

## **Competition and the Structure of the Legal Profession**

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**Isolde Goggin<sup>1</sup>**

**Chairperson, Competition Authority**

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***"Where mystery begins, justice ends" - Edmund Burke***

### **1. Introduction**

Before considering the detail of the Legal Services Regulatory Bill 2011, it is useful to first consider in general terms what a profession that is regulated in the interests of consumers might look like. Based on the Competition Authority's studies of several professions<sup>2</sup>, in my view the key features of such professions are:

- Ease of access.
- Transparency – knowing your rights and what to expect.
- Value for money.
- Public interest at the heart of regulation.

#### **Ease of access**

People know when they need to use the profession's services and how they can access them. They can contact the professional in a quick and straightforward way and can discuss their options in advance with the service provider.

#### **Transparency - knowing your rights and what to expect**

There should be no element of mystery for consumers about what service they are getting and how much they will be charged for it. They should be able to choose whether they want a simple service provided by someone with a basic level of qualification, or a more complex service provided by a highly trained individual. They should be able to compare offerings by shopping around among competing service

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<sup>1</sup> The views expressed here are those of the author and do not necessarily represent those of the Competition Authority.

<sup>2</sup> The Competition Authority's studies of General Medical Practitioners, Veterinary Practitioners, Solicitors and Barristers, Dentists, Optometrists, Architects and Engineers are available on our website at [www.tca.ie](http://www.tca.ie).

providers. Bills should be clear and understandable and consumers should be informed on where they can go in case of a dispute.

### **Value for money**

Value for money has two elements: price and quality.

Competition among professionals does not mean a race to the bottom. Customers are entitled to rely on certain standards being met, but once they are met there is the possibility for a range of service levels to emerge. The important thing is that customers should know what they are getting for their money.

On price, a profession regulated in the public interest would ensure that consumers knew in advance what they were getting, and how much it would cost them. If the cost of a job increased, this would be signalled to them in advance with reasons given and they would be given the opportunity to withdraw or switch to another provider. Vigorous competition between service providers would ensure that costs were not excessive, and consumers would have a reasonable idea of the "market price" for a service.

On quality, because some issues can be complicated and not well understood by non-professionals, practitioners would be well trained and quality standards maintained. Firstly, the profession would strive to attract the very best people, regardless of their age, social class or current occupation. It would therefore make its entry procedures as open as possible to intelligent and hard-working candidates of any background (with a variety of possible entry channels). Selection processes would be rigorous in terms of the standard to be achieved, but flexible in terms of how candidates got there. Career progression would be entirely on merit, with deserving candidates able to participate without independent financial means.

Secondly, in order to maintain standards, the profession would have a robust, quick and efficient system to deal with complaints and obtain suitable redress for consumers. Action would be taken quickly to deal with rogue operators, if necessary by withdrawing their permission to practise and publicising the fact widely. Not all complaints will have merit, but those that do will get a fair hearing. When a customer is justifiably dissatisfied with his service provider, he should find it easy to switch to another provider.

### **Public interest at the heart of regulation**

A profession regulated according to this principle would recognise that potential conflicts exist between the public interest and the private interests of its members.

For example, it may suit the profession as a whole to excessively restrict entry in order to protect and enhance its members' profits, whereas this will disadvantage consumers. Regulation in the public interest is therefore a separate task to lobbying for the profession's interests. There may be perfectly valid public policy grounds for lobbying and for a representational role, but these are different to the regulatory role and should be carried out by separate bodies.

A legal profession that is regulated purely in the public interest would have a regulator that is independent of Government. As the State is very often a party to litigation, there is a specific requirement for the profession to be regulated in a way that ensures its independence. Legal practitioners would be able to act for clients against the State without fear of retribution or loss of earnings.

## **2. How does the new regulatory regime for legal services stack up?**

The proposals made in the Legal Services Regulation Bill will substantially reform the profession. Based on the criteria outlined above, they can be expected to have a significant and positive impact on consumers and a longer term impact on legal costs. The proposed regulatory set-up encompasses many of the features we would recognise in a competitive, transparent and accountable profession. The new regulator – the Legal Services Regulatory Authority (LSRA) – will be independent of the profession and, if a few areas of the proposed legislation are amended, can be made independent of Government also. As such, consumers can feel confident that the legal profession in the future will be regulated with the public interest at its heart.

### **Ease of Access**

The Bill proposes that the ease of access to legal services, and the flexibility of the market, will be greatly enhanced in the new regulatory environment.

#### *Direct Access to Barristers for advice*

An individual or business needing legal advice will have a choice between approaching a barrister or a solicitor directly for legal advice.<sup>3</sup> Currently the Bar's *Code of Conduct* prohibits a barrister from acting for a client without the instructions of a solicitor, except a certain group of clients who are members of the Bar Council's Direct Access Scheme. Under the Bill's proposals, and following a report by the LSRA, this barrier will be removed, allowing you, the consumer, to bypass the additional cost of a solicitor and directly approach a barrister for legal advice, where this suits you and the barrister.

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<sup>3</sup> Legal Services Regulation Bill 2011 Section 73

The removal of this restriction will be particularly valuable for occasions when a client has previously received advice from the same barrister in a similar matter and knows 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 consumer. The proposals will expand the number of providers of legal services you can initially access for advice and, in some cases, may result in lower overall costs.

#### *New ways of offering services*

The Bill also makes provisions to improve the openness of the profession to different ways of providing legal services. It allows barrister partnerships and requires the case for introducing a new profession of conveyancers to be examined by the Legal Services Regulatory Authority.<sup>4</sup> Such innovations in legal services would allow consumers more choice in the type of legal service they want and are willing to pay for.

#### *Conveyancing*

Solicitors are the only professionals allowed to provide conveyancing services in Ireland. If you are transferring the ownership of your house, apartment or piece of land, apart from doing it yourself you can only use a solicitor. In England and Wales, and elsewhere, specialist professionals known as "conveyancers" can compete with solicitors to provide this service. The Bill proposes that the Legal Services Regulatory Authority will report back to the Minister for Justice on the case for the creation of a new profession of conveyancer in Ireland. The formal creation of such a profession would provide choice and competition, and could promote public confidence that this legal service will be tightly regulated.

The solicitor's monopoly on conveyancing has been defended by the current regulators in Ireland on consumer protection grounds, i.e. that solicitors are trained to a high level which is necessary due to the complexity of the Irish title system and conveyancing procedure, and because solicitors must adhere to a professional code of conduct. The current restriction on who can provide the services is, however, disproportionate. It is not necessary for service providers to undergo training in all areas of law in order to provide conveyancing services. While some conveyancing demands a high level of general legal knowledge, much of it is standard work which can be performed by someone with a narrower legal background. Regulation requiring excessive training to perform the function adds to the costs for consumers.

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<sup>4</sup> Ibid Section 30 (1) c

This demarcation of services has prevented the service from being provided by other professionally qualified individuals, which could bring some flexibility and innovation as well as competition into how the service is provided. When the new profession of conveyancers entered the market in England and Wales, for example, solicitors were forced to start offering better value. Immediately prices fell and new ways of providing the service emerged – e.g. conveyancers began offering on-line quotes. A study by the UK Department of Constitutional Affairs found savings on conveyancing costs to the economy were of the order of 25% between 1989 and 1998, despite conveyancers only securing 5% (by value) of the market<sup>5</sup>.

#### *Barrister partnerships*

The provisions to allow a barrister provide legal services as a partner or employee of a barrister partnership will also benefit consumers. Barristers already work in groups on cases and divide work among them. Partnerships allow these arrangements to be more permanent in order to benefit from the economies and efficiencies derived from shared costs, shared work, shared risk and shared professional reputation. You will have the choice of hiring (through your solicitor) a firm of barristers or a set of independent senior and junior counsel to plead your case. Partnerships could also limit the problem of barristers abandoning their client in the days before a court appearance due to a clash with another client's court date, and the client being forced to use a new barrister at short notice. A firm of barristers should be able to share information so as to avoid such clashes.

#### *Self-supply of legal services*

The Bill also seeks to allow barristers in full-time employment represent their employer in court. This means that a firm or organisation requiring legal representation can use their "in-house" barrister to represent them if they so wish. This change will effectively increase supply, act as another constraint on barristers' ability to raise prices and establish a credible threat of switching to self-supply if a firm or organisation considers that an external barrister's fees are too high.

#### *Flexible regulation*

While these are significant reforms, regulators must recognise that consumer needs and professional expertise are constantly developing. While a particular regulation may be justifiable at one time it may no longer be necessary as time moves on. For

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<sup>5</sup> UK 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

example, there is currently a lot of innovation in how legal services are being delivered – with some legal practitioners increasing the provision of on-line services offered. This type of innovation can greatly reduce administrative burden, improve access and reduce the end price to the consumer. The new regulator must ensure that it does not unduly restrict the range, price and flexibility of legal service offerings, and at the same time provide reassurance to consumers as to quality standards.

### **Transparency - knowing your rights and what to expect**

As a consumer you need to be able to make informed decisions about which legal representative to choose and at what rates. Without transparency in the price of legal services, you are prevented from comparing legal fees offered. This in turn reduces the incentive for legal practitioners to compete on price. The lack of information to consumers of legal services has facilitated the persistence of a number of anti-consumer practices in the legal profession. In general, first time consumers of legal services have no idea what the market price for the service is. The Bill tries to address this situation.

#### *Promoting public awareness*

The new Regulatory Authority will promote public awareness and disseminate information to the public in respect of legal services. <sup>6</sup>The provision of information for consumers, especially information relating to their rights when engaging a solicitor or barrister and what price information they are entitled to, is particularly important for having well-functioning legal services markets.

#### *Estimates and bills of costs*

Under the provisions of the Bill, the legal practitioner must furnish the consumer with a notice of costs as soon as they are given instructions. This is already the case in legal terms but in practical terms it appears that it is often not adhered to. This process of notification of costs must be ongoing and reactive to any changes or developments which may raise the legal costs. For instance, if the matter involves litigation, an outline of the work to be done in respect of each stage of the litigation process must be given to you, the consumer, along with the likely costs involved in each stage (for example, those related to engaging expert witnesses or other legal practitioners).<sup>7</sup> These requirements will ensure that you are aware of the costs you will face for legal services, and help you to weigh up the costs of pursuing the action

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<sup>6</sup> Ibid Section 9 (2) f

<sup>7</sup> Ibid Section 90 (2)

against the possibilities of winning in a realistic, informed way. This will also empower you to call a halt before costs escalate beyond what you are willing and able to pay.

When legal work is completed the practitioner must furnish you with a detailed bill of costs, along with an explanation of the procedure available to you should you wish to dispute any aspect of the bill.

These provisions will greatly improve the level of transparency of legal fees, and should empower consumers to shop around for the quality of legal service they require at a price they can afford. Empowered consumers who shop around for the best price and quality available put downward pressure on prices and are the best drivers of competition.

#### *Anti-competitive pricing*

The lack of transparency in legal fees has enabled anti-competitive practices to persist such as the two-thirds fee (junior counsel charging a fee at two-thirds of the senior counsels fee), percentage fees (solicitors charging fees for conveyancing and probate based on a percentage of the value of the property) and fees based on the award to the client. These types of practices have always represented bad value for consumers, but have persisted due to the lack of information on fees available to consumers. The new Bill provides for the prohibition of several pricing practices which harm consumers – for example, junior counsel charging a fee based on a percentage of that of senior counsel, or fees based on a percentage of a client’s compensation payment<sup>8</sup>. The new Bill in essence provides that fees should be reasonably incurred and reasonable in amount. The requirement to furnish the consumer with a detailed bill of costs will also allow them to identify and challenge practitioners that continue the practice.

#### **Value for money**

A well-regulated profession will provide value for money to consumers. This does not mean that everything has to be done as cheaply as possible. It means that customers can rely on certain standards being met which are in line with the price paid. Essentially, consumers should have a good understanding of what they are buying.

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<sup>8</sup> Ibid Section 89(1).

### *Price*

I have already touched on some of the main features of the Bill which will allow the profession to be more transparent, and thus empower consumers to shop around for the service they require. In tandem with this, consumers also need to be able to withdraw or switch to another provider if they are unhappy with the service they are receiving or if costs are increasing beyond what had been agreed.

In its *Competition in Professional Services Solicitors and Barristers* Report, the Competition Authority identified that clients' ability to switch solicitors was constrained. The Bill does not provide for the removal of a significant barrier to switching solicitor – i.e. a solicitor's lien on the file. This issue is discussed in Section 4 of this paper.

### *Quality*

Consumers also need to be confident that they are being given the proper quality of service. This relates to standards for entry to the profession, and to procedures to ensure that standards are maintained once a solicitor or barrister has qualified.

For consumers, it is important that they have access to a pool of highly trained legal practitioners that meet the necessary standards. The current monopolisation of legal professional training is not necessary to achieve standards – for example there are many medical schools in Ireland producing high quality doctors. Opening up the markets for solicitor and barrister training, currently monopolised by the Law Society and the King's Inns respectively, would ensure the best possible people are facilitated as much as possible to enter the market. Entry would no longer be limited to those for whom the Law Society and King's Inns courses are suitable and affordable. This can only improve the standard and quality of legal practitioners. It would also ensure that in times of high demand, the appropriate numbers of training places are made available, and that in times of low demand, the courses that survive are the one which best meet the students' needs.

Along with ensuring that those entering the profession meet high standards of education and legal capability, effective regulation must ensure that high standards are adhered to and maintained by those practising. Practitioners must be challenged if they do not provide a quality service, or sanctioned if they conduct themselves in a way which leads to professional misconduct. Without this threat, rogue operators may be tempted to cut corners or misguide a customer. Under the proposals in the Bill, clients who are unhappy with the service or behaviour of their legal practitioner

will be able to have the matter dealt with by a completely independent body. The new Complaints Committee and the Legal Professions Disciplinary Tribunal should ensure that complaints by the public will get a fair hearing, both for the complainant and the practitioner, and that standards are kept high within the profession.

High standards of entry, transparency in pricing, the ability to switch, and the maintenance of high standards of service, are all mutually reinforcing. Combined, they ensure that customers not only receive the service at a competitive price, but that it will be of a guaranteed standard, i.e. value for money is maximised.

### **Public interest at the heart of regulation**

The Legal Services Regulation Bill provides much needed reform in the way the profession has been traditionally regulated. There will be a new statutory Legal Services Regulatory Authority with responsibility for oversight of legal practitioners; a new independent arbitrator in the form of a Complaints Committee appointed by the Regulatory Authority; along with a Legal Practices Disciplinary Tribunal to deal with complaints about professional misconduct.

The Legal Services Regulatory Authority will consist of 11 members, the majority of whom shall be lay persons (i.e. people who have never practiced as a solicitor or barrister). One of the lay members will be appointed to be chairperson. The lay-majority membership structure is important for public confidence that members of a profession themselves do not have majority control in the governance of their regulatory body. It will help to restore confidence in the regulation of legal services among consumers of legal services and the public generally. Two members of the Regulatory Authority will be appointed by the Bar Council and two will be appointed by the Law Society. The involvement of the profession in the regulatory process is important and necessary, as their expertise and knowledge will help ensure the cooperation and development of practitioners to high standards and ensure the regulatory environment works effectively for the benefit of consumers and profession. The level of involvement of the profession in the structure of the Legal Services Regulatory Authority is in line with the Competition Authority's recommendations.

The Regulatory Authority has been given the specific mandate of "*protecting and promoting the public interest*" as well as other important objectives including: "*protecting and promoting the interests of consumers relating to the provision of*

*legal services” and “promoting competition in the provision of legal services in the State”.<sup>9</sup>*

These reforms bring the legal profession into line with trends towards greater transparency, accountability and consumer-focused regulation in other professions and sectors in Ireland. They clearly remove the conflict of interest faced by the current regulators, the Bar Council and the Law Society, in having responsibility for representing the interests of their members at the same time as protecting consumers and the public interest.

In the current regulatory set-up the Bar Council and the Law Society are the representative bodies for barristers and solicitors respectively and in this capacity lobby for and promote the interests of the legal profession. In their role as regulators they must also ensure that the legal profession operates to the benefit of consumers. These two roles conflict and housing them in the same organisation has clearly affected the transparency of regulation of the profession over time, while practices have been maintained that have served to protect the profession from competition.

An obvious example of where this conflict of interest has arisen can be found when looking at the complaints procedure. Currently the Law Society’s Complaints Scheme, and the Bar Council’s Professional Practices Committee, considers complaints from the public about members of the profession. While attempts have been made in recent years to increase the numbers of lay people on these committees, the fact that the body representing the profession is charged with investigating complaints against the profession, has created a negative perception that complaints will not be dealt with objectively. Now, as a consumer, if you are unhappy with the level of service you have received, or the fees you have been charged, you will no longer have to complain to the Law Society or the Bar Council. Instead you will have a clear, fully independent, and accountable body to bring your complaint to.

### **3. What will be the impact on legal practitioners?**

***“Sometimes we stare so long at a door that is closing that we see too late the one that is open.” Alexander Graham Bell***

The legal profession has undoubtedly felt the impact of the economic recession, as shown by the high levels of unemployment<sup>10</sup>, reported delays in fee payments<sup>11</sup>,

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<sup>9</sup> Ibid Sections 9(4)(a), 9(4)(c) and 9(4)(d).

people postponing transactions until the economy improves, and the stagnant property market. While there is understandably a fear among the profession that increasing competition will lead to further cuts in income, there are also many opportunities opening up for practitioners, especially for those that have struggled to establish themselves in the past. Competitive and, especially, innovative markets drive efficiency and in turn produce better value for consumers along with improved choice and quality. While in the short term the easy option may be to protect the profession from competition, in the longer term this will only postpone consumers' return to the market. Challenging existing norms, through new business models or alternative ways of delivering the service and lowering barriers to entry, will create incentives for legal practitioners to become more efficient and innovative in how they respond to consumer and business needs.

The Bill makes provisions for a number of new business models, which in turn will provide more career stability for legal practitioners than the sole trader barrister model. Changes to the way in which training and development within the profession is regulated will also increase the opportunities for those thinking of entering the profession, or switching between the two branches. Finally, the fact that there will be a clear separation of regulation in the public interest and representation of the profession's interest means that legal practitioners can trust that their representatives can carry out their mandate to represent their members to the fullest. They will no longer have the sometimes conflicting role of regulating in the interests of consumers. I explore these benefits in more detail below.

## **New Business Models**

### *Barrister Partnerships*

As previously mentioned, the Bill provides for barristers to form partnerships with other barristers. The benefits to consumers of this move have already been examined, but there are also significant benefits to be gained by barristers.

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. By virtue of their size and legal form, partnerships are better able to absorb and spread risk. They are better able to take on riskier cases, knowing that the partnership is less exposed to the risk of failure than the sole trader barrister model – the risk may be spread over more than one set of shoulders.

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<sup>10</sup> The Irish Times "Legal eagles take issue with Competitiveness claim – again", 25<sup>th</sup> June 2011

<sup>11</sup> Sunday Times "Hard up Barristers may be banned from Law Library" Colin Coyle, 16<sup>th</sup> January 2011,

Barrister partners can take on difficult cases with the understanding that their career is less reliant on this one case and in the future they will shoulder part of the risk when one of their colleagues wishes to take on a difficult case. From the firm's perspective, taking on and winning difficult cases would see its reputation enhanced and therefore the firm would have every incentive to do so.

Barrister partnerships could therefore also be a very attractive prospect to barristers who have struggled to establish themselves. They provide a more powerful challenge to well-established barristers than a fringe of sole traders.

Newly qualified barristers who enter a partnership with established barristers would be able to have some form of steady income in the first few years, compared to operating as a sole trader and being paid only very occasionally and often long after the work is complete. They can build up experience and knowledge from their colleagues before possibly striking out on their own.

#### *Other types of partnerships*

The Bill also provides for the introduction of Legal Disciplinary Practices "LDPs" and Multi-Disciplinary Practices "MDPs". LDPs are partnerships between solicitors and barristers, while MDPs are partnerships between legal practitioners and other non-lawyers, e.g. accountants, economic advisors. The Competition Authority did not recommend the immediate introduction of these models in the *Solicitors and Barristers* Report, but instead recommended that further analysis of the benefits and difficulties of their introduction be undertaken by the new Regulator. There may be benefits to consumers of legal services from the efficiencies that arise from these partnerships. However, there are also potential problems around access to justice and regulation related to these types of models. If they are to be introduced, in line with the Bill, it is important that there is a demand for them and that they are tightly regulated.

Ultimately it's clear that the business market for legal services is no longer just a domestic one, but has become globalised. Buyers are becoming larger and more knowledgeable about the types of services they require, and are willing to search beyond domestic borders for the best supplier. The UK legal system is opening itself up to alternative business structures, and so have many jurisdictions in the United States. In order for Irish firms to compete on an international scale, the benefits of these types of structures must be examined.

## **A more competitive market for training and education**

The removal of the monopoly on legal professional training for solicitors and barristers in Ireland would see the removal of one of the major barriers to entry into the profession. As has already been mentioned, the training for solicitors and barristers in Ireland is monopolised by the professions themselves. Both the Law Society and, in theory, the Kings Inns have the power to accredit providers other than their own schools, but none are currently licensed, nor has any information been published in relation to the criteria they might apply in considering applications for licences. The result is that the only professional courses for solicitor and barrister training are currently the Law Society's own course and the Kings Inns' own course, both currently in Dublin.

This has resulted in a situation where potential trainee solicitors and barristers have little choice as to where in Ireland they train, or in what format they can pursue their training (full-time, part-time, distance learning, weekends).<sup>12</sup> The current trainers face no competition from other schools competing for students. As a result they have no incentive to minimise costs (and hence course fees) or to bring innovations in how they train their students (e.g. courses tailored to specific areas of law). The numbers of those who can qualify each year is determined by the capacity of the Law Society School and the Kings Inns. Graduates who hold recognised law degrees are required to sit Entrance Examinations in both schools 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 monopolies enjoyed by the schools.

Allowing an independent body to set the standards for legal professional training and approve institutions wishing to provide such training would greatly benefit those wishing to enter the profession. The entrance of alternative training schools would drive quality in the market, and possibly lead to a reduction in the fees charged. A variety of locations for training would likely result, as well as a variety of course formats and content. Competition would ensure that an appropriate number of training places were provided to match the demand for students. Ultimately, would-be future legal practitioners could trust that the entry and training requirements were necessary and proportionate to ensuring appropriate standards and were not an attempt by those already in the profession to limit the numbers entering the profession. They would also be more likely to find a training format that fitted their life circumstances.

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<sup>12</sup> The Kings Inns provides part-time versions of its courses.

### **A strong representative body**

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. The Bill seeks to separate these two functions, and remove the conflict of interest that can arise between pursuing the interest of the profession and ensuring the profession operates to the benefit of consumers. In removing the conflict of interest, the new regulatory environment will give representative bodies a clear mandate to lobby for and promote the interests of the legal profession.

### **Other reforms**

Some of the other positive aspects of the Bill that will increase opportunities for legal practitioners are:

- Reforms to the system of awarding the title of Senior Counsel. There will now be a set of transparent criteria for awarding the title. The title will also be opened up to solicitors who advocate in court. It will become a more reliable quality signal facilitating competition in legal services.<sup>13</sup>
- Allowing solicitors to be lead advocate in mixed legal services teams.
- Direct access to barristers for legal advice will provide more business for barristers.
- Allowing barristers to act for former employers will allow barristers in employment to exercise their full range of skills.
- The requirement that legal costs must be charged on the basis of the work done. This, together with active enforcement to stamp out the arbitrary practice of Junior Counsel charging two-thirds of what Senior Counsel charge, will lead to Counsel being paid realistically for what each has contributed, with those who have done the most work on the case compensated accordingly.<sup>14</sup>

## **4. Areas requiring further consideration and debate**

The Legal Services Regulation Bill differs in its approach from the Competition Authority's report in a number of respects. The Legal Services Regulatory Authority is given more direct authority over the profession than the body recommended by the Competition Authority. The Bill does not address the issue of the solicitor's lien on the file, which acts as a barrier to consumers wishing to switch solicitor when they are unhappy with the service from their existing solicitor. The Bill also proposes a more

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<sup>13</sup> Ibid Sections 109 and 110.

<sup>14</sup> Ibid Section 89(1)(b).

complicated approach to dealing with consumer complaints about legal practitioners as compared to the various Ombudsman models previously envisaged by successive Ministers for Justice. Some preliminary views on whether and to what extent these differences may represent improvements or disimprovements is outlined below.

### **The Independence of the Regulatory Regime**

The 2006 Competition Authority report recommended that the profession be subject to regulation by a body that “*would be independent of both the Government and the profession*”.<sup>15</sup> The independence of the regulator from the profession was recommended in order to remove the conflict between the interests of consumers and the interests of the profession that is a feature of self-regulation. The independence from Government was recommended in recognition of the role of the profession in assisting citizens to challenge the State.

The Law Society and the Bar Council have publicly stated their concern that the proposed Legal Services Regulatory Authority will not be independent of Government.<sup>1617</sup> They give three reasons for this concern:

1. The Legal Services Regulatory Authority will delegate very few regulatory functions to the Law Society and the Bar Council.
2. The Minister for Justice will appoint the majority of the members of the Legal Services Regulatory Authority.
3. Many regulatory functions by the Legal Services Regulatory Authority will be subject to the approval of the Minister for Justice.

#### *1. Delegation of regulatory functions to existing regulators*

The Competition Authority considered two possible models for an independent legal services regulator.

- Option A was a statutory body that had full responsibility for regulating all aspects of the profession. No regulatory functions would be delegated to the Law Society or Bar Council. The Law Society and Bar Council would become purely representative bodies. This would be akin to the medical profession model of regulation – a profession where the statutory Medical Council regulates the

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<sup>15</sup> “Competition in Professional Services Solicitors and Barristers Report” The Competition Authority, 2006 p.47.

<sup>16</sup> “Bar Council expresses fundamental concerns regarding proposed legal services reforms” 12<sup>th</sup> October, available at [http://www.lawlibrary.ie/documents/news\\_events/BarCouncilExpressesFundamentalConcernsRegardingProposedLegalServicesReforms.pdf](http://www.lawlibrary.ie/documents/news_events/BarCouncilExpressesFundamentalConcernsRegardingProposedLegalServicesReforms.pdf)

<sup>17</sup> “Shatter hails legal reform bill but Law Society unimpressed”, Irish Times, 15<sup>th</sup> October available at <http://www.irishtimes.com/newspaper/frontpage/2011/1005/1224305259605.html>

profession and the Irish Medical Organisation and the Irish Hospital Consultants Association represent the interests of the medical profession and have no role in its regulation.

- Option B was a statutory body that would delegate day-to-day regulatory functions to the Law Society and Bar Council, but maintain overall control. The Law Society and Bar Council would no longer be permitted to represent the interests of the profession. They would become purely regulators. This would be akin to the model used to regulate the legal profession in other common-law jurisdictions.<sup>18</sup>

Which of these models is chosen is not central to the issue of a regulator that is independent of Government. The Competition Authority recommended Option B, due to three advantages unrelated to the independence of the profession. First, it was the least disruptive to the existing regulatory model. Second, continuing to use the Law Society and Bar Council as “front line regulators” had the attraction of hopefully engendering support from the profession for the new system. Third, the model was consistent with developments in the regulation of the legal profession internationally. The Competition Authority did not have, and still does not share, any concern that Option A would be less independent.

The model proposed in the Legal Services Regulation Bill is a hybrid of the Competition Authority’s two options, but essentially lies closer to Option A. The vast majority of regulatory functions are carried out by the Legal Services Regulatory Authority with very few functions delegated to the Law Society and Bar Council (for example, keeping the roll of solicitors and barristers). The Law Society and Bar Council will be largely representative organisations. This option also has its advantages. It provides a simpler regulatory landscape, with a single regulator for all legal services. This can facilitate clearer accountability for the regulation of the profession and the avoidance of confusion for consumers. It also better facilitates the unification of the profession if that path is chosen in future. As such, the regulatory model provided for in the Bill whereby very few functions are delegated to “front line regulators” does not of itself make it less independent of Government than that proposed by the Competition Authority - it is just different. However, the mechanism by means of which the model will work, as set out in the Bill, certainly raises questions about its independence, as we will see.

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<sup>18</sup> New South Wales in Australia, and England and Wales.

## *2. The appointment of board members*

It is common practice that even independent regulators are appointed by Ministers or by Government. This is not of itself problematic depending on how candidates are selected before being appointed. Members of the Competition Authority, for example, are appointed by the Minister for Jobs, Enterprise and Innovation following a competitive process run by the Public Appointments Service.

It is important that all members of the Legal Services Regulatory Authority are independent in their role and seen to be independent in their role. Currently, the Bill provides that the Minister will nominate all lay board members. This method risks the perception that nominees are too close to the Minister. The requirement for some of the members to have knowledge of certain relevant disciplines – such as, competition law, the needs of consumers of legal services, business and commercial matters – may help lessen concerns that appointments will be politically motivated.<sup>19</sup> Nevertheless, more consideration could be given to the process for selecting candidates for the board of the Legal Services Regulatory Authority in order to avoid negative perceptions. For example: there may be merit in asking educational institutions, consumer bodies, the President of the High Court, etc. to nominate a number of persons each for the Minister's consideration. The proposal to appoint a Department of Justice official should also be reconsidered, as such a person could face conflicts in his duties to the Minister and to the Regulatory Authority.

It is also increasingly recognised that good governance of State bodies requires a good *team*, of a manageable size, at board level. The appointment of a board is perhaps best thought of as a human resource task, and not a representation function.<sup>20</sup> The Public Appointments Service could be asked to conduct interviews with nominated candidates with a view to creating a good fit among candidates. Asking the Public Appointments Service to evaluate candidates in this way and make recommendations to the Minister could help ensure the appointment of an effective team.

## *3. Ministerial involvement*

There is always a natural tension between accountability and independence of regulators. It is desirable and standard practice that regulatory authorities be held

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<sup>19</sup> Ibid Section 8(3).

<sup>20</sup> OECD (2008) Ireland: Towards an Integrated Public Service, Paris OECD, [http://www.oecd.org/documents/31/03746,en\\_2649\\_33735\\_40529119\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/documents/31/03746,en_2649_33735_40529119_1_1_1_1.00.html)

accountable and assist policy-making by reporting to a relevant Minister.<sup>21</sup> At the same time, Ministers should not be able to interfere with or influence the decisions or independence of the regulator. The level of Ministerial involvement in the operational activities of the Legal Services Regulatory Authority envisaged in the Bill is much higher than that seen in the regulation of other professions in Ireland, such as the medical and pharmacy professions (where arguably the independence of the profession is less important). This should be reconsidered.

For example, the Bill provides that the Regulatory Authority may devise a Code of Conduct for legal practitioners but that the Code will be subject to the Minister's approval. In theory, this Ministerial power could be used to influence the Code to contain provisions to make legal practitioners less inclined to act against the State. Equally, this power could be theoretically used by a "captured" Minister to influence the Code to make rules that favour the legal profession over the public interest. The possibility and perception of such outcomes should be avoided.

The Bill also states that the Government may at any time, for stated reasons, remove a member of the Authority from office if, in the opinion of the Government –

- a) the member has become incapable through ill health of effectively performing the functions of the office
- b) the member has committed stated misbehaviour
- c) the member has a conflict of interest of such significance that the or she should cease to hold the office, or
- d) the member's removal appears to be necessary for the effective performance of the functions of the Authority<sup>22</sup>

Similar provisions are also made for the Chief Legal Costs Adjudicator and a Legal Costs Adjudicator. It is not clear why the final provision is included, and it could be deemed to impact on the independent decision making of the Authority. It should therefore be reconsidered.

### **Solicitors' Lien on the File**

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

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<sup>21</sup> "Economic Regulation – Recentralisation of Power or Improved Quality of Regulation", Paul K Gorecki, The Economic and Social Review, Vol 42 No 2, Summer 2011, p.180-181

<sup>22</sup> Legal Services Regulation Bill Section 8 (12) and Section 88 (11)

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 due to the current solicitor.

Obstructing or preventing a consumer from switching to another solicitor is a serious restriction on competition and is generally harmful to consumers of legal services. The abolition of this practice would enable buyers to switch solicitors where they are dissatisfied with the quality of work received, or if they have obtained a more competitive quote from another solicitor. Furthermore the possibility of clients switching from one supplier to another will in itself drive competition in the market for solicitors' services.

The Bar Council has removed a similar restriction on switching barristers. A similar rule existed in the engineering profession but has also been removed following a Competition Authority study of that profession.

It is difficult to see the justification for solicitors having additional protection from potential bad debts relative to other suppliers of services, when they have the unique skills to sue their clients. As legal services bills are in general paid only after a legal matter has ended, solicitors are naturally wary of clients being allowed to switch solicitor without paying anything to the assigned solicitor. However a rebalancing of this concern with consumer rights is needed.

### **Cost of the new regime**

It is vital that the costs of the new regime are kept at a reasonable level. The amount of the levy on legal practitioners will depend on whether the new body manages complaints against legal practitioners and inspections of legal practitioners in a cost-effective way. Barristers in particular may feel the brunt of any excessive cost as they do not deal with clients' money, are far fewer in number, have less direct interaction with the public, and thus also have far fewer complaints against them. Solicitors could actually save on regulation fees if the legislation and the Regulatory Authority do a better job than the existing systems.

The Bill proposes a rather elaborate process for dealing with complaints about the behaviour of legal practitioners – an initial Complaints Committee and a subsequent Legal Disciplinary Tribunal to deal with professional misconduct. This process is based on the current complaints processes regarding solicitors. This process must be

sufficiently flexible and results-driven to provide effective complaints resolution in an efficient manner. Risk-based enforcement regarding client account and other regulations (including inspections of client accounts) will also be essential to an effective but low cost enforcement regime.

## **5. Conclusion**

***"Justice was not born one day, some time ago, in one country. It had to be found time and time again as societies evolve and new challenges arise in an ever converging world," Mr Justice John Murray***

The proposals made in the Legal Services Regulation Bill will substantially reform the profession and will stimulate competition between legal practitioners. A more efficient and competitive legal system is not only important for domestic consumers, but is also vital to allow Irish legal firms compete on an international scale. Ireland is just one country among many currently renegotiating their legal systems, and it is vital that we do not isolate ourselves from these developments. The globalisation of legal services and the changing needs of clients mean that the regulatory systems also need to change so as to be fit for purpose. The proposed Legal Services Bill is certainly a great leap in the right direction.