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SOLICITORS

our ref DJCM1030543.4

your ref

date 27 June 2005

Mr Andrew Rae  
The Competition Authority  
14 Parnell Square  
Dublin 1

## Competition Authority – Study of Competition in Legal Services – Preliminary Report

Dear Mr Rae

McCann FitzGerald welcomes this opportunity to offer comments on the Authority's Preliminary Report (the "**Report**") in its Study of Competition in Legal Services. Members of the firm have interests in many of the matters covered by the Report, but this letter will address only a few points on which we hope that we can comment.

### 1. SYNOPSIS

In summary, we suggest that:

- 1.1 The present regulatory role of the Law Society ought be retained.
- 1.2 Lawyers ought to be permitted to practise with limited liability.
- 1.3 Sections 4 and 7 of the Attorneys and Solicitors Act 1870 should be repealed, to remove current uncertainty about the ability of a solicitor to limit their liability to a client by contract.
- 1.4 The rules on the ownership of law firms might be relaxed, but only if the culture and independence of lawyers is safeguarded by ensuring among other things that law firms remain under the predominant control and ownership of lawyers practising in such firms.
- 1.5 The division within the legal professions is not the most important factor that reduces competition between barristers and solicitors. The very heavy reliance of Irish litigation upon

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Vivienne Bradley, Catherine Deane, Paul Heffernan, Terence McCrann, Muriel Walls, Roderick Bourke, Grace Smith, Ambrose Loughlin, Niall Powderly, Kevin Kelly,  
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oral processes conducted before the court does have a serious effect of this kind however and, for that reason as well as even more importantly to produce greater economic efficiency generally in the resolution of disputes, serious study should be carried out so as to establish ways to reduce these factors.

1.6 A review of the purpose and qualifications for the award of the title 'Senior Counsel' would most usefully be carried out in the context of a decision as to whether or not, steps are to be taken to encourage the provision of advocacy services by solicitors.

We now set out our comments on each of these issues.

## 2. **REGULATORY REFORM - SOLICITORS** [Preliminary Report: Chapter 3]

2.1 There are arguments to be made for reform in areas of solicitors' regulation but, we find it difficult to understand however, how in the Irish context, a Legal Services Commission would possess any real likelihood of providing generally better or equally economic regulation in the interests of the public than do the present arrangements. With respect to the writers of the Report, the advantages which they suggest might flow from the changes they propose seem to be based on conceptual improvements rather than upon the need for changes that could be achieved by a new authority in virtue of its being independent of the Law Society. The Report does not try to identify exhaustively the areas in which it considers that the current system has not worked well but, in this brief submission, it seems fair to refer simply to paragraphs 3.40 to 3.42 and paragraph 3.48 which are those which seek to identify specific failings. Again, with respect to the writers of the Report, we suggest that so far as failures in these areas concern solicitors, all but one of the areas identified have always been treated as properly the subject for legislation by the Oireachtas rather than regulation by the Law Society or, in the case of advertising, have been the subject of significant Government intervention which must seriously colour any approach towards the specific items listed at paragraph 9.37 of the Report. Collaterally to that, the Report does not offer any convincing reason why changes in the areas it identifies or that it suggests, if desirable in the public interest, should not be achieved by legislation, or any reason for supposing that the Law Society would not be prepared and capable of giving effect to such changes once appropriate legislation had been enacted.

2.2 The only area described in the identified paragraphs which has unambiguously been the responsibility of the Law Society is that of education. We ourselves would have no principled objection to institutions other than the Law Society providing education for aspiring solicitors but, in the absence of any serious informed criticism of the present arrangements, it seems legitimate that the Law Society should seek to develop its own system of professional education, particularly where it has felt, after long experience, that what is required is something different from the lecture-dominated models that are characteristic of other institutions that teach law.

2.3 We agree with the arguments expressed by the Law Society and summarised at paragraphs 3.17 to 3.24 of the Report as to the advantages of the present arrangements. We think it is fair to note that the writers of the Report do not actually contradict any of these. As remarked, their objections seem to be conceptual. To the advantages of the present

arrangements listed at paragraph 3.17, we would add that, in common with members of other professions, solicitors have more compelling economic reasons for the proper regulation of their work than any other entity that is likely to be invented and that, provided such domestic regulation is under the ultimate control of the legislature and is actually kept under occasional but thorough review in the interests of the public by the legislature and public agencies such as the Competition Authority, the invention of specialist agencies is likely to be wasteful and should therefore be avoided. In particular, the distancing of regulatory and disciplinary procedures from a regulator that is identified with the profession is, in our view, likely to legitimise and lengthen challenges by individual or groups of lawyers to regulatory activity. The remark in footnote 62 of the Report as to complaints by some solicitors that the Law Society is "*making life difficult for them*" (rather than assisting them) indicates to us what may be a satisfactory balance between the Society's regulation of solicitors and solicitors' professional identification with the Society. We sense that the Report writers' may find this balance suspicious and conceptually unsound, but we consider that it may produce a greater cultural commitment to regulatory norms than could be achieved by more detached regulation administered by an authority with whom solicitors did not feel themselves identified.

2.4 Since as solicitors we will be regarded as inevitably in favour of being left entitled to regulate ourselves, I think it is fair to add that although solicitors in the firm contribute very significantly to the Law Society's education activity, they have no current role on its Council and the partners generally would not be identified as having historically had a significant role in the Society's activity, either regulatory or representative. We therefore regard ourselves as able to comment on the advantage of maintaining a regulatory responsibility of the Law Society from a reasonably independent viewpoint.

### 3. **LIMITATION OF LIABILITY** [Preliminary Report: Chapter 5]

The Report considers and asks for comments on whether lawyers should be permitted to practise with limited liability, as is permitted in most other common law jurisdictions.

#### 3.1 ***Limitation of liability generally***

We believe that there are strong competition arguments for permitting solicitors to limit their financial liabilities. Lawyers provide advice on a wide variety of issues and encounter competition both from non-lawyer consultants (such as accountants, tax advisers, pension consultants and planning consultants), and from lawyers from other jurisdictions. These other advisers are generally free to limit their liability to clients by contract and to conduct their activities through undertakings that give the owners the protection of limited liability. The inability of Irish lawyers to do so is a barrier to competition since it results in costs of insuring or self-insuring risks that cannot be related to the economic value to clients of the particular services provided and which other providers of professional services do not have to bear.

The anomalous nature of the current position becomes especially apparent when, in some substantial projects, a law firm is to join with other advisers to provide a multidisciplinary approach and the other advisers can limit their exposure by contract while the lawyers cannot. This situation produces a serious disincentive to an Irish law firm organising or leading any

such consortium of advisers since primary responsibility for services provided by the consortium will often have to be accepted by the consortium leader.

In the first place therefore we support proposals to permit lawyers to provide services with the protection of limited liability.

The right to establish an undertaking with overall limited liability however (akin to the protection afforded to the members of a limited liability company, or the proprietors in a limited liability partnership) protects the individuals involved only against financial catastrophe. It does not enable ongoing management and allocation of financial risks between the legal service undertaking and consumers of its services. Doing the latter requires a right on the part of the undertaking to agree contractual limitations of liability with consumers. We therefore suggest that the Authority consider the need to permit solicitors to contractually limit their liabilities and section 3.2 below focuses on this issue.

### **3.2 *Specific issues with the limitation of liability by contract***

Currently, it is unclear whether an exclusion or limitation of liability, if contained in a contract for legal services by a solicitor, would be enforceable. This uncertainty stems from sections 4 and 7 of the Attorneys and Solicitors Act 1870, the text of which is appended. Legal opinion differs as to whether sections 4 and 7 of the 1870 Act combine to prohibit a solicitor excluding or limiting their liability under any contract with a client, or only prohibit such exclusion or limitation where the relevant contract also deals with the measurement of fees. Legal opinion also differs as to whether these provisions prohibit only contracts which purport to remove all liability from a solicitor, or whether they prohibit any contractual limitation of liability. These uncertainties should be removed so that the market may determine the proper allocation of risks between suppliers and consumers and the costs of such allocations. Such risk-allocation is commonplace in commercial relations generally and the apparent prohibition in the context of legal services is anomalous and an unnecessary restraint on competition and efficiency in the market.

In submitting this, it is important that we emphasise that the 1870 Act was enacted long before the enactment of the many and nuanced laws that now protect the interests of consumers generally from unreasonable exclusions or limitations of liability by suppliers of services. These include the Sale of Goods and Supply of Services Acts and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000. Such legislation now provides consumers generally (and individual consumers in particular) with comprehensive protection in respect of the imposition of unreasonable contractual conditions.

## **4. OWNERSHIP OF LAW FIRMS AND MULTI-DISCIPLINARY PRACTICES** [Preliminary Report: Chapter 5]

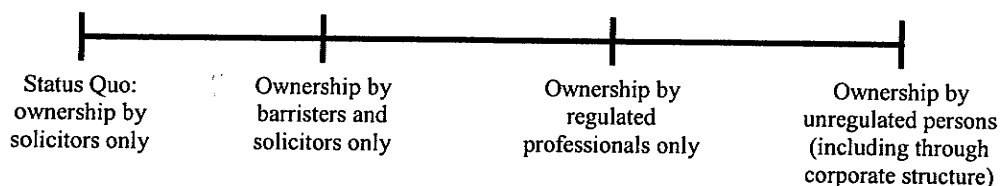
In practice, there is substantial overlap between the issues relevant to the concept of a multi-disciplinary practice (or MDP) providing legal services and those relevant to the ownership of a law firm.

If any changes were to be made to the law regulating the ownership of law firms or the conduct of legal practice by firms including members who are not qualified lawyers it would be critical to ensure that in fact as well as theory, a culture is preserved in which the interests

of each client are the firm's priority and that these are pursued within a culture that supports objective evaluation of what the law requires, and the lawyer's duties generally and to the High Courts to uphold these obligations.

The importance of solicitors' independence in performing their responsibilities is obvious, and at the same time is obviously sensitive to incursion in an environment in which commercial undertakings and private individuals are increasingly regulated and in which increasing numbers of specialist advisers operate. Self-evidently, the effectiveness of regulatory regimes is dependent upon effective regulators. Less remarked upon is that their effectiveness depends on a day-to-day basis upon objective advice as to the law's requirements being available to those affected by regulation. It is often difficult to combine the lawyer's responsibility for assisting clients in achieving their goals while telling them, perhaps in equal or greater measure, what they may not do. In our experience the capacity of a lawyer to give and maintain what may be unpalatable objective advice is very much dependent upon their real (as distinct from formal or structural) independence. Real independence is to a large extent a product of the culture of those with whom the lawyer works, and to whom the lawyer reports, and of the way in which these people balance their own and their clients' economic objectives against legal norms. It is difficult to maintain such an environment, particularly where, nowadays, the advice of a lawyer is often balanced and elaborated alongside the advice of others. In our view, it is unrealistic to suppose that this essential independence could be maintained if the lawyers normally responsible for advising the public are not controlled, both immediately and to the highest level, by authority which is clearly and predominantly legal in culture, philosophy and tone.

The issues relating to the ownership and control of a firm providing legal advice and representation may be plotted on a continuum, from the *status quo* at one end to ownership entirely by non-lawyers (including corporate ownership and including publicly quoted ownership) at the other. The further that one moves on that continuum from the *status quo*, the greater will be the difficulty in maintaining the independence described:



This firm frequently involves non-lawyers in the services that we deliver and would welcome the opportunity to bring such people to the highest levels of the firm while maintaining overall control by professional lawyers. In our minds however there is a question whether the level of regulation required to allow such flexibility while ensuring legal professional control would be justified by any improvement in competition likely to flow from the flexibility that the regulation aimed to achieve. Long debate over such changes might be an unnecessary distraction from more important reforms in the delivery of legal services.

## 5. DIVISION OF THE LEGAL PROFESSIONS

[Preliminary Report: Chapters 5 and 6]

We suggest that the Report's focus on the division of the professions of solicitor and barrister may over-emphasise its importance in competition terms.

If it is desired to encourage competition in the provision of legal advocacy services, it will certainly be necessary to encourage lawyers who are not barristers to act as advocates. There is nothing in the qualification of barrister as such that uniquely enables barristers to provide advocacy services and solicitors should not be discouraged from providing such services merely by reason of their not being barristers, or because they also carry out legal work that is not related to advocacy. On the contrary, although clients often gain considerable advantages from having the services of a specialist and independent advocate, there are many circumstances in which the role of advocate, or a part of that role, might be carried out more effectively by a lawyer who in an advisory capacity has already acquired a knowledge of their clients' general interests or of the particular case in hand.

A number of factors at present operate as disincentives to a solicitor providing services as an advocate. These include the separation of the professions of barrister and solicitor, but we do not think that this division is at all the most significant factor involved. In our view, the public derives advantages from the existence of an independent bar and it should not be necessary to amalgamate the professions to achieve the aims sought. Some of the inhibitions to competition encouraged by the separation as such could be dealt with by other means.

In the Irish public system for the resolution of disputes however there exists what, in the developed world, we suspect may be a unique degree of reliance on oral procedures, conducted in the actual presence of the Court. As a result of these factors which contribute to and operate in conjunction with unpredictability in the timing and duration of litigation procedures, it is in practice impossible to combine any significant amount of advocacy with a significant amount of advisory or transaction-orientated work offered to the public. These features of Irish litigation make it necessary for any lawyer doing a substantial amount of advocacy in the Superior Courts especially to hold themselves available for such work pretty well all of the time, and to be based in the immediate vicinity of the courts in which they practice. The emphasis on orality also makes necessary the development of oral advocacy skills. The only effective way of acquiring these is by practice and, as explained, this at present requires a choice to specialise in such work to the exclusion of other responsibilities.

A reduced emphasis on orality and on the need for physical presence in Court (for example through greater use of documentary procedures, the use of electronic and voice-telecommunications and the identification and transfer of administrative tasks to non-judges), supplemented by an effective appointments system, would make it feasible and attractive for solicitors to undertake advocacy work along with advisory work. To our knowledge, many younger solicitors in particular are enthusiastic about the possibility of establishing such practices.

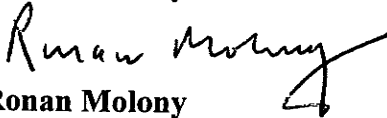
The factors that we have identified should be the subject of serious study in order to try to remedy the difficulties described, not only in order to encourage a wider range of people to offer their services as advocates, but perhaps even more importantly, in order to avoid many wasted costs which we believe result from the present arrangements.

McCann FitzGerald  
SOLICITORS

A review of the purpose and qualification for the award of the title 'Senior Counsel' (Preliminary Report, Chapter 11) would most usefully be undertaken in the context of a decision as to whether or not steps were to be taken to encourage the provision of advocacy services by solicitors.

We will be pleased to develop any of these comments if to do so would assist the Authority.

Yours sincerely



**Ronan Molony**  
*Chairman*  
McCann FitzGerald

APPENDIX

*Attorneys and Solicitors Act 1870*

Section 4

“An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or advocate or conveyancer, either by a gross sum...”.

Section 7

“A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he should be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void.”