrister. For example, those wishing to enter either branch of the legal profession must do so by way of a training school monopoly.
 - Rivalry and competition between lawyers is highly restricted. The legal profession in Ireland is organised in a highly rigid business model; the title of Senior Counsel is inclined to distort rather than facilitate competition; there is a near blanket ban on advertising by barristers; and clients wishing to switch to another solicitor or barrister have found unnecessary obstacles in their way.
 - Competition in legal fees has been additionally dampened by a lack of information for consumers seeking legal services and retaining a lawyer. Known anti-consumer practices - such as barristers charging fees in proportion to one another and solicitors charging fees as a percentage of the award their client receives - have continued unchecked.
- 3.4 The Competition Authority recommends the establishment of an independent Legal Services Commission with overall responsibility for regulating the legal profession and the market for legal services. The Legal Services Commission (subject to its oversight) will delegate day-to-day regulation of the legal profession to the existing front line regulators, the Law Society and the Bar Council. The Legal Services Commission, in turn, should be given explicit powers to veto any proposed professional rules and also be given powers to repeal (or to require the repeal of) existing professional rules.

- 3.5 The Competition Authority further recommends the separation of representative and regulatory functions within the profession and the greater involvement of non-lawyers in the regulatory framework. A new regulatory structure of this type is required to meet the principles of good regulation established by the Government and in order to address adequately the risks associated with self-regulation.
- 3.6 This chapter describes and analyses the current regulatory structure of the legal profession and its effects for competition and consumers. Complaints procedures are discussed including the role of the proposed Legal Services Ombudsman. The rationale for the current system is presented, with particular reference to submissions from the Bar Council, the Law Society and the Honorable Society of King's Inns. International examples of regulatory structures are then highlighted. The concluding part of this chapter sets out the Competition Authority's analysis and its recommendation for the establishment of a Legal Services Commission.
- 3.7 Chapters 4 to 6 of this report examine the rules, regulations and practices which dampen competition in the market for legal services and have not been addressed by the regulatory bodies, such as those outlined above. Where it is clear that the restriction on competition is not necessary or that it serves a valid objective which can be attained by less restrictive means, the Competition Authority makes recommendations.
- 3.8 A number of the recommendations in Chapters 4 to 6 are addressed to the Bar Council and the Law Society. These recommendations should be implemented by these existing front line regulators. In the case of the Bar Council, the actual power to make changes to the Code of Conduct rests with the Bar, but the Bar Council is the initiator of changes to the Code. The Legal Services Commission as the oversight regulator for the legal services market should use its powers to ensure that these recommendations are implemented. The Legal Services Commission's power to compel the Bar Council or the Law Society to undertake certain actions should be provided for by statute.
- 3.9 In other instances where a broader and more detailed examination, involving a wider group of stakeholder perspectives is required, the Competition Authority does not make a recommendation. An important function of the Legal Services Commission should be, on an ongoing basis, to monitor, analyse and promote changes to regulations and practices which would be beneficial to consumers of legal services, and consistent with public policy.

Current regulatory structure

- 3.10 As outlined in Chapter 2, under the current system of 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 persons may enter the market and also how lawyers must operate once in the market. This discretion creates the potential for regulation to be enforced in an anti-competitive manner, or at least for delay in undertaking actions that would be pro-competitive. The regulatory authority for aspiring barristers, the Honorable Society of King's Inns, is governed by barristers and members of the judiciary who were formerly practising barristers. The Bar Council is the regulatory authority for practising barristers. It is entirely governed by barristers and must have the approval of the Bar to regulate in certain areas. In addition, the Bar Council is the representative body for barristers and thus has the role of promoting the interests of barristers.
- 3.11 The Law Society combines its role as the regulator of solicitors with its role of representing the interests of solicitors. The Law Society is subject to some oversight by both the Minister for Justice, Equality and Law Reform and the President of the High Court, but this co-regulation exists in only a few areas, such as advertising and client accounts – it does not extend to the training of solicitors.

Effects of current system of regulation

- 3.12 The current system of regulation includes a number of rules which, as well as being unnecessary to protect the public, have the effect of protecting lawyers from competition. The report identifies a number of practices in the profession which serve to dampen competition and have not been addressed by the regulatory bodies. They include:
- An unnecessary monopoly by the profession in the provision of professional legal training;
 - Excessive restriction on corporate form, i.e. the types of business models that lawyers (particularly barristers) can use to supply legal services;
 - Unnecessary restrictions on advertising;
 - Unnecessary restrictions on direct access to barristers;
 - The continued practice of junior counsel charging a fee (without reference to work done) at two-thirds that of the Senior Counsel in a case.
- 3.13 Another failing of the current self-regulatory structure is the complete lack of any proactive consumer awareness initiatives. Unlike other sectoral regulators, such as the Financial Regulator, which invest considerable resources in consumer education, the Law Society and Bar Council make no comparable commitment and offer little in the area of consumer guides to purchasing legal services.
- 3.14 For example, many consumers may not be aware that their solicitor is obliged “*on the taking of instructions to provide legal services to a client, to provide in writing the actual charges or an estimate of the charges by that solicitor for the provision of such legal services*”⁹² (this letter is commonly referred to as a Section 68 letter). The Law Society submits that it publishes a pamphlet for consumers “*Information in relation to Legal Charges*” which contains information in relation to Section 68 letters. Yet this pamphlet is not available on the Law Society’s website nor is there any section on the website which informs consumers about legal fees and charges. Likewise, the Bar Council has no area on its website informing consumers about fees.
- 3.15 The current regulatory structure has inherent conflicts of interests for the Bar Council and Law Society in their dual roles as regulatory and representative bodies. Promoting the commercial interests of a profession is the role of professional representation; promoting the interests of consumers is the role of regulation. These two roles can come into conflict; housing them together in one body lacks transparency and consequently the danger of consumers losing out.

Complaints and the proposed Legal Services Ombudsman

- 3.16 The Law Society’s Complaints Scheme is provided for under the *Solicitors (Amendment) Act 1994* and caters for three types of complaints: inadequate service, excessive fees and misconduct. 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 Law Society. Complainants who are dissatisfied with the manner in which the Law Society has handled a complaint may refer the matter to the Independent Adjudicator, a position filled by an individual unconnected with the legal profession. The Independent Adjudicator is appointed by the Law Society.
- 3.17 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 four practising barristers, and five non-lawyers, one nominated by the Irish Business and Employers Confederation (IBEC), one nominated by the

⁹² Section 68 of the *Solicitors (Amendment) Act 1994*.

Irish Congress of Trade Unions (ICTU) and the remainder nominated by the Bar Council. The Tribunal can impose penalties, including recommending the disbarring of a barrister. It cannot order that redress be paid to the client.

- 3.18 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. Since the publication of the Preliminary Report, dissatisfaction with the procedures of the current regulatory structure led to a Government decision to set up an independent Legal Services Ombudsman, to whom complaints to the Bar Council and the Law Society can be appealed.⁹³ Both the Law Society and the Bar Council have welcomed this step as complementary to their own reviews of complaints against solicitors and barristers.
- 3.19 As currently proposed, the Legal Services Ombudsman would effectively subsume the existing office of Independent Adjudicator (who deals with complaints against solicitors only) and carry out the same functions in respect of both solicitors and barristers.⁹⁴ The key function would be to provide a forum of appeal for customers of legal services who are dissatisfied with the outcome of a complaint made to the Law Society or Bar Council. The Ombudsman would also have an overseeing role by examining a selection of complaint files each year taken on a random basis. The Ombudsman would have a statutory basis on which to report to the Minister and the Oireachtas. The cost of the proposed Ombudsman would be met by the Law Society and Bar Council on a *pro-rata* basis based on the numbers of practising solicitors and barristers.
- 3.20 It is proposed that the Legal Services Ombudsman will have the power to recommend to the Law Society that a payment be made to a complainant from the Law Society's Compensation Fund. This recommendation concerning compensation refers only to solicitors and unlike similar independent complaints bodies in England and Wales, New South Wales and Scotland it is not proposed that the Irish Legal Services Ombudsman will have the power to order that compensation for loss, distress or inconvenience be paid to the complainant. The Ombudsman should be given the power to order that a solicitor or barrister or the Law Society or the Bar Council pay compensation to a complainant.
- 3.21 The establishment of a Legal Services Ombudsman will not alter the initial procedure for making complaints; a complainant must, in the first instance, submit their complaint to the Law Society or the Bar Council. It is only if they are dissatisfied with the handling of such a complaint they can go to the Ombudsman. Given apparent levels of dissatisfaction with the complaint procedures of the Law Society⁹⁵ it is imperative that the procedures of the front line regulators are continually reviewed and monitored.
- 3.22 The Legal Services Ombudsman will have a role to oversee on an on-going basis the procedures of the Law Society and the Bar Council (and if necessary recommend and enforce improvements) in relation to the receipt and examination or investigation of complaints. It is vital that the Ombudsman is properly resourced to undertake this function in a pro-active manner and not in a reactionary manner to an ordeal experienced by a complainant.
- 3.23 The creation of a Legal Services Ombudsman will be an appropriate step towards a more transparent, accountable and accessible system for reviewing complaints about solicitors and barristers who may have breached the rules governing the legal profession provided it is given the proper resources and powers to carry out its duties. The creation of this new Office will not, however, address the fundamental question of who should be making the rules that solicitors and barristers have to adhere to in the first place.

93 Press Release by the Department of Justice, Equality and Law Reform, 11th January 2006, available at www.justice.ie.

94 The Independent Adjudicator is appointed by the Law Society under the *Solicitors (Adjudicator) Regulations 1997* – S.I. 406 of 1997.

95 RTE Prime Time "Fighting the Law", 29 May 2006.

Rationale offered for retaining the status quo

3.24 The Law Society, King's Inns and the Bar Council put forward various reasons why the *status quo* should be retained. In essence, the three bodies submit that the current system of regulation:

- Utilises the knowledge and expertise of lawyers who are best placed to understand the workings of the profession;
- Has the respect of those it regulates;
- Ensures regulatory independence from the State, which is one of the largest buyers of legal services; and
- Incorporates sufficient external, independent involvement.

3.25 The Law Society argues that lawyers have a greater knowledge of the profession than non-lawyers and are better qualified to provide superior quality regulation:

*"when participants in the market are involved in its regulation, the regulator will be better informed than would be an external regulator The Society is able to draw on a large pool of experienced and knowledgeable solicitors to assist it in carrying out its regulatory functions"*⁹⁶.

3.26 Similarly, King's Inns submits that it:

*"has serious concerns that, were non-lawyers to set the standards for the education of barristers, there is significant risk that it would not be possible to ensure that consumers of legal services can be advised and represented in an efficient, effective and ethical manner"*⁹⁷.

3.27 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. The Independent Adjudicator of the Law Society indicated his support of this point to the Competition Authority.

3.28 The Law Society submits that:

*"self-regulation ensures the independence of the legal profession from government control or influence, a crucial feature of a free democratic society"*⁹⁸.

3.29 On the issue of independence and regulation, the Bar Council submits that:

*"having regard to the fundamental role of the Bar in the constitutional democracy of the State, it is clearly in the public interest that the Bar should be independent and self-regulating."*⁹⁹

3.30 King's Inns submits that:

*"its independence from the State is of importance, not only because the State is one of the largest purchasers of legal services, but also because of the separation of powers between the legislature, the Executive and the Judiciary under the Constitution, as recognised by the Supreme Court in Re: Haughey. While King's Inns essentially only regulates only one aspect of the barristers' profession – i.e. education – this aspect is clearly of importance in the overall context of the independence of the profession and to the administration of justice."*¹⁰⁰

96 Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 24.

97 Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005.

98 Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 24.

99 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p. 32.

100 Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005, p.11.

- 3.31 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 or that minor adjustments to the current regulatory regime would be sufficient.

"[T]he [Law] Society believes that there are adequate safeguards of the public in the present system of regulation. It accepts that any system can always be improved. In fact, changes to the Society's systems of regulation and representation have been, or are to be, implemented following the comprehensive review and report of its Regulatory Review Task Force in 2004. The Society is ready to consider any further changes that would improve the present system while retaining its advantages."¹⁰¹

"King's Inns believes that there is no basis for a suggestion that it has in any way used its control over the entry process to the degree of Barrister-at-Law for inappropriate purposes such as the artificial restriction of the supply of barristers. In the circumstances it is believed that the proposed Legal Services Commission is neither necessary nor justified. However, it may be appropriate to have some form of periodic external verification independent of the Executive."¹⁰²

"[T]he Bar Council will propose reforms of the complaints and disciplinary systems. In particular, it will reform the disciplinary system to ensure that non-barristers are in the majority when complaints are considered."¹⁰³

International Experience

- 3.32 In a number of Australian States there has been a move toward a system of regulation that actively involves independent boards of the profession in the regulation of lawyers. The regulatory environments in New South Wales, Queensland and Victoria are illustrative of this shift towards independent oversight regulation. In these jurisdictions the day-to-day regulation of the profession is left in the hands of the front line regulators (FLRs), such as the Law Society and Bar Council. The FLRs are subject to oversight by a statutorily appointed regulator. More recently a similar approach has been proposed in England and Wales. For illustrative purposes the mechanics of two systems of regulation are discussed below – the new system proposed in England and Wales and the system operating in New South Wales.

England and Wales

- 3.33 The most recent analysis of the legal profession in England and Wales is to be found in the *Clementi Report*.¹⁰⁴ The Government accepted Sir David Clementi's recommendations and set out its agenda for reforming the regulation and delivery of legal services in a White Paper entitled *"The Future of Legal Services: Putting Consumers First"*.¹⁰⁵
- 3.34 A draft Legal Services Bill setting out the proposed new regulatory framework and principles governing the legal profession was published in May 2006 and has recently been reported on by a Parliamentary Joint Committee.¹⁰⁶
- 3.35 Front Line Regulators (FLRs), like the Bar Council and the Law Society, will be required to separate their regulatory and representative functions. A new oversight regulator called the Legal Services Board will be created. It will be independent of Government and providers of legal services.
- 3.36 The Legal Services Board will authorise the FLRs to carry out the day-to-day regulation of the profession provided they meet certain standards. However, legislation will provide the Legal Services Board with power:

¹⁰¹ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 18.

¹⁰² Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005, p. 13.

¹⁰³ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p. 28. In March 2006 reforms were implemented and now non-barristers are in the majority when complaints are considered.

¹⁰⁴ *"Review of the Regulatory Framework for Legal Services in England and Wales – Final Report"*, Sir David Clementi, December 2004.

¹⁰⁵ *"The Future of Legal Services: Putting Consumers First"*, Department for Constitutional Affairs, October 2005, available at <http://www.dca.gov.uk/legalsys/folwp.pdf>

¹⁰⁶ <http://www.publications.parliament.uk/pa/jt/200506/jtselect/jtlegal/232/232i.pdf>

- To issue regulatory guidance to FLRs;
- To direct an FLR to take a specific regulatory action;
- To strike down or amend rules of an FLR;
- To remove the authorisation of an FLR in a particular area or areas of regulation.

3.37 Legislation will also establish an Office for Legal Complaints. It will deal with all consumer complaints about legal service providers but refer any issues of misconduct to the FLRs (e.g. the Law Society, the Bar Council). The Office for Legal Complaints will be independent of Government and providers of legal services. It will be accountable to the Legal Services Board and funded by the sector.

3.38 The Office for Legal Complaints will have power to:

- Require evidence from relevant persons in order to properly assess complaints;
- Dismiss cases where it is believed the complaint is vexatious or frivolous;
- Enforce decisions (including those concerning fees). If the Office for Legal Complaints considers that redress should be made to a consumer it will have the power to enforce such a decision. The Office for Legal Complaints will, *inter alia*, have the ability to order a legal practitioner to waive some or all of a fee to a client or require a legal practitioner to make a payment to a consumer for poor service, loss or distress.

New South Wales

3.39 In New South Wales, Australia, regulation of the legal profession involves two FLRs, the Law Society and the Bar Council, and three independent statutory bodies: the Legal Profession Advisory Council, the Legal Profession Admission Board and the Legal Services Commissioner.

3.40 The Legal Profession Advisory Council was established under the *Legal Profession Act 2004 (NSW)* to keep under constant review the structure and function of the legal profession. The Advisory Council consists of a chairman, five legal representatives and five non-lawyer members, appointed by the Attorney General.

3.41 The Legal Profession Admission Board is responsible for making rules for, and approving the admission of, legal practitioners.

3.42 The Legal Services Commissioner is responsible for monitoring the exercise of regulatory functions (other than imposition of conditions on practising certificates) by the FLRs, reviewing professional rules and dealing with all areas relating to the complaints procedures.

3.43 The legislation provides that both the Law Society and the Bar Council must notify the Commissioner and the Advisory Council of their intention to make a legal professional rule. The Advisory Council can also, at any time, review the legal professional rules. The Commissioner can, at any time, request an FLR to review any legal professional rule, and that FLR must furnish a report to the Commissioner within 28 days.

3.44 On the advice of the Commissioner or the Advisory Council, the Attorney General may declare any legal professional rule inoperative.

3.45 All complaints against legal practitioners in New South Wales are made to the Legal Services Commissioner. The Commissioner can investigate the complaint or refer it to the Bar Council or Law Society for review. The Bar Council or Law Society must conduct an investigation into a complaint once it has been referred to them.

The Commissioner is required by legislation to monitor referred complaints and the FLRs must report to the Commissioner on the progress of a complaint. The Commissioner or FLRs may do any or all of the following:

- Caution the practitioner;
- Reprimand the practitioner;
- Make a compensation order i.e. redress to a consumer for poor service, loss or distress.

Other jurisdictions

3.46 The Law Society is the sole representative body for solicitors in Northern Ireland.¹⁰⁷ Under the *Solicitors (Northern Ireland) Order 1976*, the Law Society also acts as the regulatory authority governing the education, accounts, discipline and professional conduct of solicitors. The Bar Council is the regulatory and representational body for the barristers' 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.

3.47 The statutory objects of the Law Society of Scotland include promoting "*the interests of the solicitors' profession and those of the public in relation to the profession.*"¹⁰⁸ 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. The Faculty of Advocates is both the representative and the regulatory body for advocates in Scotland.

3.48 In New Zealand, and within Australian, in both the Capital and Northern Territories, lawyers are both represented and regulated by their respective Law Society.

3.49 In Canada, each province and territory has its own Law Society, which is the governing and regulatory body for the legal profession in that area. The Canadian Bar Association is the representative body for the legal profession in Canada and its provinces and territories.

Analysis of the Competition Authority

3.50 The Law Society, Bar Council and King's Inns all reject the notion of an independent external regulator in favour of the *status quo*, and have put forward a number of reasons why they believe the *status quo* should be retained. These rationales are analysed below before moving on to a discussion of the problems with self-regulation in the legal profession. Two possible options for an independent external regulator, which were put forward in the Competition Authority's Preliminary Report, are discussed as is the complementary relationship between an independent external regulator and the Government's proposals for a Legal Services Ombudsman and a Legal Costs Regulatory Body.

Regulatory regime that utilises lawyers' knowledge and is respected

3.51 As discussed earlier, the Law Society, King's Inns, and the Bar Council submit that the existing regulatory system ensures the valuable input of experienced, knowledgeable lawyers and judges into the regulation of the legal profession. This they say is vital for the effectiveness of the regulatory structure. Furthermore, it is submitted that lawyers feel more ownership of, and commitment to, regulation when they have a say in its development.

3.52 It is important that lawyers respect and feel committed to the regulatory structure in which they operate. It is also important that a regulatory body utilise the knowledge and expertise of those being regulated to better

¹⁰⁷ Information obtained from the Information Office of the Law Society of Northern Ireland.

¹⁰⁸ www.lawscot.org.uk

inform itself. For both these reasons it is desirable to have lawyers and judges involved in the regulation of the legal profession. 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.¹⁰⁹

Independence

3.53 King's Inns emphasises in its submission the level of judicial involvement in its affairs.

"There is a significant Judicial membership of the main committees of King's Inns (Council of King's Inns, Standing Committee and Education Committee)".¹¹⁰

King's Inns points to the constitutional separation of powers and submits that because of this it would be inappropriate to have State involvement in the regulation of King's Inns. Its argument on this point would appear to be that the appointment of a Legal Services Commission would, insofar as the Commission was involved in the affairs of King's Inns, be an unwarranted intrusion by the executive into the judicial domain, contrary to the constitutional separation of powers.

3.54 This argument is without foundation. The doctrine of the separation of powers holds that each one of the legislative, executive and judicial powers of the State is independent from the others, and none must trespass or intrude in the domain of the others. The judicial arm of the State is that described in Article 34.1 of the Constitution: "*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution [...]*". It is into this domain, of the administration of justice by judges in courts, that the legislature and the executive are forbidden to intrude. It is clear that not everything a judge does amounts to the administration of justice. A judge is not exercising the judicial power of the State when sitting on a committee, even if that committee is concerned with the training of future barristers or the governance of a law school. The involvement of the State in the affairs of King's Inns would not in any way infringe the doctrine of the separation of powers.

3.55 It is also suggested that self-regulation ensures the independence of the legal profession from Government control or influence. However, a single regulatory body, set up with clear regulatory objectives and separate from Government departments, implies 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. The Competition Authority is not recommending regulation of the legal profession by Ministerial fiat, but by an independent body. Such a body would be independent of both the Government and the profession.

3.56 It was also suggested that an independent regulatory body would face a conflict of interest with the State in its role as a buyer of legal 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. The more obvious conflict of interest arises from a regulatory body also being a representative body for the profession, as is the case at present for the Bar Council and the Law Society. Furthermore, in many 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.

Sufficient external involvement

3.57 The self-regulatory bodies maintain that the present structure works well, contains sufficient independent external involvement, and delivers effective regulation. They have also said that they are willing to consider any changes that would improve the present system.

¹⁰⁹ 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, non-lawyer members, including the chairperson. See paragraph 3.40.

¹¹⁰ Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005, p. 11.

- 3.58 To this end in March 2006, the Bar Council reformed its complaints and disciplinary systems and now non-barristers are in the majority when complaints are considered.
- 3.59 The Law Society alludes to the changes to its systems of regulation that have been implemented or are to be implemented following its Regulatory Review Task Force 2004.
- 3.60 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.

Self-regulation

3.61 Self-regulation is profession-focused, rather than focused on the services provided, or on the buyers of those services. It facilitates the creation or continuation of rules and practices that, while they may be in the interests of the regulated profession itself, unnecessarily restrict competition and stifle innovation – and thus are not in the public interest.

3.62 Indeed, the Law Society Director General acknowledges that there is the potential for self-regulation to be producer-focused:

“Self-regulation has the potential to be self-interest regulation at the expense of the people whom the profession exists to serve.”¹¹¹

However, the Director General believes that the term co-regulation more accurately reflects the present system of regulation:

“However, the term ‘self-regulation’ as a description of the system of regulation of solicitors in this jurisdiction is completely misleading. The term ‘self-regulation’ in relation to the solicitors’ profession in Ireland is a misnomer.....For some years now, we in the Society have used the more accurate term ‘co-regulation’.”¹¹²

3.63 The President of the High Court, the Oireachtas and the Minister for Justice, Equality and Law Reform do have an oversight role in relation to the regulation of solicitors.¹¹³ However, this role is confined to the approval of new regulations proposed by the Law Society. These oversight ‘regulators’ do not have the power to compel the Law Society to repeal an existing rule or to implement a new rule. Nor is it the mandate of these oversight regulators to compel the Law Society to undertake measures, such as those discussed below, which would be pro-competitive and pro-consumer.

3.64 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 Chapter 4, it has not done so nor has it provided the guidelines necessary for prospective education providers to make licence applications.

3.65 The current system of regulation is profession-focused, resulting in a lack of focus on providing information and assistance to consumers 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. The Law Society does

¹¹¹ Law Society Gazette, July 2006, p 17.

¹¹² Law Society Gazette, July 2006, p 17.

¹¹³ 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. Regulations made by the Law Society pursuant to the *Solicitors (Amendment) Act 1994* 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 pursuant to Section 66 of the *Solicitors Act, 1954* as amended by Section 76 of the *Solicitors (Amendment) Act, 1994*, governing how solicitors maintain their financial accounts, must have the consent of the President of the High Court.

not provide nearly the same degree of information and assistance in connection with the purchase of legal services. This is discussed in more detail in Chapter 6.

- 3.66 Unlike solicitors, the regulation of barristers is not based or founded in legislation. There are no statutes or Government-imposed controls on conduct, discipline or education. Rather, the Bar Council regulates practising barristers, while 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.
- 3.67 In response to the Preliminary Report, King's Inns has made changes to its rules to make it easier for solicitors wanting to switch to become barristers, to enable persons to undertake the Diploma and/or Degree course on a part-time or full-time basis and to establish an independent board to review its courses. However, King's Inns has preferred to retain its monopoly over legal education, rather than extend it to competing suppliers. These issues are discussed in more detail in Chapter 4.
- 3.68 The Bar has also made a number of changes to its Code of Conduct which have been welcomed by the Competition Authority. Many of these directly implemented certain proposals made by the Competition Authority in its Preliminary Report, for example, permitting part-time barristers, expanding the scope of occupations in which a practising barrister may be employed, permitting a previously employed barrister to take work from his/her former employer, and allowing a barrister to take over a case from another barrister.¹¹⁴ Many, if not all, of the previous restrictions were anti-competitive, and have been implicitly acknowledged as being so by the Bar Council, and their removal is welcome.
- 3.69 The Law Society has made no changes to its Rules following the Preliminary Report.
- 3.70 The submissions clearly indicate that the current regulatory authorities prefer the *status quo*, where they can decide if and when to make changes to the rules governing themselves. The Bar and King's Inns, in response to the Competition Authority's Preliminary Report, have made a number of changes to their rules. Although there is some oversight regulation of the Law Society this is passive in nature and only concerns certain areas of its regulatory realm. The Law Society has failed to undertake a number of steps that would be pro-competitive and pro-consumer.
- 3.71 The fundamental point is that if self-regulating professions are left to their own devices there is little incentive for them to encourage competition in the market. This has been borne out in the market for legal services in the State.
- 3.72 The problems of self-regulation are further exacerbated by the fact that the Bar Council and the Law Society are also the representative bodies for barristers and solicitors respectively. Promoting the commercial interests of a profession is the role of professional representation; promoting the interests of consumers is the role of regulation. These two roles can conflict and housing them together in one body lacks transparency and brings the danger that the consumer will lose out.

Options proposed in the Preliminary Report

- 3.73 To address the problems inherent in the current regulatory structure of the legal services profession the Competition Authority, in its Preliminary Report, proposed the establishment of a Legal Services Commission with overall authority for regulating the market for legal services. Specifically, the Preliminary Report sought comments on two models for reforming the regulatory environment:

¹¹⁴ See Chapter 5 for a full discussion.

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.

3.74 The Law Society submits that Option A:

*"with the Law Society limited to a representative role, is particularly unattractive in that informed solicitor input would become the minor part of the regulatory process, with attendant loss of many of the advantages of self- or co-regulation, in particular, the commitment of the profession to a regulatory process in which its members are fully involved."*¹¹⁵

3.75 The Law Society's view on Option B is that it:

*"would retain some of the advantages of self-regulation, but there would still be the additional costs of the LSC as well as some concern about loss of independence of the profession and excessive bureaucracy."*¹¹⁶

3.76 A submission from a representative body whose members are frequent purchasers of legal services notes that there are practical problems with any regulatory change but

*"Option B lessens these by enabling the Legal Services Commission to delegate many regulatory functions to existing and possibly new self-regulatory bodies with appropriate expertise, which are not permitted to exercise representative functions."*¹¹⁷

3.77 As discussed above in paragraphs 3.53 to 3.56, the establishment of an independent regulator, such as the Legal Services Commission, does not compromise the independence of the legal profession from the State.

3.78 The principle that the regulatory framework should be independent of those being regulated is better achieved by Option A, since it would remove the self-regulatory element within the framework. Option A would also simplify the regulatory landscape by installing a single regulator for the legal services market.

3.79 As the submissions have indicated, including members of the profession in the regulatory structure is likely to increase the commitment of practitioners to high standards and ensure a well functioning regulatory environment. This is consistent with Option B, where the day-to-day regulatory functions will be delegated, subject to oversight from the Legal Services Commission, to the front line regulatory bodies such as the Law Society and the Bar Council.

3.80 A further argument in favour of Option B is that the practical transitional arrangements would be much easier to organise than for Option A. Only a small number of tasks involved in oversight functions would need to move to the new oversight regulator; the great majority of tasks would remain where they are, in the front-line regulatory bodies. The risk of losing regulatory expertise during any transitional period would be much reduced.

3.81 A split between regulatory and representative functions could be achieved by adopting either Option A or Option B. Option A provides the clearest split since all regulatory functions are moved to the Legal Services Commission. Option B leaves the front-line regulatory functions at practitioner body level, subject to consistent

¹¹⁵ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 28.

¹¹⁶ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 28.

¹¹⁷ Submission of the Irish Insurance Federation to the Competition Authority, June 2005, p. 8

oversight by the Legal Services Commission, but requires the bodies to split their regulatory arm from their representative arm, i.e., under Option B FLRs have no representative function.

Legal Services Commission, the Ombudsman and the Legal Costs Regulatory Body

- 3.82 Establishing a Legal Services Commission does not conflict with, or compromise the establishment of, the proposed Legal Services Ombudsman. Rather, the role of each body would enhance and complement the work of the other. The establishment of an Ombudsman should be seen as one important step in a process of reforming the legal services profession.
- 3.83 Having both a Legal Services Commission and a Legal Services Ombudsman would also be in line with the regulation of other areas of the Irish economy, for example financial services, where there is both the Financial Regulator and the Financial Services Ombudsman.
- 3.84 The Legal Services Ombudsman could be completely independent from the regulator (the Legal Services Commission), as is the case with the Ombudsman in the financial services market. Alternatively, the Legal Services Ombudsman could be a distinct component of the Legal Services Commission. This would be similar to the model of regulation proposed for England and Wales, where the Office of Legal Complaints will replace the Legal Ombudsman as an independent body accountable to the Legal Services Board (the oversight regulator).
- 3.85 It is envisaged that among the Legal Services Commission functions would be a role in setting standards for the front line regulators and that failure to meet these standards should be subject to a financial penalty. Given this, it may be desirable for the Ombudsman to report to, or at least liaise with, the Commission given that the Legal Services Ombudsman has a role in overseeing the procedures of the Law Society and the Bar Council in relation to the receipt and examination or investigation of complaints.
- 3.86 The Legal Costs Working Group, in its report into legal costs, made a number of recommendations, which the Minister for Justice, Equality and Law Reform intends to implement.¹¹⁸ One recommendation is that a Legal Costs regulatory body be established. The Legal Costs regulatory body will take over the existing functions as to costs performed by the court rules committees and other bodies, as well as exercising new powers to set guidelines and limits in respect of costs. It will also have a public information role.
- 3.87 The Legal Costs regulatory body has a role in reforming one specific area of the legal services market, whereas the Legal Services Commission's role would be to ensure reform in a number of areas in the market for legal services. It is clear that the proposed Legal Costs regulatory body would complement the work of a Legal Services Commission. There is no reason why the Legal Costs regulatory body could not also form a distinct component of the Legal Services Commission.
- 3.88 The movement towards installing independent bodies in the area of complaints and legal costs is symptomatic of the dissatisfaction with those areas of the legal services market and the movement away from self-regulation. The movement away from self-regulation should be extended to other areas of the legal services market which are currently controlled by the profession. This is best achieved by establishing an independent external regulator, i.e. a Legal Services Commission.

¹¹⁸ Press Release by the Department of Justice, Equality and Law Reform, 11th January 2006, available at www.justice.ie. See Chapter 6 for a more in-depth discussion of legal costs and the Legal Costs Working Group Report.

Solution

- 3.89 Making 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, they will continue to be faced with a conflict between the interests of consumers and the interests of their members, whom they are also mandated to represent. The Competition Authority considers that external independent regulation of the legal profession is needed to ensure competition in the provision of legal services.
- 3.90 The submissions quite clearly indicate that when participants in the market are involved in its regulation, the regulator is highly informed about and responsive to the changing environment. It is also submitted that professionals feel more ownership and commitment to regulation when they are involved in its creation.
- 3.91 The establishment of the Legal Services Commission will move the regulatory environment from one of self-regulation to one of independent oversight regulation. The Legal Services Commission (subject to its oversight) will delegate day-to-day regulation of the legal profession to the existing front line regulators, the Law Society and the Bar Council. The Head of the Legal Services Commission, and also a majority of its members, should not be practicing members of the legal profession.
- 3.92 The front line regulators should be required to notify the Legal Services Commission of their intention to make a new professional rule before implementation. The Legal Services Commission, in turn, should be given explicit powers to veto any proposed professional rules and also be given power to repeal (or to require the repeal of) existing professional rules. The Legal Services Commission should also be empowered to sanction the regulatory bodies if they fail to meet certain standards laid out by the Commission. For example, the Commission may require the regulatory bodies to provide a minimum level of information on their websites, regarding fees, and consumer rights. The means by which these powers could be exercised should be provided for by statute.
- 3.93 Independent regulation would engender greater confidence and would attract the respect of both clients and the general public. The new regulatory environment would also have the respect and commitment of legal practitioners themselves due to the continued front line role played by the existing regulatory bodies.
- 3.94 Establishing a Legal Services Commission is a necessary step to make the regulation of the legal profession more transparent and accountable to consumers and the general public. The model now proposed retains the advantages of the current regulatory model, whereby experienced practitioners play an important role, while removing the negative aspects with minimal disruption. It is consistent with the regulation of other professions and sectors in Ireland, as well as trends internationally in the regulation of legal services. (Appendix 4 provides further description of the roles and functions of the proposed Legal Services Commission and the relationships between the Legal Services Commission and other agencies, particularly front line regulatory agencies).

Recommendation 1:

Establish an independent Legal Services Commission to oversee the regulation of legal services

Details of Recommendation

The Minister for Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission (“LSC”), an independent statutory body with responsibility for regulation of both branches of the legal profession. The Legal Services Commission 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 the power to veto the rules of self-regulatory bodies. The Legal Services Commission would undertake research and analysis of the market for legal services to identify priority areas for reform and also to set guidelines for the assessment of costs in contentious matters.

The Head of the Legal Services Commission, and also a majority of its members, should not be practicing members of the legal profession.

Self-regulatory bodies would not be permitted to exercise representative functions.

Action By

Minister for Justice, Equality and Law Reform

June 2008



section 4

FOR SALE

SOLD

4. RESTRICTIONS ON OFFERING LEGAL SERVICES

Summary

- 4.1 This chapter examines various restrictions on who can offer legal services. There are a number of unnecessary restrictions on becoming a solicitor or barrister, on the recognition of foreign legal qualifications, on switching between the professions of solicitor and barrister, and on the provision of conveyancing services. These restrictions prevent suitable persons from offering legal services or training as lawyers, and serve only to shelter existing lawyers from further competition. They are unrelated to the maintenance of standards in legal services and offer no protection to consumers.
- 4.2 Entry into the legal profession in Ireland is controlled by those already in the profession. The Law Society – the representative and regulatory body for solicitors – controls who may train to be a solicitor, how and where. The Honorable Society of King's Inns – which is governed by barristers and former barristers – decides who may train to be a barrister, how and where. This situation has resulted in these bodies having a monopoly in the markets for training solicitors and barristers respectively.
- 4.3 The reservation of professional legal training to the Law Society and King's Inns prevents competition in legal training and may also be restricting competition in legal services. A person wishing to train as a solicitor or barrister can train only on a full-time basis, in a school that has no incentive to minimise its costs (and hence its course fees). Until recently those wishing to train as a solicitor or a barrister could train only in Dublin.¹¹⁹ The monopoly provision of legal training has the potential to reduce the numbers qualifying as lawyers, increase the cost of legal training and diminish the possibility of innovation in teaching methods. The Competition Authority strongly recommends that the education of solicitors and barristers should be regulated independently of the profession, with transparent standards set which must be met by all providers of legal education.
- 4.4 Lawyers who qualify in Ireland are obliged to demonstrate their competence in the Irish language before being allowed to practise. This requirement is designed to ensure that consumers can choose to be represented through Irish, as is their constitutional right. However, the Competition Authority understands that the Irish examination is not of a sufficiently high standard to achieve this and recommends that the Irish competency requirement be abolished and replaced by a voluntary system of advanced Irish language training.
- 4.5 Those already in the legal profession control entry of foreign-trained lawyers to the profession. Lawyers qualified outside the European Economic Area, who wish to practise as solicitors or as barristers in Ireland, must fulfil criteria set by the Law Society or the Honorable Society of King's Inns before they can practise in Ireland.
- 4.6 Lawyers cannot readily switch from one branch of the legal profession to the other in response to changes in demand or supply. In the Preliminary Report, the Competition Authority recommended that the professional bodies should amend their rules to allow lawyers to switch between the solicitors' and barristers' branches of the profession more easily. The Bar Council and King's Inns have amended their rules and as a result it is now much easier for solicitors to become barristers. The Competition Authority recommends that the Law Society follows the lead of the other professional bodies and makes the necessary changes to ensure that switching is frictionless in both directions.
- 4.7 In Ireland, only solicitors are allowed to provide conveyancing services i.e., to transfer the ownership of real property from one person to another. In a number of other countries there are specialist professionals known as "conveyancers" or "licensed conveyancers" who are trained and qualified in property law and may therefore offer conveyancing services to the public.

¹¹⁹ This is still the case for those wishing to train as barristers. On 10th April 2006 the Law Society announced that it would locate a professional training course for solicitors in Cork in collaboration with the Law Faculty at University College Cork. The course commenced in November 2006 and was expected to have an intake of approximately 100. Welcoming this initiative, the newsletter of the UCC Faculty of Law noted "It means that students will have the choice to study and qualify in Cork if they wish. The inconvenience and cost of moving to Dublin was a huge burden for many graduates, particularly graduates of the evening BL programme", UCC Faculty of Law Newsletter, 2006.

- 4.8 Experience in countries which permit conveyancers, such as England and Wales and Australia, has shown that prices of conveyancing services have dropped with the introduction of competition in the conveyancing market. Allowing only solicitors to provide conveyancing services limits competition for these services and keeps conveyancing fees high. The Competition Authority wishes to see an end to the solicitors' monopoly on conveyancing services through the introduction of the profession of conveyancing in Ireland. Conveyancers should be required to abide by a code of ethics, to have professional indemnity insurance and to contribute to a compensation fund in order to ensure the greatest possible degree of consumer protection.

The Law Society's Monopoly on Training Solicitors

Summary

- 4.9 Professional training and education for trainee solicitors can, by law, only be provided by the Law Society and bodies licensed by the Law Society. The training for solicitors in Ireland is, therefore, controlled by the profession itself. The Law Society has neither licensed any providers other than its own school nor published any information in relation to the criteria it might apply in considering applications for licences. This has discouraged applications for licences from other institutions which might wish to provide legal education but are not prepared to apply for a licence without an indication of the criteria to be applied. The result is that the only professional training course for solicitors in Ireland is the Law Society's own course which is offered in two locations: Dublin, and, from November 2006, Cork. Both the Dublin and Cork courses are offered on a full-time basis only.
- 4.10 Consequently, potential solicitor trainees have little choice as to where in Ireland they can train, or in what format they can pursue their training (full-time/part-time/weekends). The monopoly enjoyed by the Law Society school means that it has weak incentives to minimise its costs (and hence its course fees) and bring innovations to the way in which it trains solicitors. As the capacity of the Law Society's course is a key determinant of the number of solicitors who qualify in Ireland each year, this monopoly has the potential to restrict the numbers entering the legal profession and prevent the supply of solicitors from meeting the levels of demand.
- 4.11 The Competition Authority strongly recommends that the responsibility for regulating legal education be given to an independent body, specifically to the Legal Services Commission proposed in Chapter 3. This would involve setting standards that all providers of legal education would be required to meet, with publicly available criteria for institutions which might wish to offer legal education in the future. Having independent regulation of legal professional training would encourage other education providers to enter the market for the training of solicitors, ensuring that the number of training places available is likely to meet demand, and would allow innovations such as part-time/weekend courses or courses in specific areas of law. This recommendation is in line with the earlier OECD recommendation that control of legal education in Ireland should be removed from the self-governing bodies.¹²⁰

Nature of Restraint

- 4.12 Professional training and education for trainee solicitors can, by law, only be provided by the Law Society and bodies licensed by the Law Society.¹²¹ The Law Society has issued no licences and is itself the sole provider of professional education leading to the title of solicitor.¹²² The Law Society has not published criteria that educational institutions would be required to meet in order to be licensed to provide solicitor training.

Effects of Restraint

- 4.13 Two distinct markets are affected by this restraint: the market for the training of solicitors and the market for legal services.

¹²⁰ "Regulatory Reform in Ireland", OECD, 2001.

¹²¹ Section 40 of the Solicitors Act 1954, as substituted by section 49(a) of the Solicitors (Amendment) Act 1994.

¹²² The Law Society says that it has never received an application from another institution for a licence to provide education and training.

4.14 The absence of any publicly available criteria has deterred other education providers from offering training for solicitors, with the result that the only available course is that run by the Law Society itself.

4.15 The existence of a monopoly in legal professional training for solicitors in Ireland has a number of effects:

- Potential trainee solicitors have no choice as to what format they can pursue their training in (full-time/part-time/weekends), as the full-time model is the only one on offer. This arrangement has the potential to exclude suitable candidates from pursuing a career as a solicitor, particularly individuals who do not have the means to finance full-time study for substantial periods of time;¹²³
- The number of solicitors who qualify in Ireland each year is determined by the capacity of the Law Society's courses. This has the potential to limit Ireland's supply of solicitors with respect to future demand;
- The incentive for the Law Society's school to minimise its costs (and hence its course fees) is reduced as it faces no competition for students;
- The Law Society's school has little incentive to bring innovations to the way in which it trains solicitors, for example, the provision of courses tailored to specific areas of law, as it faces no competition for students;
- The Law Society requires graduates who hold recognised law degrees to pass its Entrance Examinations before being permitted to commence training as a solicitor despite their having already been examined in the subjects covered as part of their law degree. This requirement is a direct result of the monopoly enjoyed by the Law Society in professional training for solicitors. If it were to be abolished, then theoretically all those holding recognised law degrees would be entitled to pursue training as a solicitor, in addition to those who do not hold law degrees but who qualify through the Entrance Examination. With most Irish universities offering law degrees, clearly the Law Society could not cope with the potential demand due to the limits on its capacity. As a consequence, they would be forced to find some other means of selecting potential students.

4.16 These effects would be present even if the education of solicitors was carried out by a monopoly provider unconnected with the solicitors' profession. The fact that the training of solicitors is controlled by the solicitors' own representative body creates additional problems. Solicitors have an incentive to limit competition in the market for solicitor training and limit the number entering the profession, because that will limit the competition they face when offering legal services. Without any independent assessment of, or input into, the requirements for individuals seeking to train as solicitors, and the content and format of the training, it is difficult to know whether the requirements are necessary and proportionate to ensuring appropriate standards, or whether they are excessive, or whether they are simply ways to limit entry.

Rationale offered for Restraint

4.17 The Law Society says that 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 place to ensure commensurate standards.

4.18 The Law Society claims that consistency could not be ensured by a central system of examinations, as solicitors' training is practice rather than examination focused. The Law Society would be happy to license other course providers only if such providers could replicate the standards and systems of education and training of trainee solicitors provided by the Law Society.

¹²³ Trainee solicitors must undertake the 8 month Professional Practice I course and the 3 month Professional Practice II course as part of their training.

4.19 The Law Society says that it has never received an application from another institution for a licence to provide professional education and training. In its submission to the Competition Authority on the Preliminary Report, the Law Society said that it did:

"not accept that a case has been made for change to the present position, and because other options should also be considered, the Society cannot agree to the Competition Authority's recommendation on the publication by September 2005 of criteria for potential applicants for a licence to provide such training courses."

No information was provided to the Authority as to the nature of the other options which should be considered.

4.20 The Law Society puts forward the following arguments to justify its monopoly:

- The Law Society's system of education is highly cost-effective. The Law Society "cannot imagine" that the competition produced by another institution would lower the costs for a trainee solicitor. The Law Society is non profit-making and entirely self-financing. It claims that other providers of legal education would charge higher fees as they would seek to make a profit. The Law Society also notes that it cannot increase fees unreasonably as any increase in its course fees must be approved by the President of the High Court.
- The Society says that its law school achieves economies of scale in education and training. It has access to the 570 or so practitioners who provide their experience to the law school as a teaching resource.

International Experience

4.21 The Law Society of England and Wales stipulates the standards for professional 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. While all the courses have to meet the written standards stipulated by the Law Society, each one is unique. This means that there may be some variations in how the subjects are taught and assessed.

4.22 Similarly, most other common-law jurisdictions have more than one training school. For example, in the Australian State of New South Wales, the Legal Profession Admissions Board recognises 10 accredited law schools and 7 providers of practical legal training. Northern Ireland has only one postgraduate training course for solicitors and barristers, offered at the Institute of Professional Legal Studies at Queens' University, Belfast, which must be successfully completed by anyone who wishes to enter either branch of the legal profession in Northern Ireland.

Analysis of the Competition Authority

4.23 The Competition Authority welcomes the recent commencement of a training course for solicitors in Cork. This will improve the situation for those prospective trainees who do not have the means to train full-time in Dublin. However, the Law Society's monopoly of solicitor training remains.

4.24 The Law Society's monopoly on the licensing and provision of solicitor training is a serious restriction on competition in the market for the training of solicitors, and may also be restricting competition between solicitors in the market for legal services.

4.25 While the objective of consistency in education standards is valid, a monopoly is a disproportionate means of achieving it. Consistency can be achieved despite a course having a vocational element. For example, consistent standards are maintained in medicine, where student and junior doctors are trained in one of five medical schools in Ireland and subsequently work as interns in Irish hospitals or recognised hospitals elsewhere

before receiving full registration with the Medical Council. If this system can work for doctors, and for solicitors in other jurisdictions, it can work for solicitors in Ireland.¹²⁴

- 4.26 Submissions made to the Competition Authority in response to the Preliminary Report indicate that certain third level institutions are willing to provide training services for solicitors and that these courses would complement their existing legal degrees. These respondents say that their law courses are well supported by the local legal community and that this support would ensure that the tutorial system, which is a feature of solicitors' education, and relies on practitioners giving their services, could be replicated in educational centres both in and outside Dublin.
- 4.27 Some 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 have 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. As the Law Society has indicated that it does not intend to issue such criteria in the foreseeable future, it is unlikely that any other institution will apply for a licence.
- 4.28 The justifications put forward by the Law Society for its monopoly are not supported by any evidence.
- First, whether other potential suppliers could provide the course as - or more - efficiently than the Law Society is a matter for such suppliers and should not concern the Law Society.¹²⁵ Any monopolist has an incentive to claim that other suppliers would be less efficient; without any competitors it is conveniently impossible to benchmark their costs.
 - Second, a monopoly is not necessary for the Law Society to achieve economies of scale.¹²⁶ Monopolies are, in fact, notoriously bad at exploiting potential cost economies. If the Law Society 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. Introducing competition to the airline industry in Ireland eventually forced Aer Lingus to become more efficient and reduce its prices, expand the services it offered and still make a profit.
 - Third, the Law Society's not-for-profit status is not a reason to block other suppliers from entering the market (indeed it might well be claimed as a source of competitive advantage in the market for solicitor training). The mere fact that an organisation operates on a not-for-profit basis does not of itself mean that it is more efficient or that it prevents the monopoly costs outlined above. Moreover, while the Law Society must have increases in its course fees approved by the President of the High Court, the latter cannot reasonably be expected to have in his/her possession all the 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.
- 4.29 The fees charged by the Law Society in recent years are set out in Table 10 below.

¹²⁴ Multiple training schools are available for most professions in Ireland with the exception of optometry and veterinary medicine, both of which are available at one site.

¹²⁵ While as a competitor the Law Society need not be concerned with whether other potential operations could provide the course more efficiently, as a regulator it should be concerned to ensure that legal education is delivered as efficiently and to as high a quality as possible. This is an example of the conflict of interest between the Society's education and regulatory roles.

¹²⁶ The economies of scale associated with training solicitors are not likely to be significant, as they do not require specialist laboratories or technical facilities.

Table 10: Law Society Fees

	2004	2005	2006
PPC I	€6,250	€6,400	€6,850
PPC II	€3,500	€3,600	€3,950

4.30 Opening up the market for training solicitors would lead to competition between training schools. This, in turn, would lead to:

- Pressure on providers of solicitor training to minimise their costs and pass these on to students, thus ensuring that the price of legal training is competitive;
- The potential for innovations in the provision of solicitor training, such as the availability of part-time or weekend courses or courses in specialist areas of law.

4.31 The ending of the Law Society's monopoly would allow competitive educational institutions to emerge, providing courses concentrating on particular areas of law.¹²⁷ 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 in attracting trainees from abroad.

4.32 Finally, if other suitable educational institutions were licensed to train solicitors, the number of qualifying solicitors each year would not be limited to the capacity of the Law Society's courses and would be more likely to ensure that the supply of solicitors matches the demand for their services. The increase in the number of trainee solicitors has already resulted in the introduction of evening classes for students and the use of video links to cope with the overflow from the main classrooms.¹²⁸

4.33 Recent numbers of solicitors qualifying are set out in Table 11 below.

Table 11: Newly qualified solicitors by year

Year	Newly qualified solicitors
2001	406
2002	321
2003	352
2004	444
2005	420

Source: The Law Society

4.34 In its Preliminary Report, the Competition Authority recommended that the Law Society should issue guidelines for potential applicants for a licence to provide solicitors' training. To date, it has not done so and has indicated that it does not favour a move towards licensing third party providers at this time.¹²⁹

4.35 Even if the Law Society were to issue guidelines to potential providers of solicitors' training, it would be difficult to know whether the criteria and requirements which would be set out were necessary and proportionate to

¹²⁷ 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.

¹²⁸ Source: Sunday Business Post, 22nd January 2006.

¹²⁹ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p 36.

ensuring appropriate standards, or whether they were excessive, or whether they were simply ways to limit entry.¹³⁰ Independent assessment of, or input into, the requirements for individuals seeking to train as solicitors, and of the content and format of the training, is important to ensure that such requirements are necessary.

- 4.36 In the Preliminary Report, the Competition Authority highlighted the fact that some prospective trainees are required to pass a Preliminary Examination before being allowed to sit the Entrance Examination for the Law Society's Law School.¹³¹ This is a statutory requirement and the Preliminary Report recommended that the Minister for Justice, Equality and Law Reform remove it. In its response to the Preliminary Report, the Law Society indicated that it was not opposed to the removal of this requirement. The necessity for a preliminary examination should be considered in the context of the setting of standards for legal education by an independent body.

Solution

- 4.37 In its Preliminary Report the Competition Authority recommended that standards for the provision of professional legal education should be set by an independent body, such as the proposed Legal Services Commission, and that the Law Society should, in common with other providers, be required to apply and meet the specified standards. Solicitors and barristers should form part of the governing structures of this body but not represent a majority. Following consideration of the submissions received in response to the Preliminary Report, the Authority reiterates its earlier recommendation.
- 4.38 This measure will facilitate competition in the market for solicitor training and benefit trainee solicitors who will be able to choose from multiple providers, probably in a greater variety of locations and with a variety of course formats and content.
- 4.39 While these providers would provide training in certain core topics set by an independent regulatory body, they could, in response to demand, tailor their courses. For instance, trainees could be taught at weekends or in the evenings or could be given additional training in certain legal areas. Increasing the number of providers will lead to increased choice.
- 4.40 Competition between solicitors' training schools will drive quality in the market and improve the standard of legal services being provided.
- 4.41 Competition in the market for solicitor training will ensure that an appropriate number of training places are made available to match demand for legal services and that competition in legal services is not restrained.

130 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 and may increase training costs in the market for legal education. In addition, the course may include non-legal topics that are not relevant for all trainees. On the other hand, wide training permits solicitors to switch easily from one area of practice to another. 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 the market power of practitioners in any specific area. The issue of whether the professional course can be streamlined or tailored to meet specific student demands would not be addressed if the Law Society was to license other institutions on the basis that these institutions were to provide identical courses to the course it provides itself.

131 Certain groups are exempt from the requirement to pass the preliminary examination: University graduates from Ireland and the UK and holders of degrees awarded by the Higher Education and Training Awards Council (HETAC); Foreign graduates and holders of other qualifications can apply to the Law Society's Education Committee for exemption on the basis of such qualifications; Law Clerks with at least five years experience, who hold a Diploma in Legal Studies or equivalent qualification, can also apply for exemption; A Law Clerk with more than ten years experience may apply to the Committee for exemption, even if he/she does not hold a Diploma in Legal Studies.

Recommendation 2:

Have an independent body to set standards for solicitor training and approve institutions that wish to provide such training

Details of Recommendation

The Minister for Justice, Equality and Law Reform should remove the Law Society's role of setting standards for the provision of legal education. This role should instead be given to an independent body such as the Legal Services Commission.

The Law Society and any other institution that wishes to provide training for solicitors should be required to apply to the Legal Services Commission for approval to do so.

Action By

Minister for Justice, Equality and Law Reform

June 2008

The King's Inns' Monopoly on Training Barristers

Summary

- 4.42 Professional education and training for trainee barristers in Ireland is controlled by the Honorable Society of King's Inns (King's Inns) which was established in 1541 and whose primary role is the education of barristers. The Honorable Society of King's Inns comprises "benchers"¹³², barristers and students.
- 4.43 The path to be followed to become a barrister in Ireland, as decided by King's Inns, is through successful completion of the Barrister-at-Law degree provided by King's Inns own School of Law. Candidates are admitted to the School of Law by the benchers, on successful completion of the Entrance Examination. On successful completion of the Barrister-at-Law degree, candidates may be called to the Bar by the Chief Justice.
- 4.44 Unlike the case of solicitor training, there are no statutory provisions governing the training of barristers. King's Inns has decided that the best way for it to control the training of barristers is through a monopoly on education. The result is that the only professional training course for barristers in Ireland is King's Inns' own course which is offered only in Dublin.
- 4.45 King's Inns' professional training course used to be offered on a part-time basis but was changed to a full-time course in 2004. This has the effect of placing a barrier in the way of those in full-time employment wishing to train to become barristers. Barristers with previous experience in other employments are likely to have skills and experience that are valued by certain buyers of legal services but pose a competitive threat to existing barristers who have not worked in other sectors of the economy.
- 4.46 In addition, King's Inns' monopoly in the provision of barrister training has allowed it to impose unnecessarily onerous entrance requirements on those wishing to train as barristers.
- 4.47 Consequently, potential barrister trainees have no choice as to where in Ireland they can train, or in what format they can pursue their training (full-time/part-time/weekends). The monopoly enjoyed by the King's Inns school means that it has weak incentives to minimise its costs (and hence its course fees) and bring innovations to the way in which it trains barristers. As the capacity of the King's Inns course is a key determinant of the number of barristers who qualify in Ireland each year, this monopoly has the potential to restrict the numbers entering the legal profession and prevent the supply of barristers from meeting the levels of demand.

¹³² The "Benchers" of King's Inns include all the judges of the Supreme and High Courts and a number of elected barristers.

4.48 As in the case of solicitor training, the Competition Authority recommends that an independent body, specifically the Legal Services Commission proposed in Chapter 3, be given responsibility for regulating the training of barristers. This would involve setting standards that all providers of legal education would be required to meet, with publicly available criteria for institutions which might wish to offer legal education in the future. Having independent regulation of legal professional training would encourage other education providers to enter the market for the training of barristers, increasing the number of training places available and allow innovations such as courses available outside Dublin or courses in specific areas of law. This recommendation is in line with the earlier OECD recommendation that control of legal education in Ireland should be removed from the self-governing bodies.¹³³

Nature of Restraint

4.49 The Honorable Society of King's Inns is the sole provider of the Barrister-at-Law degree ("the degree"). Only persons who have obtained the degree provided by the 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.

Effects of Restraint

4.50 Two distinct markets are affected by this restraint: the market for the education of barristers and the market for the provision of legal services.

4.51 King's Inns' monopoly in recognising and providing barrister training is a serious restriction on competition in the market for the training of barristers, and may also be restricting competition between barristers in the market for legal services.

4.52 The lack of guidance for an alternative supplier to have its training course recognised for the purposes of being called to the Bar has resulted in only one option for those who wish to become barristers - King's Inns own training course.

4.53 The existence of a monopoly in legal professional training for barristers in Ireland has a number of effects:

- Potential barrister trainees have no choice as to where in Ireland they can train, or what format they can pursue their training in (full-time/part-time/weekends), as there is only one choice on offer. This arrangement has the potential to exclude well-suited individuals from pursuing a career as a barrister, particularly individuals who do not have the means to finance full-time study in Dublin for substantial periods of time¹³⁴;
- The number of barristers who qualify in Ireland each year is determined by the capacity of the King's Inns school. This has the potential to limit Ireland's supply of barristers with respect to future demand;
- The incentive for the King's Inns' school to minimise its costs (and hence its course fees) is reduced as it faces no competition for students;
- The King's Inns' school has little incentive to bring innovations to the way in which it trains barristers, for example, the provision of courses tailored to new or developing areas of law, as it faces no competition for students;

¹³³ "Regulatory Reform in Ireland", OECD, 2001.

¹³⁴ Trainee barristers must undertake a one-year full-time course leading to the Barrister-at-Law degree. Those who do not have a degree in law must also undertake a two-year full-time Diploma in Legal Studies in order to be admitted to the degree course. Both of these courses are available in Dublin only. King's Inns has indicated to the Competition Authority that it is prepared to consider the provision of a modular course to facilitate trainee barristers who are working. The question of offering elements of a modular course outside Dublin is also being considered.

- Prospective trainees who do not hold a recognised law degree must obtain the Diploma in Legal Studies before being allowed to sit the Entrance Examination.¹³⁵ King's Inns is the sole provider of the Diploma. Graduates who hold recognised law degrees are required to sit the Entrance Examination before being permitted to commence the degree course despite having already been examined in the subjects covered as part of their law degree. These requirements are a direct result of the monopoly enjoyed by King's Inns in professional training for barristers. If these requirements were abolished, then theoretically all those holding recognised law degrees would be entitled to pursue the Barrister-at-Law degree, in addition to those who do not hold law degrees but who qualify through the Entrance Examination. With most Irish universities offering law degrees, clearly King's Inns could not cope with potential demand due to the limits on its capacity and it would be forced to find some other means of selecting potential students.

4.54 These effects would be present even if the education of barristers was carried out by a monopoly unconnected with the barristers' profession. The fact that the educational monopoly is held by a body governed by members of the profession creates additional problems. Barristers have an incentive to limit competition in the market for barrister training and limit the numbers entering the profession, because that will limit the competition they face when offering legal services. Without any independent assessment of, or input into, the requirements for individuals seeking to train as barristers, and the content and format of the training, it is difficult to know whether the requirements are necessary and proportionate to ensuring appropriate standards, or whether they are excessive, or whether they are simply ways to limit entry.

Rationale for the Restraint

4.55 King's Inns put forward a number of justifications for the monopoly's existence:

- King's Inns 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;
- King's Inns operates on a break-even basis funded by student fees and a subsidy from the Bar Council. Other educational providers could not provide a similar course for the same level of fees. It further claims that the existence of a second institution might lead to fee increases, as King's Inns would have to increase the fees paid to tutors to attract them to teach its 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;
- Given the location of the Superior Courts in Dublin, a provider of barrister training would have to source practitioners and teachers from the pool of barristers based in Dublin. King's Inns claims that an institution outside Dublin would be unable to provide appropriate training, as it would not have enough barristers available to teach the course. It also claims that there is insufficient demand for barrister training to justify a second provider in Dublin or elsewhere;
- There would be an increase in regulatory costs if, instead of King's Inns monopoly provision of barristers' education, licences were awarded and course standards had to be evaluated across different educational providers;
- Entrusting the right to decide who should have the right to practise at the Bar, or the educational standards to be met before being so qualified, to a body appointed by the State would interfere with the historical independence of the barristers' profession.

4.56 In recent discussions with the Competition Authority, King's Inns has said that it recognises that the full-time degree course does not allow people to combine work and study and has indicated that it intends to offer the

¹³⁵ In July 2006, King's Inns changed its Education Rules to allow for the approval of post-graduate diplomas in law provided by other institutions. Holders of such diplomas would then be eligible to sit the King's Inns Entrance Examination in the same way as holders of approved law degrees or the King's Inns Diploma in Legal Studies. In addition, any third level institution with degree awarding powers or degrees validated by the Higher Education and Training Awards Council (HETAC) may now apply for approval of their degrees and/or post-graduate diplomas. Previously, only universities could apply.

degree course on a modular basis, in addition to the full-time option. King's Inns' rules have been amended to allow other institutions to have their law degrees recognised for the purposes of entry to the School of Law. King's Inns has also indicated that it is open to the possibility of running elements of a modular course in locations outside Dublin. King's Inns Diploma in Legal Studies is currently the subject of a major review with a report to be submitted to the Council¹³⁶ in the latter half of 2006.

International Experience

4.57 Other jurisdictions offer a choice of barrister training. Prospective barristers in England and Wales must first complete a recognised law degree, or a non-law degree followed by a one-year postgraduate law conversion course. Candidates must then commence the Bar Vocational Course (BVC) which is offered in eight third-level institutions. The BVC is offered as either a one-year full-time or two-year part-time course. Applications for the course must be made through the Bar Council's central applications system. All the courses must be validated by the Bar Council and are subject to periodic monitoring and assessment. While the areas to be studied on the BVC are set down by the Bar Council, there are differences in assessment methods between the various institutions offering the course. Barristers in Scotland, known as Advocates, must undertake the Diploma in Legal Practice, offered in four different universities, before undertaking practical training.

Analysis of the Competition Authority

4.58 King's Inns' willingness to consider options such as the introduction of a modular course and the possibility of offering at least some modules outside of Dublin is a welcome step. On the other hand, there are no firm proposals or indicative time scales for these initiatives. While greater flexibility in course provision is a welcome development and will improve matters for those prospective trainees who do not have the means to train full-time in Dublin, King's Inns' monopoly of barrister training remains.

4.59 The Preliminary Report recommended that King's Inns should issue criteria pursuant to which it would recognise Barrister-at-Law degrees awarded by other educational providers and allow persons awarded such degrees entry to the barristers' profession. To date it has not done so, although it has altered its education rules to facilitate the recognition of postgraduate diplomas in law offered by other third level institutions. If any such diplomas are approved it will provide an alternative means for non-law graduates to qualify to take the Entrance Examination to the degree course.

4.60 The justifications put forward by King's Inns for its monopoly are not supported by any evidence:

- While the objective of consistency in education standards is valid, a monopoly is a disproportionate means of achieving it. Monopoly education by King's Inns is not the only way to satisfy the judiciary as to the quality of barristers who appear before them. King's Inns or, preferably, some independent body could establish criteria for courses and examinations which could then be offered by other providers, as happens in other jurisdictions and in other professions;
- Whether a competing school could supply at lower cost is not a valid concern for King's Inns, and is not a justification for blocking entry. Monopoly status is not necessary for King's Inns to provide courses at the lowest possible prices and indeed the monopoly on barrister training actually reduces the incentive on King's Inns to constrain its costs. King's Inns' claim that the existence of a second institution might lead to fee increases, as King's Inns would have to increase the fees paid to tutors to attract them to teach its courses, is illustrative of the typical monopolist's mentality of passing on all cost increases to customers;
- The justification that the amount paid to tutors would increase with competition would apply only if the current market for tutors was uncompetitive. If tutors were currently being paid competitive market rates, the demand and rates for tutors could only increase if the overall number of student places increased. In other

136 The Council is the executive body of King's Inns.

words, a new supplier of barrister education would have to generate new student business, rather than simply encourage students to transfer from King's Inns, if it was to generate additional demand for tutors;

- 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 resources¹³⁷ 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;
- The regulatory costs associated with King's Inns or an independent body regulating legal education and 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;
- The setting of standards for the training of barristers by a body appointed by the State would have no impact on the independence of the barristers' profession. Such standards would be laid down for the purposes of barrister training only and would not interfere in any way with how barristers practise their profession, in the same way that the educational standards set for other professions, such as architects or medical practitioners, do not affect the practice of the profession in question;

4.61 Various problems with the provision of barristers' education illustrate the market failure brought about by the monopoly held by King's Inns. The number of persons able to train as barristers has been restricted. The Competition Authority received submissions expressing dissatisfaction with the standard of training provided and the high costs. King's Inns has itself recognised the lack of quality in its course and has substantially changed its degree programme to address this.¹³⁸

4.62 Fees charged by King's Inns for its degree course and its diploma course are set out in Table 12 below.

Table 12: Fees charged by King's Inns

	2004	2005	2006
Degree Course (total fee)	€10,750	€11,250	€11,600
Diploma (total fee)	€8,750	€9,270	€9,550

4.63 Although there are currently no quantitative limits on the number of places, the Education Rules of King's Inns have in the past limited the number of entrants to the Barrister-at-Law degree course to 120. The rules have now been amended so that all persons who pass the Entrance Examination will be offered a place in that year subject to teaching capacity. King's Inns says that it can accommodate up to 250 students in any one year.¹³⁹ 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.

4.64 King's Inns' new degree course began in Autumn 2004. The course now runs for one year full-time, rather than the previous two year part-time course. This change has led to complaints from those currently studying the

¹³⁷ 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.

¹³⁸ The emphasis of the new course is on teaching practical skills including, of course, advocacy. While some teaching is by way of lectures, most teaching takes place in small groups of students being taught by barristers who have been trained to provide this tuition. At the time of writing a major review of the diploma programme was underway. The new degree course will be kept under ongoing review.

¹³⁹ 193 students enrolled for the degree course in the academic year 2005-2006.

¹⁴⁰ As noted in para 4.58 above, King's Inns has indicated to the Competition Authority that it is considering the introduction of a modular course to facilitate those working full-time who wish to qualify as barristers.

preparatory diploma, and from others wishing to do so, who will be unable to work full-time and do the degree, thus preventing them from qualifying.¹⁴⁰

- 4.65 While the move to a one-year full-time course has prevented those working full-time from studying to be a barrister, others will prefer the one-year course. The problem is 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.

Solution

- 4.66 In its Preliminary Report the Competition Authority recommended that standards for the provision of legal education should be set by an independent body, such as the proposed Legal Services Commission, and that King's Inns should, in common with other providers, be required to apply and meet the specified standards. Solicitors and barristers should form part of the governing structures of this body but not represent a majority. Following consideration of the submissions received in response to the Preliminary Report, the Authority reiterates its earlier recommendations.
- 4.67 This measure will facilitate competition in the market for barrister training and benefit trainee barristers who will be able to choose from multiple providers, probably in a greater variety of locations and with a variety of course formats and content.
- 4.68 While these providers would provide training in certain core topics set by an independent regulatory body, they could, in response to demand, tailor their courses. For instance, trainees could be taught at weekends or in the evenings or could be given additional training in certain legal areas. Increasing the number of providers will lead to increased choice.
- 4.69 Competition between barristers' training schools will drive quality in the market and benefit the standard of legal services being provided.
- 4.70 Competition in the market for barrister training will ensure that an appropriate number of training places are made available to match demand for legal services, and that competition in legal services is not restrained.

Recommendation 3:

An independent body should set standards for barrister training and approve institutions that wish to provide such training

Details of Recommendation

The Minister for Justice, Equality and Law Reform should give an independent body, such as the Legal Services Commission, the task of setting standards for the provision of legal education.

The Honorable Society of King's Inns and any other institution that wishes to provide training for barristers should be required to apply to the Legal Services Commission for approval to do so.

Action By

Minister for Justice, Equality and Law Reform

June 2008

Explanatory Note: Monopolies in professional training

A monopoly is the most extreme form of the absence of competition and is thus a serious restriction in the market for legal professional training. A monopoly can have several effects:

All providers of education or training set prices (course fees), quantities (number of places), and quality (the requirements for entry on to the course) in a manner which suits their objectives. In the case of monopolies, the monopolist's choice becomes the market outcome and it is highly unlikely that what suits the monopolist best is also best for society.

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.

Monopolists tend to be less innovative. A competitive firm that innovates successfully will win business from competitors. However, there is no incentive for a monopolist to innovate as there is no competitor to win business from.

Irish competency requirement for solicitors and barristers

Summary

4.71 *The Legal Practitioners (Qualification) Act 1929* requires that solicitors and barristers must show a certain level of competence in the Irish language before being allowed to practise. This is intended to ensure that consumers who wish to vindicate their constitutional right to be represented in Irish in legal proceedings can do so. However, the requirement does not actually achieve this aim and instead can act as an unnecessary obstacle for certain trainee solicitors and barristers.

4.72 The Competition Authority recommends that the existing Irish competency requirement be abolished and replaced by a voluntary system of advanced Irish language training. Both the Law Society and Kings Inns agree with this recommendation. The effect of this change will be to remove an unnecessary obstacle for certain trainee solicitors and barristers, to provide a cohort of solicitors and barristers with the competence necessary to properly represent their clients through the medium of Irish and to give clients wishing to exercise their constitutional right to representation through Irish access to lawyers who are well qualified to do so.

Nature of the Restraint

4.73 Section 3 of the *Legal Practitioners (Qualification) Act 1929* provides that a person cannot be admitted by the Chief Justice to practise as a Barrister-at-Law in the Irish Courts unless he/she has previously satisfied the Chief Justice that he/she possesses a competent knowledge of the Irish language.¹⁴¹

4.74 Section 4 of the same Act provides that no person can become a solicitor unless he/she has passed an examination designed to show that he/she has a competent knowledge of the Irish language.

Effect of the Restraint

4.75 The Irish examinations constitute a barrier for non-Irish speaking persons who have obtained their law degree in Ireland and wish to become a solicitor or barrister. Such persons have increased education costs, as they must take pre-examination Irish courses. This may even reduce the number of qualifying lawyers in Ireland. Lawyers who have qualified in other jurisdictions do not have to take this examination.

¹⁴¹ The requirement does not apply to foreign-trained barristers of at least three years standing at any other Bar who have been admitted to the degree of Barrister-at-Law by the Honorable Society of King's Inns pursuant to a reciprocal arrangement. No such reciprocal arrangement exists at present.

Rationale offered for Restraint

4.76 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.

Views of interested parties

4.77 Both the Law Society and King's Inns addressed this issue in their submissions.

4.78 The Law Society agrees with the proposal that legislation be amended to abolish the Irish language competency requirement and favoured the establishment of a voluntary system:

"This is a better means of ensuring that Irish-speaking clients can be effectively represented through the Irish language and the Society would be pleased to be involved in the introduction of such a voluntary system and would urge the State to assist in its establishment".¹⁴²

King's Inns notes that it currently offers an optional course in Advanced Advocacy and Legal Drafting through the medium of the Irish language and is open to the idea of a course to replace the existing Irish competency requirement:

"King's Inns considers the development of such a course is important in order to have available legal practitioners who are qualified to conduct cases in Irish. It is willing to consider the further development of such courses and the granting of a qualification to those who reach an agreed standard".¹⁴³

King's Inns has informed the Competition Authority that it has made proposals to the Department of Justice, Equality and Law Reform proposing a basic Irish course for all trainees and an advanced course for those who wish to undertake it, leading to a recognised qualification.

Analysis of the Competition Authority

4.81 While the objective of ensuring that those who wish can be represented through the medium of Irish is valid, it cannot be achieved unless the Irish examination is of a sufficiently high standard to ensure that those who pass it are competent to conduct litigation in Irish.

4.82 It is not necessary to require all lawyers to be proficient in Irish in order to ensure that those who wish to avail of their constitutional right to be represented in Irish can do so. 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.¹⁴⁴

Solution

4.83 In its Preliminary Report, the Competition Authority proposed that the Irish language competency requirement be abolished and replaced by a voluntary system for lawyers who wish to represent their clients in Irish. Following consideration of the submissions received in response to the Preliminary Report, the Authority reiterates its earlier recommendation.

4.84 Such a voluntary system would encourage those who wished to do so to achieve a significant level of competency in Irish. Those who had achieved this level of competency, which would be verified by an examination, could advertise themselves as being qualified and willing to provide legal services through the medium of the Irish language.

¹⁴² Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 79.

¹⁴³ Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005, p. 27.

¹⁴⁴ This would require the lifting of the advertising restrictions discussed in Chapter 5. Incentives to complete the course may also need to be provided (e.g. course subsidisation).

- 4.85 This would ensure that, instead of the current situation where nominally all legal practitioners are competent in Irish but few are actually able, or willing, to provide legal services through Irish, there would be a pool of legal practitioners who had the ability to provide full legal services through Irish to those clients who wish to receive them.

Recommendation 4:

The existing basic Irish competency requirement should be abolished and replaced by a voluntary system of high level Irish language training

Details of Recommendation

Action By

The Minister for Justice, Equality and Law Reform should introduce legislation to repeal sections 3 and 4 of the Legal Practitioners Qualification Act 1929.

Minister for Justice, Equality and Law Reform

June 2008

The Law Society and the Honorable Society of King's Inns should publish criteria for a voluntary system whereby solicitors and barristers who wish to represent clients in Irish, or who have a particular interest in Irish, could be trained and examined to a high and consistent standard. Institutions other than the Law Society and King's Inns should be permitted to provide such courses and examinations.

The Law Society

Honorable Society of King's Inns

December 2007

Restrictions on the provision of legal services in Ireland by foreign-qualified lawyers

Summary

- 4.86 EU Directives provide a means by which lawyers qualified within the European Economic Area (EEA)¹⁴⁵ can offer legal services in Ireland, either under their home country designation¹⁴⁶, for example as an Italian lawyer, or as Irish solicitors or barristers.¹⁴⁷
- 4.87 Lawyers qualified outside the EEA cannot practise in Ireland under their home country designation and are required to undergo extensive legal examinations¹⁴⁸ before they can practise as solicitors or barristers in Ireland. This is the case even for lawyers qualified in common-law countries with legal systems very similar to Ireland, regardless of their experience. The present system for the recognition of lawyers qualified in non-EEA countries is disproportionate, unduly restrictive and operates to the detriment of buyers of legal services.
- 4.88 The Competition Authority recommends that lawyers qualified outside the EEA who wish to practise in Ireland should be subject to procedures for assessment of their qualifications similar to the procedures in place for lawyers with EEA qualifications.

¹⁴⁵ The European Economic Area is made up of the 25 Member States of the EU, Iceland, Liechtenstein and Norway.

¹⁴⁶ Council Directive 98/5/EC allows a lawyer, who is a national of an EEA Member State, and authorised to practise in an EEA Member State, to practise in Ireland under his/her home designation. After a three year period, the lawyer is entitled to apply for admission to practise as a barrister or solicitor (but not both). In making such an application the lawyer is required to provide proof of regular and effective pursuit of law in Ireland.

¹⁴⁷ Council Directive 89/48/EC. Under this Directive the Law Society and King's Inns, as the competent authorities in the State, may require EEA – qualified lawyers to satisfy their requirements in relation to their knowledge of Irish law and practice before qualifying as an Irish solicitor or barrister.

¹⁴⁸ The requirements are set by the Law Society in the case of solicitors and King's Inns in the case of barristers.

Nature of Restraint

- 4.89 Lawyers qualified in non-EEA countries cannot practise in Ireland under their home country designation, nor can they qualify as Irish solicitors or barristers unless they undertake the full professional training provided by the Law Society (in the case of those wishing to practise as solicitors) or King's Inns (in the case of those wishing to practise as barristers). Alternatively, if the country where they received their qualification has reciprocity arrangements with Ireland, they must pass a transfer test.¹⁴⁹
- 4.90 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, after the Law Society has deemed that the legal profession in that country corresponds to the solicitors' profession in Ireland.¹⁵⁰ 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.¹⁵¹
- 4.91 In the case of barristers, a reciprocating country is a jurisdiction where the professions of solicitor and barrister are separate and which, in the opinion of King's Inns, affords corresponding advantages to members of the Bar of Ireland.¹⁵² Recognition of other countries is entirely at the discretion of the governing body of King's Inns (the "Benchers"). 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.¹⁵³ At present there are no reciprocal arrangements in force with any country.

Effects of Restraint

- 4.92 The effects of the rules and regulations is that lawyers qualified in jurisdictions outside the EEA, and where there is no reciprocity agreement, are prevented from qualifying and practising as Irish solicitors or barristers unless they go through the entire process of qualifying as an Irish solicitor or barrister. This is unnecessarily onerous.
- 4.93 The restrictions also prevent competent practitioners from offering legal services in the State under their home country designation, 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.
- 4.94 In addition, non-EEA based law firms are prevented from setting up Irish sub-offices to supply legal services in the Irish market under their home country designation.

Rationale offered for Restraint

- 4.95 The objective of these requirements is to ensure that foreign-trained lawyers are properly qualified so that consumers of legal services will be protected.

Views of Interested Parties

- 4.96 In its Preliminary Report, the Competition Authority recommended that the Department of Justice, Equality and Law Reform should establish criteria for foreign lawyers which would be assessed on a case-by-case basis by the Law Society and that King's Inns should amend its rules to permit foreign lawyers to practise in Ireland as barristers without the need for reciprocity or other recognition requirements but subject to the Bar Council's Code of Conduct and disciplinary sanctions.
- 4.97 The Law Society:
*"agrees with the proposal that criteria be established for foreign lawyers and believes that such criteria should be set down by the Society with the consent of the Department of Justice, Equality and Law Reform. The assessment of such foreign lawyers should be undertaken on a case by case basis by the Society".*¹⁵⁴

149 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. King's Inns does not have any reciprocal arrangements with other countries.

150 Section 52 of the Solicitors (Amendment) Act 1994.

151 The Law Society recently announced that its Council has approved reciprocal recognition with New South Wales in Australia. Source: Law Society Gazette, August/September 2006, p 44.

152 Rule 23(a) Education Rules of the Honorable Society of King's Inns (October 2004 edition).

153 Rule 23(d) Education Rules of the Honorable Society of King's Inns (October 2004 edition).

154 Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 67.

4.98 King's Inns noted that the issue of international recognition of legal qualifications is currently under review by the World Trade Organisation (WTO). The WTO is considering the extension of the model provided for by Council Directive 98/5/EC.¹⁵⁵ The King's Inns favours this model over the one proposed by the Competition Authority. It believes that:

"this model, and not that suggested by the Authority, would be the appropriate one in the event that it was decided to extend the recognition of foreign legal qualifications".¹⁵⁶

Analysis of the Competition Authority

4.99 The protection of consumers of legal services is a valid objective, given the potential for significant harm resulting from poor legal advice, and the difficulties many consumers of legal services would face in accurately assessing the quality of the service they receive. Nevertheless, the current restrictions are disproportionate, and the objective of protecting consumers can be better achieved by less restrictive means.

4.100 Reciprocity arrangements are not the best means of regulating the entry of foreign-trained lawyers to the Irish market. The present arrangements are illogical and inconsistent. Lawyers from countries with common-law jurisdictions similar to Ireland, such as Australia, New Zealand and Canada, are subject to greater stringency in entry requirements than lawyers from EEA countries, including those EEA countries that have significantly different legal systems to Ireland (e.g. civil law jurisdictions).

4.101 The present requirements prevent Ireland becoming a destination for overseas law firms to establish European offices. Extending the system established via Council Directive 98/5/EC to non-EEA lawyers will enable overseas law firms to establish themselves in Ireland and provide legal services to both Irish and European consumers. As well as giving consumers greater choice, this would also potentially attract lawyers with diverse backgrounds and expertise and would be likely to result in stronger competition in particular areas of law such as international finance.

4.102 The Competition Authority agrees that it would be sensible to adopt the model which is being proposed by the WTO, as noted by King's Inns in its response to the Preliminary Report. Adopting this model would mean that lawyers from non-EEA countries could practise in Ireland under their home country designation and, after a period of three years, be eligible to apply for admission to practise as either an Irish solicitor or barrister, subject to the provision of proof of regular and effective pursuit of law in Ireland. This would adequately address the objective of ensuring that foreign-trained lawyers are properly qualified to practise law in Ireland.

4.103 However, given that it may be some time before such a model is finalised by the WTO, it is important that an intermediate solution is put in place to remove the current restrictions faced by foreign-qualified lawyers wishing to practise in Ireland.

Solution

4.104 The system created as a result of Council Directive 98/5/EC, whereby lawyers qualified in EEA countries can practise in Ireland under their home designation only (for example, a French lawyer can practise in Ireland as a French lawyer), should be replicated to allow non-EEA lawyers to practise in the State under their home title.

4.105 The same approach should be adopted in relation to Council Directive 89/48/EC which created the system whereby lawyers qualified in an EEA Member State can become qualified as lawyers in another Member State without having to undergo full professional training, provided that they can satisfy the requirements¹⁵⁷ of the relevant competent authority (King's Inns in the case of barristers and the Law Society in the case of solicitors) in relation to their knowledge of Irish law.

¹⁵⁵ See Footnote 147 in this chapter for a brief outline of the model provided for in Directive 98/5/EC.

¹⁵⁶ Submission of the Honorable Society of King's Inns to the Competition Authority, July 2005, p. 26.

¹⁵⁷ In the case of the Law Society, candidates are required to pass the Qualified Lawyers Transfer Test. Applications to King's Inns are considered on a case by case basis by the Education Committee which may recommend that: (a) the applicant be admitted to the degree of Barrister-at-Law without being required to pass any part of the aptitude test; or (b) the applicant may be required to pass all or part of the aptitude test; or (c) the application be refused. The aptitude test consists of three written papers and one oral assessment.

- 4.106 Replicating the systems created by these Council Directives would be equitable and clear and more efficient than the current reciprocity system or a case by case approach to applications from foreign-trained lawyers.

Recommendation 5:

The current system of reciprocity in recognition of legal training of non-EEA lawyers should be replaced by mirroring the existing provisions for EEA lawyers

Details of Recommendation

Action By

Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 98/5/EC for non-EEA lawyers who wish to practise in the State under their home title.

Minister for Justice, Equality and Law Reform

June 2008

Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 89/48/EC for non-EEA lawyers who wish to practise in the State as an Irish solicitor or barrister.

Minister for Justice, Equality and Law Reform

June 2008

Restrictions on switching between the two branches of the legal profession

Summary

- 4.107 Lawyers cannot readily switch from one branch of the legal profession to the other. The Competition Authority recommended in its Preliminary Report that the professional bodies concerned, i.e. the Law Society, the Bar Council and the Honorable Society of King's Inns, should amend their rules to allow lawyers to switch more easily between the two branches of the profession. In the period since the publication of the Preliminary Report, the Bar Council and King's Inns have amended their rules. In addition, the Law Society and King's Inns have established a joint committee which is looking at the issue of switching between the professions.
- 4.108 The Competition Authority recommends that the Law Society should follow the lead of the Bar Council and move to ensure that all unnecessary barriers faced by barristers wishing to become solicitors are removed.

Nature of Restraint

- 4.109 Until July 2006 a solicitor wishing to become a barrister was required to have his/her name removed from the Roll of Solicitors at least three months before being called to the Bar.¹⁵⁸ A barrister wishing to become a solicitor must first procure his/her disbarment¹⁵⁹ (i.e. cessation of his membership of the Bar).¹⁶⁰
- 4.110 Barristers wishing to become solicitors are assessed by the Law Society's Law School in order to identify the areas in which they have demonstrated a competence. A report is then submitted to the Education Committee setting out those areas in which the candidate can be considered exempt from attending the Professional Practice Courses and sitting examinations. In all cases, barristers are required to sit courses and pass examinations in Professional Practice, Conduct and Management. Barristers must also spend at least six months in the office of a practising solicitor, although this requirement may be waived in exceptional circumstances.¹⁶¹

¹⁵⁸ Rule 24(b) (2) Education Rules of the Honorable Society of King's Inns (now amended) provided that solicitors who had been in practice for 3 years could be admitted to King's Inns and called to the Bar provided they ceased to act as a solicitor and had their name removed from the Roll of Solicitors at least 3 months before being admitted to the Inns. Solicitors in practice for less than 3 years must undertake King's Inns Education Course. The amended Rule 24(b) requires solicitors to have their name removed from the Roll of Solicitors 10 days before being called to the Bar.

¹⁵⁹ 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 the solicitors' profession, a barrister of three years standing must first procure his/her disbarment.

¹⁶⁰ 2001 and 2005, 18 solicitors transferred to the Bar. Source: Bar Council.

¹⁶¹ Between 2001 and 2005, 14 Irish barristers requalified as solicitors. Source: Law Society.

Effects of Restraint

4.111 The restrictions deter lawyers switching between the professions of solicitor and barrister in response to changes in demand or supply.

Rationale offered for Restraint

4.112 According to the Law Society, a barrister wishing to become a solicitor needs prior training in handling of client money, probate and conveyancing, as barristers would have neither training nor practice in these areas.

International Experience

4.113 In England and Wales a solicitor can transfer to the Bar after undertaking time in pupillage, the time required depending on his/her experience. Alternatively, a solicitor can switch to the Bar after obtaining rights of audience as a solicitor in higher courts (unlike in Ireland, solicitors in England and Wales do not have automatic rights of audience in the Higher Courts and must apply for them through one of a number of possible routes). Barristers wishing to become solicitors must pass a test in Professional Conduct and Accounts and either satisfactorily complete 12 months pupillage and 12 months legal practice or complete two years legal practice acceptable to the Law Society.

4.114 In New Zealand all legal 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.

Views of Interested Parties

4.115 The Preliminary Report proposed that restrictions which prevented lawyers from simultaneously holding the titles of solicitor and barrister should be removed. A number of submissions addressed the issue of allowing lawyers to hold dual titles and fusing the profession.

4.116 The Law Society believes that there is no advantage in allowing lawyers to hold dual titles as "*a solicitor can already do everything that a barrister can do.*" The Society also believes that the proposals in the Preliminary Report would in essence create a fused profession in which the independent existence of a referral Bar would be obscured and, over time, be eliminated.

4.117 The Law Society favours making transfer between the professions easier and is working with the Bar Council and King's Inns on the issue.

4.118 The Bar Council disagrees with the proposal that barristers should be allowed to simultaneously hold the titles of barrister and solicitor but is in favour of proposals that would ease restrictions on transferring between the two branches of the legal profession.

4.119 In March 2006, the Bar Council removed Rule 8.11¹⁶² of its Code of Conduct and replaced it with a new Rule 8.16 which provides that:

"A former solicitor who is called to the Bar in accordance with requirements set from time to time by the Honorable Society of King's Inns shall have the same rights and duties as any other barrister, and shall be admitted to membership of the Law Library immediately free from restriction or hindrance".

4.120 As far as the Bar Council is concerned, there is now no restriction on a solicitor switching. King's Inns has amended its Education Rule 24(b)(2) which required a solicitor to have his/her name removed from the Roll of

¹⁶² Rule 8.11 provided that before a former solicitor could become a member of the Law Library, he must "a) Satisfy the Bar Council that he has ceased to be a practising solicitor and has ceased to work in a solicitor's office for at least two months prior to admission to the Law Library, whichever is the later; b) Undertake not at any time to accept any work upon which he may have been engaged when practising or working in any solicitor's office; and c) Undertake not to accept instructions in any case where, by reason of his prior relationship with the client or with the case, there is a risk that he may be required to give evidence before that court or tribunal on any matter arising out of or in connection with that case."

Solicitors three months prior to admission as a barrister. Solicitor students can now maintain their names on the Roll of Solicitors until 10 days before being called to the Bar.

Analysis of the Competition Authority

- 4.121 The Preliminary Report proposed that King's Inns, the Bar Council and Department of Justice, Equality and Law Reform amend their rules/ regulations to enable lawyers to simultaneously hold the titles of solicitor and barrister. This would remove any distinction between solicitors and barristers.
- 4.122 The focus of this report is on restrictions on competition in the market for legal services that result from legislation, regulation and the rules of the Bar Council, Law Society and the Honorable Society of King's Inns governing who can become a lawyer and how solicitors and barristers must operate. The overall effect on competition of having a mandatory solicitor/barrister distinction between lawyers is, therefore, not considered in this report and the Competition Authority does not make any recommendation in this regard.
- 4.123 Since 1971 solicitors have been permitted to advocate on behalf of their clients in all courts. Solicitors in Ireland are equivalent to those legal practitioners in certain Australian States who practise as "solicitors and barristers". However, to be a member of the independent Bar in those States one must practise only as a barrister. Thus, the term "barrister sole" has emerged to describe members of the independent bar in those jurisdictions.
- 4.124 The right of solicitors to advocate in all courts means that there is no aspect of the work normally carried out by barristers which cannot be done by solicitors. However, barristers are not permitted to carry out certain tasks normally done by solicitors, such as conveyancing and handling clients' funds.
- 4.125 Switching between the disciplines of solicitor and barrister should be made as easy as possible. Neither a barrister nor a solicitor who wishes to switch should be made to sit previously taken examinations.
- 4.126 As a result of recent rule changes by the Bar Council and King's Inns, it is now much easier for solicitors to become barristers. However, barristers wishing to become solicitors must still be assessed by the Law Society to identify those areas in which they can be exempted from attending the Professional Practice Course and passing examinations. In every case a barrister wishing to become a solicitor will be required to sit courses and pass examinations in Professional Practice, Conduct and Management. Barristers must also, save in exceptional circumstances, spend at least six months in the office of a practising solicitor.
- 4.127 The Competition Authority welcomes recent rule changes by the Bar Council and King's Inns which will make it easier for solicitors to become barristers and the current discussions between the professions regarding simplifying the transition from barrister to solicitor.

Solution

- 4.128 The Law Society should follow the lead of the Bar Council and King's Inns and implement the necessary measures to ensure that switching between the professions is frictionless.
- 4.129 This recommendation would make it easier for barristers and solicitors to switch between the professions. Removing unnecessary barriers to switching between the professions of barrister and solicitor will enable practitioners to move between the two professions in response to changes in demand and/or supply. This in turn would ensure choice for consumers.

**Recommendation 6:
Remove unnecessary barriers to switching between the branches of solicitor and barrister**

Details of Recommendation

The Law Society and the Bar Council should ensure that all unnecessary barriers are removed for lawyers wishing to switch from one branch of the legal profession to the other.

Action By

Law Society

June 2007

Bar Council

Implemented July 2006

Restrictions on emerging professions

Summary

- 4.130 Transferring the ownership of a house, apartment or piece of land from one person to another is known as conveyancing. There is nothing to prevent anyone carrying out this task for themselves, if they have the necessary time, legal knowledge and confidence.
- 4.131 However, most people prefer to employ a professional. In Ireland, solicitors are the only professionals allowed to provide conveyancing services.
- 4.132 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. Draft legislation to achieve this was published in June 2006.¹⁶³ Reform along these lines will make the conveyancing process much simpler and mean that it will be even easier for non-solicitors to be trained to provide conveyancing services.
- 4.133 In Britain and elsewhere, specialist professionals known as “conveyancers”, or “licensed conveyancers”, also offer conveyancing services and are regulated in a similar fashion to solicitors. The introduction of a similar profession of conveyancers in Ireland would lead to downward pressure on conveyancing fees and more consumer-friendly and innovative ways of providing these services.
- 4.134 The Competition Authority wishes to see an end to the solicitors’ monopoly on conveyancing through the introduction of the profession of conveyancer in Ireland. This recommendation is in line with earlier findings by the Fair Trade Commission and the OECD on opening up the provision of conveyancing services in Ireland.¹⁶⁴

Nature of the Restraint

- 4.135 Only solicitors can provide conveyancing services to the public for payment.¹⁶⁵
- 4.136 In many other countries, paralegal professionals known as “conveyancers”¹⁶⁶ are licensed to provide conveyancing services to consumers, in addition to solicitors. A conveyancer is a specialist trained and qualified in property law.

Effects of the Restraint

- 4.137 Allowing only solicitors to provide conveyancing services limits competition for these services.

¹⁶³ *Land and Conveyancing Law Reform Bill 2006*, published 7th June 2006.

¹⁶⁴ “*Report of Enquiry into the effects on Competition of the Restrictions on Conveyancing and the Restrictions on Advertising by Solicitors*”, Restrictive Practices Commission, 1982 and “*Regulatory Reform in Ireland*”, OECD, 2001.

¹⁶⁵ Section 58 of the *Solicitors Act 1954*. 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.

¹⁶⁶ Conveyancers are also often referred to as “licensed conveyancers”.

- 4.138 Consumers do not have the choice of employing a specialist property conveyancer and instead must employ a solicitor, who is qualified to provide a range of other services which they may not need.
- 4.139 Solicitors' monopoly on conveyancing in Ireland means that they do not face competitive pressure on fees for conveyancing services from other professionals. Preliminary empirical analysis carried out by Indecon suggests that conveyancing fees in Ireland increase where there are fewer suppliers of conveyancing services.¹⁶⁷
- 4.140 The absence of competitive pressure from other professions has also limited the incentives for solicitors to innovate in the delivery of conveyancing services. There has not been any substantial innovation in solicitors' delivery of conveyancing services in Ireland.¹⁶⁸ This is in contrast to England and Wales, where solicitors' firms have innovated to provide conveyancing services outside traditional office hours and "on-line" to facilitate customers.

Rationale offered for the Restraint

- 4.141 The Law Society submits that the solicitors' monopoly of conveyancing services is required to protect consumers for three reasons:
- Consumers are financially protected by virtue of the requirement on solicitors to carry indemnity insurance to cover instances of negligence.¹⁶⁹ In addition, solicitors' clients have access to the Law Society's compensation fund to cover instances of fraud.
 - Solicitors must adhere to the Law Society's Professional Code of Conduct, which stresses independence, representing clients' interests and avoiding conflicts of interest.
 - 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.
- 4.142 The Law Society further suggests that the introduction of conveyancers in Scotland was not successful, as evidenced by the limited number of conveyancers there. As Ireland is comparable in size to Scotland, the Law Society says that the introduction of conveyancers would have little effect in Ireland.

International Experience

- 4.143 England, Wales, Scotland, most Australian States and most recently, New Zealand, have all introduced conveyancers, with appropriate regulation, over the past 20 years.¹⁷⁰
- 4.144 In England and Wales, conveyancers are regulated by an independent statutory body – the Council of Licensed Conveyancers. The Council requires all conveyancers to have academic qualifications, professional indemnity insurance and to pay into a fund for the protection of client monies. The Council is entirely self-funding through registration fees from conveyancers. It does not provide training for conveyancers itself but sets the standard for private institutions to meet. Conveyancers are qualified in all types of conveyancing. They work on their own, or as employees of licensed conveyancers and solicitors, or for local authorities, property developers and banks.
- 4.145 Similar systems of regulated conveyancers exist in most Australian States and legislation establishing regulation of conveyancers was passed in New Zealand in 2006.
- 4.146 In contrast to England and Wales and other common-law countries where conveyancers are regulated by independent bodies, Scottish conveyancers are regulated by the Law Society of Scotland. The Law Society of

¹⁶⁷ Based on surveyed responses on the price of conveyancing for a €300,000 house Indecon suggest that a 100 point increase in the Herfindahl-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.

¹⁶⁸ 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.

¹⁶⁹ Professional indemnity insurance is particularly necessary for conveyancing, which attracts the majority of claims for professional negligence.

¹⁷⁰ For example, regulation of licensed conveyancers was introduced in England and Wales in 1987, in New South Wales in Australia in 1992 and in New Zealand in 2006.

Scotland requires applicants to have a law degree – a requirement far in excess of the regulations in England and Wales and Australia.

- 4.147 In England and Wales, conveyancers entered the market in 1987. A 1986 study¹⁷¹ showed that solicitors reduced their fees in anticipation of increased price competition from the new licensed conveyancers. The Department for Constitutional Affairs in the UK says that while conveyancers have secured only 5% by value of the market for conveyancing, the average cost of conveying a £65,000 house had fallen by 25% between 1989 and 1998.¹⁷²
- 4.148 In New South Wales, deregulation measures, which included solicitors being permitted to advertise, the elimination of fee scales and the introduction of conveyancers, resulted in a 17% average fee reduction in conveyancing fees.¹⁷³ Though not all of this may be attributed to the arrival of conveyancers, even a portion of this estimate is a sizeable saving for consumers. Moreover, this saving followed a minimal deregulation, whereby conveyancers were only allowed to offer a limited range of conveyancing services and in limited ways. New South Wales has since expanded the range of conveyancing services that can be provided by conveyancers, further deregulating the market and bringing those cost savings to a wider range of consumers.
- 4.149 The experience of using conveyancers in other jurisdictions has not created problems and has generated considerable savings for consumers as well as a more innovative, responsive market for conveyancing services.

Analysis of the Competition Authority

- 4.150 The market for conveyancing services in Ireland is growing both in terms of volume and value. It is estimated that the total housing stock in Ireland stands at 1.7 million units,¹⁷⁴ worth an estimated €480bn.¹⁷⁵ New completions have been rising steadily for the last ten years with 90,000 new units predicted for 2006.¹⁷⁶ The number of housing transactions is increasing, with 120,000 new mortgages predicted for 2006, up from 108,000 in 2005. A significant number of transactions are carried out without a mortgage, meaning that the total number of transactions, and consequently the total number of conveyances, is likely to be greater than the number of mortgages.¹⁷⁷
- 4.151 This conveyancing work is shared among 7,242 solicitors who are the only professionals permitted to provide conveyancing services. Indecon calculated, based on data available from the Law Society, that in 1999 conveyancing work provided 31% of fee income earned by solicitors.¹⁷⁸
- 4.152 The current restriction on who can provide conveyancing services is disproportionate. Providing a high level of consumer protection does not require conveyancing services to be limited to solicitors. This is clearly evidenced from the experience of many other common-law jurisdictions which have introduced regulated systems of conveyancers as outlined above.
- 4.153 The relevant parts of the Law Society's Code of Conduct can be replicated in a code of conduct for conveyancers, thus ensuring consumer protection. The Council of Licensed Conveyancers in England and Wales has a statutory Code of Conduct that all conveyancers must adhere to.
- 4.154 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

171 Paterson, Farmer, Stephen and Love, "Competition in the Market for Legal Services" (Journal of Law and Society) 1988, Vol. 15 pp 361-373; 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 p55.

172 Department for 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.

173 J. Barker "Conveyancing Fees in a Competitive Market" (Justice Research Centre) 1996.

174 Source: *Annual Housing Statistics Bulletin 2005*, Department of the Environment, Heritage and Local Government.

175 Source: *The Irish Property Review. A Quarterly Analysis – July 2005*, Bank of Ireland.

176 Source: *The Irish Property Review. A Quarterly Analysis – August 2006*, Bank of Ireland

177 For example, 54,000 loans were given for new homes in 2005, while there were 81,000 completions, indicating that one third of new properties were bought without need for a mortgage. Source: *The Irish Property Review. A Quarterly Analysis – August 2006*, Bank of Ireland.

178 See Table 4.1, "Indecon's Assessment of Restrictions in the Supply of Professional Services", March 2003.

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 the costs for consumers of conveyancing services. Licensed conveyancers in England and Wales and Australia have been trained to a high standard by private colleges, which have provided courses in conveyancing and have trained persons to a standard commensurate with the training in conveyancing received by solicitors.

- 4.155 Shopping around for conveyancing services is now relatively easy in England and Wales. Many conveyancing firms and solicitors' firms offer on-line quotations and out-of-hours meetings. There has been no drop in the quality of conveyancing services since the market was opened up to licensed conveyancers.¹⁷⁹
- 4.156 The low take-up of licences for conveyancing in Scotland, referred to by the Law Society in its submission, does not mean that a system of licensed conveyancers would fail in Ireland. The situation in Scotland, where conveyancers are regulated by the Law Society, shows the importance of having an independent statutory body to regulate conveyancers. The slow take-up of licences for conveyancing in Scotland can be attributed to the fact that law graduates are far more likely to continue on to become solicitors, trained in all aspects of law, than conveyancers.
- 4.157 Conveyancers are specialists and have a level of expertise based on constant experience of conveyancing work which solicitors, who provide a much broader range of services, may not have.
- 4.158 The introduction of a profession of conveyancers would not result in any diminution of consumer protection. Conveyancers should be required to abide by a code of ethics, to have professional indemnity insurance and to contribute to a compensation fund in order to ensure the greatest possible degree of consumer protection. Professional indemnity insurance can be procured by new suppliers to the conveyancing market. In England and Wales, conveyancers source their professional indemnity insurance from over 40 insurance companies and pay into a fund equivalent to the compensation fund operated by the Law Society of Ireland.
- 4.159 In Ireland a significant number of titles to property, especially in urban areas, are unregistered (i.e. ownership is based on deeds), rendering them more complex. This complexity need not stand in the way of allowing trained conveyancers to offer conveyancing services in Ireland. Some Australian States, such as New South Wales, continue to use deeds as well as a land registry system and yet have successfully introduced regulatory systems for conveyancers.
- 4.160 When a system of licensed conveyancers was introduced in England and Wales, the first group of people to opt for this career choice were law clerks who had been carrying out conveyancing work in English and Welsh legal practices. The new regime allowed them to set up their own businesses as property conveyancing experts. In Ireland, conveyancing work is already regularly carried out by law clerks working in larger legal firms. Thus the law clerks currently working in Ireland are already well placed to offer conveyancing services directly, once appropriately trained. Indeed, the Law Society already recognises law clerks with ten years experience as equivalent to persons with law degrees for the purposes of being allowed to sit the entrance exam to train as a solicitor.¹⁸⁰
- 4.161 The experience in England and Wales has been that around one-sixth of new additions to the register of conveyancers are solicitors switching to this profession. The Council for Licensed Conveyancers believes that this is because, unlike solicitors, conveyancers can operate as limited companies – and hence receive outside investment and business expertise – and that they are regulated by a smaller and less costly regulator.
- 4.162 The Preliminary Report of the Competition Authority proposed that the Minister for Justice, Equality and Law Reform should bring forward legislation to permit conveyancers to provide conveyancing services, and that the

179 Source: Council of Licensed Conveyancers, England.

180 www.lawsociety.ie

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

- 4.163 In its submission following the publication of the Preliminary Report, the Law Society rejected this proposal on the grounds that conveyancing in Ireland is complex, the regulation of conveyancers would involve “*additional costs*” and “*there is a competitive market for conveyancing services*”. These arguments are not valid.
- 4.164 First, the costs of regulating conveyancers would be borne by the conveyancers themselves, in exactly the same way as the Law Society is funded by the fees paid by solicitors. Apart from once-off initial set-up costs for a regulator for conveyancers, there are no “*additional costs*” associated with regulating conveyancers. In fact, the regulatory costs to conveyancers are more likely to be lower than those of solicitors, thus giving conveyancers a lower cost base. In England and Wales, initial set-up costs for the Council of Licensed Conveyancers were provided by the Exchequer but the on-going running costs are entirely funded out of licensed conveyancers’ fees to the Council. Licensed conveyancers in England and Wales pay an annual fee to the Council that is much lower than the fee paid by solicitors to the Law Society there.¹⁸¹
- 4.165 Second, whether or not there is currently a strong level of competition between solicitors regarding conveyancing services, new competition from outside the solicitors’ profession can only increase competition further. This is especially true where the new entrants can form limited companies and have a lower cost base.

Solution

- 4.166 As part of the current programme of reform and modernisation of land law and conveyancing law, the Minister for Justice, Equality and Law Reform should introduce legislation to allow licensed conveyancers to offer conveyancing services to the public.
- 4.167 Conveyancers should be regulated by a transparent, accountable and self-funding statutory body, independent of both conveyancers and solicitors, similar to the Council for Licensed Conveyancers in England and Wales.
- 4.168 In the interests of consumer protection, licensed conveyancers should be required to have professional indemnity insurance and to contribute to a compensation fund for the protection of client monies.
- 4.169 The Preliminary Report recommended that this task be undertaken by the Legal Services Commission, a new statutory body which would oversee all providers of legal services. This Final Report recommends, in chapter 3, a Legal Services Commission to act as an oversight body for legal services and delegate the day-to-day functions of regulation to “front line regulators” (the Law Society and the Bar Council). It is more appropriate therefore to set up a similar front line regulator for conveyancers, also under the umbrella of the Legal Services Commission. This is similar to the model of regulatory oversight being proposed in the UK and New Zealand.
- 4.170 A “Conveyancers’ Council of Ireland” should be established by statute to govern the level of qualifications and professional indemnity insurance required to be registered as a conveyancer, and to establish a compensation fund and code of ethics for the profession. The Council should also provide information to consumers of conveyancing services. These measures would ensure that consumers would enjoy the same level of protection as they currently do from solicitors offering conveyancing services.
- 4.171 The Preliminary Report also recommended that legislation be introduced to allow financial institutions to provide conveyancing services to the public by way of employed solicitors. The question of the appropriate individuals or firms offering conveyancing services should be a matter for the proposed Conveyancers Council of Ireland.

¹⁸¹ The Law Society of Ireland currently charges solicitors an annual practising fee of €1,821.

4.172 An increased range of suppliers would result in increased consumer choice, lower fees and innovative ways of delivering conveyancing services.

**Recommendation 7:
Allow qualified persons other than solicitors to provide conveyancing services**

Details of Recommendation

The Minister for Justice, Equality and Law Reform should bring forward legislation to permit qualified persons other than solicitors to provide conveyancing services.

Persons wishing to provide conveyancing services should be required to be registered as “conveyancers” by a Conveyancers’ Council of Ireland with responsibility for regulating the training, qualification and operation of conveyancers.

Conveyancers should be required to abide by a code of ethics, to have professional indemnity insurance and to contribute to a compensation fund in order to ensure the greatest possible degree of consumer protection.

Action By

Minister for Justice, Equality and Law Reform

June 2008



section 5

5. RESTRICTIONS ON COMPETITION AND RIVALRY BETWEEN LAWYERS

Summary

- 5.1 Rivalry and competition between lawyers is highly restricted through various unnecessary rules emanating from legislation, regulation and practice. The legal profession in Ireland is currently organised in a highly rigid business model; the title of Senior Counsel is inclined to distort rather than facilitate competition; there is a near blanket ban on advertising by barristers; and clients wishing to switch to another solicitor or barrister have found unnecessary obstacles in their way. These restrictions do not exist to the same extent in any other common-law jurisdiction.
- 5.2 The overall effect of these restrictions is to dampen competition between lawyers and prevent the delivery of legal services from evolving to meet Ireland's needs. Persons and businesses requiring legal services are restricted in their choices of how and from whom they can obtain legal services; lawyers are not free to operate in the most efficient model for their clients; and prices are likely to be higher and the quality of services lower than would prevail in the absence of these unnecessary restrictions.
- 5.3 In its Preliminary Report, the Competition Authority recommended the abolition of the rules of the Bar's Code of Conduct which prohibited practising barristers from undertaking part-time employment and from acting for a former employer for a specified period after commencing practice at the Bar. These rules made it more difficult for new barristers to make a living and reduced the competitive threat they posed to established barristers. The Bar implemented these recommendations in March 2006.
- 5.4 The Competition Authority makes fourteen recommendations in this chapter, to the Law Society, the Bar Council, and the Minister for Justice, Equality and Law Reform. As discussed above, some recommendations have already been implemented by the Bar in response to concerns raised in the Preliminary Report. The implementation of the remaining recommendations will remove unnecessary restrictions on competition between lawyers and allow Ireland's citizens and businesses the benefits of a more competitive market for legal services, including better choice, efficiency and value for money.
- 5.5 The legal profession in Ireland is currently organised in a highly rigid business model from which lawyers cannot deviate:
- A person wishing to avail of legal services may retain a solicitor but not a barrister. Where a person wishes to retain a barrister, the solicitor retains the barrister on behalf of his/her client;¹⁸²
 - Barristers must operate as sole practitioners;
 - Solicitors may enter partnerships, but only with other solicitors;
 - Firms employ solicitors and barristers for legal advice. They may send their solicitors into court to represent them but not their barristers.
- 5.6 Though this model of delivering legal services may suit many clients, it is not necessary that it be imposed as the only way of delivering legal services. Relaxing some of the rules enforcing this model will allow solicitors and barristers the opportunity to deliver their services in other ways which are more suitable, more efficient and more cost effective for their clients without any harm to the administration of justice.

¹⁸² Some organisations may go directly to barristers for legal advice.

- 5.7 Specifically, the Competition Authority recommends that:
- a) The existing scheme for direct access to barristers for legal advice (i.e. without having to retain a solicitor first) be open to all;
 - b) Barristers who share premises and costs should be permitted to hold themselves out as practising as a group;
 - c) Barristers be allowed to form partnerships, in addition to the sole trader model; and
 - d) Employed barristers be allowed to represent their employers in court.
- 5.8 Other potential business models, such as direct access for contentious issues and solicitor-barrister partnerships, would also allow more flexibility in the delivery of legal services but raise regulatory and other public policy issues which require more detailed consideration by a wider group of experts and so are not being recommended at this time. Further research into and consideration of these models are a function that the independent Legal Services Commission recommended in Chapter 3 could usefully carry out.
- 5.9 The lack of transparent objective criteria for the title of Senior Counsel, and the fact that it is not monitored and never revoked, have made it an unreliable indicator of quality, and likely to distort competition in legal advocacy services. The Competition Authority recommends that this situation be rectified, and the title opened up to solicitors who advocate in court, so that the title of Senior Counsel becomes a useful quality signal facilitating competition in legal services.
- 5.10 Truthful informative advertising is beneficial to consumers and is pro-competitive. Advertising by lawyers in Ireland is regulated and there are considerable differences between the restrictions imposed on barristers and on solicitors. The only form of advertising that barristers are permitted to engage in is to put their name, contact details and experience on the Bar Council's website and in the Law Society's Law Directory. Solicitors have a lot more freedom to advertise. The Competition Authority's recommendations reflect differing immediate priorities for reform. The Authority recommends the liberalisation of barrister advertising subject only to limited restrictions, namely that advertising is not misleading, factually incorrect, likely to bring the administration of justice into disrepute or otherwise be considered in bad taste. The Competition Authority recommends that the existing regulations on solicitor advertising should be changed in one specific respect; to allow solicitors to advertise as specialists in their chosen areas of law. In the longer term the Competition Authority recommends that the Legal Services Commission should have responsibility for monitoring advertising in legal services and promoting pro-consumer reform.
- 5.11 If a consumer wishes to switch solicitor, for example in response to dissatisfaction with the quality of service received, the solicitor has, in certain circumstances, the right to withhold the client's files, i.e. not transfer them to another solicitor. This right has the potential to jeopardise the client's case and serves to dampen competition between solicitors. It is not necessary for the protection of solicitors, and the Competition Authority recommends its removal by way of legislation. Prior to March 2006, the Bar's Code of Conduct precluded a barrister from taking over a case from another barrister until that other barrister had been paid. That rule has been removed by the Bar.

Competition, Rivalry and Cooperation

5.12 The mission of the Competition Authority is:

“To ensure that competition works for the benefit of consumers throughout the Irish economy.”

5.13 This does not imply that all markets must consist of huge numbers of small buyers and sellers interacting via an auction process. The model of “perfect competition” is a hypothetical construct to show the opposite extreme to a monopoly. Competition does not require the complete absence of co-operation. Every market involves some co-operation to make it work - a firm is just a set of arrangements between workers, managers and contributors of capital, co-operating to supply goods or services. Even co-operative agreements between firms can be good for competition and are recognised as such in case law.¹⁸³

5.14 Competition implies that suppliers should, in general, be free to arrange, deliver and promote their goods or services in ways that suit their customers and customers should be free to choose the supplier that suits them. A variety of business structures and selling methods can coexist to best meet the needs of various consumers in a particular market and there is no one optimal model for all time. This is why firms make decisions on an ongoing basis with regard to, for example, mergers and acquisitions, advertising campaigns and outsourcing arrangements.

5.15 Any restrictions on suppliers, or on their customers, which interfere with this process must be justified by a valid overriding objective which cannot be achieved by less restrictive means.

Direct Access to Barristers

Summary

5.16 Direct access to barristers, i.e. between client and barrister without the services of a solicitor, is allowed only for a few approved bodies and then only for legal advice.

5.17 The Competition Authority strongly recommends that the Bar Council's Direct Access Scheme - whereby certain approved clients are allowed to approach barristers directly for legal advice - be extended to all members of the public. The option of going directly to a barrister for legal advice should not be reserved to a few approved clients.

5.18 Direct access for contentious matters, i.e. involving representation in court or other tribunals with power to decide between opposing parties, is a more complex issue and merits further analysis. From a competition perspective direct access for contentious issues is warranted but there are a number of regulatory issues surrounding clients' monies, touting and advertising which require further consideration. As such, the Competition Authority recommends that this issue should be considered further by the Legal Services Commission recommended in Chapter 3.

5.19 The Fair Trade Commission in its report on the legal profession recommended that all clients should be able to approach barristers directly, both for contentious and non-contentious business.¹⁸⁴

Nature of restraint

5.20 Rule 4.1 of the Bar's Code of Conduct prohibits a barrister from acting for a client without the instructions of a solicitor, except where otherwise authorised by the Bar Council.¹⁸⁵ Rule 2.19 prevents a barrister from directly or

¹⁸³ For example: co-operative purchasing or selling schemes among farmers.

¹⁸⁴ *Report of Study into Restrictive Practices in the Legal Profession* (March 1990), p 142.

¹⁸⁵ 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 a Trade Mark Agent.”

indirectly administering or handling the funds or assets of any client.¹⁸⁶ Taken together, these rules prevent the general public from having full direct access to the services of a barrister.

5.21 In May 1990, the Bar Council established a *Direct Professional Access Scheme* which involves approving certain organisations and bodies to have “direct professional access” to members of the Bar of Ireland for what it calls “non-contentious” matters. Organisations must apply for inclusion and “*must satisfy the Bar Council:*

- (1) *that the members of the body provide skilled and specialist services;*
- (2) *that the affairs and conduct of the body are regulated by constitutional provisions governing standards of admission of members and disciplinary measures for unethical and/or dishonourable conduct;*
- (3) *that the body or institution has a significant requirement for services of a barrister.”¹⁸⁷*

5.22 The above are the only publicly available guidelines in relation to how the Bar Council decides whether an organisation merits inclusion on the list of approved professional bodies. A wide range of bodies (professional, representative, regulatory etc.) are currently on the approved list of professional bodies, for example, Institute of Chartered Accountants in Ireland [Fellows and Associates], Commission for Aviation Regulation, Irish Congress of Trade Unions.¹⁸⁸

5.23 Approved bodies may have direct access to barristers for legal advice but not for legal representation in court or before tribunals dealing with issues between opposing parties. Barristers are not obliged to accept direct professional access clients, but may choose to participate in the scheme.

Effects of Restraint

5.24 The restriction on direct access for legal advice restricts certain buyers of legal services from directly approaching a barrister and obliges them to employ a solicitor first. This imposes an additional cost on the barrister’s client and prevents potential efficiencies from being realised. In some instances, direct access may result in lower overall costs to the client. This might be the case, for example, where the client had previously received advice from the same barrister in a similar matter, and knew how to ask for the required advice. In such an instance, the solicitor’s fee would appear to represent a totally unnecessary cost to the client.

5.25 The current limitations on access to barristers limit the number of providers of legal services that clients can initially access for litigation. The restriction also 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. There may be instances where direct access would result in lower overall costs for the client.

Rationale offered for the restraint

Direct access for legal advice

5.26 The Bar Council submits that it is justified in limiting direct access for legal advice to certain approved bodies. It argues that organisations such as those on the Bar Council’s approved list are better able to assess the quality of barristers’ services than the public and as a result would be in a better position to hire an appropriate barrister. The Bar Council says that this view:

“is reflected in the Direct Access scheme which targets organisations which are likely to make informed choices and which are coming from a position of economic and organisational strength.”¹⁸⁹

¹⁸⁶ Rule 2.19 provides as follows: “*In the interest of maintaining an independent referral bar barristers are prohibited from directly or indirectly administering or handling the funds or assets of any client and barristers shall not give any financial advice or assistance to a client or their solicitor on the investment of such funds or assets.*”

¹⁸⁷ http://www.lawlibrary.ie/ViewDoc.asp?fn=/documents/Direct_Professional_Access/thescheme.htm&CatID=8&m=d

¹⁸⁸ For the full list of bodies approved by the Bar Council see

http://www.lawlibrary.ie/ViewDoc.asp?fn=/documents/direct_professional_access/approvedbodies.htm&CatID=12&m=d

¹⁸⁹ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p.79.

Direct access for contentious issues

- 5.27 The Bar Council says that permitting full direct access would change the concept of the independent referral Bar. The Bar Council describes the independence of the Bar as an “*overriding duty to the Court*” above barristers’ personal interests, external pressures (for example, from other barristers or public opinion) and even the interests of the client in certain circumstances.¹⁹⁰ According to the Bar Council, the referral system whereby barristers are engaged only through solicitors and must take a case if they are available (subject to their usual fee) “*enables barristers to provide clients with advice which is more objective*”, as they are not engaged to manage the affairs of their clients or to hold their funds.¹⁹¹
- 5.28 The Bar Council says that although the “*continued existence of the independent referral bar necessarily entails that there are some services which barristers do not provide*”¹⁹², it believes that such an independent referral Bar has considerable advantages, in terms both of competition and the administration of justice.

International Experience

- 5.29 In England and Wales, where the concept of an independent referral bar also exists, direct access to barristers has now been extended to the public. However, although direct access is allowed both for advice and legal representation in court, barristers are prohibited from accepting instructions directly in areas of practice such as immigration or asylum work and family or criminal proceedings (subject to some exceptions). Where the brief involves a court appearance, the barrister is prohibited from doing the work of a solicitor in preparing the case. Barristers are not obliged to accept direct access work. A barrister who has indicated his/her willingness to undertake such work can refuse a direct access brief if it is in the best interests of the client that a solicitor be briefed.
- 5.30 Barristers in New South Wales (NSW) and Queensland are permitted to accept direct access briefs directly from the lay client for both legal advice and representation in court. Where the brief involves a court appearance, the barrister is prohibited from doing the work of a solicitor in preparing the case. While barristers in NSW and Queensland are permitted to accept direct access briefs, they are not obliged to do so.
- 5.31 The direct access scheme in Victoria, Australia allows a barrister to accept instructions or a brief from a member of an approved professional body or a lay client in a matter in which the client is directly concerned. Under the direct access scheme a barrister must not accept instructions to receive or handle client’s money, perform any administrative work not normally performed by a barrister, or perform *inter partes* work of a kind not normally performed by a barrister. A barrister in Victoria must decline a direct access matter if it is in the interests of the client that a solicitor be briefed.
- 5.32 The Faculty of Advocates in Scotland has a direct professional access scheme through which it awards status to approved bodies to instruct an advocate directly. Instructions to counsel by members under the scheme are accepted for advisory work, drafting of documents, and the conduct of proceedings before any public enquiry, tribunal or forum (other than a court), before which the instructing person may have a right of audience. Membership of the direct professional access scheme in Scotland is largely composed of professional bodies and government agencies.

Views of Interested Parties

- 5.33 Both the Irish Insurance Federation and the Self Insured Taskforce support the proposition that direct access to barristers’ services be widened. Both organisations submit that their members would benefit from being able to instruct barristers directly.

190 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p.14.

191 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p.24.

192 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p.76.

Analysis of the Competition Authority

5.34 Barristers offer two key legal services: legal advice and legal representation. In its Preliminary Report, the Competition Authority proposed that Rule 4.1 and Rule 2.19 be abolished so that unlimited direct access to barristers for both legal advice and legal representation is permitted or that the existing Direct Professional Access scheme be expanded in a manner similar to the new scheme in England and Wales.

Direct access for legal advice

5.35 In response to the proposals in the Preliminary Report, the Bar Council outlined its intention to promote an expanded Direct Professional Access Scheme in respect of advisory services. Before implementing a new Direct Professional Access Scheme, the Bar Council intends to explore the implications of a wider scheme by means of a public consultation. It intends to seek the views of organisations that already use the Direct Professional Access Scheme, potential users and other interested persons with regard to the needs and demands of potential participants.

5.36 Although organisations such as insurance companies may, on the whole, be better able to assess the quality of barristers' services than the general public, other businesses and members of the public will also often be well informed about the particular areas in which they seek legal advice, be able to put their questions to barristers in a succinct manner or already have the information compiled from an earlier experience. Barristers with previous experience in a particular sector of the economy should be particularly well placed to take instruction from lay clients from that sector.

5.37 The option of going directly to a barrister for legal advice should not be limited to a few approved clients. If the barrister believes that it is in the best interests of the client to see a solicitor in any particular case, he/she should be free to refuse direct access (as he/she is currently permitted to do). There is no evidence to suggest that widening direct access for advice would have any negative effect on the operation of an independent referral Bar or on the provision of legal services generally. It would instead have a positive effect on access to legal advice.

Direct access for contentious issues

5.38 The proposals of the Bar Council for extending its Direct Professional Access Scheme, referred to above, do not extend to contentious issues. The Council does not intend to allow direct access for this purpose.

5.39 Allowing direct access for contentious issues would increase the number of competing lawyers with the right to conduct litigation and as a result offer consumers greater choice in the market for legal services. Direct access for contentious issues could also reduce some clients costs by allowing them to cut out the services of a solicitor where they are not necessary.

5.40 The Bar Council submits that:

"The current system promotes certain efficiencies by dividing the services provided in litigation between barristers and solicitors. In contrast to advisory services, the running of a case requires both the skills of a barrister and the organisation, preparation and management of the case by another person, a solicitor. Barristers taking on the role of solicitors would substantially increase the costs to both individual barristers and customers".¹⁹³

5.41 If, indeed, the current system is the most efficient and provides the best value and service for consumers it is undoubtedly going to persist as the norm, even in a marketplace where direct access to barristers for contentious issues is permitted. As with the current direct access scheme a barrister could be entitled to refuse a direct access brief. The fundamental point is that barristers should in general have the freedom to choose how they operate, in response to their clients' needs.

193 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 77.

- 5.42 The Bar Council believes that allowing direct access for contentious issues would undermine the core values of the independent referral bar, namely: duty to the court, duty to promote the client's interest fearlessly, duty to accept instructions in any case ("Cab Rank Rule"), duty to act as a sole trader, duty of independence.
- 5.43 The Bar Council says there are several aspects to the duty to the Court:
- Not to deceive or mislead the Court;
 - To bring to the attention of the Court matters such as legal authorities that may not help the client;
 - To conduct proceedings to assist the Court in the effective and efficient discharge of the Court's duty to administer justice.
- 5.44 It is not clear how allowing direct access for contentious issues would affect a barrister's duty to the Court. Furthermore, the concept of referral is not necessary to promote or to discharge this duty to the Court, given that solicitors who appear in court have the same duty. The duty is not uniquely imposed on barristers.
- 5.45 The Bar Council states that it is the duty of the barrister to advance his or her client's case subject only to the paramount duty to the Court. In this connection, the barrister must not allow other matters or interests to intrude in the discharge of this duty. It would be illogical to suggest that a barrister representing a direct access client is not going to promote his or her client's interests fearlessly.
- 5.46 Allowing direct access for contentious issues would not affect a barrister's ability to practise as a sole trader. A barrister could continue to operate as a sole trader while taking on direct access briefs for contentious issues.
- 5.47 The Bar Council states that barristers "*must operate independently of their personal interests and any external pressures*" and that "*barristers are accountable only to the Court and to their client*". Direct access for advisory services has not altered a barrister's ability to operate independently of their personal interests and any external pressures. It is similarly unlikely that extending the direct access scheme will alter this ability to operate independently. Furthermore, allowing direct access for contentious issues would not alter a barrister's accountability, compared to the present situation.
- 5.48 Barristers in the State must, under the Bar Council's Rules, comply with the Cab Rank Rule, that is, accept a brief provided the barrister has the requisite expertise and experience and the client is prepared to pay the requested fee. The Bar Council submits that this ensures that every person has equal access to the best advocates, facilitating equal access to justice.
- 5.49 The current Direct Professional Access Scheme operated by the Bar Council allows barristers to decide whether they wish to make themselves available for direct access clients. If direct access was extended to contentious issues, barristers should still be allowed to decide whether they wish to make themselves available for direct access clients. The effect on access to justice from extending Direct Access to contentious issues would be no different than is currently the case under the Direct Professional Access Scheme.
- 5.50 The Bar Council also points out that if clients were allowed to approach barristers directly in all cases, barristers would be obliged to handle clients' funds, which they are prohibited from doing at present,¹⁹⁴ 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.

194 Rule 2.19 of the Bar's Code of Conduct, see paragraph 5.20 of this Report.

5.51 To allow direct access to barristers for contentious issues would require a regulatory system which enables barristers to handle clients' funds while offering protection to the client. Similarly, certain restrictions in relation to touting and advertising would need to be placed upon barristers in order to protect consumers. Neither of these obstacles appears to be insurmountable given that: a) there is a regulatory regime in place which allows solicitors to handle funds and b) legislation and regulations are in place which protect unscrupulous solicitors from preying upon vulnerable consumers. While the provisions relating to solicitors do not provide a quick-fix solution they do provide an excellent reference point.

Solution

5.52 The expressed intention of the Bar Council to expand the Direct Professional Access Scheme in advisory services is welcome, but limits on who can access barristers for legal advice are unnecessary. The Competition Authority strongly believes that direct access to barristers for legal advice should be extended to all members of the public. As is currently the case, barristers should be free to choose whether they wish to take on direct access briefs or not.

5.53 It is not clear from the Competition Authority's perspective why a barrister cannot represent direct access clients for contentious issues. There are some regulatory issues surrounding client's monies, touting and advertising which would need to be addressed but these are hardly insurmountable. The Competition Authority believes that direct access for contentious issues would be beneficial for consumers but that the issues surrounding its implementation should be examined in more detail, by the Legal Services Commission recommended in Chapter 3.

Recommendation 8: Allow unlimited direct access to barristers for legal advice

Details of Recommendation

Permit unlimited direct access to barristers for legal advice.

Action By

The Bar Council

December 2007

Recommendation 9: The Legal Services Commission should undertake research in the area of direct access

Details of Recommendation

The Legal Services Commission should be given the power to undertake research in any area of the market where reform may be beneficial for consumers or the functioning of the market.

Action By

Minister for Justice, Equality and Law Reform

The Legal Services Commission should undertake research in the area of direct access to barristers for contentious issues.

June 2008

Business Structures

5.54 There are several possible business structures for delivering goods and services: a limited company, a partnership (limited or unlimited), a sole trader and others. In any given market, one structure may emerge as more suitable and may come to dominate the market. Most large manufacturing and retail businesses in developed economies are organised as public corporations with outside shareholders and hired managers. Professional businesses are mostly structured as partnerships. This is true of consultancy firms, accounting firms, architects, medical practices and solicitors firms. However, different structures will often co-exist, perhaps in different niches within a broader market. The basic tenet is that the market will give rise to the business structure or structures which are most efficient.¹⁹⁵

5.55 In 1990 the Fair Trade Commission recommended that there:

“should be the greatest possible freedom allowed to individual solicitors and barristers to decide themselves upon the most suitable form of business organisation through which to offer their services to clients, with adequate safeguards to ensure the preservation of standards.”¹⁹⁶

5.56 The Fair Trade Commission also made specific recommendations in relation to how this “freedom” to choose organisational form could be achieved.¹⁹⁷ Despite these recommendations, little has changed in the intervening sixteen years and there are still a large number of restrictions on the way in which lawyers in the State can organise themselves:

- Barristers are not allowed to form partnerships among themselves;
- Barristers are not allowed to hold themselves out as practising as a group;
- Barristers are not allowed to form partnerships with solicitors (Legal Disciplinary Practices (“LDPs”)) or any other persons (Multi Disciplinary Practices (“MDPs”));
- Solicitors are allowed to form partnerships amongst themselves but partnerships with any other persons are not allowed i.e. LDPs and MDPs are prohibited;
- Solicitor-only firms are not allowed to incorporate, limit their liability or have non-solicitor owners.

5.57 These restrictions deny lawyers in the State the freedom available to nearly all firms in nearly all other sectors to choose the way in which they operate. The effect of these restrictions is that lawyers are unable to organise themselves in ways which could be more efficient. Furthermore, the restrictions on business structures limit the ability of lawyers to offer consumers alternative ways of delivering legal services. The proceeding sections discuss these restrictions and their effects in more detail.

Barrister Business Structures

Summary

5.58 Barristers in the State are required to operate as sole traders. Barristers are prohibited from operating in partnerships, chambers or any other business model.

5.59 The Bar has recently made changes to its Code of Conduct to permit groups of barristers to share

195 See, Dow and Lapuerta, (2005), “The Benefits of Multiple Ownership Models in Law Services”; available at <http://www.dca.gov.uk/legalsys/lreform.htm>

196 Report of Study into Restrictive Practices in the Legal Profession (March 1990), para. 11.35.

197 Report of Study into Restrictive Practices in the Legal Profession (March 1990), p 170.

administrative costs in premises not owned by the Bar Council. This relaxation in the rules does enable barristers to realise economies of scale as a result of the sharing of administrative costs. However this is, at best, a limited relaxation on the freedom of barristers to choose their organisational form.

- 5.60 The Competition Authority recommends that the current prohibition on barristers practising as a group be removed in order to allow barrister groups to build a reputation and to enable economies of scale to be realised from group advertising.
- 5.61 The Competition Authority further recommends that barristers be allowed to enter into partnerships with each other. Allowing barristers to form partnerships would allow them to benefit from the economies and efficiencies deriving from shared costs, shared work, shared risk and shared professional reputation. Clients would benefit from a choice of service delivery that suits their needs.

Nature of restraint

- 5.62 Up to March 2006, Rule 7.13 of the Bar's Code of Conduct prohibited barristers from sharing premises or facilities with other barristers.¹⁹⁸ Since the amendment of Rule 7.13 in March 2006, barristers may share facilities, premises and costs of practice, with other barristers.¹⁹⁹ However, Rule 8.6 of the Code of Conduct still prohibits barristers from carrying on their practices as partners, or as a group, or as professional associates, or from holding themselves out as such.²⁰⁰

Effects of restraint

- 5.63 Rule 7.13 prior to being amended had prevented barristers from organising themselves in groups, outside of the Bar Council's premises, for the purposes of sharing administrative costs. The restriction prevented barristers from organising the supply of their services in possibly more efficient ways and from realising potential economies of scale. The restriction in relation to the sharing of administrative costs by barristers has been removed by the change to Rule 7.13.
- 5.64 However, more significantly, Rule 8.6 still prevents barristers from organising themselves in ways other than as a sole trader. This has the effect of restricting alternative structures which could be more efficient and beneficial to the consumer.
- 5.65 For example, the restriction prevents barristers practising as a group of sole traders, and as such, prevents barristers' ability to exploit the potential efficiencies that can arise from being able to build a shared reputation and from the economies of scale that would flow from group advertising. The restriction further prevents barristers and consumers from reaping the benefits of barrister partnerships – increased pool of knowledge, reduction in transaction costs, new ways of doing business, shared risk and the ability to adapt to meet clients' needs.
- 5.66 Rule 8.6 may also act as a barrier to sustainable entry to the legal profession. As pointed out in Chapter 2, most new barristers have few cases and limited income in their first years;²⁰¹ this makes it difficult for them to continue in the profession in the long term.²⁰² The rule prevents new barristers from enjoying the relative security that

198 The old Rule 7.13 of the Code of Conduct provided: "No arrangements for the sharing of premises or facilities by two or more barristers shall be made without the consent of the Bar Council."

199 The new rule 7.13 provides: "Subject to compliance with the rules of this Code and instruments made under it, a barrister shall not have breached the Code of Conduct merely by sharing any facility, premises or cost of practice, including any capital or operating cost, with one or more other barrister. For the avoidance of doubt, a barrister is entitled to so share in a location not administered by the Bar Council."

The amendment to the rule formalises the situation whereby barristers have been operating for some time at premises not administered by the Bar Council. Approximately 50 barristers operate from premises at Arran Square, Dublin, and share their operating costs. Some are owner-occupiers and others are tenants. More recently, a number of barristers have purchased premises in a building on Capel Street, Dublin, and are likewise expected to share costs.

200 Rule 8.6 of the Bar's Code of Conduct provides: "In the interest of maintaining an independent Bar barristers shall not carry on their practices as partners or as a group or as professional associates or in such a way as to lead solicitors or others to believe that they are partners or members of a group or associated in the conduct of their profession as barristers."

201 See Chapter 2 for details of barristers' incomes.

202 That is, it directly raises the costs of sustainable entry by new barristers.

would result from being attached to or employed by a group of existing established barristers, or indeed, from forming such groups among themselves.²⁰³

Rationale for the restraint

5.67 The Bar Council submits that the requirement for barristers to operate as sole practitioners preserves the independence of *“barristers from each other, from solicitors and from other professional partners and as such promotes the ability of the barrister to:*

avoid risk of conflict of interest;

offer independent advice to clients unaffected by considerations of how such advice might impact upon the partnership or chambers;

discharge his or her obligation to the Court to appraise the Court of all relevant facts and issues of law;

act on behalf of any client who requests his or her services subject only to the requirement that the barrister is available to act and has the expertise to act;

*take on pro bono work unaffected by considerations as to whether his or her partner (who must necessarily bear some of the costs) approves of either the practice or the extent of the taking on of such work.”*²⁰⁴

5.68 In respect in particular of partnerships, the Bar Council further submits that the sole practitioner rule prevents market concentration or worse, a cornering of the market, and that it preserves the Law Library model for new barristers.

5.69 In respect in particular of chambers, the Bar Council points to the situation in the UK, where the number of places offered by chambers is insufficient to meet the demand, effectively precluding some qualified barristers from entering the market.

International Experience

5.70 In England and Wales, most of the 11,000 or so practising barristers operate from chambers. A barrister chambers is a group of individual barristers who practise at the same address, sharing the same administration services. Typically, the staff of a chambers are headed by a Senior Clerk, who together with Junior Clerks, and other support staff, including fee clerks for credit control, manage all aspects of the barristers' professional lives, including arranging court cases, and negotiating fees for the work done by the barristers. Barristers practising in chambers can advertise themselves as being members of those chambers.

5.71 There are no rules prohibiting two or more members of the same chambers from being instructed by different parties in the same case. Guidelines to ensure confidentiality in such instances are set out in the *“Client Confidentiality within Chambers Guidelines”* of the Bar Council's Professional Standards Committee.²⁰⁵ This ensures that the cab-rank rule can still be operated.

5.72 In a number of Australian States, for example New South Wales, Queensland and Victoria, barristers are allowed to organise themselves in chambers but not in partnerships. Similarly, in Scotland barristers are permitted to form chambers but not partnerships.

5.73 In Northern Ireland, barristers are not permitted to organise themselves in chambers or partnerships.

²⁰³ Of course, if partnerships were to be permitted, it would be necessary also that the Bar remove the prohibition on barristers employing other barristers on a contract of service, contained in Rule 7.6, which provides: *“A barrister shall not have breached the Code of Conduct merely by carrying out a specific task of research or opinion work given to the barrister by another barrister, or by giving such a task to another barrister, on terms that are mutually acceptable, so long as the arrangement does not involve any contract of service, a standing retainer or employment terms.”*

²⁰⁴ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 51.

²⁰⁵ Appendix 3 at <http://www.barcouncil.org.uk/documents/section6FINAL.PDF>

Analysis of the Competition Authority

Groupings

- 5.74 With the coming into effect of the new Rule 7.13 of the Bar's Code of Conduct, a group of barristers of any number can decide to buy or rent premises not administered by the Bar Council. They can share all the running expenses of the building, including whatever staff they deem necessary for its efficient operation. For example, there does not appear to be any prohibition on such a group employing a non-lawyer to manage the administration of the group. The only prohibition that distinguishes such a group from, say, a group practising in chambers in the UK, is that contained in Rule 8.6, which prohibits barristers from carrying on their practice as a group, or from carrying it on in such a way as to lead others to believe that they are a group. The effect of this rule on a group sharing premises, overheads and staff would seem to be that they cannot advertise themselves, either directly or by implication, as a group.
- 5.75 The Competition Authority welcomes the changes made by the new Rule 7.13 in that it enable barristers to share premises and running costs. These cost savings can in turn be passed on to consumers. Nevertheless, while Rule 8.6 still remains in force, barristers sharing premises cannot advertise as a group, nor can individual barristers benefit from the possibility of building a shared reputation.
- 5.76 In the light of the new rule, most of the Bar Council's arguments in opposition to barristers practising or holding themselves out as a group cease to have any real merit.
- 5.77 In the context of a grouping of barristers (analogous to chambers), the argument that barristers' independence would be weakened ceases to have merit. As a barrister in a grouping would continue to be a sole trader, risks of conflict of interest would not arise any more frequently than they do at present. Such a barrister would still be able to offer independent advice, discharge all his/her obligations to the Court, act on behalf of any client seeking his/her service or take on *pro bono* work at his/her own discretion.
- 5.78 There does not appear to be any reason why the independence of a barrister in a group would be affected if the group were allowed to advertise as a group, or hold itself out as a practising group. The Bar Council has not adduced any evidence to show that this happens in jurisdictions where chambers are the norm. But in any event, independence can be assured in such a context by a clear and enforceable set of ethical guidelines, as the experience of the Bar of England and Wales shows.
- 5.79 The Bar Council points out that one of the effects of the chambers system in England and Wales is that a newly qualified barrister who wishes to practice must obtain a place in a chambers; while in Ireland, a newly-qualified barrister commences practice in the Law Library. The Bar Council points out that the number of places offered by chambers in the UK is insufficient to meet demand:
- "One of the difficulties associated with that system concerns people who have qualified but who cannot obtain access or entry into chambers. Such barristers are effectively precluded from practice without any opportunity to even begin to practice and clearly such a scheme may operate in an anti-competitive fashion, and has been criticised for being elitist."*²⁰⁶
- 5.80 The situation in England and Wales differs from that in Ireland, in that chambers are the only means whereby a barrister can commence practice. In Ireland, on the contrary, every barrister who has been called to the Bar is entitled, on payment of the appropriate fee, to a place in the Law Library.
- 5.81 At present, at his or her call to the Bar, each barrister gives an undertaking to the Chief Justice that if he/she intends to practise, he/she will become a member of the Law Library. This means that even those barristers who

206 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 42.

(should they wish) become members of a group would also remain as members of the Law Library, and continue to pay a Law Library fee, as is currently the case.

- 5.82 In those circumstances, there would seem to be no reason why the Bar Council could not stipulate that devilling, i.e. apprenticeship, must be carried out in the Law Library rather than in the premises of a group of barristers.
- 5.83 The Bar Council states that the Competition Authority has failed to examine any other jurisdiction where various business structures have been shown to co-exist successfully. Most jurisdictions that allow a number of alternative business structures to co-exist do not distinguish rigidly between solicitors and barristers, for example the United States and New Zealand, and thus are not directly comparable. No jurisdiction with barristers as a separate branch from solicitors allows barrister partnerships. With regard to co-existing models of sole traders only (no partnerships): some Australian states have both chambers and a law library and the two models co-exist – the barristers in the law library forming the minority. This may simply suggest that the chambers model is a better model for the delivery of barrister services in most cases. The experience of England and Wales - where an attempt to introduce a law library model alongside chambers failed – must be recognised in the context of a long established history of chambers. In Ireland, the law library model is the business structure with the long established history and thus likely to be retained.

Partnerships

- 5.84 Allowing barristers to form partnerships would allow them to benefit from the economies and efficiencies deriving from shared costs, shared work, shared risk and shared professional reputation. Clients would benefit from a choice of service delivery that suits their needs. Barristers practising in a partnership would no longer be required to be sole practitioners.
- 5.85 Having barristers in the one firm provides a one-stop shop; consumers will hire a firm of barristers as opposed to having their solicitor hire, on their behalf, a certain number of independent senior and junior counsel. Firms naturally draw together persons with differing levels of experience and differing areas of expertise. This enables the consumer to gain more rounded legal advice, as barristers acting in a firm can discuss and give advice to other barristers within the firm. Having barristers in one firm could also reduce search costs for consumers; for example if a technical issue surrounding contract law arose in a case the consumer (through their solicitor) would not have to seek out and retain a contract expert as well as their own barrister.
- 5.86 A more flexible organisational system, where new entrants could enter a partnership with established barristers, would enable new barristers to have some form of guaranteed income for their first few years. 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.

Excessive market concentration

- 5.87 The Bar Council believes that the sole trader rule assures competition in the provision of advocacy services and prevents market concentration, or worse, a cornering of the market. This argument appears to have even greater force if one divides barristers into different sub-markets based on quality and competence. If all or most of the top quality barristers of one specialisation formed a partnership there would be a reduction in choice for the consumer who needed a lawyer from that specialisation, together with the possibility of fee increases.
- 5.88 An outright ban on any form of market concentration is disproportionate to preventing a cornering of the market, i.e. excessive market concentration. Competition does not imply that all co-operation is anti-consumer.

Competition implies that lawyers should, in general, be free to organise their services in ways that suit their clients. Moreover, to encourage competition and choice a more proportionate rule would be to stipulate that barristers from the same partnership should not represent clients on opposing sides of a case. Such a stipulation would, particularly in specialised areas, prevent all or most of the barristers specialised in that area from forming partnerships with each other. In order to ensure that they continued to get work, they would be more likely to form several partnerships specialising in that area, or to form partnerships of mixed specialisation. In this way, excessive concentration is deterred while allowing barristers to deliver their services in a variety of ways to suit their clients.

The cab-rank rule

- 5.89 With regard to market concentration more generally, the Bar Council believes that no market concentration or formal groupings should be allowed and that the consumer continues to be able to choose the exact barrister of his/her choice, assuming the barrister is available.²⁰⁷
- 5.90 Stipulating that barristers from the same partnership should not represent clients on opposing sides of a case would imply that clients would not always be able to choose their preferred barrister if that barrister worked in the same partnership as the opposing side's barrister. Thus it would represent a nuancing of the cab-rank rule - whereby barristers are required to *"act on behalf of any client who requests his or her services subject only to the requirement that the barrister is available to act and has the expertise to act"*²⁰⁸ – by essentially changing the definition of what it means to be available.
- 5.91 The matter is a trade-off between allowing barristers to develop new work practices and efficiencies, for the benefit of consumers, and having unlimited choice among individual barristers. First, it is important to note that allowing barristers to form partnerships will not force them to do so – the model of sole trader will still be allowed. Allowing alternative business structures to exist does not imply that they are better models, only that barristers should be free to choose the model which best serves their clients. The co-existence of a number of models will allow barristers' services to respond to the different needs of different consumers. Second, as the Bar of Ireland grows in size, as it is doing every year,²⁰⁹ consumer choice is growing but it also becomes more difficult for solicitors to know of all the relevant barristers. Allowing barristers to form partnerships, while stipulating that each partnership cannot represent two sides of a case, strikes a balance between an over-liberal approach to allowing mergers on the one hand, and protecting against excessive concentration, on the other.

The Law Library

- 5.92 The Bar Council, in its response to the Preliminary Report, draws attention to the facilities afforded to barristers, especially new entrants, by membership of the Law Library. The Council states that these costs are borne collectively, and if barristers were allowed to form partnerships, members of such partnerships would no longer wish to subsidise the Library system, thus increasing costs for those participating in it, to the ultimate detriment of clients.

207 The Bar Council also points out that a Senior Counsel in a partnership would have an incentive to recommend a junior counsel from the same partnership and states that a solicitor is best placed to put together a team of barristers for a case. Allowing barristers to form partnerships would not prevent solicitors from deciding which counsel to use, as they do now.

208 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 51.

209 See Chapter 4 for numbers of graduates from King's Inns.

Table 12: Law Library Subscription Fees 2006/07²¹⁰

Category	Location/seat	Fee
New Junior Counsel	Dublin without seat only	€1,460 + €1,500 entry fee = €2,960
Second year Junior Counsel	Dublin with seat	€1,900
	Cork with seat	€950
10th year Junior Counsel	Dublin without seat	€4,350
	Dublin with seat	€5,150
	Cork with seat	€2,575
Senior Counsel	Full subscription	€8,400
	Full subscription without seat	€7,600
	Reduced subsidy for longest serving members	€1,680

5.93 Though the Law Library model may be seen as allowing entrants to commence practice with minimum overheads, allowing barristers to commence as employees offers them the opportunity to get experience with no overheads at all. The Bar Council submits that the introduction of partnerships would lead to the barristers who operate out of the Law Library being considered second class barristers and thus, to the demise of the Law Library. In order to preserve the Law Library, which is expanding all the time with the increasing number of barristers, on some scale, the Bar Council could require devilling, i.e. apprenticeship, to be completed in the Law Library and continue to subsidise this through the fees charged for the regulation of the profession (i.e. Law Library subscriptions). As mentioned earlier, at present each barrister gives an undertaking to the Chief Justice that if he/she intends to practise, he/she will become a member of the Law Library. There is no reason why this position should change, a barrister could be a member of both the Law Library and a partnership.

Independent Advice and Conflict of Interest

5.94 The Bar Council submits that barristers have duties to clients which are incompatible with having duties to partners. The Council submits that:

*"the ability of a barrister to take on the cause of what may be an unpopular client and to present his or her case fearlessly and in a manner which may displease powerful interests, other clients or in a manner which may bring the barrister personal professional unpopularity is **necessarily** lessened by the extent to which the barrister is accountable to others"*²¹¹ (emphasis added).

5.95 The concern of the Bar Council is that the administration of justice will suffer because barristers will be tempted to renege on the cab-rank rule and avoid unpopular causes or advise clients in a manner which may bring revenue to the partnership but not necessarily be in the interests of the client.

210 There are 46 different Law Library subscription fees depending on whether a barrister is a junior counsel or senior counsel, how long he/she has been in the Law Library, whether he/she practices in Dublin or Cork and whether he/she prefers to pay for an assigned seat in Dublin or not. In addition, new barristers must pay entry fees - €1,500 in 2006/07. The figures above are given as an illustration of the 46 fees.

211 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 52.

- 5.96 Both of these concerns and potential lapses in duties already arise under the current sole trader model. All barristers have an incentive to advise a client to pursue a case to bring themselves revenue; all barristers have an incentive to avoid unpopular causes and falsely claim to be unavailable. The expectation is that barristers rise above such temptations and to do otherwise would hurt their long-term career. The Bar Council's concern is that barristers in partnership will be more tempted to breach their duties and the administration of justice may suffer.
- 5.97 Barristers are not the only profession with duties to their client which may conflict with the professional's own material gain. Any employee or business partner can be confronted with dilemmas concerning compliance with rules or laws where this may not be in the immediate interest of their employer or business partners. Common examples include compliance with health and safety legislation or legislation regarding the sale of goods and services. Addressing these problems does not require that only independent sole contractors should supply the market.

Obligations to the Court

- 5.98 The Bar Council states that the sole trader model ensures that a barrister will “*discharge his or her obligation to the Court to appraise the Court of all relevant facts and issues of law*”²¹² This argument is without foundation. Currently, if a barrister fails to discharge his/her obligation to, for example, cite an authority i.e. reveal case law, which is unfavourable to his/her client, this can put him/her in contempt of court and/or lead to a complaint to the Professional Practices Committee alleging professional misconduct by misleading a court. This can potentially result in the barrister being struck off, but word of mouth of a breach will also damage a barrister's career prospects.²¹³ According to the Bar Council, such breaches of the Bar's Code of Conduct with regard to misleading a court tend to be investigated following a complaint from a client or, more usually, a complaint from counsel on the opposing side of a case. Luck can also play a part in detecting actual breaches.²¹⁴ This situation will not change if barristers are allowed to form partnerships.
- 5.99 Breaches of the Bar's rule regarding misleading a court will be no more or less likely to be detected, investigated or penalised in the context of barrister partnerships. The severe penalty of being struck off, and the more informal damage to a barrister's reputation – which could be extended to the partnership - will have the same effect of deterrence as it does now.

Pro bono/“no foal no fee” work

- 5.100 The Bar Council is of the view that the sole trader model is:

“conducive to representation on a no foal no fee basis and that no foal no fee services ensure an equality of arms in the conduct of litigation in many areas”.

Certainly, “no foal no fee” services are an important aspect of access to justice and an unusual market feature. What is not obvious is that allowing business structures other than sole trader models would jeopardise this feature in any way. Currently many solicitor firms offer “no foal no fee” services and solicitors are allowed to and do organise themselves in partnerships.²¹⁵

- 5.101 Barristers benefit from “no foal no fee” clients not only when they win and can charge a fee but also when they are involved in a high profile case, which might not otherwise have been taken but for the no foal no fee option. The ability of barristers to enhance their reputation, and earn income, from “no foal no fee” cases will still exist in a world where barristers are allowed to form partnerships and is likely to be a feature of competition between barrister partnerships.

212 Submission of the Council of the Bar of Ireland to the Competition Authority. July 2005, p 51.

213 Source: Information provided by the Bar Council during enquiries, p. 61.

214 Source: Information provided by the Bar Council during enquiries, p. 61.

215 To be clear, both sole trader solicitors and solicitor partnership firms offer “no foal no fee” services.

5.102 In fact a barrister partnership may be more likely to take on “no foal no fee” work as the cost and risk is spread among a pool of barristers. A barrister operating as a sole trader must shoulder the entire risk of a “no foal no fee” case and as such is more unlikely to take on high risk cases as it could mean no pay for the entire case. On the contrary, a barrister in a partnership can take on high risk cases knowing that the risk of the case is spread amongst the partnership and as a result, regardless of the outcome, the barrister will be guaranteed a share of the partnership’s other activities. Risk-sharing is one of the fundamental reasons for firms and corporate structures.

Solution

5.103 In its Preliminary Report, the Competition Authority proposed that the Bar should amend its Code of Conduct to remove the sole practitioner requirement on barristers. The following options to replace this prohibition were 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.

5.104 The Bar has not adopted either option. Informal groupings of barristers are, however, now permitted for the purpose of sharing premises and running costs. These *de facto* groups should be allowed, if they so wish, to realise the economies and efficiencies to be achieved by holding themselves out, whether by advertisement or any other means, as practising in a group.

5.105 The Competition Authority further recommends that barristers be allowed to enter into barrister partnerships. Allowing barristers to form partnerships would allow them to benefit from the economies and efficiencies deriving from shared costs, shared work, shared risk and shared professional reputation. Clients would benefit from a choice of service delivery that suits their needs.

5.106 Allowing partnerships does not mean restricting sole traders; barristers will be free to choose whatever alternative suits them and it will be the market which will determine the most efficient method. After working in a partnership there is always the possibility of returning to being a sole practitioner and using contacts/experience gained in partnership as a sole practitioner.

Recommendation 10:**Barristers sharing premises should be allowed to promote themselves as a group****Details of Recommendation**

Barristers who share premises and costs should be permitted to hold themselves out as practising as a group.

Action By

The Bar Council
December 2007

Recommendation 11:**Barristers should be allowed to form partnerships****Details of Recommendation**

Barristers should be allowed to offer their services in partnerships, subject to appropriate regulation.

Action By

The Bar Council
December 2007

Other Potential Business Structures for Legal Services

Summary

- 5.107 Lawyers in Ireland are subject to various restrictions in the way they organise the delivery of their services. This section examines the rules prohibiting solicitors and barristers from forming partnerships (Legal Disciplinary Partnerships or “LDPs”), the restrictions prohibiting lawyers from sharing fees with non-lawyers (Multi-Disciplinary Partnerships or “MDPs”) and a number of restrictions on the way in which solicitor firms can finance and organise themselves.
- 5.108 Though there are benefits to consumers of legal services from these different business models, they each raise regulatory issues, for example regarding how and by whom the new business entity should be regulated. The Competition Authority does not make any recommendations regarding alternative business structures at this time but recommends that they be looked at again in more detail in the future, by the Legal Services Commission recommended in Chapter 3.
- 5.109 For completeness, the Competition Authority’s analysis of each of these issues in the light of submissions received following the Preliminary Report is given below.

Legal Disciplinary Practices and Multi-Disciplinary Practices

Nature of restraint

- 5.110 Sections 59 and 64 of the *Solicitors Act 1954*, prohibit a solicitor from sharing fee income with a non-solicitor.
- 5.111 However, Section 71 of the *Solicitors (Amendment) Act 1994*, allows the Law Society, with the concurrence of the Minister for Justice, Equality and Law Reform and the Minister for Enterprise, Trade and Employment, to make regulations in respect of the sharing of fees between a solicitor and a non-solicitor arising either from a partnership between them or from an agency arrangement concluded between them. To date, no regulations have been made.

5.112 Barristers are prohibited, by Rule 7.14 of the Bar's Code of Conduct, from entering into partnership with any professional, whether a barrister or solicitor or member of another profession.

Effects of restraint

5.113 The prohibitions have two effects. First, they prevent the formation of legal disciplinary practices (LDPs), that is, practices composed of both solicitors and barristers. Second, they prevent the formation of multi-disciplinary practices (MDPs), practices composed of lawyers and other professionals.

5.114 The prohibition on LDPs prevents barristers and solicitors from working together within one business entity. The result is that consumers face a double mark-up on the services they receive. The consumer pays the mark-up associated with the solicitor's fee and the mark-up associated with the barrister's fee. However, when a consumer uses a bundled service the consumer only faces one mark-up, that of the single business entity.

5.115 The ban on the formation of MDPs prevents the supply of inter-related services together in a way which may generate synergies known as economies of scope. It prevents 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. Where economies of scope exist, they should result in lower costs to clients. The prohibition also limits the ability of clients to benefit from a "one-stop shop" and hinders innovations which might otherwise result from the combination of different services, which could allow for new products or services to be developed to the benefit of clients.

Rationale offered for restraint

5.116 First, both the Bar Council and the Law Society say that the objective of the prohibition on sharing of fee income is to ensure the proper, independent practice of the legal profession, free from undue influence.

5.117 With reference to legal disciplinary practices, both the Bar Council and the Law Society argue that barristers are more likely to give independent advice if they remain separate from solicitors. They submit that if a barrister were in partnership with a solicitor, he/she might not give disinterested advice in the client's best interest when asked to comment, as he/she would be influenced by the desire to keep the case within the firm. Someone one step removed from the client might be better placed to give advice which the client might view as bad news and be heeded.

5.118 The Law Society adds that the prohibition on solicitors sharing fee income with non-solicitors facilitates competition in the market for solicitors' services and helps promote 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 solicitors' firms and is particularly beneficial for clients based outside Dublin.

5.119 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 might form partnerships with a number of barristers, leading to fewer barristers being available to provide services to smaller solicitors' firms.

5.120 The Law Society submits that the ban on MDPs protects the core values of the solicitors' profession, namely the independence of legal advice, the duty of loyalty to the client and avoidance of conflict of interest, the duty of confidentiality and the client's right to legal professional privilege. The Bar Council's concerns in relation to allowing barristers to form partnerships with solicitors extend equally to barristers forming partnerships with non-lawyers.

International Experience

5.121 In England and Wales neither the Law Society nor the Bar Council are averse to the idea of legal disciplinary practices the formation of which was recommended by the Clementi report:

"In its response to the Consultation Paper the Law Society favours, subject to conditions, lifting the restriction on solicitors entering partnerships with other lawyers and non-lawyers (rule (b) in paragraph 2 above). As regards rule (a) in paragraph 2, the Bar Council has indicated that it is prepared to permit barristers to enter partnership with other lawyers, subject to regulation by a recognised body other than itself; but continues to argue that it will not permit partnerships among barristers under its direct regulatory auspices."²¹⁶

5.122 The UK's Department for Constitutional Affairs White Paper *"The Future of Legal Services: Putting Consumers First"* goes further and proposes that barriers will be removed to make it easier for providers of legal services in England and Wales to organise themselves through alternative business structures ("ABS") with lawyers and non-lawyers alike:

"Different types of lawyers (e.g. solicitors and barristers), and lawyers and non-lawyers, will be able to work together on an equal footing in alternative business structures ("ABS") firms."²¹⁷

5.123 In both Northern Ireland and Scotland barristers and solicitors are prohibited from forming either multi-disciplinary or legal disciplinary partnerships.

5.124 In New South Wales and Queensland, Australia, there is a legislative basis for legal services to be provided by lawyers in conjunction with other lawyers and/or non-lawyers in incorporated practices and multi-disciplinary partnerships. However, these States' respective Bar Council's rules, prohibit members of the bar from entering into any partnership.

5.125 Lawyers are allowed to operate in multi-disciplinary practices in Canada, subject to the following:

- Effective control of the practice must rest with the lawyers;
- Lawyers are responsible for ensuring non-lawyers' compliance with the Law Society regulatory scheme and that non-lawyers' services are provided with the appropriate level of skill and competence;
- A multi-disciplinary partnership is required to maintain professional liability insurance for non-lawyers.

Analysis of the Competition Authority

Legal Disciplinary Practices

5.126 The objective that advice given by a barrister be independent is a valid one, 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.

5.127 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.

²¹⁶ Review of the Regulatory Framework for Legal Services in England and Wales, Final Report, December 2004, p 107.

²¹⁷ *"The Future of Legal Services: Putting Consumers First"*, Department for Constitutional Affairs, p. 39, October 2005.

- 5.128 If LDPs were permitted it is possible that a large number of the most capable advocates would be enticed to work for the larger city-based firms. It is highly unlikely that barristers would form partnerships with small rural firms. In such an event it is possible that smaller rural and urban clients would no longer be able to access those advocates. As a result there could be a reduction in the supply and quality of advocacy services for smaller buyers. However, these worries are only likely to arise if the largest solicitors tie up a significant proportion of the currently independent barristers.
- 5.129 The argument that there could be a reduction in access has more force if one divides barristers into different sub-markets based on areas of specialisation. In some specialist areas of the law, for example defamation, there are only a small number of highly experienced and expert barristers. If even one of these were to join a large city firm this could have a negative effect on access to justice and competition by allowing lower quality barristers charge a higher rate and/or allowing the existing expert barristers charge a higher rate. The scenario laid out above is based upon the assumption that the large solicitor firms will choose to foreclose their smaller rivals by denying access to the services of barrister partners. It is not obvious that this would occur.
- 5.130 As it currently stands, a lay client hires a solicitor and where required a solicitor hires a barrister on the client's behalf. While this is a one-stop shop, it does not eradicate the double mark-up that the client faces. Namely, a client pays a solicitor's fee and a separate barrister's fee. As the solicitor and the barrister are separate economic entities each fee will include their respective mark-ups.
- 5.131 Allowing lawyers to organise themselves in LDPs would benefit clients by allowing them to avail of a one-stop shop where the client will no longer have to pay a double mark-up. As the solicitor and barrister would both work for the same economic entity there would only be only one mark-up, that of the firm. The most likely providers of such an integrated service would be the city-based firms.
- 5.132 The Bar Council points out that there is an extensive regulatory structure in relation to solicitors and the handling of client funds, but that there is no similar regulatory structure for barristers as they are not permitted to handle client's money. If LDPs were allowed, barristers would need such a regulatory structure.

"The effect of the rules of partnership law is to make every partner in a firm responsible for clients' money handled by the firm, and for any misappropriation or misapplication of that money, whether or not he or she personally has access to the firm's client accounts. A barrister who becomes a partner in a firm of solicitors therefore needs to be regulated in relation to his responsibility for handling clients' money."²¹⁸

- 5.133 A further issue concerns the regulation of LDPs. One possible option is that lawyers in an LDP be regulated by their respective professional bodies. However, as pointed out above in the case of regulations regarding clients' funds this is likely to lead to a mismatch of different professional rules for different lawyers. Another possible option is that a single regulator, such as the Legal Services Commission recommended in Chapter 3, takes charge of regulating LDPs. The Bar Council believes that it would be more appropriate if regulation were done by a single regulator.

"the Bar Council considers it essential, in view of the nature of a partnership, that individuals who choose to practise together in a partnership should be regulated by a single regulator and subject to the same professional rules."

- 5.134 From a competition perspective there are undoubtedly benefits to allowing LDPs, however there are possible issues surrounding access to justice and regulation which require further consideration. Further research into, and consideration of, these issues are a function that the independent Legal Services Commission recommended in Chapter 3 could usefully carry out.

218 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p. 61.

Multi-Disciplinary Practices

- 5.135 As the Competition Authority is not recommending at this time that barristers should be permitted to enter partnerships with solicitors because of the need to examine in more depth issues surrounding access to justice, it follows that it will not recommend that they should be permitted to enter practices with non-lawyers. This section therefore discusses only whether solicitors should be permitted to form Multi-Disciplinary Practices (MDPs).
- 5.136 The Law Society submits that the rationale for the ban on MDPs is to protect the core values of the solicitors' profession, namely the independence of legal advice, the duty of loyalty to the client and avoidance of conflict of interest, the duty of confidentiality and the client's right to legal professional privilege.
- 5.137 In examining this issue, the Competition Authority has had regard to the judgement of the European Court of Justice in the *Wouters* case.²¹⁹ 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 accountancy profession in the Netherlands was not subject to the same requirements of professional conduct as was the Netherlands Bar.²²⁰ 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.
- 5.138 In order to determine whether a prohibition imposed by a professional body is necessary to ensure the proper practice of the profession concerned, the Court set out a three-fold test. A detailed examination of the suitability of every possible MDP between solicitors and non-solicitors is beyond the scope of this report. What is clear though is that *Wouters* does not vindicate a complete prohibition on MDPs.
- 5.139 A second point put forward against MDPs by the Law Society is that it would be difficult to devise a regulatory regime to protect solicitors' core values:
- "the problems of developing satisfactory regulation are real and hard to resolve. The Society therefore remains opposed to the introduction of MDPs in Ireland. The profession as a whole, and its clients as a whole, would suffer were there to be a regulatory failure affecting MDPs in which the legal profession had been involved."*²²¹
- 5.140 The Competition Authority agrees that there would be difficulties, but it does not believe that they would be insuperable. First, legislation and regulations that apply to solicitors would apply with equal force to solicitors operating in MDPs. Second, governance arrangements could be implemented in an MDP to ensure that solicitors would be in a position to comply fully with their ethical and professional responsibilities. For example:
- The legal profession's standards respecting confidentiality of client communications could apply in relation to legal services delivered by the MDP, and, when one MDP member's duty of confidentiality conflicts with another member's duty of disclosure, the MDP would fully disclose the conflict to the client immediately.
 - The MDP could implement procedures to ensure that all reasonable steps would be taken to preserve solicitor-client privilege, and to inform every client, at the commencement of the retainer, of any limitations of solicitor-client privilege arising from the MDP context.
- 5.141 While the Law Society could not regulate non-solicitor members of MDPs, it would be open to it to stipulate, in regulations, that if a non-lawyer in an MDP acted unprofessionally, or if the MDP as a corporate entity acted

²¹⁹ Case C-309/99, J.C.J. *Wouters and Ors v Algemene Raad van de Nederlandse Orde van Advocaten*, Judgment of 19 February, 2002

²²⁰ *Wouters* is authority for the following propositions:

A prohibition imposed by a professional body upon its members is a decision of an association of undertakings when it constitutes the intention of the profession that they should act in a particular manner in carrying on their economic activity.

When such a decision restricts competition, it will be prohibited by Article 81 if it goes beyond what is necessary to ensure the proper practice of the profession concerned.

²²¹ Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority, July 2005, p42.

in contravention of a regulation made by the Law Society, solicitors would be prohibited from delivering legal services through that MDP.

- 5.142 One of the potential benefits of MDPs is that consumers of legal services will have greater flexibility in deciding from where to obtain legal and non-legal services from new and innovative businesses. Furthermore, MDPs should be able to offer consumers two complementary services, at a lower price than those services would cost if they were purchased from two separate firms. This would arise where firms realise savings through economies of scale and reduced transaction costs.

Solution

- 5.143 It is clear that there are competition benefits to allowing both LDPs and MDPs. However, there are undoubtedly a number of other issues outside the realm of competition policy which require further exploration. For this reason the Competition Authority recommends that the issues surrounding LDPs and MDPs should be explored in more detail, by the Legal Services Commission recommended in Chapter 3.

Solicitor only practices

- 5.144 There are a number of restrictions on the way in which solicitors-only practices organise themselves. 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-solicitors, but whether solicitor only firms should be allowed to organise and finance themselves in alternative ways.
- 5.145 Solicitors are prohibited from incorporating so when two or more solicitors operate a practice together they invariably compromise a partnership.²²²
- 5.146 However, section 70 of the *Solicitors (Amendment) Act 1994*, allows the Law Society, with the concurrence of the Minister for Justice, Equality and Law Reform, to make regulations permitting solicitors to manage and control bodies corporate ("incorporated practices") which provide the same legal services as those provided by individual solicitors. To date, no such regulations have been promulgated.
- 5.147 Section 70 does not provide for a solicitor to work for an incorporated practice in which a non-solicitor has any financial interest, where that practice is offering solicitor services.
- 5.148 More generally, section 59 of the *Solicitors Act 1954*, prevents non-solicitors from running, owning or being shareholders in law firms.

Limited Liability Partnerships

- 5.149 Solicitors are not permitted to organise limited liability partnerships ("LLPs"), and consequently are subject to unlimited liability for any debts incurred by their legal practice.
- 5.150 The Preliminary Report asked for submissions in relation to limited liability partnerships for lawyers. The LLP structure allows professional firms to retain the benefits of the partnership structure, such as tax breaks and ease of operation, while reducing the personal liability of individual partners for torts and negligent acts committed by other partners.
- 5.151 The Law Society is in favour of limited liability partnerships for their members. However, no reason was given as to how limited liability partnerships would benefit consumers.

²²² See section 64 of the *Solicitors Act 1954* as amended by section 70 of the *Solicitors (Amendment) Act, 1994*.

- 5.152 Limited liability partnerships without outside ownership would not enable lawyers to raise additional capital. There is also the risk that the liability limitation of LLPs will create a disincentive for solicitors firms to adopt effective risk management systems to control negligence and malfeasance within the firm.
- 5.153 No recommendation is made in regard to limited liability partnerships because it is not clear that there are any competition benefits and there may be increased risks for consumers of solicitor's services. There may be other reasons why limited liability partnerships should be permitted but their analysis is outside the Competition Authority's remit. In this regard it is noted that the issue of limited liability partnerships is to be considered by the Law Reform Commission.

Incorporated Practices

- 5.154 Section 70 of the *Solicitors (Amendment) Act 1994*, discussed above allows the Law Society to make regulations to provide for incorporated practices.
- 5.155 Any benefits to competition by allowing solicitors to incorporate under section 70 are tempered by the fact that non-solicitor ownership is prohibited. There are also a number of regulatory issues surrounding consumer protection, compensation funds and negligence which need to be considered in detail. For these reasons the Competition Authority does not make any recommendation in relation to incorporated practices. The issues surrounding incorporated practices should be further explored, preferably by the Legal Services Commission recommended in Chapter 3.

Non-solicitor ownership

- 5.156 The restrictions on non-solicitor ownership 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.
- 5.157 The restrictions also limit the ability of solicitor practices to hire business managers and reward them on an equal footing with solicitors. It also restricts the ability of firms to have owners or shareholders from differing backgrounds. This has the effect of stifling more efficient and innovative methods of delivering legal services to consumers.
- 5.158 The Law Society outlines that the fundamental reason for the restriction on outside ownership is the protection of clients.

*"Ownership of law firms by non-lawyers who are not bound by the same rules and codes of conduct would put at risk the core values of the profession. Where a non-lawyer has financial control, the independence of the lawyer(s) comes into question. He or she may be pressurised into acting in the commercial interests of the owner rather than in the best interests of the client."*²²³

*"Non-lawyer owners such as banks, supermarkets or whoever are obliged to seek maximum value for their shareholders. They can have different agendas to those of a firm of professional lawyers."*²²⁴

- 5.159 The commercial incentives faced by solicitors are no different from those faced by non-solicitors. There is no reason to believe that non-solicitors would be more commercially motivated, or that they would put extra pressure on their employees to breach their duties to clients. It is disingenuous to say that law firms are less driven by profits than their commercial counterparts.

²²³ Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority, July 2005, p43.

²²⁴ As above.

- 5.160 Conflict between quality, ethics and short-term commercial gain confront other industries than the law. Reputation, brand names, legal responsibility for negligence, existing rules and regulations and ethics help to uphold quality.
- 5.161 Conflicts of interest arise in almost every part of the economy. Regulations and professional codes address these problems and can work effectively in companies financed with outside equity. Permitting outside equity does not equate to a relaxation of regulations or professional rules concerning conflicts of interests and further regulations can be added if necessary.
- 5.162 The Law Society suggests that a non-lawyer owner could have an interest in the outcome of a legal issue. The solution would appear to be specific proposals to deal with this rather than a complete ban. For instance, a legal practice with non-solicitor 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.
- 5.163 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 laid out.
- 5.164 Non-solicitor owners of legal practices would not face the sanction of disbarment that applies to solicitors, but equivalent other sanctions exist or could be put in place.
- 5.165 The benefits of allowing non-solicitor ownership include increased access to finance, reduced risk for solicitor-owners and ability to retain high quality non-solicitor staff.
- 5.166 Increased access to finance will enable firms to expand and undertake efficiency enhancing projects which could reduce the price of certain legal services. Allowing non-solicitor ownership helps to spread risk among a larger group of persons and enables a firm to take on certain investments and projects which could reduce prices. High quality non-solicitor staff, from differing backgrounds, as things stand cannot be rewarded in the same way as solicitors in a firm, which makes hiring and retaining them difficult. Experts from differing backgrounds can drive efficiency and innovations.
- 5.167 It is clear that there are potential benefits to allowing non-solicitor ownership. However, the issues surrounding the regulation and running of these firms require more detailed examination. For this reason the Competition Authority does not make any recommendation in relation to non-solicitor ownership. These issues should be further explored, preferably by the Legal Services Commission recommended in Chapter 3.

Recommendation 12:

The Legal Services Commission should undertake research in relation to business structures

Details of Recommendation

The Legal Services Commission should be given the power to undertake research in any area of the legal services market where reform may be beneficial for consumers or the functioning of the market.

The Legal Services Commission should examine alternative business structures so that solicitors and barristers have the greatest possible freedom in choosing their preferred structure.

Action By

Minister for Justice, Equality and Law Reform

June 2008

Restrictions on Employed Barristers

Summary

- 5.168 A barrister in full time employment is not allowed to represent his/her employer in court.²²⁵ This means that a firm or organisation requiring legal representation in court must engage the services of another barrister.
- 5.169 The restriction preventing employed barristers from practising in court reduces choice and competition in the market for legal services. The restriction further has an impact on all potential clients by effectively reducing the supply of available barristers. Individual firms or organisations are denied the option of choosing their employed barrister to represent them. In addition once the independent barrister is hired he or she is unavailable to other potential clients.
- 5.170 The restriction is also disproportionate. The Bar Council has stated that employed barristers face a conflict of interest, to the court on the one hand and to their employer on the other. The Bar Council's concerns about possible conflicts of interest for employed barristers are legitimate and important but do not require that all employed barristers must never practice in court. In addition there is no similar rule regarding solicitors, i.e., while an employed barrister cannot represent their employer in court an employed solicitor is not precluded from doing so.

Nature of restraint

- 5.171 Three rules of the Bar's Code of Conduct when taken together have the effect of prohibiting a barrister in full-time employment from practising at the Bar, even if such a barrister's only client is his/her employer.²²⁶

Effects of restraint

- 5.172 This restriction creates a potential extra cost for a barrister's employer who is engaged in litigation. The employer must engage a barrister who is in practice at the Bar to represent him/her in court, even if the employer's preference would be representation by the employed "in-house" barrister.
- 5.173 The restriction removes a competitive constraint on independent barristers by preventing the option of supply from businesses or other organisations which employ in-house barristers. At present, such bodies are obliged to out-source the work of legal representation in court.
- 5.174 There is, however, one exception to the restriction on businesses or organisations wishing to be represented by an employee. Whereas employed barristers are precluded from practising in court an employed solicitor is able to do so.

Rationale offered for restraint

- 5.175 The Bar Council submits that the restriction is necessary to preserve the integrity of the independent referral bar:

*"Employed barristers are frequently in a position of conflict of interest. On the one hand, they owe a duty as an employee to obey the instructions of their employer. On the other hand, they are bound by a duty of disclosure to the court, including a duty to disclose relevant legal authorities to the court. [...] Put simply, such a situation contains an inherent conflict of interest which threatens the discharge of a barrister's duty to the court. It is not an uncommon complaint of a client and sometimes a solicitor that a barrister has revealed an aspect of law, a rule of procedure or a feature of their case to the court which is unfavourable."*²²⁷

²²⁵ The rule also prevents an employed barrister from representing a person, firm or organisation other than their employer.

²²⁶ Rule 2.6 excludes barristers from occupations which conflict with the duties contained in the Code. While it no longer expressly requires a barrister to keep his practice as his primary occupation, it must be read in conjunction with the express permission in rule 2.7 to engage in part-time occupations and with Rule 8.3 which confines membership of the Law Library to full-time practising barristers (subject to the exceptions already mentioned in respect of part-time employment).

²²⁷ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p. 84.

International Experience

- 5.176 In England and Wales an employed barrister may supply legal services (defined to include representation in court) to his employer.²²⁸
- 5.177 In Northern Ireland an employed barrister may represent his or her employer in court but not a third party.²²⁹
- 5.178 In NSW, Queensland, Victoria, and Scotland a barrister in full time employment is not permitted to practice at the Bar.

Views of Interested Parties

- 5.179 Both the Irish Insurance Federation and the Self Insured Taskforce support the proposition that barristers be permitted to represent their employers in court. Both organisations stress that their members have ongoing legal needs and should be permitted to use in-house employed barristers to represent them in court. The prohibition results in their members having to outsource, at considerable additional cost, barrister services. The Self Insured Taskforce believes there is no conflict of interest in barristers representing their employers and point out that in-house solicitors can and do represent their employers in court.

Analysis of the Competition Authority

- 5.180 Prohibiting qualified barristers from representing their employers in court has the effect of restricting competition in the market for barrister services in the State. If allowed, the use of in-house barristers would effectively increase supply, constrain barristers' ability to raise prices and also sharpen the incentive for barristers to provide good quality service. Allowing in-house barristers to practice in court would establish a credible threat of switching to self-supply if the firm or organisation considered that an external barrister's fees were too high. This would benefit all consumers of legal services. If the option of using an in-house barrister was permitted, even those organisations who, in general, preferred to outsource advocacy services might reconsider if barristers' fees began to rise.
- 5.181 The Bar Council's concerns about the conflict of interest posed to an employed barrister by his/her duty to the court on the one hand and to his/her employer on the other, are real concerns. However, they do not justify a total ban on employed barristers practising in court.
- 5.182 First, as the international experience above shows, barristers in England and Wales are allowed to represent employers without evident detrimental effect upon barristers' independence and duty to the court.
- 5.183 Second, in Ireland solicitors in employment are entitled to represent their employers at all stages of legal proceedings. While it is not common for such solicitors to represent their employers in the higher courts, there is nothing preventing them from doing so. Solicitors regularly represent their employers in the District Court.
- 5.184 Third, the potential conflict of interest pointed out by the Bar Council does not only arise when the steps of the court have been crossed. The same conflict can arise in preparing for litigation, yet in-house barristers are regularly involved with this stage of the work, with no evident general detrimental effect to the administration of justice.
- 5.185 Finally, if the prohibition were lifted, steps could be taken to ensure so far as is possible that the Bar's ethical standards were met. This could be done by redefining "barrister" in Rule 1.7(a) of the Code of Conduct to include employed barristers, who would then become subject to the Bar's Code of Conduct and its disciplinary procedures. An employed barrister could be obliged, for example, to inform his employer that he was bound by certain ethical standards and obligations of disclosure.

228 Rule 501 of the Code of Conduct of the Bar of England and Wales provides as follows: *An employed barrister whilst acting in the course of his employment may supply legal services to his employer and to any of the following persons: (a) any employee, director or company secretary of the employer in a matter arising out of or relating to that person's employment; (b) where the employer is a public authority (including the Crown or a Government department or agency or a local authority): (i) another public authority on behalf of which the employer has made arrangements under statute or otherwise to supply any legal services or to perform any of that other public authority's functions as agent or otherwise; (ii) in the case of a barrister employed by or in a Government department or agency, any Minister or Officer of the Crown.*

229 Section 26 of the Code of Conduct for the Bar of Northern Ireland

- 5.186 The potential conflict of interest described by the Bar Council is not unique to barristers. Other professionals also face the potential for a conflict between duties to employers and professional obligations. For example, actuaries employed by life assurance companies have statutory obligations which may be inconvenient to their employers.
- 5.187 Furthermore, any employee can be confronted with dilemmas concerning compliance with rules or laws where this may not be in the immediate interest of their employer. Common examples include compliance with health and safety legislation or legislation governing the sale of goods and services. Addressing these problems does not require that only independent sole contractors should be allowed to supply the market.²³⁰

Solution

- 5.188 The Bar should extend recognition of practising barristers to include employed barristers in order to remove the restrictions on employed barristers representing their employer in court. This would be achieved by amending Rules 2.6, 2.7 and 8.3 of the Code of Conduct for the Bar of Ireland. Allowing employed barristers to represent their employers in court would increase choice and competition in barristers' services and be consistent with the regulation of employed solicitors.

Recommendation 13:

Allow employed barristers to represent their employers in court

Details of Recommendation

The Bar Council should propose to the Bar of Ireland, the amending of Rules 2.6, 2.7 and 8.3 of the Code of Conduct of the Bar of Ireland to allow barristers in employment to represent their employers in court.

Action By

The Bar Council
December 2007

Senior Counsel

Summary

- 5.189 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 title "Senior Counsel". According to the Bar Council:

*"Senior Counsel (known as "silks") are the equivalent of Queen's 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."*²³¹

- 5.190 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.²³²
- 5.191 A senior counsel holds himself/herself out as having a particular expertise. His/her work is almost exclusively confined to advocacy and advisory work, as, unlike junior counsel, he/she does not draft pleadings.²³³ The title Senior Counsel signals to buyers of legal services that a barrister is particularly highly skilled in the legal

²³⁰ If taken to extreme lengths, solving potential conflicts of interest of the type highlighted by the Bar Council by restricting the activity of employees would suggest that in the organisation of commercial activity, independent arms-length contract relations should always be preferred to employer-employee relationships. This is not the case, even in relation to legal services, as shown, for example, by the existence of firms.

²³¹ www.lawlibrary.ie

²³² The application form for admission to the Inner Bar can be viewed at <http://www.barristers.ie/documents/publications/calls-to-the-inner-bar.pdf>

²³³ Pleadings are the claim and response of plaintiff and defendant, together with any subsequent documents setting out the issues in a case.

profession. This quality mark enables a barrister to command a premium for his/her work over and above that of a junior counsel.

- 5.192 The title of Senior Counsel has also facilitated 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. This distorts price competition among junior counsel because it becomes impossible for clients to determine whether they are being charged a competitive fee. The practice, discussed in more detail in Chapter 6, is anti-competitive and should cease. The rest of this section focuses on the awarding and monitoring of the title Senior Counsel.
- 5.193 The Competition Authority concludes that the title of Senior Counsel, as currently awarded, may distort competition because it is not a reliable mark of quality. There is no set of transparent criteria for awarding the title, neither is there any ongoing monitoring of quality, nor any procedure for withdrawal of the title in the event of a lessening of quality. The Competition Authority recommends the Government establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing it.

Nature of restraint

- 5.194 The title of Senior Counsel is a government-sponsored quality mark for the legal profession, currently 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 of restraint

- 5.195 As currently awarded (i.e., without objective criteria or monitoring of quality) the title of Senior Counsel has the potential to distort the market for legal services by leading solicitors and their clients to believe without adequate justification that in engaging senior counsel, they are always engaging a lawyer who excels in his/her field or that other practising barristers are not of the same calibre.
- 5.196 The title of Senior Counsel restricts competition between barristers, because junior and senior counsel do not compete on an equal footing. It is hard for experienced and expert junior counsel to compete with senior counsel for business as consumers believe that senior counsel work is of a higher quality than that of junior counsel. This is not necessarily the case as there are no objective criteria for appointing Senior Counsel.

Rationale offered for restraint

- 5.197 The Bar Council believes that the title of Senior Counsel is a mark of quality. The title provides information to buyers of legal services indicating that they will receive from senior counsel a higher level of advocacy skills than they would from junior counsel and thus distinguishes between providers of advocacy services.
- 5.198 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 has a different degree of specialisation and does not get involved in certain types of work. The Bar Council believes that advertising would not achieve the same result.
- 5.199 The Bar Council believes that the title of Senior Counsel should be retained, but agrees that the Government should establish objective criteria for awarding the title, together with a procedure for monitoring and removing it.

International Experience

- 5.200 In England and Wales in 2003, the Department for Constitutional Affairs published a consultation paper on the future of Queen's Counsel.²³⁴ The paper sought to explore whether the system of appointing Queen's Counsel was in the public interest, and whether it commanded public confidence. Based on the responses to the consultation paper a new scheme for appointing Queen's Counsel in England and Wales was developed by the Bar Council, Law Society and the Department for Constitutional Affairs. The new scheme for appointing Queen's Counsel was designed to ensure that the public interest was served by establishing a fair and transparent means of identifying excellence of advocacy in the higher courts. To this end new procedures also provide a mechanism for the removal of the title for cause.²³⁵
- 5.201 In Scotland, a recommendation is forwarded by the Lord Justice General to the First Minister, who exercises on the Queen's behalf her prerogative of appointing Queen's Counsel.²³⁶
- 5.202 In Queensland applicants are appointed by the Chief Justice from names selected by a group appointed by the Bar. The Chief Justice consults with other judges and the President of the Bar Association²³⁷
- 5.203 In New South Wales Senior Counsel are appointed by the President of the Bar Association on the recommendation of a selection committee consisting exclusively of members of the Bar. Consultation takes place with barristers outside the selection committee, with the Law Society and with members of the judiciary.²³⁸

Analysis of the Competition Authority

- 5.204 The title of Senior Counsel is intended to be a mark of quality. A quality mark is a signal to consumers designed to help them to overcome the difficulty of knowing less about the quality of the service being offered than does the person offering the service. When a quality mark works as it should, it enhances competition and helps the market for that service to function well. When a quality mark is inappropriately managed, it distorts competition and misleads consumers.
- 5.205 As a mark of quality, the title of Senior Counsel does not operate well, neither does it achieve the objectives identified by the Bar Council, for the following reasons:
- 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;
 - 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.
- 5.206 The failure to objectively award and properly monitor the title gives rise to certain problems in the market for legal services.

²³⁴ The title of Queen's Counsel is the UK equivalent of the Irish title of Senior Counsel.

²³⁵ Under the new system for appointing Queen's Counsel, recommendations for appointment will be made by an Independent Selection Panel. The Independent Selection Panel includes a substantial lay membership. It is chaired by an independent member and includes two barristers, two solicitors and a retired senior judge, as well as three further non-lawyer members. See <http://www.qcapplications.org.uk/external/pdf/SummaryOfProcessForQCAward.doc>

²³⁶ The Lord Justice General consults the Lord Advocate, the senators of the College of Justice, the Dean of the Faculty of Advocates and the Law Society of Scotland before submitting a recommendation to the First Minister. There is provision for feedback to applicants in the process. See <http://www.advocates.org.uk/profession/index.html>

²³⁷ Applications for the title are reviewed by the Senior Counsel Consultation Group ("SCCG"). The SCCG is appointed by the Bar and consists of a President, Vice-President and three senior counsel nominated by the President and approved by the Bar Council. After the applications are reviewed the Chief Justice is furnished with a list of names that the SCCG think are suitable for the title. Before making a decision on who should be appointed Senior Counsel the Chief Justice consults with the judges of the Supreme Court, the Chief Justice of the Federal Court and the President of the Bar Association. See <http://www.qldbarnet.au/Criteria.pdf>

²³⁸ The Selection Committee comprises the President of the Bar, the Senior Vice President of the Bar and three other senior counsel nominated by the President. The Selection Committee consults with various members of the judiciary before making its final selection. The President cannot appoint any applicant included in the committee's final selection whose appointment the Chief Justice opposes. See <http://www.nswbar.asn.au/>

- 5.207 First, because it is the practice for barristers who become senior counsel to charge higher fees than they did as junior counsel, the impression is created that their work is always more valuable than that of a junior counsel, which may not be the case. This presents a clear danger that consumers of legal services are being systematically misinformed as to the value of services on offer.
- 5.208 Second, the courts and the Taxing Master²³⁹ award higher costs and tax costs at a higher rate for senior counsel fees than for those of junior counsel, thus making the services of a junior counsel less valuable, although they may not be so in reality.
- 5.209 In its Preliminary Report, the Competition Authority proposed that the Government should establish objective criteria for awarding the mark, together with a procedure for monitoring and removing it. The Bar Council endorses this proposal, acknowledging that in order to be an effective quality mark the title of Senior Counsel must be awarded in a fair and transparent manner:

"In essence, the Bar Council supports the putting in place of criteria and procedures designed to ensure that the title of Senior Counsel operates effectively as a quality mark."²⁴⁰

Solution

- 5.210 The title of Senior Counsel, if transparently awarded and monitored, would be more likely to provide an accurate indication of quality. Any premium associated with retaining Senior Counsel would be justified on the basis of quality and not just by virtue of the title itself.
- 5.211 The Competition Authority also recommends (in this chapter) that direct access to barristers should be widened. Should this occur a transparently awarded and monitored quality mark could assist buyers of barristers' services in choosing the best advocate for their needs.

Recommendation 14: Establish objective criteria for awarding the title of Senior Counsel

Details of Recommendation

The Government should establish objective criteria for the awarding, monitoring and withdrawing of the title of Senior Counsel.

Action By

Minister for Justice, Equality and Law Reform

June 2007

Restrictions on Solicitors Acting as Advocates

Summary

- 5.212 Solicitors who choose to exercise their rights to advocate in higher courts face two restrictions which affect their ability to compete in the provision of advocacy services. First, solicitors are ineligible for the title of Senior Counsel, irrespective of their ability in the provision of advocacy services. Second, solicitors are prohibited from being the lead advocate in instances where a team of both barrister(s) and solicitor(s) is representing a client in court.
- 5.213 Given transparent qualifying criteria, as recommended above, allowing solicitors to become a Senior Counsel would increase consumer information and increase consumer choice. Removing the existing restrictions would

²³⁹ 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 6.

²⁴⁰ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 101.

increase the number of qualified advocates available to clients seeking legal representation and consequently would increase competition in the market for advocacy services.

- 5.214 Allowing solicitors to lead barristers in court would increase consumer choice and competition by increasing the range of options for how legal teams represent clients in court. For example, it would be possible for a solicitor to lead a team of barrister(s) and solicitor(s) in court, if a solicitor was best qualified and if the client so desired.

Nature of restraint

- 5.215 The Bar's Code of Conduct limits eligibility for the title of Senior Counsel exclusively to barristers.²⁴¹ Notwithstanding their right to appear as advocate in the highest courts, a solicitor cannot become Senior Counsel.
- 5.216 The Bar's Code of Conduct also prevents a barrister from being led in a case by anyone except another barrister (or, in exceptional cases, and at the discretion of the Bar Council, a foreign lawyer).²⁴² Solicitors are thereby prohibited from being the leader if and when a mixed group of barrister(s) and solicitor(s) presents a case in court. Unless amended, this restriction would apply even if solicitors were to be granted access to the title Senior Counsel.

Effects of restraint

- 5.217 Excluding solicitors from eligibility for the title of Senior Counsel restricts competition for the provision of legal services in the area of advocacy. The effect of the restriction is to deny to a supplier of legal services access to the most recognised, and State-sponsored, signal of quality.
- 5.218 The requirement in Rule 7.4 of the Code of Conduct, that a barrister must only be led by another barrister, means that even if a solicitor was awarded the title of Senior Counsel, he/she would not be able to avail himself/herself of the right of precedence in court whereby senior counsel leads junior counsel appearing for the same party.

Rationale offered for restraint

- 5.219 The Bar Council believes that the title of Senior Counsel is a mark of quality in advocacy. Given that barristers specialise in advocacy and since Senior Counsel is a mark designed to reward excellence in advocacy, the Bar Council believes the title should only be awarded to barristers.

International Experience

- 5.220 In England and Wales, the equivalent title of Queen's Counsel is open to all barristers as well as to solicitors who advocate in the higher courts. In Scotland, both qualified advocates and solicitor advocates may apply to be appointed as Queen's Counsel.
- 5.221 In Queensland appointment as Senior Counsel is restricted to practising barristers "*unless there are exceptional circumstances*".²⁴³ In New South Wales, the appointment of Senior Counsel is restricted to practising advocates.

Views of Interested Parties

- 5.222 The Law Society supports the proposal that the Government should establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing it. The Law Society also submits that solicitors should be eligible for the title of Senior Counsel.²⁴⁴

241 Only those admitted to the Inner Bar can use the title Senior Counsel and the Government awards the title only to barristers. Rule 11.1 of the Bar's Code of Conduct excludes solicitors by stating that: "*Admission to the Inner Bar is confined to practising barristers.*"

242 Rule 7.4 provides as follows: "*Where more than one barrister is briefed it is for the leader to determine when and to what extent any of them may be absent from the hearing and the consent of the instructing solicitor is also necessary for such absence as permitted by the leader. A barrister shall only be lead by another barrister save only in the case of a ruling of the Bar Council made pursuant to paragraph 7.15 hereof.*"

243 www.qldbar.asn.au

244 Submission of the Law Society of Ireland to the Competition Authority, July 2005, p 69.

Analysis of the Competition Authority

- 5.223 The fact that the title of Senior Counsel is not awarded to solicitors restricts competition for the provision of legal services in the area of advocacy by denying one group of suppliers of legal services, i.e. solicitors, access to a State-awarded signal of quality.
- 5.224 There is no justification for confining the title to barristers, to the exclusion of solicitors. Solicitors are trained in advocacy during the professional part of their training, and have a statutory right of audience in all courts.
- 5.225 The Bar Council itself points out that the title is a mark designed to reward excellence in advocacy. There is no reason, therefore, given transparent and objective qualification criteria, why a solicitor who excels at advocacy should not be eligible for the title.
- 5.226 A transparently awarded and monitored title available to solicitors would signal to clients which solicitors excel at advocacy. For example, clients who wish to avail of a “one-stop shop”, whereby a solicitor conducts an entire case from preparatory work to advocating in court, would benefit from a title which acts as a signal of quality.
- 5.227 In the longer term, broadening eligibility for the title of Senior Counsel would provide an incentive for solicitors to increase their provision of advocacy services. This would further increase consumer choice and competition in the market for advocacy services.
- 5.228 Solicitors are, however, further restricted in competing for advocacy services by the present requirement that a barrister must only be led by another barrister. A solicitor, even if he or she had the title Senior Counsel, could not avail of the right of precedence in court whereby Senior Counsel leads Junior Counsel appearing for the same party.²⁴⁵ This restriction should also be removed.
- 5.229 Restricting the title of Senior Counsel exclusively to barristers, and prohibiting solicitors from leading barristers, are disproportionate measures that do not serve the interests of consumers. Allowing solicitors to hold the title of Senior Counsel would increase competition and consumer choice. Allowing the possibility of solicitors leading barristers would introduce greater flexibility in the organisation and presentation of a case in court, including, if it is the client’s preference, the option of a solicitor leading a barrister.

Solution

- 5.230 The Bar should amend Rule 11.1 of its Code of Conduct to broaden eligibility rules so that solicitors as well as barristers can become Senior Counsel. As discussed earlier, the Government should establish objective criteria for awarding the title of Senior Counsel, together with a procedure for monitoring and removing it. Both barristers and solicitors should be eligible to be awarded the title.
- 5.231 The Bar should also remove Rule 7.4 of its Code of Conduct to remove the restriction on solicitors leading barristers in court proceedings.

²⁴⁵ There is one other relevant situation, not discussed in this report or in the Bar Council’s or the Law Society’s submissions, namely whether a solicitor, who is not a Senior Counsel should be able to lead a Junior Counsel engaged to represent a client. Current practice, as determined by the Bar’s Rule 7.4 requires that the solicitor cannot lead the Junior Counsel. Abolishing Rule 7.4 would allow this to happen.

Recommendation 15: Remove restrictions on solicitors advocating in court

Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland the amendment of Rule 11.1 of the Bar's Code of Conduct to remove the restriction on solicitors holding the title of senior counsel.	The Bar Council December 2007
The Bar Council should propose to the Bar of Ireland that Rule 7.4 of the Bar's Code of Conduct, which stipulates that a barrister shall only be led by a barrister, be abolished.	The Bar Council December 2007
The Government should, (where it awards the title of Senior Counsel and on the basis of transparent criteria consistent with recommendation 14) award the title to both barristers and solicitors.	The Government June 2007

Restrictions on Advertising

Summary

- 5.232 Truthful and objective advertising gives existing and prospective clients useful information which helps them to choose among competing lawyers.²⁴⁶ Unnecessary restrictions impinge on the ability of individual lawyers or firms to undertake effective and/or innovative and informative advertising campaigns. There are considerable differences between the restrictions imposed on solicitors and those imposed on barristers and consequently the Competition Authority's recommendations reflect differing immediate priorities for reform.
- 5.233 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 Society's Law Directory. The UK, in contrast, allows barristers the freedom to advertise, subject to certain limitations. The restrictions on advertising by barristers in Ireland are disproportionate and limit competition.
- 5.234 The Competition Authority recommends that the existing restrictions on barrister advertising should be significantly reframed. Barristers should be able to advertise subject only to limited restrictions, namely that advertising is not misleading or factually incorrect or likely to bring the administration of justice into disrepute or otherwise be considered in bad taste.
- 5.235 Restrictions on solicitor advertising cover both form and content, focusing particularly on personal injuries claims. The controls on advertising are a means of avoiding the costs of excessive and unnecessary litigation.²⁴⁷ The particular issue of interest is whether the restrictions designed primarily to control excessive litigation (or "ambulance chasing") unnecessarily prevent consumers from obtaining valuable information that advertising can provide.
- 5.236 The Competition Authority recommends that the existing regulations should be changed in one specific respect; to allow solicitors to advertise as specialists in their chosen areas of law.

²⁴⁶ In general, advertising rules imposed on professionals should not outline what is permitted (a "white-list") as this restricts the ability of professionals to undertake advertising which is neither offensive nor misleading. Rather, advertising should be controlled in a pro-consumer manner by preventing advertising which brings a profession into disrepute or which has direct negative effects on consumers, such as would occur from factually inaccurate advertising, for example. Instead of attempting to set out what is allowed, this "blacklist" approach specifies what is not allowed.

²⁴⁷ These restrictions are contained in the *Solicitors (Amendment) Act 2002* and the *Solicitors (Advertising) Regulations 2002*. The Minister for Justice, Equality and Law Reform stated that the main purpose of the legislation was "to place more effective controls on the nature and extent of advertising by solicitors, particularly in the area of personal injuries. The Bill specifies what may and may not be contained in solicitors' advertising generally." Mr John O'Donoghue TD, Dáil Eireann – Volume 496 – 18 November 1998 *Solicitors (Amendment) Bill 1998*, [Seanad] Second Stage.

- 5.237 In the longer term, the Competition Authority recommends that the Legal Services Commission, recommended in Chapter 3, should be responsible for monitoring the market for legal services, including advertising. The Legal Services Commission's role would include identifying priority areas of reform, which would be consistent with public policy objectives and of benefit to consumers.
- 5.238 The regulation of advertising has previously been addressed by various agencies and organisations. In the early 1980s the Restrictive Practices Commission, recommended there should be no restrictions other than prohibiting advertising which would bring the legal profession into disrepute. In 1990 the Fair Trade Commission recommended substantial liberalisation of barrister and solicitor advertising. More recently in 2001 the Organisation for Economic Co-operation and Development (OECD) supported a liberal regulatory environment for solicitor advertising.²⁴⁸

Barrister Advertising

Nature of restraint

- 5.239 Advertising by barristers is strictly limited to placing their names and specialisations on the Bar Council's website and in the Law Society's Law Directory.²⁴⁹

Effects of restraint

- 5.240 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 otherwise be the case as they dampen competitive pressure.
- 5.241 Advertising restrictions further unbalance the playing field for newly-qualified barristers who have few or no contacts in the solicitors' profession. Barristers, especially those who are recently qualified, need to make these connections. Barristers who have established such contacts have a ready-made source of business. A master²⁵⁰ is expected to help a new barrister by introducing him or her to solicitors. On the other hand, if this does not occur, or if for any other reason a new barrister is not making sufficient solicitor contacts, a barrister is constrained from taking effective steps to remedy the situation. In particular the barrister is unable to advertise the fact that he/she has commenced practice. The advertising restrictions affect the ability of newly qualified barristers to become established and may contribute to the relatively high drop out rate among newly qualified barristers.²⁵¹
- 5.242 Currently, in most instances, only solicitors are permitted to engage barristers (although limited exceptions to this apply in non-contentious matters). If greater direct access to barristers is permitted, as recommended in this report, advertising will become all the more important because lay clients would be 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 needs.

248 Appendix 2 provides a brief summary of the reports of the Restrictive Practices Commission, the Fair Trade Commission and the OECD.

249 Rule 6.1 of the Bar's Code of Conduct provides as follows: "*Barristers may advertise by placing prescribed information concerning themselves 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. Barristers 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, facilitating competition and maintaining proper professional standards.*" The Bar Council has not made any recommendations regarding advertising to date.

250 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".

251 As noted in Chapter 2, the Bar Council estimates that approximately 15% of new barristers leave the Bar within five years.

Rationale offered for restraint

5.243 The Bar Council says that 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.

5.244 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/she 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 identifying specialty areas of law, and it points out that barristers can do that at present on the Bar Council's website.

International Experience

5.245 In England and Wales, and also Northern Ireland and Scotland, barristers ("advocates" in Scotland) are permitted to advertise. The rules in all three jurisdictions in relation to advertising are almost identical. For example, the Code of Conduct of the Bar of England and Wales states the following:

"710.1 Subject to paragraph 710.2 a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include:

- (a) photographs or other illustrations of the barrister;*
- (b) statements of rates and methods of charging;*
- (c) statements about the nature and extent of the barrister's services;*
- (d) information about any case in which the barrister has appeared (including the name of any client for whom the barrister acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client.*

710.2 Advertising or promotion must not:

- (a) be inaccurate or likely to mislead;*
- (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;*
- (c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession);*
- (d) include statements about the barrister's success rate;*
- (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance with this Code;*
- (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed."*²⁵²

²⁵² The relevant section of the Code of Conduct of the Bar of England and Wales is available at <http://www.barcouncil.org.uk/document.asp?languageid=1&documentid=2827#ParaLink>

5.246 Barristers in Queensland are permitted to advertise. Unlike in England and Wales, Scotland and Northern Ireland, the barristers' rules do not say what may be included in an advertisement only that which is prohibited. Advertisements must not be:

(a) "False, misleading or deceptive;

(b) In contravention of any legislation;

(c) Vulgar, sensational, or otherwise such as would bring or be likely to bring a court, the barrister, another barrister or the legal profession into disrepute.²⁵³

International evidence on benefits of advertising

5.247 The opinion of the Federal Trade Commission in the *Nesson Dorma* case highlighted that restrictions on advertising are likely to harm consumers and competition by "raising consumers' search costs and reducing sellers' incentives to lower prices".²⁵⁴ The economic expert's opinion was based on a number of empirical studies in the regulated professions which found that advertising restrictions result in consumers paying higher prices.²⁵⁵

5.248 A study by the US Federal Trade Commission²⁵⁶ examined optometry services in different cities in the USA, classified in terms of their restrictions on advertising, and found that restrictions on advertising raised price without affecting quality. The study provided compelling evidence that advertising posed no danger to the quality of healthcare services provided. Eye examinations were just as accurate and thorough, while the workmanship of glasses was of the same quality whether advertising restrictions were in place or not. The findings of this study have been corroborated in later work.²⁵⁷

5.249 Specifically in relation to the legal profession in the US, Schroeter et al examined attorney fees and advertising practices in seventeen metropolitan areas across the US.²⁵⁸ The results obtained for the three routine legal services examined (a simple will, an uncontested personal bankruptcy and an uncontested dissolution of marriage) highlighted that advertising increased competition among sellers in the market.

5.250 Another empirical paper from the US compared the quality (defined both objectively and subjectively) of legal services provided by a heavy advertiser and the traditional firms in the Los Angeles market. The paper found that there is no reduction in quality of services provided by the heavy advertising firm, rather there may be an increase in quality.²⁵⁹

Analysis of the Competition Authority

5.251 Truthful and objective advertising provides clients with useful information and helps them to choose among competing barristers. Even better informed purchasers of barrister services, including solicitors, can benefit from advertising. For example, not all solicitors will be fully informed of the expertise of particular barristers.²⁶⁰

5.252 Protecting the public interest, maintaining proper professional standards and the proper administration of justice are not only valid, but eminently desirable objectives. Advertising, so long as it is accurate and not detrimental to the administration of justice, is consistent with these objectives. Furthermore, by increasing available information, advertising can contribute positively to competition, client choice and to the

253 http://www.qldbar.asn.au/Barristers_Rule_2004_amended_10_July_2005_.pdf pp25, 26.

254 <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>

255 See p38, <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>

256 Bond, Ronald S., et al, *Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, Federal Trade Commission Bureau of Economics, September 1980.

257 See Love, James H. and Frank H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, International Journal of the Economics of Business, Vol. 3, 1996.

258 Schroeter J.R, Smith S., Cox S.R, *Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation*, Journal of Industrial Economics, Vol 36 (1), 1987, pp.49-60.

259 Muris, T.J, and McChesney F.S, *Advertising and the Price of Legal Services: The Case for Legal Clinics*, American Bar Foundation Research Journal, 1979, pp 179-207.

260 Advertising would assume even greater importance to consumers if there was wider direct access, as recommended earlier in this chapter.

administration of justice. Limiting advertising only to the placing of a barrister's name and specialisations on the Bar Council website and the Law Directory is disproportionate to the above objectives.

5.253 International experience shows that informative advertising lowers prices without lowering the commitment of practitioners to professional standards. In Ireland, in the case of optometry services, there is no evidence that the quality of eye care services in the State has fallen now that advertising has become a market feature. In any case, the commitment of barristers to professional standards is maintained via the Bar's Code of Conduct.

5.254 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 existing general legislation prohibiting false and misleading advertising. The Bar Council could also prohibit misleading advertising through regulation. There is no reason to believe that, because a barrister places an accurate advertisement in a newspaper, the administration of justice is undermined.

5.255 As the Bar Council says, it may not be possible to accurately advertise a barrister's ability by referring to success in Court. Most obviously, the facts of the case, and the clarity of the relevant law, are important factors in determining the outcome of a case.²⁶¹ It is certainly possible, however, to advertise a barrister's area of 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.

5.256 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 of comparable ability 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.

5.257 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."*²⁶²

5.258 The Bar Council in its response to the Preliminary Report agrees with this analysis:

*"The Bar Council agrees that the current rule impacts on the information available to purchasers of legal services and agrees that truthful and objective advertising gives clients useful information and helps them to choose between competing barristers."*²⁶³

5.259 The Bar Council "fully supports expanded advertising by barristers" but to date has not promulgated any new regulations. In its response to the Preliminary Report the Bar Council summarises its views in the following terms:

261 A good "strike rate" of successes could simply indicate that the cases presented were simple and straightforward rather than difficult and complex. A high, or excessive, emphasis on strike rate could encourage the perverse outcome whereby solicitors and barristers would be reluctant to take on difficult or complex cases, the very cases that involve significant costs or benefits to clients and which are likely to generate valuable precedents. Sophisticated purchasers of legal services are, however likely to judge barrister or solicitor quality on more than just past strike rate. Whether the advertising of strike rates is allowed or prohibited should be a matter for the Bar Council, the Law Society and ultimately the Legal Services Commission.

262 *Report on Competition in Professional Services*, paragraph 45.

263 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 89.

a) The placing of advertising by barristers should be limited to appropriate forums, such as the Bar Council website and diary, legal and academic journals and periodicals.

b) Barristers should be able to advertise the following information about their practices:

- i. Availability;*
- ii. Areas of expertise;*
- iii. Prior professional experience;*
- iv. Publications;*
- v. Pricing.*

c) Barristers should be allowed to provide information with regard to the prices of their services. The Bar fully supports transparency of price to the best extent possible having regard to the nature and circumstances of the services supplied by barristers.

d) Advertising by barristers should not be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

e) Advertisements should not include statements about the barrister's success rate or make direct comparisons in terms of quality with other identifiable lawyers.²⁶⁴

5.260 The regulations in relation to advertising proposed by the Bar Council are a combination of a blacklist (what is prohibited) and a white-list (what is permitted). Blacklists, provided they are not all encompassing, are more beneficial for competition. A white-list may restrict a barrister from advertising in a manner which is not included in the white-list but is not misleading or inappropriate.

5.261 The Bar Council should adopt a blacklist approach as this will permit practitioners to advertise as they wish provided they do not breach those rules which have been laid down (what is prohibited). This approach encourages innovation and creativity in the way in which professionals advertise and deliver their services. It is, therefore, essential that only those restrictions which are necessary to protect consumers be incorporated in the blacklist.

5.262 A limited blacklist of what is prohibited, suggested below, should be created by the Bar Council by regulations and this should act as the reference point for any disciplinary action which may need to be taken. Given that barristers have been prohibited up to now from advertising, the Bar Council should make it explicitly clear that anything that is not prohibited in the regulations is permitted.

5.263 Consistent with Recommendation 1 in Chapter 3 of this report, it is the Competition Authority's view that the Legal Services Commission would be the most appropriate body to undertake a more thorough review of barrister advertising in the future.

Solution

5.264 The Bar Council should promulgate regulations to allow barristers to advertise subject to the exceptions outlined below.²⁶⁵

²⁶⁴ Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p 94.

²⁶⁵ This recommendation is not prescriptive in detailing what specific advertising content or advertising media should be prohibited. The drafting of more specific provisions (e.g. identifying specific content or specific media or locations) should be the responsibility of the Bar Council and ultimately the Legal Services Commission.

**Recommendation 16:
Remove unnecessary restrictions on barristers' ability to advertise**

Details of Recommendation	Action By
The Bar Council should promulgate regulations permitting advertising so long as it does not	The Bar Council
<ul style="list-style-type: none">• Give false or misleading information; or,• Bring the administration of justice into disrepute, or otherwise be considered in bad taste.	December 2007
The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.	Minister for Justice, Equality and Law Reform June 2008

Solicitor Advertising

Nature of restraint

5.265 Solicitors may advertise their services, subject to restrictions contained in the *Solicitors (Amendment) Act 2002* and the *Solicitors (Advertising) Regulations 2002*. The legislation and regulations regarding advertising set out what a solicitor is prohibited from doing when advertising (a "blacklist" approach) and also what a solicitor is permitted to do when advertising (a "white-list" approach).

5.266 For example, section 3 of the *Solicitors (Amendment) Act 2002*, permits only advertisements that include:

"Basic details, such as name, address and other contact details;

Qualifications and experience;

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

Charges or fees.

Any other information specified in regulations."

5.267 On the other hand, section 9(a) of the *Solicitors (Advertising) Regulations 2002* prohibits advertisements that:

"include words or phrases such as 'no win, no fee', 'no foal no fee', 'free first consultation', 'most cases settled out of court', 'insurance cover arranged to cover legal costs' or other words or other phrases of a similar nature which could be construed as meaning that legal services involving contentious business would be provided by the solicitor at no cost or reduced cost to the client;

include any cartoons;

include dramatic or emotive words or pictures; or

make reference to a calamitous event or situation;

refer to willingness to make hospital or home visits.”

5.268 Solicitors are also precluded from asserting specialist knowledge in any particular area of law, but may as a matter of factual accuracy state what legal services are provided.²⁶⁶

Effects of restraint

5.269 The constraints on advertising are not limited to personal injury claims and have broader effects, including on services that are unrelated to personal injuries claims. New firms can be 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. The restrictions regarding specialisation also constrain consumers from obtaining valuable information.

Rationale offered for restraint

5.270 As noted earlier, the controls on solicitor advertising focus particularly on personal injuries claims and in that context seek to avoid the costs to society of excessive and unnecessary litigation.

5.271 More generally the Law Society cites consumer protection as the main reason for imposing certain restrictions on advertising:

“consumers can easily be misled, and the competitive process distorted, if solicitors are able to engage in the more persuasive forms of advertising that may be perfectly acceptable for the advertising of frequently purchased consumer goods. Moreover, the circumstances of the user of legal services can make him or her particularly vulnerable to the more aggressive and potentially misleading forms of advertising, for example, in the case of the bereaved or recently injured.”²⁶⁷

Analysis of the Competition Authority

5.272 Truthful and objective advertising provides clients with useful information and helps them to choose among solicitors. The legislation and regulations governing advertising by solicitors combine a white-list (what is permitted) and a blacklist (what is prohibited). A white-list may restrict a solicitor from advertising in a manner which is not included in the white-list but is not misleading or inappropriate. This approach can stifle innovative and creative ways of advertising and delivering legal services. Blacklists are more beneficial for competition, provided they are not all encompassing, as they allow practitioners to advertise as they wish provided they do not breach the particular rules which have been laid down.

5.273 The objectives of the current advertising restrictions, namely to prevent unnecessary and costly litigation in personal injuries, and to more generally protect the public from being misled, are valid. However, the current restrictions are disproportionate, particularly with respect to the provision of services not related to personal injury claims.

5.274 In seeking to limit excessive and costly litigation in relation to personal injuries, the regulations carry with them the risk of overly restricting advertising for other legal services. Other measures have recently been introduced in relation to personal injury claims, such as the Personal Injuries Assessment Board (PIAB) and the *Civil*

²⁶⁶ These requirements are set out in Regulations 4 (a) (iv) and 4 (b) (iii) of the *Solicitor (Advertising) Regulations 2002*.

²⁶⁷ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p 62.

Liability and Courts Act 2004, both of which also seek to control unnecessary and costly litigation,²⁶⁸ and consequently there is less need to rely on advertising restrictions as a means to limit personal injury litigation.

- 5.275 The Competition Authority's most immediate concerns centre on some of the prohibitions on solicitor advertising. For example, solicitors cannot claim in advertisements that they are specialists in a particular area of law.²⁶⁹ Rather, solicitors are permitted only to state as a matter of factual accuracy, the areas of the law in which they have past experience. As currently drafted, the regulations appear to imply that a solicitor claiming to be a specialist necessarily claims to have superior knowledge relative to other solicitors, which is prohibited. The Competition Authority does not agree that there is sufficient justification to prohibit solicitors claiming to be specialists. This restriction reduces the information content of advertising to consumers. Allowing solicitors to advertise more explicitly their areas of specialisation would assist consumers to better identify solicitors able to meet their needs.²⁷⁰
- 5.276 There are various other blacklist items which the Competition Authority identifies as worthy of further review. These include the restrictions on, and in some instances total prohibition of: certain locations, sizes of advertisement, sizes and variations of font, use of cartoons or reference to calamitous events. It is not clear, for example, why solicitor advertising should not be allowed on buses, nor why it is necessarily inappropriate to advertise in newspapers. Nor is it clear why a solicitor who has authored books or articles, should not be able to circulate these at no cost to recipients.²⁷¹ It is not clear that the existing regulations are a proportionate way to protect consumers. The Competition Authority does not, however, propose to make a firm recommendation on the above matters at this time.
- 5.277 Consistent with Recommendation 1 in Chapter 3 of this report, it is the Competition Authority's view that the Legal Services Commission would be the most appropriate body²⁷² to undertake a more thorough review of solicitor advertising restrictions. Any such review could include analysis of whether it is necessary for the Law Society to have a role in allowing solicitors to be called specialists.

Solution

- 5.278 As an immediate measure the Law Society should amend the *Solicitors (Advertising) Regulations 2002* to include specific provisions, consistent with the *Solicitors (Amendment) Act 2002*, for the Law Society to allow solicitors to advertise as specialists in their chosen area(s) of the law.
- 5.279 In the longer term, the Legal Services Commission should be responsible for monitoring solicitor advertising. The Legal Services Commission's role would include identifying priority areas of reform, which are consistent with public policy objectives and of benefit to consumers.

268 The Minister for Justice, Equality and Law Reform described the purpose of the legislation in the following terms: "By introducing new penalties for fraudulent and exaggerated claims it tackles the so-called 'compensation culture'. The Bill also provides for major procedural changes in relation to personal injury actions to reduce the time taken and the costs involved in processing such actions." Mr Michael McDowell TD Dail Eireann – Volume 588 – 30 June 2004 *Civil Liability and Courts Bill 1998* [Seanad] : Second Stage.

269 This restriction is set out in sections 4 (a) (iii) and (iv) of the *Solicitors (Advertising) Regulations 2002*.

270 Section 4, subsection 8, of the *Solicitors (Amendment) Act 2002* gives the Law Society the statutory authority to establish regulations to allow solicitors, upon application to the Society, to be designated as having specialist knowledge. To date no such regulations have been made.

271 The provisions discussed in this paragraph are contained variously in Sections 4, 7, 9, 11 and 12 of the *Solicitors (Advertising) Regulations 2002*.

272 The Law Society, in its response to the Preliminary Report said that it was not opposed to undertaking a review of the present regulations to see if the rules on advertising can be made less prescriptive while retaining the required level of consumer protection. It is not obvious that the Law Society, given its current regulatory and representative functions, 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.

**Recommendation 17:
Remove unnecessary restrictions on solicitors' ability to advertise**

Details of Recommendation

Action By

The Law Society should amend its Regulations to enable the designation of solicitors as specialists and to allow such solicitors to advertise as specialists.

The Law Society
December 2007

The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.

Minister for Justice, Equality and Law Reform
June 2008

Restrictions on Switching Lawyers

Summary

- 5.280 A client may, for a variety of possible reasons, wish to change from one barrister to another barrister or from one solicitor to another solicitor. For example, a client may be dissatisfied with the quality of service provided.
- 5.281 Clients' ability to switch barristers was until March 2006 restricted, as a barrister could not take over a case until any previously engaged barrister had been paid in full. This restriction was disproportionate, restricted consumer choice and limited competition between barristers. The Bar has amended its Code of Conduct and this restriction no longer applies, a decision the Competition Authority welcomes.
- 5.282 Clients' ability to switch solicitors remains constrained. Solicitors have the right to withhold a client's file if payment is outstanding or disputed. As a practical matter, full payment may not be possible to achieve in a short space of time and in the interim the client may be disadvantaged with possibly serious consequences. For example, a consumer who believes their current solicitor is putting their case in jeopardy, or is failing to act in a timely manner, cannot take their business elsewhere, i.e., switch solicitors, unless and until there is no amount outstanding to, or in dispute with, the currently engaged solicitor.
- 5.283 Obstructing or preventing a consumer from switching to another solicitor is an unnecessary and disproportionate restriction on competition and is harmful to consumers of legal services. This restriction serves only the interests of solicitors and should be abolished.²⁷³ The Competition Authority recommends its removal by way of legislation.²⁷⁴

Restriction on Switching Barrister

- 5.284 Prior to March 2006 the Bar's Code of Conduct, in Rule 7.5, precluded a barrister from taking over a case from another barrister until that other barrister had been paid.
- 5.285 The rule was disproportionate to the objective of ensuring barristers receive income for services rendered. The rule restricted clients' ability to choose a barrister and also restricted competition in the market for legal services by unnecessarily preventing barristers from offering their services.

²⁷³ Solicitors' interests are not equally served by the restriction. The restriction provides a protection to the solicitor holding the file but disadvantages any solicitor willing to take over the case.

²⁷⁴ The restriction on solicitors is established in **common law** and consequently legislation is required if the restriction on switching solicitors is to be removed.

5.286 The Competition Authority, in its Preliminary Report, proposed that Rule 7.5 be abolished. The Bar, in amending its Code of Conduct in March 2006 abolished Rule 7.5. The Competition Authority welcomes this decision.

**Recommendation 18:
Remove the unnecessary restriction on switching barrister**

Details of Recommendation

The Bar Council should propose to the Bar of Ireland that it amend Rule 7.5 of its Code of Conduct which prevents one barrister taking over a case from another until satisfied that the first barrister has been paid.

Action By

The Bar Council
Implemented March 2006

Restriction on Switching Solicitor

Nature of Restraint

5.287 A solicitor can withhold the transfer of a client's file to another solicitor in circumstances where payment is outstanding or disputed.²⁷⁵ In other circumstances the right to withhold files does not exist. A solicitor cannot withhold client files if there are no costs outstanding, or in the event of an order of a court, or if the first solicitor has delayed providing a bill for costs. The Law Society also has the statutory power to set aside a solicitor's right to withhold files, subsequent to an investigation on receipt of a complaint by the client.

Effects of restraint

5.288 The right of a solicitor to withhold clients' files hinders a consumer's ability to switch from one solicitor to another thereby restricting competition between solicitors. The right to withhold clients' files can also increase the costs of switching solicitors to the detriment of the client. For example, in the event that a solicitor refuses to relinquish a file, a client has two options. The client must either obtain a court order, which adds additional costs and can be time-consuming, or complain to the Law Society, who will investigate the matter. There is no guarantee that this investigation can or will be completed expeditiously. Consequently, clients are at best delayed and possibly prevented altogether from switching solicitors either when they receive poor service or if the outcome of their case is in jeopardy as a result of unnecessary delays.

Rationale offered for restraint

5.289 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, are paid for their services. The Law Society also points to its ability to assist clients through its power to investigate solicitors and to compel a solicitor to hand over a file.

Analysis of the Competition Authority

5.290 Although the objective of ensuring that solicitors are paid for work done is legitimate it does not justify this restriction on consumers and on competition for legal services. While it is proper that solicitors be paid for work they have done this can be achieved by enforcement of the contract they have with their client through normal dispute resolution channels, including if necessary the courts, as all other suppliers of professional services have to do.

5.291 Of all professionals, solicitors are best placed to pursue clients for monies owed to them as they can self-supply the legal service at minimal cost to themselves.

²⁷⁵ This right is established in common law and is referred to as a *lien* on the file.

- 5.292 Consumers of legal services, especially small infrequent buyers, are in a far more vulnerable position. There is little that a client, or a new solicitor acting on their behalf, can do to compel the first solicitor to relinquish the file in a timely manner. Delays in legal matters can cause significant financial and other harm to clients even if they eventually receive a favourable outcome.
- 5.293 The right of solicitors to withhold clients' files, subject to receipt of payment, restricts consumers' ability to switch solicitors in response to poor service, or for any other reason. This restriction does nothing to encourage competition between solicitors either in terms of quality of work or the timeliness in which work is undertaken.
- 5.294 As noted above, the Bar Council has removed a similar restriction on switching barristers. A similar rule existed in the engineering profession which the Competition Authority has already examined. In that case, the relevant restriction has now been removed.²⁷⁶

Solution

- 5.295 There is no justification for solicitors having additional protection from potential bad debts relative to other suppliers of services, especially when it creates the potential for harm to a consumer's rights and abuse by unscrupulous solicitors.²⁷⁷
- 5.296 Removing a solicitor's ability to withhold a file will enable consumers to switch solicitors if they are dissatisfied with the quality of work they are receiving. The abolition of the restriction will also enable buyers to switch solicitors where they have obtained a more competitive quote from another supplier. Furthermore, the possibility of clients switching from one supplier to another will in itself drive competition in the market for solicitors' services in the State.
- 5.297 The unnecessary restriction on switching between solicitors harms competition between rivals and should be removed. Because the restriction on switching solicitors, i.e. the right to withhold files, is established in common law, legislation is the required mechanism to remove this restriction.

Recommendation 19: Remove the unnecessary restriction on switching solicitor

Details of Recommendation

The Minister for Justice, Equality and Law Reform should introduce legislation to prohibit a solicitor from retaining a client's file pending payment from the client.

Action By

Minister for Justice, Equality and Law Reform

June 2008

Restriction on other employment for practising barristers

Summary

- 5.298 In its Preliminary Report, the Competition Authority recommended the abolition of the rule of the Bar's Code of Conduct that prohibited practising barristers from having other part-time employment. This rule made it more difficult for new barristers to become established in the profession. The Bar Council proposed amendments to the Code to the Bar which were agreed in March 2006.

²⁷⁶ The Competition Authority's Final Report on Engineers, 2004, pages 7 and 42-45, available at: <http://www.tca.ie/>

²⁷⁷ 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/she has furnished to a third party on behalf of his now former client. It is reasonable for the first solicitor to require his/her release from this commitment before being required to hand over the file.

Nature of restraint

5.299 Until March 2006 Rule 2.6 of the Bar Council's Code of Conduct prohibited practising barristers from having any occupation that did not allow them to practice full-time.²⁷⁸ Rule 8.3 of the Bar's Code of Conduct confines membership of the Law Library to full-time practising barristers subject to some exceptions.²⁷⁹ Thus, even if a barrister's practice did not keep him/her engaged full-time (as is the case with many barristers in their early years) he/she could not take part-time employment, as it would be inconsistent with full-time practice, and is not one of the exceptions to Rule 8.3.

Effect of restraint

5.300 The effect of this was to make it more difficult for new barristers to stay in the profession, thus reducing the overall supply of barristers in the market place, to the detriment of consumers.

International experience

5.301 Part-time practice at the Bar is not prohibited by either the Bar of England and Wales,²⁸⁰ nor the Bars of New South Wales²⁸¹ and Victoria.²⁸²

Solution

5.302 The Competition Authority, in its Preliminary Report, proposed that the Bar should abolish Rule 2.6.

5.303 In March 2006, the Bar amended Rule 2.6 and added a new Rule 2.7. The effect of the two rules is that barristers may now engage in any part-time occupation that is not inconsistent with the Code of Conduct.²⁸³ Thus, for example, a barrister may not work in a solicitor's office, nor take any part-time job which would involve him/her in a conflict of interest, or would mean that he/she was unable to act for a client who wished to brief him/her. Apart from that, many possibilities are now open to the barrister who is able to organise his/her part-time employment in such a way as not to interfere with his/her practice.

5.304 The new rule, although restricting the exercise of part-time occupations to those not inconsistent with the Code of Conduct appears to be proportionate. Read in the context of the Code as a whole, and taking into account a barrister's duty to his/her clients and to the Court, it would appear to permit the exercise of any part-time occupation that does not prevent the barrister from properly fulfilling those duties.

5.305 Permitting practising barristers to exercise part-time occupations, particularly in the early years of their practice, contributes to improving sustainable entry into the profession and thus to the supply of barristers' services. The Competition Authority is satisfied that the new rules address the competition concerns identified in its Preliminary Report.

278 Rule 2.6 provided as follows: "In order to perform his functions with due independence and in a manner which is consistent with his duty to participate in the administration of justice a barrister is excluded from some occupations. Having regard to the duty of a barrister to act for all clients seeking his services and the consequent requirement of availability, and the role of the Bar in pro bono work, a barrister shall keep his practice as his primary occupation and he shall not engage in any other occupation which is inconsistent with his practice at the Bar and, in particular, a barrister shall not engage in any employment or occupation which is liable to prevent his regular attendance at Court or at the Law Library during term or that otherwise interferes with his availability to those who may seek his services as a barrister."

279 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 2.10 of this Code and to such exceptions as may from time to time be approved by the Bar Council."

280 Rule 301 of the Code of Conduct of the Bar of England and Wales.

281 <http://www.nswbar.asn.au/Professional/Profdevt/Prep4Bar/questions.htm#q19>.

282 The Victorian Bar's Practice Rules, Rules of Conduct and Compulsory Legal Education Rules do not preclude a barrister from undertaking part-time work provided that the work does not adversely affect the reputation of the barrister, the Bar or a barrister's ability to attend properly to the interests of the client.

283 The amended Rule 2.6 provides as follows: "In order to perform their functions with due independence and in a manner which is consistent with their duty to participate in the administration of justice a barrister[sic] is excluded from occupations which conflict with the duties contained in the Code of Conduct." Rule 2.7 provides as follows: Barristers are permitted to engage in any part-time occupation that is not inconsistent with the Code of Conduct."

**Recommendation 20:
Permit practising barristers to exercise part-time occupations**

Details of Recommendation

The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.6 of the Code of Conduct and/or new rules to enable part-time employment in other professions.

Action By

The Bar Council
Implemented March 2006

Restriction on practice for previously employed barristers

Summary

5.306 Previously-employed barristers were, until March 2006, prevented from acting for their former employers for a specified period after commencing practice at the Bar. This rule limited certain clients' choices of barrister, particularly in relation to specialised areas of law, by preventing clients from engaging the barrister of their choice. In its Preliminary Report the Competition Authority recommended removal of this prohibition. In March 2006, the Bar implemented this recommendation in the course of agreeing various amendments to its Code of Conduct.

Nature of restraint

5.307 Prior to March 2006, Rule 2.15 of the Bar's Code of Conduct prevented barristers who had previously been employed from accepting work from their former employer for a specified period.

Effects of restraint

5.308 The rule limited 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 have been prohibited from accepting a brief for that bank during the period specified, notwithstanding that he might as a result of his/her employment with the bank, have had an expert knowledge of banking law and practice. This operated to the detriment of the client, whose choice of barrister was thereby limited.

5.309 The rule also militated against sustainable entry into the profession by preventing previously employed barristers from competing with other members of the Law Library in respect of work made available by a former employer.

Solution

5.310 In its Preliminary Report, the Competition Authority recommended that Rule 2.15 of the Code of Conduct be abolished. Rule 2.15 was abolished by the Bar Council in March 2006. The Competition Authority welcomes this and is satisfied that its concerns in this area have been addressed.

5.311 Allowing barristers who have previously been employed in other areas of the economy to use those contacts in their initial years at the Bar increases the possibility of sustainable entry for these barristers. This operates to the ultimate benefit of future purchasers of legal services who as a result will have a wider choice of barristers, particularly in specialised areas of law.

**Recommendation 21:
Allow new barristers to act for former employers**

Details of Recommendation

The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.15 of the Code of Conduct to enable barristers to be engaged by previous employers.

Action By

The Bar Council
Implemented March 2006

CONTRACTS

section 6



6. LEGAL FEES

Summary

- 6.1 Competition in legal fees is desirable for both economic and social reasons. Excessive legal fees increase the costs of living and doing business in Ireland and are bad for Ireland's competitiveness. Excessive legal fees also limit citizens' constitutional right of access to the courts.
- 6.2 Although all of the restrictions identified in Chapters 4 and 5 combine to reduce competition in the legal profession and thus lower competition in legal fees, there are a number of anti-competitive features and practices in the market for legal services which impact directly on the cost of legal services in Ireland.
- Unlike other professions and service providers, solicitors and barristers do not regularly provide a quotation and/or an estimate of the fee for their services in advance of commencing work;
 - Consumers are often not aware of their legal right to a letter laying out actual or estimated charges on retaining a solicitor;
 - Solicitors still frequently charge fees based on a percentage of the value of the assets being sold or disputed and consumers are not made aware that this is not necessarily in their interest;
 - Although it is prohibited by law to base legal fees on the monetary award a client receives in a case, evidence from two different independent sources, discussed below, shows that the principal determinant of legal fees in contentious issues is the size of the award;
 - Junior counsel generally charge a fee equal to two-thirds of the senior counsel's fee in a specific case, regardless of the work done by each barrister;
 - The State's system of arbitration for disputes over legal bills (taxation) has cemented these anti-competitive features and practices instead of counter-acting them.
- 6.3 These features and practices can affect all buyers of legal services, even well-informed repeat buyers, but they are particularly likely to occur when the consumer is unaware of their effects. The Competition Authority makes recommendations in this chapter to the Bar Council, Law Society, Taxing Masters and County Registrars to end all of these anti-competitive features and practices.

Legal Costs Working Group

- 6.4 The level of concern over legal fees in Ireland led the Minister for Justice, Equality and Law Reform to establish a Legal Costs Working Group to look at this issue. The Legal Costs Working Group issued its final report in November 2005 and made a number of wide-ranging recommendations for reform of the legal profession and the State's system for arbitration on legal costs.
- 6.5 The Minister for Justice, Equality and Law Reform announced his intention to implement the recommendations of the Legal Costs Working Group in full.²⁸⁴ An implementation body has been established to examine how best to implement the recommendations.

²⁸⁴ Address by Minister at the Historical Society, Trinity College Dublin - *'That regulation of the legal profession should be reformed'*, January 10th 2006 available at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6KXFX7-en>

- 6.6 The Competition Authority welcomes the recommendations of the Legal Costs Working Group and the decision by the Minister for Justice, Equality and Law Reform to implement these recommendations. A number of the proposals the Competition Authority made in its Preliminary Report have been endorsed by the Legal Costs Working Group.
- 6.7 The recommendations of the Legal Costs Working Group, which are discussed throughout this chapter, will greatly improve the level of transparency and information available to consumers of legal services regarding legal fees. Transparent pricing is an important driver of competition but by itself cannot ensure value for money in legal services. More competition must be introduced to the legal profession generally, through the implementation of the recommendations in this entire report, to ensure that the new system of transparent pricing will result in value for money.
- 6.8 The Competition Authority's recommendations in this chapter, and in this report more generally, complement and enhance those of the Legal Costs Working Group. For example, the Group recommends that an independent Legal Costs Regulatory Body be established. This regulatory body would have a role in regulating and reforming one particular aspect of the legal services market, namely legal costs. In Chapter 3 of this report, the Competition Authority recommends that a Legal Services Commission be established. The role of such a body would be to initiate reform and provide independent, accountable and transparent regulation in the market for legal services more generally. As discussed in Chapter 3, there is no reason why these two bodies could not form part of the same organisation. Implementing the recommendations of both the Competition Authority and the Legal Costs Working Group would be beneficial for competition and the operation of the legal services market in the State.

Consumer information, fees and competition

Summary

- 6.9 A number of practices, such as solicitors charging percentage fees on certain transactions and fees being calculated as a percentage of the award in a legal case, represent bad value for consumers. The fact that these practices still persist illustrates the lack of information available to consumers of legal services.
- 6.10 The practice whereby junior counsel charge a fee at two-thirds that of the senior counsel's fee in a case (without reference to work done) is anti-competitive and anti-consumer. It is vital that consumers are made aware that junior counsel need not charge a fee at two-thirds that of the senior's in a case.
- 6.11 The current regulatory bodies have failed to provide sufficient information for consumers of legal services about the legal profession generally and the charging of fees specifically, hence practices such as those outlined above have continued to persist. This contrasts with the actions of regulators in other sectors of the economy, such as the Commission for Communications Regulation and the Financial Regulator, who have undertaken consumer awareness initiatives.
- 6.12 The lack of transparency in the price of legal services makes it difficult for consumers to shop around for legal services. If consumers cannot compare the prices for legal services, there is little incentive for lawyers to compete on price. The lack of information in the market for legal services is stifling competition between lawyers to the detriment of consumers.
- 6.13 The provision of transparent, useful information about the legal services market would empower consumers to shop around for the quality of legal service they require at a price they could afford. An empowered consumer

who shops around for the best price and quality available puts downward pressure on prices and is the best driver of price competition.

- 6.14 The Competition Authority strongly recommends that the Law Society and the Bar Council actively promote consumer awareness and develop a Consumer Information webpage on their respective websites. The Competition Authority further recommends that the Bar Council, as the regulator of barristers, should point out to its members – both in internal communications and in material on its website - that the practice of charging fees in rigid proportion to one another is anti-competitive.
- 6.15 The Competition Authority also recommends that the statutory requirement on solicitors to provide letters setting out their actual or expected fees be made more prescriptive, to ensure that solicitors' clients get a useful insight into the cost they face for legal services. Failure to provide fee letters should be subject to a meaningful penalty. The Bar Council should oblige barristers to provide similar fee information.

Practices in fee setting

Percentage Fees

- 6.16 Traditionally, solicitors charged fees for conveyancing and probate based on a percentage of the value of the property or the estate involved. Fees calculated on a percentage basis usually represent bad value for solicitors' clients, as they tend to rise automatically with any rise in property values, even though the cost of the legal work required is unlikely to have increased at the same rate. In a well-functioning market, prices are related to the cost of providing a service. Percentage fees for conveyancing enable the solicitor to extract the highest price from clients of different means. They represent a kind of price discrimination as the price is not related to the cost of providing the service.²⁸⁵
- 6.17 Irish consumers have become more price conscious regarding certain legal services, and, particularly for conveyancing, it is now common for clients to call a number of solicitors to seek fee quotations. More solicitors have begun to offer flat fees for conveyancing and probate work. This is a positive step for competition.
- 6.18 Nevertheless, there is a lack of information available for consumers with regard to legal fees in general. Many consumers may not be aware that they don't have to pay legal fees on a percentage basis. The Law Society should promote awareness among consumers of their options regarding percentage legal fees and charges.

Fees Based on the Award to the Client

- 6.19 Section 68(2) of the *Solicitors (Amendment) Act 1994* prohibits a solicitor from acting for a client in connection with any contentious business on the basis that any part of the charges to the client are to be calculated as a percentage or proportion of any damages or monies that may be payable to the client. For example, a solicitor in a personal injury case is prohibited from charging a client a fee which is a percentage of the damages received by the client if they win.
- 6.20 Despite this, empirical evidence gathered by both the Competition Authority and the Legal Costs Working Group suggests that legal fees for litigation are, in practice, highly correlated to the size of the award to the client.²⁸⁶ Where a solicitor applies this kind of *pro-rata* fee to the award given to his/her client, this often represents bad value for consumers. This issue is discussed in detail below with regard to the role of the taxing system for legal fees.
- 6.21 Informing consumers of their rights and informing them about the obligations on solicitors regarding legal fees and the size of awards in contentious issues will better equip them to shop around for a price that better reflects the amount of work actually done by solicitors. The Law Society should promote awareness among

²⁸⁵ The cost of carrying out a conveyance depends on the level and complexity of the work involved, factors that are unrelated to the value of the property.
²⁸⁶ See paragraphs 6.58-6.69 of this report

consumers of the prohibition on solicitors charging legal fees calculated as a percentage or proportion of any damages or monies that may be payable to the consumer.

Barrister Fee-setting

- 6.22 When a junior counsel and a senior counsel work together on a case, it is common practice for junior counsel to charge the client a fee equivalent to two-thirds of the senior counsel's fee. This is the case even though the Bar's rule which provided for a junior counsel to receive two-thirds of the senior counsel's fee in a case was removed in 1990. Research carried out for the Legal Costs Working Group indicated that, in 95% of cases, junior counsel continue to charge a fee at two-thirds that of the senior counsel.²⁸⁷ In a well-functioning market, prices have some relationship to the cost of providing the service. Applying a rigid two-thirds relationship to fees, regardless of the work undertaken, is not consistent with a competitive market.
- 6.23 The practice of junior counsel charging two-thirds of a senior counsel's fee has been recognised by the Fair Trade Commission²⁸⁸, the Bar Council²⁸⁹, the Legal Costs Working Group²⁹⁰ and the Minister for Justice, Equality and Law Reform²⁹¹ as being anti-competitive and anti-consumer. Despite this, the practice continues to persist.
- 6.24 In the Preliminary Report, the Competition Authority proposed that the Bar Council should advise all junior counsel to mark a fee based on work done when acting in a case and that this fee should not depend in any way on that marked by senior counsel. In response, the Bar has amended its Code of Conduct by inserting a new Rule 12(1)(a) which states that barristers' fees are based on work done.
- 6.25 The new Rule 12(1)(a) is welcome and should go some way to ensuring that clients are charged only on the basis of work done and not by reference to the fee set by another barrister. However, although the new rule implicitly acknowledges the two-thirds problem, the Bar Council has stopped short of formally advising its members that the practice is anti-competitive and should cease. The Bar Council, in its submission on the Preliminary Report, commented:
- "The Competition Authority proposes that the Bar Council should advise all junior counsel to mark a fee based on work done when acting in a case. The fee should not depend in any way on that marked by senior counsel. The Bar Council agrees with the Competition Authority that the fee charged by junior counsel should relate exclusively to the work done in relation to a particular case. It is recommended by the Bar Council that fees be calculated by reference to, amongst other things, the work done and the value of that work to the client, and that junior counsel fees be calculated without reference to senior counsel fees. The Bar Council does not regulate the manner in which its members charge fees. Ultimately, the question of the level of fees paid to senior or junior counsel is a matter for agreement with the client."²⁹²*
- 6.26 The Competition Authority accepts that the Bar Council does not regulate fees, and did not suggest that it should do so. It would, however, be wholly appropriate that the Bar Council, as the regulator of barristers, should point out to its members that a particular practice is anti-competitive.²⁹³

287 *Report of the Legal Costs Working Group*, Appendix 2, p.63.

288 Fair Trade Commission, *Report of Study into the Restrictive Practices in the Legal Profession*, 1990

289 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p.101.

290 *Report of the Legal Costs Working Group*

291 Address by Minister at the Historical Society, Trinity College, Dublin - *"That regulation of the legal profession should be reformed"*, January 10th 2006 available at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6KXFX7-en>

292 Submission of the Council of the Bar of Ireland to the Competition Authority, July 2005, p. 101.

293 There are now indications that the Council may indeed take a more pro-active approach in relation to this issue.

Recommendation 22:

Advise barristers that the practice whereby junior counsel charge fees at two-thirds of senior counsel's fee is anti-competitive

Details of Recommendation

The Bar Council should formally advise barristers that the practice of junior counsel marking a fee, without reference to work done, at two-thirds of the senior counsel's fee, is anti-competitive and must cease.

Action By

The Bar Council
March 2007

Informing Consumers

- 6.27 Consumers currently lack information about legal fees – and indeed about the legal profession generally. Uninformed consumers may be unaware that certain practices (such as those discussed above) should not be occurring. Such consumers can find themselves paying large sums of money which does not reflect the value of work done. This lack of information contributes to and maintains the information asymmetry which operates to the disadvantage of consumers.²⁹⁴
- 6.28 The information gap between lawyers and consumers must be reduced in order to enable consumers to shop around for the best value, quality and expertise for their needs and to ensure that they have, at a minimum, some basic knowledge as to the basis on which legal fees are charged. Increased information about legal fees, and the profession more generally, will reduce the likelihood of consumers agreeing to pay percentage fees when it is not in their interest. Likewise, if greater information is available, consumers in a case involving a junior and senior counsel are more likely to demand upfront that fees are to be charged on the basis of work done, rather than by the traditional custom of the junior charging *pro-rata* to the senior.
- 6.29 The websites of both the Law Society and Bar Council have insufficient information in regard to how lawyers charge fees for their services. The Law Society submits that it publishes a pamphlet for consumers entitled "*Information in relation to Legal Charges*" which contains information in relation to Section 68 letters. However, this pamphlet is not available on the Law Society's website nor is there any section on the website aimed at informing consumers about how legal fees are charged.
- 6.30 More generally, the Law Society and the Bar Council have failed to provide sufficient information for consumers of legal services about the legal profession and the charging of fees.
- 6.31 This contrasts with the practices of regulators in other sectors of the economy. For example, Comreg (Commission for Communications Regulation) has a consumer campaign to educate people about mobile phone tariffs. One aspect of the campaign involved the development of an interactive website to help consumers compare the cost of personal/non-business mobile phone price plans. Consumers can establish which type of mobile phone package best suits their needs by simply inputting a few details about their mobile phone usage.
- 6.32 Similarly, the Financial Regulator provides an abundance of information on its website and in leaflet form about a number of common financial products such as bank accounts, motor loans, mortgages and insurance. The information provided by the Financial Regulator aids consumers in shopping around for the best deal and, as a result, encourages competition between financial services providers.

²⁹⁴ Information asymmetry is a condition in which at least some relevant information is known to some but not all the parties involved (i.e. lawyers know much more about what exactly needs to be done in a case and the corresponding fee). Information asymmetries are common in a number of professional services markets but can be reduced by increased consumer awareness.

- 6.33 The Law Society should publish its pamphlet for consumers on *“Information in relation to Legal Charges”* on its website and then keep it up to date in future. The National Consumer Agency would be well placed to assist in developing relevant material that is both accurate and understandable, and easily accessible to consumers.
- 6.34 The Law Society and the Bar Council should, in consultation with the National Consumer Agency, develop a Consumer Information page on their respective websites informing consumers in non-legalistic language about (for example) how lawyers operate in the State, consumer rights, a lawyer’s obligation to the consumer and information on how fees are charged.²⁹⁵

**Recommendation 23:
Provide useful information for consumers**

Details of Recommendation

Action By

(a) The Law Society should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.

The Law Society
June 2007

(b) The Bar Council should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.

The Bar Council
June 2007

Fee Letters

Solicitors

- 6.35 Section 68 of the *Solicitors (Amendment) Act 1994* requires solicitors, on the taking of instructions to provide legal services to a client, to provide in writing the actual charges, or an estimate of the charges, by that solicitor for the provision of such legal services. A solicitor should not commence legal services without having provided the information required in section 68, commonly known as a *“Section 68 letter”*. In practice, however, many solicitors do not issue Section 68 letters and many consumers of legal services are unaware that they are entitled to such a letter. While section 68 is a mandatory provision, there are limited sanctions available for failing to comply with it: the Taxing Master may take the absence of such a letter into account in determining the appropriate fees and the Disciplinary Committee of the Law Society can have regard to the failure to comply with Section 68 in appropriate cases.
- 6.36 Where solicitors do provide Section 68 letters, they do not always provide sufficient information.²⁹⁶ In some instances solicitors will indicate a “flat” fee to the client but, more often, solicitors only provide the basis on which the charges are to be made. For example, a letter which gives no more than hourly rates, or states that the cost will depend on the complexity of the case, provides little useful information for the client.
- 6.37 The Competition Authority in its Preliminary Report proposed that the Law Society should review its sample Section 68 letters and issue a practice direction to ensure that solicitors give clients more information regarding likely fees.
- 6.38 The Law Society in its response to the above proposal indicated that it had:

“no objection to reviewing its precedent Section 68 letters, and if appropriate, issuing a practice direction to encourage solicitors to give clients the maximum possible information regarding likely fees.”²⁹⁷

²⁹⁵ This recommendation is not prescriptive in detailing what information should be included in a consumer information page. The drafting of consumer information material should be the responsibility of the Law Society, the Bar Council and ultimately the Legal Services Commission.

²⁹⁶ The Law Society has issued three model Section 68 letters and solicitors generally use versions of these.

²⁹⁷ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p 71.

6.39 *The Report of the Legal Costs Working Group* considered in detail the issue of Section 68 letters. The Group believes that section 68 of the *Solicitors (Amendment) Act 1994* fails in its objective of ensuring that each client receives sufficient information regarding fees. To this end the Group recommended that the Minister for Justice, Equality and Law Reform should bring forward proposals for a revised and expanded “client engagement letter”.

6.40 Outlined below are some of the recommendations put forward with regard to Section 68 letters. The Group recommended that the letter:

- “be furnished to the client within a stated time frame,
- contain (a) details of the work to be done and (b) the estimated costs thereof or the daily or hourly charges applicable,
- contain a ‘cooling off’ provision (showing costs incurred or unavoidable and those which will ensue if case is proceeded with),
- be regularly updated, and
- give clients the opportunity to cease their action before any material increase in expenditure is incurred (subject to the knowledge that a litigant who abandons litigation may be liable to the costs of the opposing party).”²⁹⁸

6.41 The Group also recommended that failure on the part of a solicitor to issue a letter in accordance with the relevant legislative provisions should be subject to a meaningful penalty.

6.42 The Competition Authority welcomes the recommendations of the Legal Costs Working Group in relation to Section 68 letters and recommends that they be implemented in full.

**Recommendation 24:
Require solicitors to issue meaningful fee or fee estimate letters**

Details of Recommendation

Action By

The Minister for Justice, Equality and Law Reform should bring forward legislation:

Minister for Justice, Equality and Law Reform

(a) requiring solicitors to issue more detailed and accurate fee letters;

June 2008

(b) outlining a meaningful sanction for solicitors who fail to provide clients with an appropriate fee letter.

Barristers

6.43 As solicitors generally engage barristers on behalf of clients, barristers issue their invoices, known as “fee notes”, to solicitors rather than directly to clients. There is currently no 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 are sometimes unaware as to how much the barrister is charging.

²⁹⁸ *Report of the Legal Costs Working Group*, p 40.

- 6.44 Solicitors should not engage barristers on their client's behalf without any regard to the financial implications for their clients. Although some solicitors may be conscientious in this regard, imposing a requirement on barristers to issue fee estimates in advance of commencing legal services is necessary to ensure that the final consumer will have a reasonable idea as to the actual bill he or she will face.
- 6.45 The Competition Authority in its Preliminary Report proposed that the Minister for 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.
- 6.46 Since the publication of the Preliminary Report, the Bar Council has amended its Code of Conduct. Rule 12.6 of the Bar's Code of Conduct, adopted on the 13th March 2006, now provides as follows:
- "On the taking of instructions to provide legal services, or as soon as practicable thereafter, a barrister shall, on request, provide to an instructing solicitor, or to the client in the case of access under the Direct Professional Access Scheme, with particulars in writing confirming –*
- (a) the actual charges, or*
- (b) where the provision of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or*
- (c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practical, the basis on which the charges are to be made."*
- 6.47 This provision is identical to the requirement in section 68 of the *Solicitors (Amendment) Act 1994*, with one notable exception: the solicitors' requirement is mandatory – they must send such a letter every time. Barristers, on the other hand, will only be obliged to do so *"on request"*. This is not sufficiently transparent, as it means that a client or solicitor would have to be aware that they had the right to ask for such a letter; it thus runs the risk of becoming an under-used provision.
- 6.48 The Competition Authority welcomes the Bar Council's pro-active approach to the idea of Section 68-type letters for barristers but recommends that the phrase "on request" be removed from Rule 12.6 of the Code of Conduct. The removal of this phrase would ensure that, in every instance, a client would be given an indication of the barrister's likely fees.
- 6.49 As outlined above, the Legal Costs Working Group has recommended that the Section 68 letter for solicitors be amended. To ensure maximum transparency in barristers' fees, the Competition Authority recommends that the Bar Council require barristers to provide the same level of information, as will be required by solicitors in the revised Section 68 letter.

**Recommendation 25:
Require barristers to issue meaningful fee or fee estimate letters**

Details of Recommendation

Action By

The Bar of Ireland should:

The Bar Council

(a) Amend Rule 12.6 of its Code of Conduct by removing the words "on request" from the second line thereof;

June 2007

(b) Amend its Code of Conduct to require that barristers' fee information letters provide the same level of information as the Section 68 letters recommended by the Legal Costs Working Group.

Taxation of Legal Costs

Summary

- 6.50 The Irish legal system, as in most common-law countries, operates on the principle of *"costs following the event"*. The rationale behind the principle is that a person who wins an action should not suffer a financial penalty for vindicating their rights. Thus, whether defendant or plaintiff, they should be able to recover from the other party costs reasonably incurred in the process. In other words, the losing party must pay the legal costs of the successful party. Taxation is a process designed to provide an independent and impartial assessment of the legal costs involved in a case to ensure that the bill the unsuccessful party pays to the other side is fair and reasonable.
- 6.51 Taxation, as it currently operates, does not ensure that the bill the unsuccessful party pays to the other side is fair and reasonable. Furthermore, the system of taxation reinforces anti-competitive behaviour by lawyers.
- 6.52 Empirical evidence shows that the size of the damages awarded in a particular case is a much more important factor in determining fees to be paid to the successful party's lawyer than the actual legal work done. This has the effect of reinforcing anti-competitive behaviour in the market for legal services. The Competition Authority recommends that legal costs be primarily assessed on the basis of the work undertaken by individual lawyers, not by the size of the award as is currently the case.
- 6.53 As outlined earlier in the chapter, junior counsel generally charge a fee equal to two-thirds of the senior counsel's fee, regardless of the work done by each barrister. 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.²⁹⁹ The Competition Authority recommends that the Taxing Masters cease the general practice of allowing junior counsel fees at two-thirds that of senior counsel (when it is not based on work done).

The System of Taxation of Legal Costs

- 6.54 At the conclusion of contentious business, a solicitor is required to furnish a bill of costs to the client. The bill of costs summarises the legal services provided to the client and shows separately the amounts in respect of fees, outlays, disbursements and expenses incurred by the provision of such legal services.
- 6.55 Taxation is the process by which an officer of the court, a Taxing Master or a County Registrar, determines at a public hearing the amount of costs due to be paid by the unsuccessful party on foot of the bills of costs.

²⁹⁹ In 95% of cases it was found that the junior charged a fee at two-thirds of the senior counsels. *Report of the Legal Costs Working Group*, Appendix 2, p.63.

The purpose of taxation is to ensure that the unsuccessful party has only to pay a fair and reasonable amount to the other side.

6.56 In the High Court, taxation of costs is carried out by one of two Taxing Masters. In the Circuit Court costs are taxed by the County Registrar, who for that purpose has the same powers as the Taxing Master.³⁰⁰

6.57 Taxation of costs occurs when:

- (a) the legal costs which may be recovered by one party to proceedings from another party (“party and party costs”) cannot be agreed upon;
- (b) those costs that a solicitor claims from his own client (“solicitor and client costs”) cannot be agreed upon;³⁰¹ or
- (c) costs incurred in proceedings of an inter-party nature (e.g. company liquidations, wardship) are directed or required to be taxed.

Taxation and the Value of the Award

6.58 Order 99, Rule 37 (22) of the *Rules of the Superior Courts* lists the criteria to be taken into account by the Taxing Master in his or her assessment, as follows:

- *“the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;*
- *the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;*
- *the number and importance of the documents (however brief) prepared or perused;*
- *the place and circumstances in which the business involved is transacted;*
- *the importance of the cause or matter to the client;*
- *where money or property is involved, its amount or value;*
- *any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question”.*

6.59 Prior to the enactment of the *Courts and Court Officers Act 1995*, the Taxing Master was not empowered to examine the value of work done but was restricted to the reasonableness of work done. Section 27(1) of the 1995 Act gives the Taxing Master the power to assess the bill of costs by examining the nature and extent of the work done or services supplied by solicitors or barristers or by an expert witness and thus determine the value of work done.³⁰² Using this statutory power, the Taxing Master can allow or disallow any costs, charges, fees or expenses included in the bill of costs.

300 No person can be appointed to the position of Taxing Master unless at the time of appointment he or she is a solicitor of not less than ten years standing who is either then actually practising or has previously practised for not less than ten years. To be eligible for appointment to the office of County Registrar, a person must at the time of appointment be a solicitor or barrister of not less than eight years standing who is either then actually practising or has previously practised for not less than eight years.

301 These are the costs you are obliged to pay your solicitor or legal representative that are not recoverable under party and party costs

302 S.27(1): “On a taxation of costs as between party and party by a Taxing Master of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs.”

- 6.60 Despite this statutory power, analysis of data from legal costs accountants - undertaken by Dr. Vincent Hogan, UCD, on behalf of the Competition Authority - indicates that the size of the damages awarded in a particular case is a much more important determinant in the taxation of costs than the actual legal work done on a case.
- 6.61 The 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, and 80% of the variation in barristers' brief fees can be explained using simple formulae.³⁰³
- 6.62 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.
- 6.63 The *Report of the Legal Costs Working Group* presents a similar analysis on a much larger data set, relating to High Court cases taken from the records of the Taxing Master's Office and data from four Circuit Courts (Dublin, Cork, Limerick and Sligo). The vast majority of cases in the sample were personal injury (PI) cases.³⁰⁴ *"The conclusions of the analysis can be summarised as follows:*
- *There is a very large variation in fees charged even for the same class of case.*
 - *In the High Court, the most important determinant of fees charged in PI cases would seem to be the level of the award made to the plaintiff. Measures of the quality/quantity of legal services provided do not appear to be major factors.*
 - *In the Circuit Court, the level of the award does appear to influence the level of the fees – but the effect is weaker than in the High Court. Furthermore, the effect holds only for solicitors.*³⁰⁵
- 6.64 The evidence suggests that consumers are not always paying solely for work done and as a result may be paying excessive fees to lawyers.
- 6.65 In its Preliminary Report, the Competition Authority proposed that Taxing Masters should not consider the size of any award when assessing legal costs, but rather that legal costs should be assessed on the basis of the work undertaken by individual lawyers.
- 6.66 The Law Society believes that both the work done and the value and the size of the damages awarded in a particular case are relevant when assessing legal costs, as are the other various factors listed in Order 99, Rule 22 above. The Law Society highlights that solicitors assume risk, and that this risk should be acknowledged in the assessment of costs:
- "The size of an award provides a guideline against which the element of risk assumed by the solicitor in proceeding with an action can be measured. An acknowledgement, in the determination of allowable costs, of the element of risk*

303 The analysis showed 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, and 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.

304 Full details of the analysis may be found in Appendix 2 of the *Report of the Legal Costs Working Group*, 7 November 2005.

305 *Report of the Legal Costs Working Group*, Appendix 2, p.61.

assumed by a service-provider is neither anti-competitive nor unusual. In the legal context, solicitors assume significant financial risks, particularly in litigation, where they often fund all outlays for the duration of the proceedings with no certainty of recovery, particularly in 'no win, no fee' cases".³⁰⁶

- 6.67 The Bar Council agrees with the recommendation that legal costs should be based on work done. However, the Bar Council believes that a blanket ban on the size of an award as a relevant factor in assessing costs would fail to take into account the risk which a barrister may have assumed in a case and hence the value of the work done for the client. The Bar Council has amended the "Fees" section of its Code of Conduct by explicitly stating that barristers' *"fees are based upon work done"* but that a barrister is still entitled to take into account the *"amount or value of any claim"* when marking or nominating a fee.³⁰⁷
- 6.68 It is common in all forms of business that providers are rewarded for assuming risk. In the case of lawyers, the risk they assume is that they may not be paid if their client loses the case. A blanket ban on the size of an award as a relevant factor would be likely to deter lawyers from taking on certain cases. The risk which lawyers take on in certain cases is valuable to clients and ensures that certain cases are able to run through to conclusion.
- 6.69 Nevertheless, the size of the award should not be the primary determinant in the awarding of costs. The evidence above indicates that this is indeed currently the case. The Taxing Master should, therefore, place far less emphasis on the size of the award when assessing costs and more on the amount and value of the work done.

**Recommendation 26:
Legal costs should be assessed on the basis of work done**

Details of Recommendation

Legal costs should be primarily assessed on the basis of the work undertaken by individual lawyers and not primarily on the basis of the size of the award as is currently the case.

Action By

Taxing Masters and County Registrars
Immediate

Taxation and the two-thirds practice

- 6.70 When a client retains both a senior and junior counsel it is common practice for the junior counsel to fix their fee at two-thirds of the senior counsel's fee. 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.³⁰⁸
- 6.71 In its Preliminary Report, the Competition Authority proposed that Taxing Masters should cease the general practice of allowing junior counsels' 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.
- 6.72 The Bar Council submits that it agrees with the above proposal.

³⁰⁶ Submission of the Law Society of Ireland to the Competition Authority, July 2005, p. 74.

³⁰⁷ Paragraph 12.1 (a) of the Bar Council Code of Conduct, dated 13 March 2006.

³⁰⁸ The analysis in the *Report of the Legal Costs Working Group* found that the two-thirds rule was evident in 95% of cases.

**Recommendation 27:
Cease the practice of taxing junior counsel fee at two-thirds of the senior counsel.**

Details of Recommendation

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.

Action By

Taxing Masters and County Registrars

Immediate

Further recommendations of the Legal Costs Working Group

Summary

6.73 The Legal Costs Working Group recommended that the taxation system be replaced by a new system of costs assessment carried out by a Legal Costs Assessment Office. It also recommended that a Legal Costs Regulatory Body be established to oversee legal costs assessment and to formulate guidelines setting out the amounts of legal costs that normally could be expected to be recovered in respect of particular types of proceedings.

6.74 The Competition Authority welcomes the decision to reform the system of costs assessment. Nevertheless, the recommendations above in relation to the system of taxation should be implemented in the interim.

The Legal Costs Assessment Office

6.75 The Legal Costs Working Group recommended the establishment of a Legal Costs Assessment Office to replace the current Office of the Taxing Masters. Such an Office would take over the operation of the assessment process outlined by the Legal Costs Working Group. Assessment would be a new process of evaluating and determining costs in disputed cases, consisting of a written assessment procedure and an oral appeals procedure.³⁰⁹

6.76 The Competition Authority welcomes the recommendations to reform the system of costs assessment and establish a Legal Costs Assessment Office. The Legal Costs Working Group made no recommendation in relation to who should be eligible for appointment to the Legal Costs Assessment Office. The position of Taxing Master is currently reserved to solicitors. Persons other than solicitors should be eligible for appointment to the Legal Costs Assessment Office. For example, legal cost accountants would have the relevant expertise to assess the legal costs on a file.

**Recommendation 28:
Persons other than solicitors should be eligible for appointment to the Legal Costs Assessment Office**

Details of Recommendation

Appropriately qualified persons should be eligible for appointment to the proposed Legal Costs Assessment Office.

Action By

Minister for Justice, Equality and Law Reform

Legal Costs Regulatory Body

6.77 The Legal Costs Working Group also recommended that a Legal Costs Regulatory Body should be established and should be:

³⁰⁹ Report of the Legal Costs Working Group, chapter 7.

“empowered to formulate and promulgate guidelines for the assessment of costs in contentious business and should be conferred with all necessary powers to regulate such costs.

Specifically the body should:

- *Be responsible for formulating and regularly updating cost recovery guidelines which would inform billing and assessment;*
- *Set ranges for the maximum number of hours which may be normally recoverable as party and party costs for particular types of proceedings or steps within proceedings;*
- *Regulate the procedure for assessment of costs, the information to be provided by persons conducting assessments of costs, and ancillary matters;*
- *Prescribe the information to be given in respect of costs, fees and disbursements by solicitors and counsel to persons seeking or receiving legal services, or estimates of costs;*
- *Provide information to the public on the law and on client entitlements relating to cost; and,*

As an aid to the exercise of its regulatory powers and for the information of the public, collect, analyse and publish data in relation to costs, counsel's fees, witnesses' expenses and other disbursements from all court jurisdictions.”³¹⁰

- 6.78 The publication of information, guidelines and data in relation to costs will increase transparency in the market for legal services. Increased transparency in legal fees would be beneficial for consumers as it would reduce consumers' search costs, reduce the information gap between the lawyer and the consumer, and this would translate into more competition among legal service providers.
- 6.79 However, increased transparency in relation to fees can also facilitate collusive behaviour in a market. Collusive behaviour – including tacit collusion whereby suppliers charge the same price, not by agreement but by following a profitable industry practice - is usually easier when participants can pick a simple and clear focal point as the price. If competition in the market for legal services does not improve, the publication of guidelines, information and data in relation to fees may become focal points for lawyers.
- 6.80 For example, setting ranges for the maximum number of hours which may be normally recoverable as party and party costs for particular types of proceedings or steps within proceedings would have the effect of setting a price ceiling. Price ceilings can act as a focal point. The result would be a clustering of legal fees at the ceiling that would not otherwise have been observed, i.e. a large number of lawyers setting their fees at or near the maximum price allowed. In such an instance the benefits of increased transparency would be negated.
- 6.81 It is imperative that there is competition in the market for legal services so that the publishing of information, guidelines and data in relation to cost and fees do not become focal points for legal practitioners. The recommendations in this entire final report should be implemented to ensure increased competition in the market for legal services. This in turn will exert downward pressure on legal fees. Implementing the Competition Authority's recommendations will complement and enhance the reforms proposed by the Legal Costs Working Group and lay the basis for a well-functioning legal services market that works in the interests of society as a whole.

³¹⁰ Report of the Legal Costs Working Group, paragraph 7.17, p. 46.

Competitive Tendering for legal services

- 6.82 Chapter 2 of this report noted the role of the State as a major buyer of legal services, whether buying such services for itself; funding the criminal and civil legal aid schemes; or paying for legal services provided to the various Tribunals of Inquiry which have been established in recent years. The State has made efforts to contain the high cost of legal services for the Tribunals by applying a new lower scale of fees to Tribunals established after September 2004 and now proposes to apply the lower rates to existing Tribunals.³¹¹
- 6.83 While efforts to contain the legal costs of Tribunals and other public inquiries must be welcomed, such costs are only one element of the total legal costs paid by the State. It is important that the State also seeks to use its buyer power more effectively in relation to other areas of State-funded legal expenditure. To further improve value for money in the provision of legal services, the State should examine the possibility of introducing competitive tendering in appropriate areas.
- 6.84 The issue of value for money in legal aid procurement is currently being addressed in the UK. In July 2005 the Department for Constitutional Affairs published “*A Fairer Deal for Legal Aid*”, a strategy paper for legal aid reform which has as one of its aims “*ensuring that the taxpayer gets value for money from those who provide legal services*”.³¹² As part of this strategy a review of legal aid procurement was conducted by Lord Carter. His report “*Legal Aid - a market-based approach to reform*” was published in July 2006.³¹³ Among the recommendations in the report was that there should be “*best value tendering for legal aid contracts based on quality, capacity and price from 2009*”.
- 6.85 The Department of Justice, Equality and Law Reform should identify those legal services purchased by the State where competitive tendering would be an appropriate form of procurement and examine the developments in relation to competitive tendering in other jurisdictions as well as the likely impact of introducing a similar system in Ireland.
- 6.86 Competitive tendering, with selection of providers based on quality of service as well as price, could push suppliers of legal services to innovate and become more efficient and enable the State to maximize value for money for its expenditure on legal services. This would ensure that the resources put into State-funded legal aid schemes are used to the maximum benefit of those that such schemes are designed to assist.

Recommendation 29:

Examine the possibility of introducing competitive tendering for the provision of legal services

Details of Recommendation

The Department of Justice, Equality and Law Reform should

(a) identify those legal services purchased by the State where competitive tendering would be an appropriate form of procurement; and

(b) examine systems of competitive tendering for the provision of legal services operating in other jurisdictions with a view to introducing such a system in Ireland.

Action By

Department of Justice, Equality and Law Reform

December 2008

311 Section 39 of the Tribunals of Inquiry Bill 2005.

312 See http://www.dca.gov.uk/laid/fairerdeal.htm#fairer_deal_las

313 Available at <http://www.legalaidprocurementreview.gov.uk/publications.htm>. See also <http://www.legalservices.gov.uk/criminal/lcct/lcct.asp> for details of a consultation on ‘*Improving Value for Money for Publicly Funded Criminal Defence Services in London*’, launched on 28 January 2005.





section 7

7. CONCLUSION

- 7.1 Competition in legal services is severely hampered by many unnecessary restrictions permeating the legal profession. These restrictions emanate mainly from the regulatory rules and practices of the Law Society, the Bar Council and the Honorable Society of King's Inns but also from the relevant legislation.
- There are a number of unnecessary restrictions on becoming a solicitor or barrister. For example, those wishing to enter either branch of the legal profession must do so by way of a training school monopoly.
 - Rivalry and competition between lawyers is highly restricted. The legal profession in Ireland is organised in a highly rigid business model; the title of Senior Counsel is inclined to distort rather than facilitate competition; there is a near blanket ban on advertising by barristers; and clients wishing to switch to another solicitor or barrister have found unnecessary obstacles in their way.
 - There is no profession of "conveyancers" in Ireland, as in other common-law countries, and this limits competition in conveyancing services.
 - Competition in legal fees has been additionally dampened by a lack of information for consumers seeking legal services and retaining a lawyer. Known anti-consumer practices - such as barristers charging fees in proportion to one another and solicitors charging fees as a percentage of the award their client receives - have continued unchecked.
- 7.2 The Law Society, the Bar Council and King's Inns have not sufficiently promoted the interests of consumers of legal services. They have failed to provide consumers with necessary information for dealing with the legal profession and put unnecessary limits on how consumers access legal services and on how one can become a solicitor or barrister. They have presided over restrictions on competition which may have benefits for lawyers but harm consumers. The overall effect of the myriad restrictions on competition in legal services has been to limit access, choice and value for money for those wishing to enter the legal profession and those purchasing legal services.
- 7.3 In this report, the Competition Authority makes 29 recommendations for reform of the unnecessary restrictions on competition that are identified in this report. These recommendations are in line with reform of the legal profession in other countries and reflect the trend towards better regulation in Ireland generally. They should be implemented without delay, so that Ireland's citizens and businesses can sooner reap the benefits of increased competition in legal services, including more choice, efficiency and value for money. A few of the recommendations have already been implemented in response to the Competition Authority's Preliminary Report, when the Bar Council proposed changes to the Bar's Code of Conduct and those changes were accepted by the barristers of Ireland. The Law Society and King's Inns, in contrast, have refused to respond to the Preliminary Report's recommendation that they issue guidelines to potential providers of professional training for solicitors and barristers, respectively.³¹⁴
- 7.4 A key recommendation of the Competition Authority is the establishment of an independent Legal Services Commission with overall responsibility for regulating the legal profession and the market for legal services. The Authority further recommends the separation of representative and regulatory functions within the profession, i.e. the Law Society and the Bar Council, and the greater involvement of non-lawyers in the regulatory framework. The current regulators – the Law Society and the Bar Council – have proven themselves unwilling to implement change in many areas in the face of scrutiny by independent bodies, over a period of two decades. There is a

³¹⁴ King's Inns has broadened its criteria for the recognition of diploma courses that may be eligible for recognition for entry to the Barrister-at-law degree and has stated its intention to provide a modular course leading to the degree, to facilitate those in full-time employment who wish to train as barristers. The Law Society has commenced training solicitors in Cork since the publication of the Preliminary Report.

need for independent oversight to ensure that the regulation of the legal profession is appropriate to Ireland's needs and consumers of legal services.

- 7.5 A new regulatory structure of this type is required to meet the principles of good regulation established by the Government and in order to address adequately the risk associated with self-regulation.³¹⁵ Independent regulation of the legal profession would be consistent with reforms aimed at greater transparency, accountability and consumer focused regulation in other professions and sectors in Ireland, and in the legal profession internationally.
- 7.6 The current regulatory framework for the legal profession in Ireland raises the potential for conflicts – between the commercial interests of lawyers and the interests of consumers of legal services. Barristers are totally self-regulated and solicitors are largely self-regulated with minimal independent oversight in some areas. The Bar Council and the Law Society are the representative bodies for barristers and solicitors, respectively and, in that capacity, lobby for and promote the interests of the legal profession. Also, in their role as regulators of the legal profession, the Bar Council and the Law Society must ensure that the legal profession operates to the benefit of consumers. These two roles can conflict and housing them in the same organisation lacks transparency.
- 7.7 An independent Legal Services Commission, to oversee the Law Society, Bar Council and other regulatory bodies, will address the conflict inherent in the current system and meet the principles of good regulation established by the Government in *"Regulating Better"*.³¹⁶
- 7.8 Other key recommendations are:
- The Minister for Justice, Equality and Law Reform should remove the Law Society's and King's Inns' role of setting standards for the provision of legal education and give this role to the Legal Services Commission. The Law Society and King's Inns and any other institutions which wish to provide training for solicitors or barristers should be required to apply to the Legal Services Commission for approval to do so.
 - The Law Society and the Bar Council should develop and actively provide useful and accessible information for consumers on their rights and key features of legal services. They should develop a Consumer Information page on their websites.
 - The Bar of Ireland should allow unlimited direct access to barristers for legal advice.
 - The Minister for Justice, Equality and Law Reform should bring forward legislation to permit qualified persons other than solicitors to provide conveyancing services. Persons wishing to provide conveyancing services should be required to be registered as "conveyancers" by a Conveyancers' Council of Ireland with responsibility for regulating the training, qualification and operation of conveyancers.
- 7.9 Overall, the legal profession is in need of substantial reform by way of comprehensive new legislation – a Legal Services Bill – to address all of the issues identified in this report. Such root and branch reform reflects the important need to create a modern system of regulation of the legal profession that is proportionate, accountable, transparent, flexible and reflects the needs of consumers. In the interim, there is much the legal profession can do itself to initiate reform for the benefits.

³¹⁵ 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.

³¹⁶ www.betterregulation.ie



Appendices

Appendix 1: Submissions received in response to Preliminary Report

[A barrister]

[A barrister]

The Bar Council

Griffith College

John Hanlon

Higher Education Authority

The Honorable Society of King's Inns

Irish Employers and Business Confederation (IBEC)

Irish Insurance Federation

Irish Mortgage Council

The Law Society

McCann Fitzgerald

Medical Protection Society

Personal Injuries Assessment Board

Self Insured Taskforce

University College Cork

University of Dublin (Trinity College)

Appendix 2: Previous Reports on the Legal Profession in Ireland

Restrictive Practices Commission – *Report of Enquiry into the effects on Competition of the Restrictions on Conveyancing and the Restrictions on Advertising by Solicitors* (April 1982)

Background

The Restrictive Practices Commission reported to the Minister for Trade, Commerce and Tourism in April 1982 on its Enquiry into:

(1) *“the nature and extent of competition in the carrying on of conveyancing for gain with particular reference to the effects on competition of legal requirements restricting the provision of this service; and*

(2) how the prohibition on advertising affects competition by solicitors.”

In the course of its Enquiry the Commission received 33 submissions from interested parties and held twelve days of public sittings, taking evidence from 29 witnesses.

Recommendations

The Commission made a number of recommendations designed:

- to ensure protection to members of the public through greater publicity for the Law Society's disciplinary procedures and lay representation on the Society's Disciplinary bodies and its Council;
- to prohibit restrictions on advertising (with the exception of advertising which would bring the profession into disrepute);
- to make it unlawful to induce a solicitor not to charge less than the prescribed scale fees; and
- to examine whether the aspects of conveyancing reserved to solicitors could be reduced.

Implementation

Some of the Commission's recommendations have been implemented. There is now some lay representation on the Law Society's disciplinary bodies. Other recommendations have been overtaken by events, for example fee scales are now prohibited. Other recommendations have not yet been implemented (for example there is still no lay representation on the Council of the Law Society), or partly implemented (such as the recommendation to prohibit restrictions on advertising).

Fair Trade Commission – *Report of Study into Restrictive Practices in the Legal Profession* (March 1990)

Background

In 1990 the Fair Trade Commission published the report of its Study into Restrictive Practices in the Legal Profession. The study was part of a wider study into certain professional services which the Commission was asked to carry out by the Minister for Industry, Trade, Commerce and Tourism in April 1984.

The Commission received more than 80 submissions from interested parties and compiled a questionnaire which it sent to the relevant professional bodies. The Commission also held 40 days of meetings with interested parties, including the Law Society and the Bar Council.

Recommendations

The Commission examined a number of issues in the course of its study and made a series of detailed recommendations. On the issue of **legal education**, the Commission recommended the establishment of an Advisory

Committee on Legal Education and Training to review the education and training of lawyers and to implement a system of common vocational training for solicitors and barristers. The Commission also highlighted its concern that the control over entry exerted by the professions might lead to the numbers admitted being restricted to a level which matched the requirements of the profession and not the public.

On **direct access to barristers**, the Commission concluded that all clients should be able to approach barristers directly, both for contentious and non-contentious business, but that individual barristers would be entitled to insist that a solicitor be engaged.

The Commission also examined a number of rules and practices around the **size of legal teams** in Court and recommended that the number of counsel engaged in a case should be no more than strictly necessary.

On the issue of **business structures**, the Commission recommended that there should be the greatest possible freedom allowed to solicitors and barristers to decide on the most suitable form of business organisation.

The Commission recommended that individual barristers and solicitors should be permitted full freedom to negotiate **fees** with their clients; that the various Rules and Orders prescribing solicitors fees should be revoked and that neither the Law Society nor the Bar Council should issue recommendations on fees to their members.

On **advertising**, the Commission recommended that barristers be able to advertise freely and that restrictions on advertising by solicitors, such as the prohibition on touting for business and the ban on fee advertising, should be removed.

On **legal personnel in employment**, the Commission recommended that employed barristers should be allowed to represent their employers in Court and that barristers should be permitted to be employed by other barristers and by solicitors and multi-disciplinary practices.

The Commission expressed concern that there was no lay involvement in the **disciplinary procedures** of the Law Society and the Bar Council and recommended lay representation on disciplinary bodies and the establishment of an office of Legal Ombudsman to deal with complaints concerning solicitors and barristers.

The Commission also made a number of **miscellaneous recommendations** such as the appointment of solicitors as judges and that consideration be given to dealing with personal injuries actions in a tribunal rather than a normal court.

Again, some of the recommendations made by the Commission have been implemented, such as lay involvement in disciplinary procedures; the appointment of solicitors as judges and the establishment of the Personal Injuries Assessment Board. Legislation providing for the establishment of a Legal Services Ombudsman was published in April 2006. Others have been partly implemented, such as direct access to barristers, which is limited to certain groups for legal advice only, rather than full access as recommended by the Commission. Many recommendations have not been implemented. For example, employed barristers cannot represent their employers in court; barristers are still not allowed to advertise freely and solicitors and barristers are still restricted in terms of the business structures they can use in offering their services to the public.

Organisation for Economic Co-operation and Development – *Regulatory Reform in Ireland*, OECD (2001)

Background

The OECD examined the provision of legal services as part of a larger Study on Regulatory Reform in Ireland.

Recommendations

The OECD Report noted earlier reforms in the legal profession which allowed solicitors to advertise and removed the compulsion of scale fees published by the self-regulatory bodies and recommended that further reform was needed. While the Report made few specific recommendations,³¹⁷ it identified a number of areas for further reform: the removal of remaining impediments to competition among solicitors; opening up the provision of conveyancing services; direct access to barristers; and allowing barristers and solicitors to practice in other business forms.

³¹⁷ The Report recommended that control of legal education should be removed from the self-governing bodies and that the freedom of solicitors to advertise fees and areas of specialisation be maintained.

Appendix 3: Regulatory Regimes in other Common-Law Jurisdictions

This section describes the regulatory framework as it affects competition in other common-law jurisdictions. The jurisdictions explored are:

- England and Wales;
- Northern Ireland;
- Canada;
- New Zealand; and
- the following Australian territories: New South Wales; Queensland; Victoria; Western Australia; Australian Capital Territory.

England and Wales

England and Wales, like Ireland, has a legal profession with two separate branches: solicitors and barristers.

Solicitors³¹⁸ - Education:

The Law Society³¹⁹ 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 and The College of Law.³²⁰ 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.

Solicitors - Representation and Regulation:

The profession is 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 is also the representative body for solicitors in England and Wales.

Barristers³²¹ - Education:

A number of third-level institutions provide the compulsory Bar Vocational Course. All students must be admitted to an Inn of 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.

Barristers - Representation and Regulation:

One of the objectives of the Bar Council³²² 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.

318 Information in this section has been in part provided by the Law Society of England and Wales and in part taken from its website, www.lawsoc.org.uk

319 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.

320 The College of Law is the largest provider of postgraduate legal training in the UK. The College only provides legal courses and has six centres: Birmingham, Chester, Guildford, London (2) and York.

321 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 of England and Wales.

322 The General Council of the Bar of England and Wales was founded in 1894 to represent the interests of barristers.

Barristers - Other Information:

Direct access to barristers has now been extended to the public in general for both advice and legal representation in court. However, barristers are prohibited from accepting instructions directly in areas of practice such as immigration or asylum work and family or criminal proceedings (subject to some exceptions). Where the brief involves a court appearance, the barrister is prohibited from doing the work of a solicitor in preparing the case. Barristers are not obliged to accept direct access work.

An employed barrister may supply legal services (defined to include representation in court) to his employer.

Barristers in England and Wales are permitted to advertise their services.

Conveyancers:

In England and Wales, Licensed Conveyancers were introduced in 1987. Conveyancers are regulated by an independent statutory body – the Council of Licensed Conveyancers. The Council requires all conveyancers to have academic qualifications, professional indemnity insurance and to pay into a fund for the protection of client monies.

Review and reform of regulatory framework in England and Wales

In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework in the legal services market in England and Wales. The Clementi report recommended:

- the creation of a new Legal Services Board (LSB) to provide oversight regulation;
- statutory objectives for the LSB;
- that regulatory powers should be vested in the LSB, with powers devolved to Front Line Regulators, e.g. Law Society, Bar Council and Council of Licensed Conveyancers, where they meet LSB standards;
- that Front Line Regulators should be required to separate their regulatory and representative functions;
- the establishment of a new Office for Legal Complaints to handle consumer complaints;
- the facilitation of legal disciplinary practices, to allow different kinds of lawyers to work together.

The Government accepted Sir David Clementi's recommendations and set out its agenda for reforming the regulation and delivery of legal services in a White Paper entitled "*The future of Legal Services: Putting Consumers First*". A draft Legal Services Bill setting out the proposed new regulatory framework and principles governing the legal profession was published in May 2006 and has recently been reported on by a Parliamentary Joint Committee.

Northern Ireland

The structure of the legal profession in Northern Ireland is similar to that in the State, 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.

Solicitors - 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.

Solicitors - Representation and Regulation:

The Law Society is the sole representative body for solicitors in Northern Ireland.³²³ Under the *Solicitors (Northern Ireland) Order 1976*, 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.³²⁴

Barristers - 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.

Barristers - Representation and Regulation:

The Bar Council of Northern Ireland is the regulatory and representative body for the profession.

Barristers - Other information:

In Northern Ireland an employed barrister may represent his or her employer in court but not a third party. A barrister is also permitted to advertise his or her services.

Canada

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 legal system.

Education:

There are twenty approved law schools in Canada. On 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 practise. The length of the course varies from nine to eighteen months across the provinces, and includes a legal apprenticeship.

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

³²³ Information obtained from the Information Office of the Law Society of Northern Ireland

³²⁴ www.lawsoc-ni.org

lawyers in Canada belong to the CBA.³²⁵ 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 practise as lawyers. They also set professional standards.³²⁶

New Zealand

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.

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.

Representation and Regulation:

The New Zealand Law Society was established by statute in 1869. The *Law Practitioners Act 1982* 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.³²⁷

Conveyancing:

The *Lawyers and Conveyancers Act 2006*, received the Royal assent on 20 March 2006. The Act provides for the registration of conveyancers and ends the legal profession's exclusive right to provide conveyancing services. A new body, the New Zealand Society of Conveyancers, is to be established. Practice rules in relation to conveyancers will be made by the Society of Conveyancers.

Australia

The legal profession in Australia consists of both barristers and solicitors. In some States, the profession is integrated, in others it is not. Interestingly, in those States where the profession is formally integrated, an independent Bar has nevertheless emerged in relatively recent times. 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.

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 a number of states, 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.

³²⁵ www.cba.org

³²⁶ www.jurist.law.utoronto.ca

³²⁷ www.nz-lawsoc.org.nz

New South Wales

In New South Wales, the legal profession comprises 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).

Solicitors - Education:

Prospective solicitors must undertake a practical legal training programme. 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.

Solicitors - 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.³²⁸ Regulation of solicitors involves the Law Society and three independent statutory bodies: the Legal Professional Advisory Council, the Legal Profession Admission Board and the Legal Services Commissioner, which oversee the Law Society in the carrying out of its regulatory functions.

Barristers - Education:

In order to be eligible for admission to practise, it is necessary to complete an accredited programme of practical legal training, and pass the Bar examinations 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. The barrister must complete a 12-month Reading Programme organised by the Bar Council under the supervision of at least one experienced barrister, called a tutor. Depending on the reader's progress, the conditions on the practising certificate may start to be lifted after completing the civil and criminal reading requirements.

Barristers - Representation and Regulation:

Barristers are represented and regulated by the New South Wales Bar Association. Barristers are regulated under the *Legal Profession Act 2004*. As with solicitors, the Legal Professional Advisory Council, the Legal Profession Admission Board and the Legal Services Commissioner, oversee the Bar Association's regulatory functions.

Barristers - Other information:

Barristers in New South Wales are permitted to accept direct access briefs directly from lay clients for both legal advice and representation in court. Where the brief involves a court appearance, the barrister is prohibited from doing the work of a solicitor in preparing the case. Barristers in New South Wales are prohibited from representing their employers in court.

Conveyancers:

Licensed conveyancers in New South Wales receive their licences from the Department of Fair Trading. The Department of Fair Trading also administers the *Conveyancers Licensing Act 1995*. The conduct of conveyancers come under the *Legal Professions Act 2004* and the Legal Services Commissioner oversees this. The NSW Division of the Australian Institute of Conveyancers is the professional body representing conveyancers in NSW and has representatives sitting on committees with the various Government Departments. It is also consulted on the educational requirements for licensed conveyancers including mandatory continuing education.

Queensland

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

328 www.lawsociety.com.au

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.

Solicitors - Education:

Following completion of an approved law degree, a candidate must complete either an approved practical legal training course (available from a number of educational establishments), or Articles of Clerkship with a principal of a law firm.

Solicitors - 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.

Barristers - 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.³²⁹

Barristers - Representation and Regulation:

Barristers are represented and regulated by the Bar Association of Queensland.³³⁰

Victoria³³¹

The enactment of the *Legal Profession Practice Act 1891 (Vic)* legally fused the barristers' and solicitors' branches of the legal profession in Victoria. 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.

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.³³²

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.³³³ Both of these bodies are funded and regulated by the Legal Practice Board (LPB).³³⁴ The LPB is an independent body headed by a 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.

³²⁹ www.bond.edu.au

³³⁰ www.qldbar.asn.au

³³¹ 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

³³² www.vicbar.com.au

³³³ www.vicbar.com.au

³³⁴ www.lpb.vic.gov.au

Review and reform:

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

Western Australia has a fused legal profession, although a separate, independent Bar emerged in 1961. 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.³³⁵

Education:

Law graduates must complete a period of twelve months as an articled clerk before gaining admission to practise.

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. 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.

Australian Capital Territory

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.³³⁶

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.

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.

335 www.austlii.edu.au

336 www.lawsocact.asn.au

Appendix 4: Legal Services Commission

In Chapter 3, the Competition Authority recommends the establishment of an independent oversight regulator for the legal profession - the Legal Services Commission. This Appendix sets out some of the powers and functions the Legal Services Commission should be given. This list is intended to be indicative and not exhaustive.

Composition

The Head of the Legal Services Commission, and also a majority of its members, should not be practising members of the legal profession.

Powers and functions

The powers and functions of the Legal Services Commission should be provided for by statute.

An excerpt of the draft legislation³³⁷ outlining the powers and functions of the independent oversight regulator, the Legal Services Board ("the Board"), in England and Wales is included on pages 168 to 184.

An excerpt of the *Legal Profession Act 2004 (NSW)* is included on pages 185 to 191. The excerpt of legislation outlines the process by which legal professional rules are made in New South Wales. The excerpt highlights the relationship between the front line regulators, the Law Society and the Bar Council, and the independent oversight regulators, the Legal Services Commissioner ("Commissioner") and the Advisory Council, in the making of legal professional rules.

Rules, regulations and standards

The Legal Services Commission should be given powers to repeal (or require the repeal) of existing professional rules.

The existing front line regulators - the Law Society and the Bar Council - should be required to submit any proposed rule changes to the Legal Services Commission for approval before implementation. The Legal Services Commission, in turn, should be given the power to require amendments to, or reject, proposed rule changes.

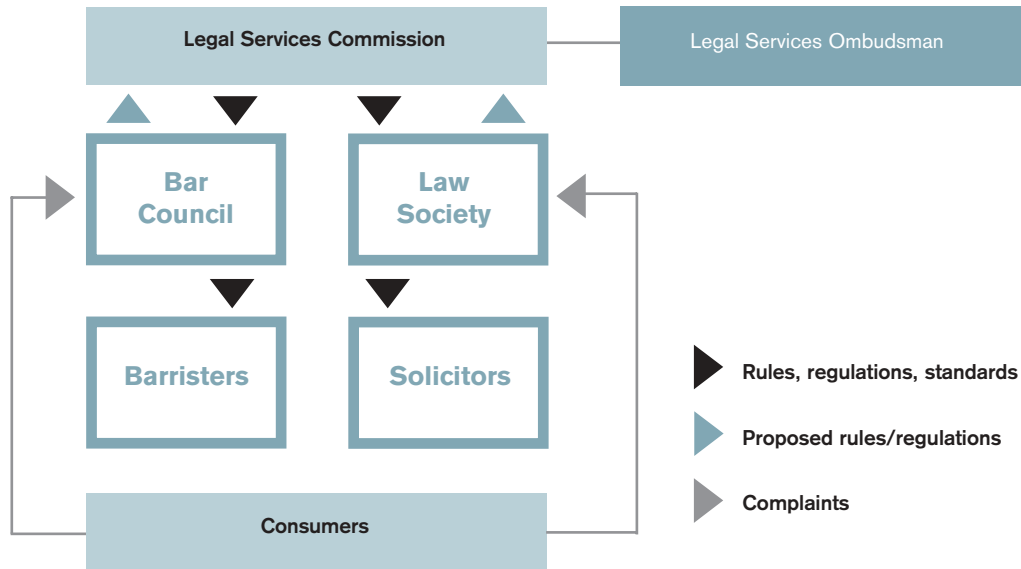
The Legal Services Commission should also have the function of requiring the front line regulators to meet certain standards in the carrying out of their duties. For example, the Commission may require that the regulators provide a minimum amount of information to consumers about complaint processes, purchasing legal services, legal fees etc.

The Legal Services Commission should be given the power to impose financial penalties or other sanctions on a regulator who fails to meet prescribed standards.

³³⁷ *Draft Legal Services Bill, Explanatory Notes and Regulatory Impact Assessment*, presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty, May 2006.

Figure A1 below outlines the recommended relationship between the front line regulators and the Legal Services Commission in relation to rule-making and standards in the market for legal services.

Figure A1: Market for Legal Services



Complaints

As outlined in Chapter 3, the proposed establishment of a Legal Services Ombudsman, or indeed the proposed Legal Services Commission, does not alter the fact that the Law Society and the Bar Council will remain a consumer’s first avenue for lodging a complaint against a lawyer. As such, it is imperative that the front line regulators meet certain standards in the handling of complaints.

It is proposed that the Legal Services Ombudsman will have a role to oversee on an on-going basis the procedures of the Law Society and the Bar Council (and if necessary recommend and enforce improvements) in relation to the receipt and examination or investigation of complaints.

The Legal Services Commission’s remit should include the setting of standards generally. It would seem sensible that the Legal Services Ombudsman, in conjunction with the Legal Services Commission, set standards in relation to complaints procedures, or at least liaise with the Commission when making recommendations in relation to complaints procedures. Such a system would free up resources for the Ombudsman to investigate complaints, leaving the regulatory issues largely in the hands of the Legal Services Commission.

Legal Costs

The Legal Costs Working Group, discussed in Chapter 6, recommended that a Legal Costs Regulatory Body should be established and should be:

“empowered to formulate and promulgate guidelines for the assessment of costs in contentious business and should be conferred with all necessary powers to regulate such costs.”³³⁸

The establishment of a Legal Services Commission would obviate the need to establish a Legal Costs Regulatory Body, as the proposed Legal Costs body could simply form one component of the Legal Services Commission.

The Legal Services Commission, the oversight regulator of the legal services market, should carry out, as part of its functions, the job of formulating and promulgating guidelines for the assessment of costs in contentious matters.

Research

One of the functions of the Legal Services Commission should be to undertake research in areas of the legal services market where reform may be beneficial for consumers or for the functioning of the market.

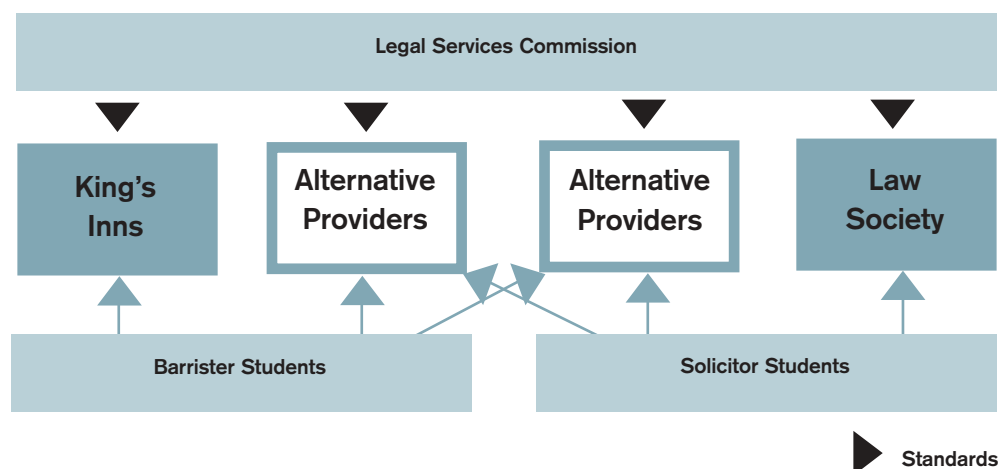
For example, the Competition Authority has highlighted, in Chapters 4 to 6 of this report, a number of areas where introducing reform is likely to benefit competition, but where further research is required. The Legal Services Commission should undertake such research to investigate the practicalities and costs of implementing reforms in areas such as:

- Direct Access for contentious issues
- Legal Disciplinary Practices
- Multi-Disciplinary Practices
- Incorporated Legal Practices.

Education

Figure A2 below outlines the relationship between the Legal Services Commission and the providers of legal education.

Figure A2: Market for Legal Education



³³⁸ Report of the Legal Costs Working Group, paragraph 7.17, p. 46.

The Legal Services Commission should have the function of setting the standards for the provision of legal education in the State. Allowing a centralised body to set the standards for legal education allows more scope for common training of lawyers, where appropriate, as is the case in Northern Ireland and Scotland.

The Honorable Society of King's Inns, the Law Society and any other institution which wishes to provide training for barristers and/or solicitors should be required to apply to the Legal Services Commission for approval to do so.

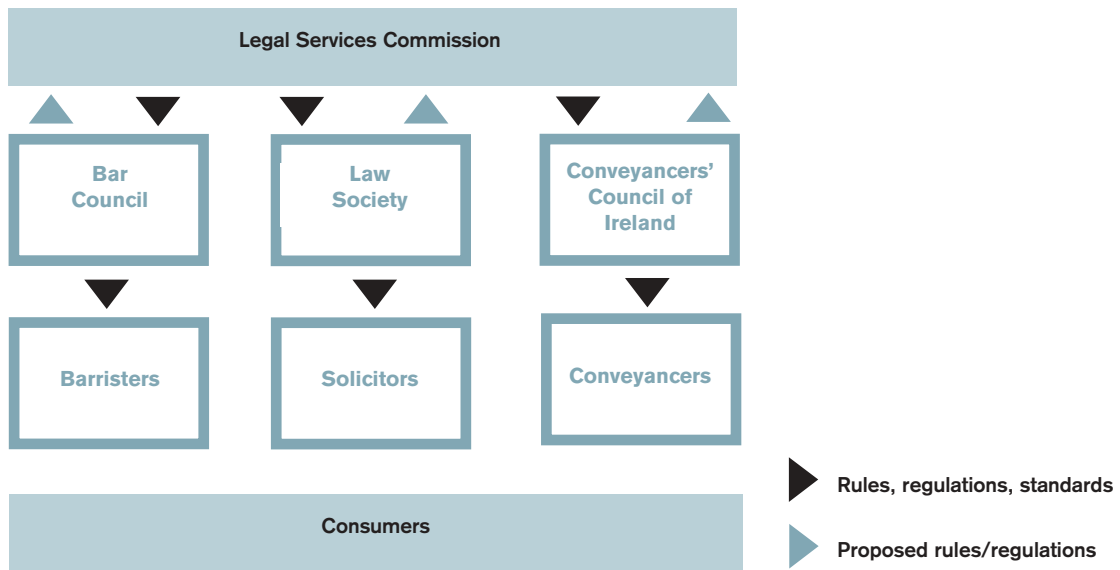
Conveyancing

Chapter 4 of the report recommends that the Minister for Justice, Equality and Law Reform should bring forward legislation to permit qualified persons other than solicitors to provide conveyancing services.

It is also recommended that persons other than solicitors wishing to provide conveyancing services be required to be registered as “conveyancers” by a Conveyancers’ Council of Ireland with responsibility for regulating the training, qualification and operation of conveyancers.

The Legal Services Commission, subject to its oversight, would delegate day-to-day regulation of conveyancers to the Conveyancers’ Council of Ireland, as illustrated below.

Figure A3: Market for Conveyancing Services



Extract from Draft Legal Services Bill 2006 (UK)

10

Legal Services Bill
Part 3 – Reserved legal activities

19 in respect of the provisional reserved activity, pursuant to a recommendation made by the Board following the provisional report; “new reserved legal activity” means a legal activity which has become a reserved legal activity by virtue of an order under section 19.

21 Recommendations that activities should cease to be reserved legal activities 5

- (1) The Board may recommend that an activity should cease to be a reserved legal activity.
- (2) Schedule 6 makes provision about the making of recommendations for the purposes of this section.
- (3) The Secretary of State must consider any recommendation made by the Board for the purposes of this section. 10
- (4) Where the Secretary of State disagrees with a recommendation (or any part of it), the Secretary of State must publish a notice to that effect which must include the Secretary of State’s reasons for disagreeing.

PART 4 15

REGULATION OF APPROVED REGULATORS

Introductory

22 Regulatory functions of approved regulators

- In this Act references to the “regulatory functions” of an approved regulator are to any functions the approved regulator has – 20.
- (a) under or in relation to its regulatory arrangements, or
 - (b) in connection with the making or alteration of those arrangements.

General duties of approved regulators

23 Approved regulator’s duty to promote the regulatory objectives etc

- (1) In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section. 25
- (2) The approved regulator must, so far as is reasonably practicable, act in a way –
 - (a) which is compatible with the regulatory objectives, and
 - (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives. 30
- (3) The approved regulator must have regard to –
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and 35
 - (b) any other principle appearing to it to represent the best regulatory practice.

Draft Bill

Performance targets

24 Performance targets and monitoring

- (1) The Board may –
 - (a) set one or more performance targets relating to the performance by a particular approved regulator of any of its regulatory functions, or 5
 - (b) direct an approved regulator to set one or more performance targets relating to the performance by the approved regulator of any of its regulatory functions.
- (2) A direction under subsection (1)(b) may impose conditions with which the performance targets must conform. 10
- (3) In exercising its regulatory functions, an approved regulator must seek to meet any performance target set for or by it under this section.
- (4) The Board must publish any target set or direction given by it under this section.
- (5) An approved regulator must publish any target set by it pursuant to a direction under subsection (1)(b). 15
- (6) The Board may take such steps as it regards as appropriate to monitor the extent to which any performance target set under this section is being, or has been, met.

Directions 20

25 Directions

- (1) Where the Board is of the opinion that an approved regulator has failed –
 - (a) to perform any of its regulatory functions to an adequate standard (or at all),
 - (b) to meet any performance target set under section 24(1)(a) or (b), 25
 - (c) to comply with any requirement imposed on it by or under this Act or any other enactment,
 - (d) to ensure that the exercise of its regulatory functions is not prejudiced by any functions it has in connection with the representation, or promotion, of the interests of persons regulated by it, 30the Board may direct the approved regulator to take such steps as the Board considers will remedy the failure, mitigate its effect or prevent its recurrence.
- (2) A direction –
 - (a) may only require an approved regulator to take steps which it has power to take; 35
 - (b) may require an approved regulator to take steps with a view to the modification of any part of its regulatory arrangements.
- (3) The Board may not exercise its powers under this section to give a direction requiring an approved regulator to take steps in respect of a specific disciplinary case or other specific regulatory proceedings (as opposed to all, or a specified class of, such cases or proceedings). 40

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

12

Legal Services Bill
Part 4 – Regulation of approved regulators

- (4) For the purposes of this section a direction to take steps includes a direction which requires an approved regulator to refrain from taking a particular course of action.
- (5) The power to give a direction is subject to any provision made by any other enactment. 5
- (6) The Board may take such steps as it regards as appropriate to monitor the extent to which a direction is being, or has been, complied with.
- (7) Where the Board revokes a direction, it must –
 - (a) give the approved regulator to whom the direction was given notice of the revocation, and 10
 - (b) publish that notice.

26 Directions: procedure

Schedule 7 makes provision about the procedure which must be complied with before a direction is given under section 25.

27 Enforcement of directions

15

- (1) If at any time it appears to the Board that an approved regulator has failed to comply with a direction given under section 25, the Board may make an application to the High Court under this section.
- (2) If, on an application under this section, the High Court decides that the approved regulator has failed to comply with the direction in question, it may order the approved regulator to take such steps as the High Court directs for securing that the direction is complied with. 20
- (3) This section is without prejudice to the powers conferred on the Board by section 28 or 30 (powers to censure or impose financial penalties).

Censure

25

28 Public censure

- (1) This section applies if the Board is satisfied that an approved regulator has failed –
 - (a) to perform any of its regulatory functions to an adequate standard (or at all), 30
 - (b) to meet any performance target set under section 24(1)(a) or (b),
 - (c) to comply with any direction given by the Board under this Act, or
 - (d) to comply with any other requirement imposed on the approved regulator by or under this Act or any other enactment.
- (2) The Board may publish a statement censuring the approved regulator for that failure. 35

29 Public censure: procedure

- (1) If the Board proposes to publish a statement under section 28 in respect of an approved regulator it must give notice to the approved regulator –

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

13

Part 4 – Regulation of approved regulators

- (a) stating that the Board proposes to publish such a statement and setting out the terms of the proposed statement,
 - (b) specifying the acts or omissions which, in the Board’s opinion, constitute the failure in respect of which the statement is published, and
 - (c) specifying the time (not being earlier than the end of the period of 28 days beginning with the day on which the notice is given to the approved regulator) before which representations with respect to the proposed statement may be made. 5
- (2) Before publishing the statement, the Board must consider any representations which are duly made. 10
- (3) Before varying any proposed statement set out in a notice under subsection (1)(a), the Board must give notice to the approved regulator –
- (a) setting out the proposed variation and the reasons for it, and
 - (b) specifying the time (not being earlier than the end of the period of 28 days beginning with the day on which the notice is given to the approved regulator) before which representations with respect to the proposed variation may be made. 15
- (4) Before varying the proposal, the Board must consider any representations which are duly made.

Financial penalties

20

30 Financial penalties

- (1) This section applies if the Board is satisfied that an approved regulator has failed –
- (a) to perform any of its regulatory functions to an adequate standard (or at all), 25
 - (b) to meet any performance target set under section 24(1)(a) or (b),
 - (c) to comply with any direction given by the Board under this Act, or
 - (d) to comply with any other requirement imposed on the approved regulator by or under this Act.
- (2) The Board may impose on the approved regulator a penalty, in respect of the failure, of such amount as it considers appropriate, but not exceeding the maximum amount prescribed under subsection (3). 30
- (3) The Board must make rules prescribing the maximum amount of a penalty which may be imposed under this section.
- (4) Rules may only be made under subsection (3) with the consent of the Secretary of State. 35
- (5) A penalty under this section is payable to the Board.
- (6) For the purposes of this section and sections 31 to 33, references to an approved regulator are to a body which was an approved regulator at the time the failure within subsection (1)(a) to (d) occurred (whether or not the body subsequently ceased to be an approved regulator). 40
- (7) In sections 31 to 33 references to a “penalty” are to a penalty under this section.

Draft Bill

31 Financial penalties: procedure

- (1) If the Board proposes to impose a penalty on an approved regulator, it must give notice to the approved regulator –
 - (a) stating that the Board proposes to impose a penalty and the amount of the penalty proposed to be imposed, 5
 - (b) specifying the acts or omissions which, in the Board’s opinion, constitute the failure in question,
 - (c) specifying the other facts which, in the Board’s opinion, justify the imposition of a penalty and the amount of the penalty, and
 - (d) specifying the time (not being earlier than the end of the period of 21 days beginning with the day on which the notice is published under subsection (8)) before which representations with respect to the proposed penalty may be made. 10
- (2) Before imposing a penalty on an approved regulator, the Board must consider any representations which are duly made. 15
- (3) Where the Board proposes to vary the amount of a proposed penalty stated in a notice under subsection (1)(a), the Board must give notice to the approved regulator –
 - (a) setting out the proposed variation and the reasons for it, and
 - (b) specifying the time (not being earlier than the end of the period of 21 days beginning with the day on which the notice is published under subsection (8)) before which representations with respect to the proposed variation may be made. 20
- (4) Before varying the proposal, the Board must consider any representations which are duly made. 25
- (5) As soon as practicable after imposing a penalty, the Board must give notice to the approved regulator –
 - (a) stating that it has imposed a penalty on the approved regulator and its amount,
 - (b) specifying the acts or omissions which, in the Board’s opinion, constitute the failure in question, 30
 - (c) specifying the other facts which, in the Board’s opinion, justify the imposition of the penalty and its amount, and
 - (d) specifying a time (not being earlier than the end of the period of 42 days beginning with the day on which the notice is given to the approved regulator), before which the penalty is required to be paid. 35
- (6) The approved regulator may, within the period of 21 days beginning with the day on which it is given the notice under subsection (5), make an application to the Board for it to specify different times by which different portions of the penalty are to be paid. 40
- (7) If an application is made under subsection (6) in relation to a penalty, the penalty is not required to be paid until the application has been determined.
- (8) The Board must publish any notice given under this section.

32 Appeals against financial penalties

- (1) If the approved regulator on whom a penalty is imposed is aggrieved by – 45
 - (a) the imposition of the penalty,

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

15

Part 4 – Regulation of approved regulators

- (b) the amount of the penalty, or
 - (c) the time by which the penalty is required to be paid, or the different times by which different portions of the penalty are required to be paid,

the approved regulator may make an application to the court under this section. 5
 - (2) An application under subsection (1) must be made –
 - (a) within the period of 42 days beginning with the day on which the notice under section 31(5) is given to the approved regulator in respect of the penalty, or
 - (b) where the application relates to a decision of the Board on an application by the approved regulator under section 31(6), within the period of 42 days beginning with the day on which the approved regulator is notified of the decision. 10
 - (3) On any such application, where the court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the appeal grounds, the court may – 15
 - (a) quash the penalty,
 - (b) substitute a penalty of such lesser amount as the court considers appropriate, or
 - (c) in the case of an application under subsection (1)(c), substitute for the time or times imposed by the Board an alternative time or times. 20
 - (4) The appeal grounds are –
 - (a) that the imposition of the penalty was not within the power of the Board under section 30;
 - (b) that any of the requirements of section 31 have not been complied with in relation to the imposition of the penalty and the interests of the approved regulator have been substantially prejudiced by the non-compliance; 25
 - (c) that it was unreasonable of the Board to require the penalty imposed or any portion of it to be paid by the time or times by which it was required to be paid. 30
 - (5) Where the court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such time, as it considers just and equitable.
 - (6) Where the court specifies as a time by which the penalty, or a portion of the penalty, is to be paid a time before the determination of the application under this section it may require the payment of interest on the penalty, or portion, from that time at such rate as it considers just and equitable. 35
 - (7) Except as provided by this section, the validity of a penalty is not to be questioned by any legal proceedings whatever. 40
 - (8) In this section “the court” means the High Court.
- 33 Recovery of financial penalties**
- (1) If the whole or any part of a penalty is not paid by the time by which it is required to be paid, the unpaid balance from time to time carries interest at the rate for the time being specified in section 17 of the Judgments Act 1838 (c. 110). 45

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

16

Legal Services Bill
Part 4 – Regulation of approved regulators

- (2) If an application is made under section 32 in relation to a penalty, the penalty is not required to be paid until the application has been determined or withdrawn.
- (3) If the Board grants an application under subsection (6) of section 31 in relation to a penalty but any portion of the penalty is not paid by the time specified in relation to it by the Board under that subsection, the Board may where it considers it appropriate require so much of the penalty as has not already been paid to be paid immediately. 5
- (4) Where a penalty, or any portion of it, has not been paid by the time when it is required to be paid and – 10
- (a) no application relating to the penalty has been made under section 32 during the period within which such an application can be made, or
- (b) an application has been made under that section and determined or withdrawn,
- the Board may recover from the approved regulator, as a debt due to the Board, any of the penalty and any interest which has not been paid. 15

Intervention

34 Intervention directions

- (1) The Board may give an approved regulator an intervention direction in relation to any of the approved regulator's regulatory functions if the Board is satisfied – 20
- (a) that one or more of the intervention conditions are met in respect of the approved regulator, and
- (b) that, in all the circumstances of the case, it is appropriate to give the intervention direction. 25
- (2) An intervention direction, in relation to a regulatory function of an approved regulator, is a direction –
- (a) that the regulatory function is to be exercised by the Board or a person nominated by it, and
- (b) that the approved regulator must comply with any instructions of the Board or its nominee in relation to the exercise of the function. 30
- (3) The intervention conditions are –
- (a) that the approved regulator has failed to perform any of its regulatory functions to an adequate standard (or at all);
- (b) that the approved regulator has failed to comply with any requirement imposed on the approved regulator by or under this Act or any other enactment; 35
- (c) that the circumstances are such that, if the body were now to make an application under Part 2 of Schedule 5 (application for designation as approved regulator) in respect of the designated activities, or any of them, its application would be rejected; 40
- (d) that the approved regulator is a licensing authority and the circumstances are such that, if the body were now to make an application under Part 1 of Schedule 10 (application for designation as a licensing authority) in respect of the designated activities, or any of them, its application would be rejected. 45

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

17

Part 4 – Regulation of approved regulators

- (4) The Board may not determine that it is appropriate to give the intervention direction unless it is satisfied that the approved regulator's failures cannot be adequately addressed by the Board exercising the powers available to it under sections 24 to 33.
- (5) In this section "the designated activities" –
- (a) in subsection (3)(c) means the reserved legal activity or activities in relation to which the approved regulator is designated as an approved regulator, and
 - (b) in subsection (3)(d) means the reserved legal activity or activities in relation to which the approved regulator is designated as a licensing authority.
- (6) Part 1 of Schedule 8 makes provision about the procedure which must be complied with before an intervention direction is given and the manner in which such a direction is to be given.
- 35 Intervention directions: further provision**
- (1) This section applies where an intervention direction has effect in respect of a function of an approved regulator.
- (2) The approved regulator must give the specified person all such assistance, in connection with the proposed exercise of the function by the specified person in pursuance of the direction, as the approved regulator is reasonably able to give.
- (3) The specified person is, in the exercise of the function to which the direction relates, entitled to exercise the powers conferred by subsections (4) and (5).
- (4) The specified person has at all reasonable times –
- (a) a right of entry to the premises of the approved regulator, and
 - (b) a right to inspect, and take copies of, any records or other documents kept by the approved regulator, and any other documents containing information relating to the approved regulator, which the specified person considers relevant to the exercise of the function.
- (5) In exercising the right to inspect records or other documents under subsection (4), the specified person –
- (a) is entitled at any reasonable time to have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been in use in connection with the records or other documents in question, and
 - (b) may require –
 - (i) the person by whom or on whose behalf the computer is or has been so used, or
 - (ii) any person having charge of, or otherwise concerned with the operation of, the computer apparatus or material,to afford the specified person such assistance as the specified person may reasonably require (including, in particular, the making of information available for inspection or copying in a legible form).
- (6) In this section "the specified person" means the Board or, where a person was nominated by it as mentioned in section 34(2), that person.

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

18

Legal Services Bill
Part 4 – Regulation of approved regulators

- (7) In this section references to the specified person include a reference to any person assisting the specified person in the performance of the function.

36 Intervention directions: enforcement

- (1) If at any time it appears to the Board—
- (a) that an approved regulator has failed to comply with an obligation imposed on it by, or by virtue of, an intervention direction or by section 35, or
 - (b) a person has failed to comply with a requirement imposed under section 35(5)(b),
- the Board may make an application to the High Court under this section. 10
- (2) If, on an application under subsection (1)(a) or (b), the High Court decides that the approved regulator or person has failed to comply with the obligation or requirement in question, it may order the approved regulator or person to take such steps as the High Court directs for securing that the obligation or requirement is complied with. 15

37 Revocation of an intervention direction

- (1) An intervention direction has effect until such time as it is revoked by the Board (whether on the application of the approved regulator or otherwise).
- (2) Part 2 of Schedule 8 makes provision about the procedure which must be complied with before an intervention direction is revoked and the manner in which notice of the revocation is to be given. 20

Cancellation of approval

38 Cancellation of designation as approved regulator

- (1) The Secretary of State may by order cancel a body's designation as an approved regulator— 25
- (a) in relation to all the reserved legal activities in relation to which it is an approved regulator, or
 - (b) in relation to one or more, but not all, of those reserved legal activities, with effect from a date specified in the order.
- (2) But the Secretary of State may only make an order under subsection (1) in accordance with a recommendation made by the Board under subsection (3) or (5). 30
- (3) The Board must recommend that an order is made cancelling a body's designation as an approved regulator in relation to one or more reserved legal activities, if— 35
- (a) the body applies to the Board for such a recommendation to be made,
 - (b) the application is made in such form and manner as may be prescribed by rules made by the Board, and is accompanied by the prescribed fee, and
 - (c) the body publishes a notice giving details of the application in accordance with such requirements as may be specified in rules made by the Board. 40

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

19

Part 4 – Regulation of approved regulators

- (4) In this section “the prescribed fee”, in relation to an application, means the fee specified in, or determined in accordance with, rules made by the Board, with the consent of the Secretary of State.
- (5) The Board may recommend that an order is made cancelling a body’s designation as an approved regulator in relation to one or more reserved legal activities if it is satisfied – 5
- (a) that one or more of the cancellation conditions are met in respect of the approved regulator, and
 - (b) that, in all the circumstances of the case, it is appropriate to cancel the body’s designation in relation to the activity or activities in question. 10
- (6) The cancellation conditions are –
- (a) that the approved regulator has failed to perform any of its regulatory functions to an adequate standard (or at all);
 - (b) that the approved regulator has failed to comply with any requirement imposed on the approved regulator by or under this Act or any other enactment; 15
 - (c) that the circumstances are such that, if the body were now to make an application under Part 2 of Schedule 5 (application for designation as approved regulator) in respect of the activity or activities in question, its application would be rejected. 20
- (7) The Board may not determine that it is appropriate to cancel a body’s designation in relation to an activity or activities unless it is satisfied that the approved regulator’s failures cannot be adequately addressed by the Board exercising the powers available to it under sections 24 to 36.
- (8) Schedule 9 makes further provision about the making of recommendations under subsection (5). 25
- (9) If the Secretary of State decides not to make an order in response to a recommendation made under subsection (3) or (5), the Secretary of State must give to the Board notice of the decision and the reasons for it.
- (10) The Secretary of State must publish a notice given under subsection (9). 30
- (11) The Board may not make a recommendation under subsection (5) in respect of a body’s designation as an approved regulator in relation to a reserved legal activity at any time when, by virtue of Part 2 of Schedule 4 (protection of rights during a transitional period), any person is being treated as authorised by the body to carry on that activity. 35

39 Supplementary provision relating to cancellation of a designation

- (1) This section applies where a body (“the old regulator”) has its designation in relation to one or more reserved legal activities cancelled by an order under section 38.
- (2) The Secretary of State may by order make – 40
- (a) such modifications of provisions made by or under any enactment (including this Act or any enactment passed or made after this Act), prerogative instrument or other instrument or document, and
 - (b) such transitional or consequential provision, 45
- as the Secretary of State considers necessary or expedient in consequence of the cancellation.

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

20

Legal Services Bill
Part 4 – Regulation of approved regulators

- (3) The Secretary of State may, by order, make transfer arrangements.
- (4) “Transfer arrangements” are arrangements in accordance with which each person authorised by the old regulator who consents to the arrangements is, from the time the cancellation takes effect, treated as being authorised to carry on each protected activity by either – 5
- (a) a relevant approved regulator, in relation to the protected activity, who consents to the transfer arrangements, or
 - (b) if there is no such approved regulator, the Board acting in its capacity as a relevant approved regulator in relation to the protected activity by virtue of an order made under section 51. 10
- (5) The transfer arrangements –
- (a) must make such provision as is necessary to ensure that, where a person is treated under those arrangements as being authorised to carry on a protected activity by the new regulator, that person is subject to the regulatory arrangements of the new regulator; 15
 - (b) may make provision requiring amounts held by the old regulator which represent amounts paid to it by way of practising fees by the persons to whom the transfer arrangements apply (or a part of the amounts so held) to be paid to the new regulator and treated as if they were amounts paid by those persons by way of practising fees to the new regulator. 20
- (6) Subsection (5)(a) is subject to any transitional provision which may be made by the transfer arrangements, including provision modifying the regulatory arrangements of the new regulator as they apply to persons to whom the transfer arrangements apply. 25
- (7) The Secretary of State may make an order under this section only if –
- (a) the Board has made a recommendation in accordance with section 40, and
 - (b) the order is in the same form as, or in a form which is not materially different from, the draft order annexed to that recommendation. 30
- (8) For the purposes of this section –
- (a) a person is “authorised by the old regulator” if immediately before the time the cancellation takes effect the person is authorised by the old regulator (other than by virtue of a licence under Part 5) to carry on an activity which is a reserved legal activity to which the cancellation relates, 35
 - (b) in relation to that person, that activity is a “protected activity”, and
 - (c) in relation to that person, “the new regulator” means the approved regulator within paragraph (a) or (b) of subsection (4).
- (9) In this section “practising fee”, in relation to an approved regulator, means a fee payable by a person under the approved regulator’s regulatory arrangements in circumstances where the payment of the fee is a condition which must be satisfied for that person to be authorised by the approved regulator to carry on one or more activities which are reserved legal activities. 40
- (10) But “practising fee” does not include a fee payable by a licensed body to its licensing authority under licensing rules. 45

Draft Bill

40 The Board's power to recommend orders made under section 39

- (1) The Board may recommend to the Secretary of State that the Secretary of State make an order under section 39 in the form of a draft order prepared by the Board and annexed to the recommendation.
- (2) Before making a recommendation under this section, the Board must publish a draft of— 5
 - (a) the proposed recommendation, and
 - (b) the proposed draft order.
- (3) The draft must be accompanied by a notice which states that representations about the proposals may be made to the Board within a specified period. 10
- (4) Before making the recommendation, the Board must have regard to any representations duly made.
- (5) If the draft order to be annexed to the recommendation differs from the draft published under subsection (2)(b) in a way which is, in the opinion of the Board, material, the Board must, before making the recommendation, publish the draft order along with a statement detailing the changes made and the reasons for those changes. 15

Policy statements

41 The Board's policy statements

- (1) The Board must prepare and issue a statement of policy with respect to the exercise of its functions under— 20
 - (a) section 24 (performance targets and monitoring);
 - (b) section 25 (directions);
 - (c) section 28 (public censure);
 - (d) section 30 (financial penalties); 25
 - (e) sections 34 and 35 (intervention directions);
 - (f) section 38 (cancellation of designation as approved regulator);
 - (g) section 63 (cancellation of designation as licensing authority by order).
- (2) The Board may prepare and issue a statement of policy with respect to any other matter. 30
- (3) The Board's policy in determining what the amount of a penalty under section 30 should be must include having regard to— 35
 - (a) the seriousness of the failure in question in relation to the nature of the requirement to which the failure relates, and
 - (b) the extent to which that failure was deliberate or reckless.
- (4) The Board may at any time alter or replace any statement issued under this section.
- (5) If a statement is altered or replaced, the Board must issue the altered or replacement statement.
- (6) In exercising or deciding whether to exercise any of its functions, the Board must have regard to any relevant policy statement published under this section. 40

Extract from Draft Legal Services Bill 2006 (UK)

22

Legal Services Bill
Part 4 – Regulation of approved regulators

- (7) The Board must publish a statement issued under this section.
- (8) The Board may make a reasonable charge for providing a person with a copy of a statement.

42 Policy statement: procedure

- (1) Before issuing a statement under section 41, the Board must publish a draft of the proposed statement. 5
- (2) The draft must be accompanied by a notice which states that representations about the proposals may be made to the Board within a specified period.
- (3) Before issuing the statement, the Board must have regard to any representations duly made. 10
- (4) If the statement differs from the draft published under subsection (1) in a way which is, in the opinion of the Board, material, the Board must publish details of the differences.
- (5) The Board may make a reasonable charge for providing a person with a copy of a draft published under subsection (1). 15

Practising fees

43 Control of practising fees charged by approved regulators

- (1) In this section “practising fee”, in relation to an approved regulator, means a fee payable by a person under the approved regulator’s regulatory arrangements in circumstances where the payment of the fee is a condition which must be satisfied for that person to be authorised by the approved regulator to carry on one or more activities which are reserved legal activities. 20
- (2) An approved regulator may only apply amounts raised by practising fees for one or more of the permitted purposes.
- (3) The Board must make rules specifying the permitted purposes. 25
- (4) Those rules must, in particular, provide that the following are permitted purposes –
 - (a) the regulation, accreditation, education and training of relevant authorised persons and those wishing to become such persons, including –
 - (i) the maintaining and raising of their professional standards, and
 - (ii) the giving of practical support, and advice about practice management, in relation to practices carried on by such persons; 30
 - (b) the participation by the approved regulator in law reform and the legislative process; 35
 - (c) the provision by relevant authorised persons, and those wishing to become relevant authorised persons, of reserved legal services, immigration advice or immigration services to the public free of charge;
 - (d) the promotion of the protection by law of human rights and fundamental freedoms; 40

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

23

Part 4 – Regulation of approved regulators

- (e) the promotion of relations between the approved regulator and bodies representing the members of legal professions in jurisdictions other than England and Wales.
- (5) A practising fee is payable under the regulatory arrangements of an approved regulator only if the Board has approved the level of the fee. 5
- (6) The Board must make rules containing provision –
 - (a) about the form and manner in which applications for approval for the purposes of subsection (5) must be made and the material which must accompany such applications;
 - (b) requiring applicants to have consulted such persons as may be prescribed by the rules in such manner as may be so prescribed before such an application is made; 10
 - (c) about the procedures and criteria that will be applied by the Board when determining whether to approve the level of a fee for the purposes of subsection (5), including the time limit for the determining of an application. 15
- (7) In this section “relevant authorised persons”, in relation to an approved regulator, means persons who are authorised by the approved regulator to carry on activities which are reserved legal activities.

Information

20

44 Provision of information to the Board

- (1) The Board may, by notice, require an approved regulator –
 - (a) to provide any specified information, or
 - (b) to produce any specified document.
- (2) A notice under subsection (1) –
 - (a) may specify the manner and form in which any information is to be provided;
 - (b) must specify the period within which any information is to be provided or document is to be produced;
 - (c) may require any information to be provided, or document to be produced, to the Board or to a person specified in the notice. 25 30
- (3) The Board may, by notice, require a person representing the approved regulator to attend at a time and place specified in the notice to provide an explanation of any information provided or document produced under this section. 35
- (4) The Board may pay to any person such reasonable costs as may be incurred by that person in connection with –
 - (a) the provision of any information, or the production of any document, by that person pursuant to a notice under subsection (1), or
 - (b) that person’s compliance with a requirement imposed under subsection (3). 40
- (5) The Board, or a person specified under subsection (2)(c) in a notice, may take copies of or extracts from a document produced pursuant to a notice under subsection (1).

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

24

Legal Services Bill
Part 4 – Regulation of approved regulators

- (6) In this section –
“specified document” means a document specified or of a description specified in the notice;
“specified information” means information specified or of a description specified in the notice. 5
- (7) For the purposes of this section and section 45, references to an approved regulator include a body which was, but is no longer, an approved regulator.

45 Enforcement of notices under section 44

- (1) Where an approved regulator is unable to comply with a notice given to it under section 44(1), it must give the Board a notice to that effect stating the reasons why it cannot comply. 10
- (2) If an approved regulator refuses, or otherwise fails, to comply with a notice under section 44(1), the Board may apply to the High Court for an order requiring the approved regulator to comply with the notice or with such directions for the like purpose as may be contained in the order. 15
- (3) No person may be required under this section –
(a) to provide any information or give any evidence which that person could not be compelled to supply in evidence in civil proceedings before the High Court, or
(b) to produce any document which that person could not be compelled to produce in such proceedings. 20
- (4) This section applies in relation to a person to whom a notice is given under section 44(3) as it applies in relation to an approved regulator to whom a notice is given under section 44(1).

Competition 25

46 Reports by the OFT

- (1) If the OFT is of the opinion that the regulatory arrangements of an approved regulator (or any part of them) restrict, distort or prevent competition within the market for reserved legal services to any significant extent, or are likely to do so, the OFT may prepare a report to that effect. 30
- (2) A report under subsection (1) –
(a) must state what, in the OFT’s opinion, is the effect, or likely effect, on competition of the regulatory arrangements or part of them to which the report relates, and
(b) may contain recommendations as to the action which the Board should take for the purpose of ensuring that the regulatory arrangements of the approved regulator do not prevent, restrict or distort competition. 35
- (3) Where the OFT makes a report under subsection (1), it must –
(a) give a copy of the report to the Board, the Consumer Panel and the approved regulator, and
(b) publish the report. 40
- (4) Before publishing a report under subsection (3)(b), the OFT must, so far as practicable, exclude any matter which relates to the private affairs of a

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

Legal Services Bill

25

Part 4 – Regulation of approved regulators

- particular individual the publication of which, in the opinion of the OFT, would or might seriously and prejudicially affect the interests of that individual.
- (5) The OFT may exercise any of the powers conferred on it by section 174(3) to (5) of the Enterprise Act 2002 (c. 40) (investigation powers) for the purpose of assisting it in exercising its functions under this section. 5
- (6) For the purposes of the law of defamation, absolute privilege attaches to any report of the OFT under this section.
- 47 The Board's response to OFT report**
- (1) This section applies where a report is made by the OFT under section 46 in respect of an approved regulator. 10
- (2) The Board must allow the approved regulator a period of 28 days beginning with the day on which the copy of the report is given to the approved regulator under section 46, or such longer period as the Board may specify in a particular case, to make representations to the Board about the OFT's report. 15
- (3) The Consumer Panel may give to the Board such advice as the Consumer Panel thinks fit regarding the OFT's report.
- (4) Having considered any representations made under subsection (2) and any advice given under subsection (3), the Board must notify the OFT of the action (if any) it proposes to take in response to the report. 20
- 48 Referral of report by the Secretary of State to the Competition Commission**
- (1) This section applies where the OFT is satisfied that the Board has failed to give full and proper consideration to a report made by the OFT, in respect of an approved regulator, under section 46.
- (2) The OFT may give a copy of its report to the Secretary of State. 25
- (3) The OFT must notify the Board and the approved regulator if it gives a copy of its report to the Secretary of State.
- (4) On receiving a report under subsection (2), the Secretary of State must –
- (a) give the Competition Commission a copy of the report, and
 - (b) seek its advice on what action (if any) should be taken by the Secretary of State under section 50. 30
- 49 Duties of the Competition Commission**
- (1) Where the Secretary of State seeks the advice of the Competition Commission under section 48, the Commission must investigate the matter.
- (2) The Commission must then make its own report on the matter unless it considers that, as a result of any change of circumstances, no useful purpose would be served by a report. 35
- (3) If the Commission decides in accordance with subsection (2) not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision. 40

Draft Bill

Extract from Draft Legal Services Bill 2006 (UK)

26

Legal Services Bill
Part 4 – Regulation of approved regulators

- (4) The Commission must comply with subsection (2) or (3) within the period of 3 months beginning with the day on which it receives a copy of the OFT's report under section 48(4)(a).
- (5) A report made under this section must state the Commission's conclusion as to whether any of the matters which is the subject of the report has or is likely to have the effect of preventing, restricting or distorting competition within the market for reserved legal services to a significant extent. 5
- (6) A report under this section stating the Commission's conclusion that there is, or is likely to be, such an effect must also – 10
- (a) state whether or not the Commission considers that that effect is justified, and
- (b) if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, ought to be taken by the Board.
- (7) When determining any action to be taken by the Board under subsection (6)(b), the Commission must ensure, so far as reasonably possible, that the action stated is compatible with the functions conferred, and obligations imposed, on the Board by or under this Act. 15
- (8) A report under this section must contain such an account of the Commission's reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them. 20
- (9) Sections 109 to 115 of the Enterprise Act 2002 (c. 40) (investigation powers) apply in relation to an investigation under this section as they apply in relation to an investigation made on a reference made to the Commission under Part 3 of that Act (mergers), but as if – 25
- (a) in section 110(4) of that Act, the reference to the publication of the report of the Commission on the reference concerned were a reference to the Commission making a report under subsection (2) or a statement under subsection (3), and
- (b) in section 111(5)(b)(ii) of that Act the day referred to were the day on which the Commission makes that report or statement. 30
- (10) If the Commission makes a report or a statement under this section it must –
- (a) give a copy to the Secretary of State, the Board, the Consumer Panel and the approved regulator to which the OFT's report relates, and
- (b) publish the report or statement.
- 50. Secretary of State's power to give directions 35**
- (1) The Secretary of State may direct the Board to take such action as the Secretary of State considers appropriate in connection with any matter raised in a report made by the OFT under section 46.
- (2) Before giving a direction under subsection (1), the Secretary of State must consider any report from the Competition Commission under section 49 on that matter. 40
- (3) When exercising the power to give a direction under subsection (1), the Secretary of State must ensure, so far as reasonably possible, that the action stated in any direction is compatible with the functions conferred, and obligations imposed, on the Board by or under this Act. 45
- (4) The Secretary of State must publish a direction given under this section.

Draft Bill

Legal Profession Act 2004 No 112
Regulatory authorities
Professional bodies

Section 700
Chapter 7
Part 7.4

- (4) Matters included in a report must not identify individual Australian lawyers unless their names have already lawfully been made public under Part 4.10 (Publishing disciplinary action).
- (5) This section does not affect any other provision of this Act requiring a report to be made to the Attorney General.

Part 7.5 Legal profession rules

Division 1 Preliminary

701 Purpose

The purpose of this Part is to promote the maintenance of high standards of professional conduct by Australian legal practitioners and locally registered foreign lawyers by providing for the making and enforcement of rules of professional conduct that apply to them when they practise in this jurisdiction.

Division 2 Rules

702 Rules for barristers

- (1) The Bar Council may make rules for or with respect to practice as a barrister.
- (2) The Bar Council may make rules for or with respect to practice as a locally registered foreign lawyer.

703 Rules for solicitors

- (1) The Law Society Council may make rules for or with respect to practice as a solicitor.
- (2) The Law Society Council may make rules for or with respect to practice as a locally registered foreign lawyer.

704 Joint rules for Australian legal practitioners

- (1) The Bar Council and Law Society Council may jointly make rules for or with respect to:

Extract from Legal Profession Act 2004 (NSW)

Section 704 Legal Profession Act 2004 No 112
Chapter 7 Regulatory authorities
Part 7.5 Legal profession rules

- (a) any matters about which joint rules are authorised to be made, or
 - (b) any matters about which they may separately make rules, in connection with legal practice as an Australian legal practitioner.
- (2) Joint rules may but need not apply in the same way to both barristers and solicitors.
- (3) Joint rules prevail, to the extent of any inconsistency, over legal profession rules made separately by a Council (whether made before or after the joint rules).

705 Rules for incorporated legal practices and multi-disciplinary partnerships

- (1) The Law Society Council may make rules for or with respect to the following matters:
- (a) the provision of legal services by or in connection with incorporated legal practices or multi-disciplinary partnerships, and in particular the provision of legal services by:
 - (i) officers or employees of incorporated legal practices, or
 - (ii) partners or employees of multi-disciplinary partnerships,
 - (b) the provision of services that are not legal services by or in connection with incorporated legal practices or multi-disciplinary partnerships, but only if the provision of those services by:
 - (i) officers or employees of incorporated legal practices, or
 - (ii) partners or employees of multi-disciplinary partnerships,may give rise to a conflict of interest relating to the provision of legal services.
- (2) Without limiting subsection (1), rules may be made for or with respect to professional obligations relating to legal services provided by or in connection with incorporated legal practices or multi-disciplinary partnerships.
- (3) However, the rules made under this section cannot:
- (a) regulate any services that an incorporated legal practice may provide or conduct (other than the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or

- (b) regulate or prohibit the conduct of officers or employees of an incorporated legal practice (other than in connection with the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or
 - (c) regulate any services that a multi-disciplinary partnership or partners or employees of a multi-disciplinary partnership may provide or conduct (other than the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or
 - (d) regulate or prohibit the conduct of partners or employees of a multi-disciplinary partnership (other than in connection with the provision of legal services or services that may give rise to a conflict of interest relating to the provision of legal services).
- (4) The regulations may make provision for or with respect to the making of rules under this section.

706 Subject-matter of legal profession rules

- (1) Legal profession rules may make provision for or with respect to any aspect of legal practice, including standards of conduct expected of Australian legal practitioners or locally registered foreign lawyers to whom the rules apply.
- (2) The power to make rules is not limited to any matters for which this Act specifically authorises the making of legal profession rules.

Division 3 Procedure for making rules

707 Commissioner and Advisory Council to be notified of proposed rules

- (1) Each Council must notify the Commissioner and the Advisory Council of its intention to make a legal profession rule.
- (2) The notification must be in writing and must give details of the proposal.
- (3) The Council must wait at least 28 days after giving the notification before making the rule and must take into account any representations on the proposed rule made by the Commissioner or the Advisory Council.

Extract from Legal Profession Act 2004 (NSW)

Section 707 Legal Profession Act 2004 No 112
Chapter 7 Regulatory authorities
Part 7.5 Legal profession rules

- (4) However, the Council may make the rule before the end of the 28-day period if:
- (a) the Council considers that the urgency of the case warrants immediate action, and
 - (b) the notification indicates that the Council is of that view and intends to act immediately.

708 Public notice of proposed rules

- (1) The Council or Councils proposing to make a legal profession rule must ensure that a notice is published in the Gazette and in a daily newspaper circulating in this jurisdiction:
- (a) explaining the object of the proposed rule, and
 - (b) advising where or how a copy of the proposed rule may be accessed, obtained or inspected, and
 - (c) inviting comments and submissions within a specified period of not less than 21 days from the date of first publication of the notice.
- (2) The Council or Councils must ensure that a copy of the proposed rule is given to the Attorney General before the notice is published.
- (3) The Council or Councils must not make the rule before the end of the period specified in the notice for making comments and submissions and must ensure that any comments and submissions received within that period are appropriately considered.
- (4) However, the Council or Councils may make the rule before the end of the period specified in the notice for making comments and submissions if:
- (a) the Council or Councils consider that the urgency of the case warrants immediate action, and
 - (b) the notice indicates that the Council or Councils are of that view and intend to act immediately.
- (5) Subsections (1)–(4) do not apply to a proposed rule that the Attorney General considers does not warrant publication because of its minor or technical nature.
- (6) Section 75 of the *Interpretation Act 1987* does not apply to notices required to be published under this section.

Legal Profession Act 2004 No 112
Regulatory authorities
Legal profession rules

Section 709
Chapter 7
Part 7.5

709 Publication of rules

Legal profession rules are to be published in the Gazette and in appropriate professional publications.

710 Commencement of rules

- (1) A legal profession rule commences on the date specified in the rule for its commencement.
- (2) The date so specified is not to be earlier than the date of its publication in the Gazette and, unless the Attorney General approves, is not to be earlier than one month after the date of that publication.

Division 4 General provisions

711 Binding nature of legal profession rules

- (1) Legal profession rules are binding on Australian legal practitioners and locally registered foreign lawyers to whom they apply.
- (2) Failure to comply with legal profession rules is capable of being unsatisfactory professional conduct or professional misconduct.

712 Legal profession rules inconsistent with Act or regulations

Legal profession rules do not have effect to the extent that they are inconsistent with this Act or the regulations.

713 Availability of rules

The Councils must ensure that the legal profession rules are available for public inspection (including on their internet sites, if any, or on any other specified internet site) and that amendments are incorporated as soon as possible.

714 Review of rules requested by Commissioner

- (1) The Commissioner may, at any time, request a Council to review any legal profession rule (including any joint rule) made by it.
- (2) If a Council is requested to review a rule under this section, the Council must furnish a report on the review to the Commissioner within 28 days after the request or within such further period as is agreed on by the Commissioner and the Council.

Extract from Legal Profession Act 2004 (NSW)

Section 714 Legal Profession Act 2004 No 112
Chapter 7 Regulatory authorities
Part 7.5 Legal profession rules

- (3) After receiving a report under this section, the Commissioner must give a report to the Attorney General about the request for the review and may include in the report submissions about the rule and a recommendation that the rule be declared inoperative.
- (4) Any such report by the Commissioner must include a copy of the report on the review of the rule concerned provided by the relevant Council.
- (5) The Attorney General may make public any report by the Commissioner under this section (including, if the Attorney General thinks fit, a copy of the relevant review).

715 Review of rules by Advisory Council

- (1) The Advisory Council may, from time to time, review the legal profession rules. The Advisory Council is required to furnish reports to the Attorney General on any such review of those rules.
- (2) The Advisory Council is required to conduct such a review and furnish a report if requested to do so by the Attorney General.
- (3) The Attorney General must make each report public within 28 days after it is received by the Attorney General.
- (4) Without limiting the matters about which the Advisory Council may report, the Advisory Council must report on whether it considers any rule imposes restrictive or anti-competitive practices which are not in the public interest or is not otherwise in the public interest.

716 Rules may be declared inoperative

- (1) The Attorney General may, by order published in the Gazette, declare any legal profession rule, or part of any such rule, inoperative, but only if:
 - (a) the Commissioner has reported to the Attorney General that the rule is not in the public interest, or
 - (b) the Advisory Council has reported to the Attorney General that the rule imposes restrictive or anti-competitive practices that are not in the public interest or the rule is not otherwise in the public interest.
- (2) A rule or part of a rule may be declared inoperative even though it deals with a matter for which this Act specifically authorises the making of rules.

Extract from Legal Profession Act 2004 (NSW)

Legal Profession Act 2004 No 112
Regulatory authorities
Legal profession rules

Section 716
Chapter 7
Part 7.5

- (3) A declaration is effective to render the rule or the part of the rule inoperative.
- (4) A declaration takes effect on the date of the publication of the order in the Gazette or on a later date specified in the order.

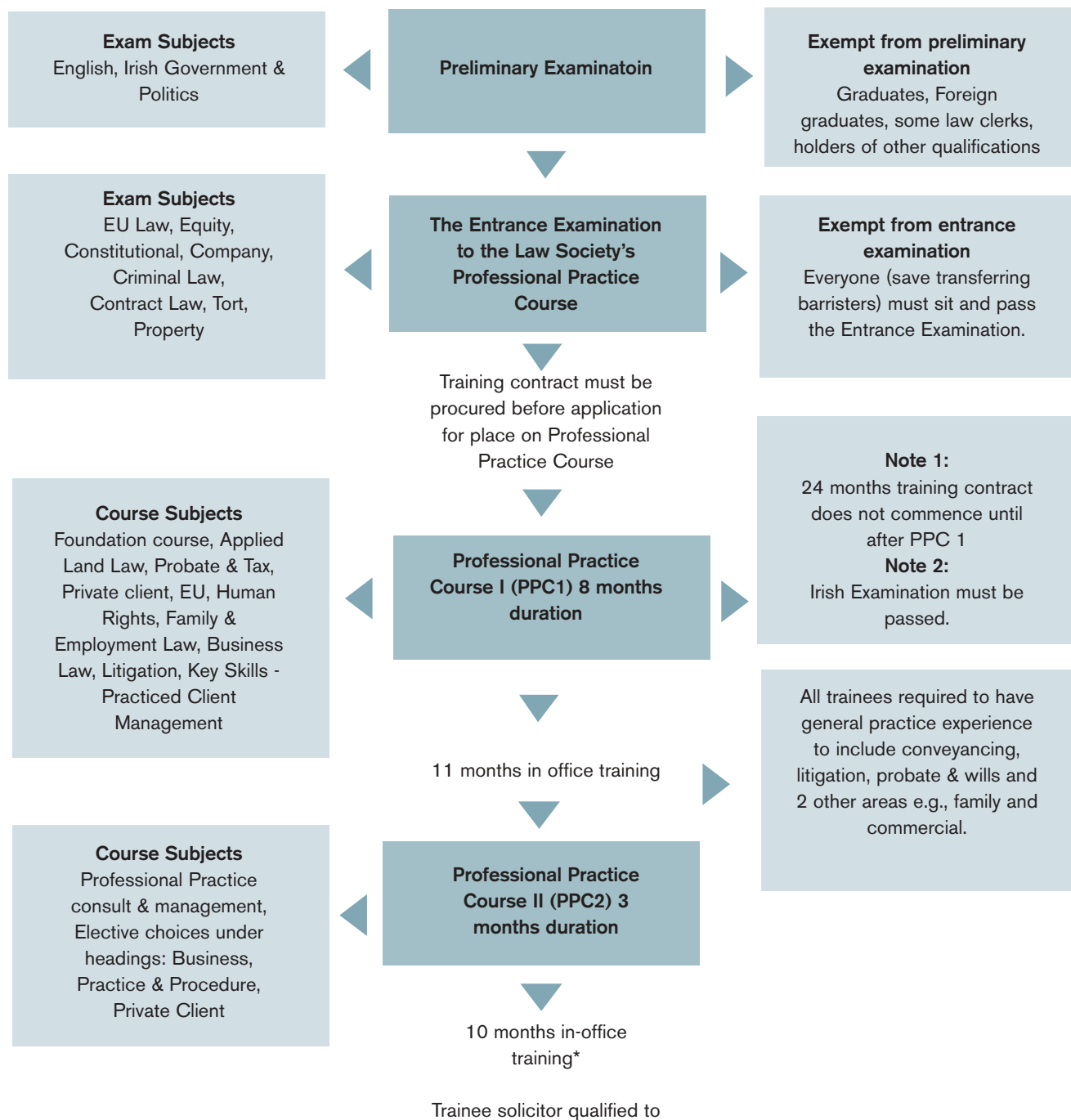
717 Other provisions as to rules

Sections 42, 43 and 45 of the *Interpretation Act 1987* apply to legal profession rules in the same way as they apply to statutory rules within the meaning of that Act.

Note. The above provisions of the *Interpretation Act 1987* relate to standard provisions authorising the adoption of other publications by reference, the making of differential rules, the amendment or repeal of rules and presumptions as to validity for rules.

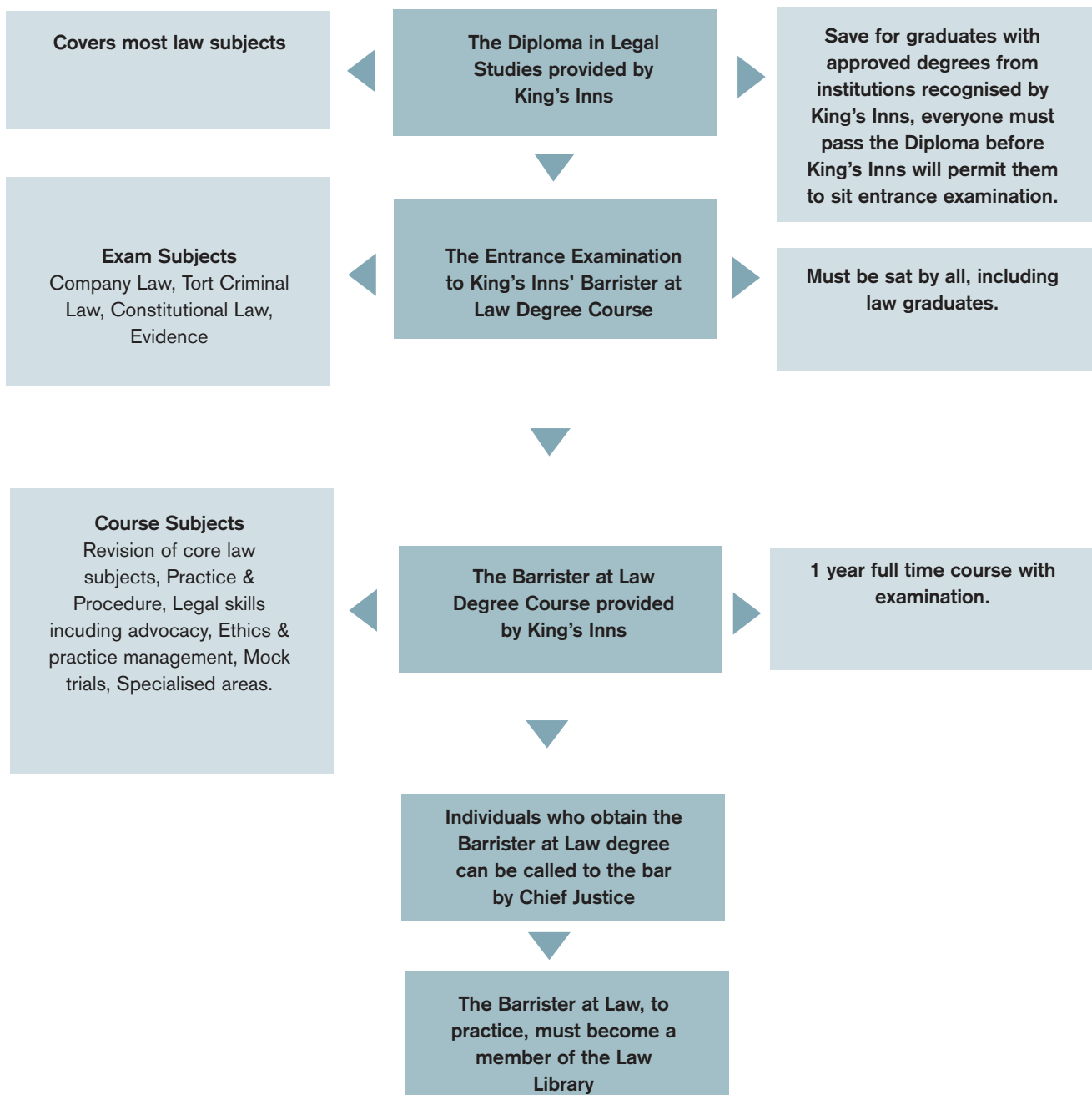
Appendix 5: Lawyer Professional Training

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.

Diagram 2: Barrister Professional Training



Appendix 6: Explanatory Notes

Explanatory Note 1: Barriers to entry

Barriers to entry are direct or indirect restrictions on the ability of potential suppliers to offer their goods or services in a particular market. In professional services markets, such restrictions prevent efficient new professionals from offering further choice to buyers. Barriers to entry often serve to protect the established members of the profession from competition and the threat of competition. The resulting lack of competitive pressure can lead to serious adverse effects on consumers, as established service providers may be able to charge higher prices, offer lower quality services and offer less choice. This protection may also mean less incentive for established members of the profession to innovate and to respond to the needs of their customers with new services and new ways of delivering professional services.

Entry barriers may arise naturally, because of the peculiar aspects of a market that make it difficult to successfully offer services such as difficulties in establishing a reputation. Entry barriers may also arise directly from actions taken by existing suppliers. For example, established members of the profession may make it difficult for their customers to switch to a new provider. Regulations limiting who may offer particular professional services create direct barriers to entry.

Markets for professional services tend to have regulatory barriers to entry. It is usually claimed that these barriers prevent a potential market failure arising from a perceived inability of buyers to evaluate the professional services. It is defended as necessary to ensure that practitioners offer a high quality service due to the potential inability of buyers to distinguish between a high quality service and a low quality service.

However, such regulatory barriers can operate to deny buyers choice and protect existing suppliers from any threat of competition without correcting any market failure. In particular, quantitative entry restrictions (where there are direct limits on the number of professionals who may supply a service) are likely to limit competition severely and hurt buyers without ensuring a high-quality service is provided. Quantitative limits can occur, for example, directly through regulations limiting the number of those who can practice, or indirectly through limitations on the educational opportunities for training in the area.

Explanatory Note 2: Rivalry

To ensure that buyers benefit fully from competition, regulatory rules and practices should enable suppliers to compete freely. Activities that reduce buyers' ability to make informed decisions regarding the price, quality and specifications of the service that best suits their needs hinder the competitive process. Thus, any barriers to buyers' ability to gain this type of information, such as advertising restrictions, are undesirable barriers to rivalry.

Advertising that is factual and accurate informs consumers of choices available to them, reduces search costs and facilitates competition in the marketplace. In addition, advertising reduces the information asymmetry between clients and service providers i.e., advertising builds up awareness of the options available. Advertising of prices allows buyers to make meaningful comparisons between service providers.

Professionals should always be free to organise the delivery of their services in different ways and to join and establish other professional organisations that compete with existing organisations in representing their interests or administering any self-regulation required within a profession.

Another type of barrier to rivalry is high switching costs, which prevent buyers from switching easily between different service providers. For example, a buyer may be locked in to a long-term contract with a certain provider which includes a penalty for opting out of the contract early.

Explanatory Note 3: Advertising and Professional Services

Advertising provides consumers with information regarding both the availability and quality of services and, therefore, helps to reduce the costs incurred by consumers in the process of selecting the appropriate professional service provider (search costs). Any increase in search costs can lead consumers to reduce the extent to which they "shop around", thus reducing the intensity of competition in the marketplace. Therefore, so long as it is truthful and not designed to deceive, advertising plays an important role in facilitating the competitive process and benefiting consumers.

Furthermore, advertising restrictions can also work as barriers to the establishment of a new practice by a professional. For example, a professional who is setting up a new practice may be prevented from pursuing both ongoing and one-off consumers. This acts in the interests of those who are established in the profession, and have built up a reputation based on word-of-mouth, to curb the effectiveness of new entrants' promotional efforts. Thus, advertising restrictions make it unnecessarily difficult for professionals who wish to open a new practice to establish themselves and also limit innovation in the delivery of professional services. Thus, any restrictions on advertising except those preventing untruthful or misleading advertisements are likely to limit competition.

Explanatory Note 4: Rules of professional bodies

The existence of professional organisations can benefit buyers of professional services as membership of these organisations can convey useful signals regarding the quality of the service from different service providers. However, to ensure that rivalry between professionals is not diminished, especially between members of professional organisations, the rules of these organisations should meet certain criteria.

The membership criteria of professional organisations should be objective and transparent, particularly if membership provides a competitive advantage (for example, by allowing suppliers to use a reputation for high quality or by providing access to reduced rates of professional indemnity insurance). In the absence of such criteria, non-members providing equivalent services and having identical characteristics as members may be placed at a competitive disadvantage and any signal of quality that membership conveys may not be accurate.

Furthermore, the rules of any professional body should not have either the object or effect of diminishing the level of rivalry between members. Notable examples of such rules are those that attempt to specify prices, limit price competition in other ways, or prevent members from competing against each other for work. The use of broad and subjective terms, such as “unfair competition”, should also be avoided as these have the potential to be used in an anti-competitive manner.



