

**THE SCHOOL OF LAW
TRINITY COLLEGE, UNIVERSITY OF DUBLIN**

**SUBMISSION TO THE COMPETITION AUTHORITY ON
STUDY OF COMPETITION IN LEGAL SERVICES:
PRELIMINARY REPORT**

A. INTRODUCTION

The School of Law, Trinity College Dublin (“the School of Law”) commends the Competition Authority for its *Study of Competition in Legal Services Preliminary Report* and for the function it fulfils in creating transparency and contributing to an informed debate in relation to how the legal profession functions. The Preliminary Report evidences focus, direction and clarity of thought together with sound underlying research and consultation with interested parties. It is clear from the Preliminary Report that the Authority has obtained a unique insight into the legal profession which has allowed it clearly to identify disproportionate effects on competition within the profession and to work towards the formulation of final recommendations for fundamental reforms.

The School of Law is a long-standing provider of undergraduate and postgraduate legal education to students for whom the next logical step is to obtain a qualification as a barrister or a solicitor. As such, it has an interest in how professional legal training is delivered to its graduates. Both the nature of the professional training offered and the demands of practice as a barrister or solicitor have an influence on teaching carried out at undergraduate and postgraduate level by the School of Law.

Accordingly, the School of Law wishes to make a submission in relation to Chapter 4 of the Authority’s Preliminary Report which deals with restrictions on competition in (a) the market for training solicitors; and (b) the market for training barristers, in which the Law Society of Ireland and the Honorable Society of King’s Inns currently occupy respective monopoly positions.

B. EFFECT OF THE MONOPOLIES HELD BY THE LAW SOCIETY AND THE KING’S INNS

The School of Law welcomes and approves of the central finding of the Competition Authority that the reservation of professional legal education to the Law Society and the King’s Inns restricts competition and has the potential to restrict the numbers qualifying as solicitors and barristers, to increase fees and to diminish the possibility of innovation in teaching methods. The School of Law entirely agrees that the monopoly provision of professional legal education and the restrictions imposed by such providers are likely to have significant and negative knock-on effects on the separate market for the provision of legal services.

The School of Law endorses the Authority’s conclusion that the monopolies of the Law Society and the King’s Inns in the sphere of professional legal education should be abolished. Accordingly, the focus of this submission is on how this finding can best be translated into practical recommendations for opening professional legal education to alternative providers.

C. OPENING LEGAL PROFESSIONAL EDUCATION TO COMPETITION

(1) Potential Market Entrants and Non-Regulatory Barriers to Market Entry

The neighbouring markets for undergraduate and postgraduate legal education accommodate a wide range of third level institutions which compete effectively with one another on the basis of a variety of factors such as academic reputation, differing and innovative course modules, student entry requirements and fee structures. Potential competitors in the provision of professional legal education are likely to be long-established competitors in these neighbouring markets who have the facilities, the expertise, the administrative back-up, and the contacts within the professions to enter the provision of professional legal education with a relatively short lead-in time. As participants in the increasingly competitive markets for undergraduate and postgraduate legal education, it is likely that many of these potential market entrants are well-attuned to innovation through adapting to meet student demand, feedback from the professions and research and publication strengths. It is this process which leads to the rolling-out of appropriately-tailored new courses and review of the content of existing courses.

If they were to enter professional legal education, many existing providers of undergraduate and postgraduate legal education have the potential to exploit and pass on the benefit of efficiencies achievable through already sunk costs, cross-subsidisation of running costs and economies of scale. These efficiencies would be achievable through utilisation of the existing availability to them of a highly-skilled and experienced pool of legal expertise, administrative and support staff, funding sources and, not least, suitable, well-equipped and appropriately-located premises.

Therefore, in logistical terms, the non-regulatory barriers to market entry are not high for third level institutions already competing in the neighbouring markets for undergraduate and postgraduate legal education. Furthermore, based on the factors outlined above, it may be cost-effective (or at least not manifestly financially disadvantageous) for some such institutions to provide professional legal education in tandem with undergraduate and postgraduate legal education.

(2) Regulatory Barriers to Market Entry

Given that the non-regulatory barriers to entering the markets for professional education are not high, the School of Law's considered view is that, in opening up professional legal education to other licensed operators, no form of quantitative as opposed to qualitative restrictions should be imposed.

The School of Law's position is that, even on an interim or transitional basis, a quota system should not take the place of an appropriate licensing system open to all who meet objective licensing criteria. Rather, there should be full liberalisation of the professional legal education markets based on market entrants who meet agreed standards competing on a free market. Low non-regulatory barriers to market entry militate strongly against

any argument being advanced in favour of the incumbent institutions and new market entrants being cushioned by phased liberalisation of the professional education markets based on an initial or transitional limited opening of the market to a fixed number of providers. In these circumstances, the only legal barrier to market entry should be clear and objectively justifiable educational quality standards which are consistently applied to putative alternative providers, as well as to the Law Society and the King's Inns. Indeed, this is the logical result of applying a proportionality analysis of the type adopted by the Authority in the Preliminary Report whereby valid objectives should be attained by the least restrictive means available. In summary, the conclusion to be drawn from the Authority's findings, an analysis of putative market entrants and the relative ease of market entry is that meeting threshold quality standards should be the sole legal barrier to market entry and that no quantitative restrictions should be imposed on the number of providers.

The School of Law imagines that this approach would give rise to the potential for a varied choice for persons wishing to become solicitors and barristers. For example, in Northern Ireland, Scotland, and England and Wales there are multiple providers of professional legal education, all of whom conform to the set requirements for such professional courses. Some institutions concentrate on barristers' or solicitors' education, some offer both, and some offer integrated courses. Furthermore, some institutions have gained a reputation for serving particular niches *e.g.* courses tailored to those joining the large commercial law firms. How these institutions fare is determined by open market conditions, and not by quotas set in advance as to the number and type of course or school.

(3) Establishing and Applying Licensing Criteria / Educational Standards

The School of Law understands that regrettably neither the Law Society nor the King's Inns has issued licensing criteria for alternative providers to meet, as recommended by the Competition Authority. This is despite the Authority's justified assertion that the regulatory costs of setting standards for alternative providers are likely to be low. Clearly the direct effect of this failure to make objective licensing criteria publicly available is to remove transparency in the regulatory process and to prevent any prospective entrant being able to make meaningful preparations for market entry. This, in itself, is indicative of the difficulty created by the potential for conflict of interest in the roles of regulator and regulated.¹

The School of Law approves of the Authority's proposal to establish an independent, transparent and accountable Legal Services Commission ("LSC") with responsibility for

¹ Case-law of the Community Courts on conflicts of interest and undertakings with special and exclusive rights in the context of Article 86 (ex Article 90) of the EC Treaty is instructive in this regard. See *RTT v GB-Inno-BM* Case C-18/88 [1991] ECR I-5941; *ERT v Dimotiki* Case C-260/89 [1991] ECR I-2925; *Silvano Raso* Case C-163/96 [1998] ECR I-533; *Ambulanz Glöckner v Landkreis Südwestpfalz* Case C-475/99 [2001] ECR I-8089.

regulating the legal profession² and its expressed intention to call on the Department of Justice, Equality and Law Reform to draft, and the Government to introduce, legislation to establish the LSC.

In the School of Law's view, a logical and necessary element of the LSC's role would be in relation to the licensing of providers of professional legal education. In order to ensure the objective and consistent application of licensing educational standards for market entrants, the School of Law approves of the Authority's proposal that the proposed LSC should be responsible for setting standards for the provision of professional education for solicitors and barristers.

As the Authority's view is that the LSC should comprise a majority of non-lawyers, the School of Law wishes to stress that it is important that provision is made for input from not only the professional but also the academic legal community in relation to setting standards for licensed providers of professional legal education. In this regard we would draw the Authority's attention to the example of the Legal Services Consultative Panel which operates in England and Wales in an advisory capacity to the Secretary of State on legal education and training matters.³ Members of the academic and professional legal community are well-represented on this Consultative Panel along with lay persons with relevant knowledge and experience.⁴ In particular, the Consultative Panel's Standing Conference on Legal Education keeps members of the Panel informed of developments in legal education and training, against a background where academic legal education at undergraduate and postgraduate level, on the one hand, and professional legal training, on the other, are regarded as going hand in hand rather than as wholly separate. In practice, this means that providers of academic legal education have a defined part to play in relation to the formulation of professional legal education standards. This is a model which the School of Law considers may serve as a useful reference point in formulating the licensing role of the LSC.

(4) Regulating Entry to Market Entrants' Courses

Once providers have been licensed by the LSC to provide professional legal education the School of Law considers that it should be a matter for each individual provider to define its own entry requirements for students provided that they are objective and proportionate to the objectives which they seek to achieve. We endorse the Authority's position that certain existing entry restrictions maintained by the Law Society and the King's Inns are disproportionate barriers to entering the legal profession. In particular, requiring law graduates to sit entrance examinations and the requirement that a training contract be signed before a student is permitted to undergo the Law Society's professional practice course are disproportionate restrictions.

² Given that the ambit of this submission is confined to issues relating to legal education, the School of Law does not express a view on the wider issue of the two models of LSC presented in the Authority's Preliminary Report.

³ See further <http://www.dca.gov.uk/atoj/lscp/lscpfr2.htm>.

⁴ This is pursuant to section 18A(2) of the *Courts and Legal Services Act 1990* (inserted by section 35(2) of the *Access to Justice Act 1999*).

D. CONCLUSION

The School of Law welcomes the Preliminary Report and approves of the Authority's proportionality approach whereby valid objectives should be achieved by the least restrictive means available. The opening-up of professional legal education is in the interests of persons considering a professional legal career by providing them with greater choice. It is also likely to lead to greater consumer choice in the market for the provision of legal services since opening the market may lead to persons entering the legal profession in greater numbers and with greater subject specialisation than is currently available under the monopoly provision of professional legal education by the Law Society and the King's Inns.

Given the low non-regulatory barriers to market entry for existing providers of legal education, the School of Law advocates that the only regulatory barrier to market entry should be compliance with objective licensing criteria. Licensed providers for professional legal education should be able to set their own entry requirements provided that they are objective and proportionate to the objectives they seek to achieve. In developing the LSC's role in licensing under a statutory scheme, the School of Law considers that it is important that the LSC is informed by the views of both legal practitioners and the academic legal community.

The School of Law
Trinity College
University of Dublin
1 December 2005