

**Opening Statement of the Chairperson of the Competition Authority, Ms
Isolde Goggin, to the Joint Committee on Justice, Defence and Equality**

21st March 2012

Introduction

I thank the Chairman and the members of the committee for inviting me here today to discuss the Legal Services Bill.

In 2006, we published a Report on Competition in the Legal Profession. We found that the legal profession in Ireland was in need of substantial reform, and made 29 recommendations designed to maximise the benefits of competition for consumers of legal services.

Today I would like to cover three main areas with you:

- The key findings and recommendations of our 2006 Report on Competition in the Legal Profession
- Our general support for the Legal Services Bill and the impact we believe it will have on consumers
- The few areas of the Bill which we believe require further consideration and debate by the Committee

Our 2006 Report: The need for substantial reform

Our report found that competition in legal services was severely hampered by many unnecessary restrictions on the commercial freedom of buyers and sellers permeating the legal profession. These restrictions were found to limit access, choice and value for money for those wishing to enter the legal profession and those purchasing legal services. They went beyond their stated aim of protecting the public, and in fact to do more to shelter lawyers from further competition. They were unrelated to the maintenance of standards in legal services and offered inadequate protection to consumers.

For example;

- There are restrictions on becoming a solicitor or barrister in Ireland. Those wishing to enter either branch of the legal profession must do so by way of a training school monopoly, and training formats are limited.
- Competition between lawyers is highly restricted. The legal profession in Ireland is organised into a highly rigid business model: direct access to

barristers for legal advice is limited to a few approved clients, barristers cannot form partnerships or represent their employers in court.

- Consumers seeking legal services and retaining a lawyer are not given relevant information to help them choose services that best meet their need and ensure they get value for money.
- Consumers wishing to switch to another solicitor face unnecessary obstacles.

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.

The current regulatory framework for the legal profession raises conflicts of interests. This is because the Bar Council and Law Society are set up to represent the commercial interests of lawyers and also charged with protecting the interests of consumers of legal services. These two roles can conflict and housing them in the same organisation lacks transparency. The fact that regulations which harm consumers have continued despite previous recommendations from independent bodies such as the Restrictive Practices Commission (1982), the Fair Trade Commission (1990), and the OECD (2001), that they be removed, demonstrates that when the interests of the profession and consumers collide, consumers have lost out. This complete resistance to change or reform led us to question the whole system of regulation for the profession.

Our report recommended that self-regulation should be replaced by an independent, accountable, transparent regulatory body with overall responsibility for regulating the legal profession and the market for legal services. We further recommended the separation of representative and regulatory functions within the profession and a greater involvement of non-lawyers in the regulatory framework.

We believe that only by taking regulation of the legal profession out of the hands of the profession itself can Ireland drive the fundamental changes necessary to reform competition in legal services.

We would like to bring to the Committee's attention that others making submissions on the Bill have sometimes erroneously misrepresented the Competition Authority's report and conclusions. We have provided the Committee members with your own copies of the report for ease of reference.

Impact of the Legal Services Bill on consumers

The Bill offers a lot to consumers in the form of greater competition, greater transparency and greater protection.

Increased competition

The proposals to reform existing business models will improve access and rivalry in the profession. 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, this barrier will be removed, allowing consumers to bypass the additional cost of a solicitor and directly approach a barrister for legal advice.

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. Such innovations in legal services would allow consumers more choice in the type of legal service they want and are willing to pay for.

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.

Increased consumer protection

The new Regulatory Authority will promote public awareness and disseminate information to the public in respect of legal services. 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.

Increased transparency

The lack of information to consumers of legal services has facilitated the persistence of a number of anti-consumer practices in the legal profession.

The Bill addresses this situation.

Legal practitioners will have to furnish the consumer with a notice of costs as soon as they are given instructions. This process of notification of costs must be ongoing and reactive to any changes or developments which may raise the legal costs. When legal work is completed the practitioner must furnish the customers

with a detailed bill of costs, along with an explanation of the procedure available to them should they 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.

The new Bill also 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. 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. We do have concerns however about the basis on which costs may be calculated under the Bill, which I will address shortly.

Some Areas for further consideration

Our 2006 report recommended that the profession be subject to regulation by a body that *"would be independent of both the Government and the profession"*.¹ 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 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, we believe raises questions about its independence.

The appointment of board members

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

¹ "Competition in Professional Services Solicitors and Barristers Report" The Competition Authority, 2006 p.47.

Bill provides that the Minister will nominate all lay board members. This method risks the perception that nominees are too close to the Minister. 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. 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.

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 accountable and assist policy-making by reporting to a relevant Minister. 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, amongst other things in the opinion of the Government “the *member’s removal appears to be necessary for the effective performance of the functions of the Authority*”

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

These issues can be easily solved and we understand that the Minister has already stated his intention to bring forward appropriate amendments on Committee Stage to address these particular concerns.

Legal Cost Concerns

Finally, now that we have had more time to examine the Bill we have some concerns about the part of the Bill relating to the adjudication of costs. This part of the Bill follows mainly from the 2005 Report of the Legal Costs Working Group. A core theme of that report, and indeed a recommendation of the Competition Authority’s report, was that legal costs should be primarily assessed on the basis of work actually and appropriately done. Thus Section 95 of the Bill specifies that the new Legal Costs Adjudicator must:

- verify that the itemised work was actually done or the listed disbursement was made;
- determine if the associated charge was appropriate and fair and reasonable in the circumstances; and
- take account of the nature, extent and value of the work concerned, the person who carried it out and the time taken to do so.

However, Section 95(1) also provides that a list of factors in Schedule 1 must also be considered in each case. These factors appear to provide a menu of reasons for justifying increases in fees and to cement rather than reform existing legal costs practices. In particular, the “complexity”/“difficulty”/“novelty”/“specialised” nature of the issue is listed as a factor to be considered four times. Similarly, the importance of the matter to the client – whether by urgency or financial value – is given three separate opportunities for consideration.

The most important considerations for the Legal Costs Adjudicator should be the time spent on that case and whether that amount of time was necessary, and the level of expertise of those put on the case and the corresponding charges. For example, solicitor firms charge higher rates for the hours that their top partners spend on a case as compared to more junior staff members. The Legal Costs Adjudicator must decide whether the complexity or novelty of the case justified the number of hours spent on the case by the top partner but not also allow the per hour rate for the partner's time to be increased due to the complexity of the issue.

I would urge the Committee to look at this vitally important section of the Bill carefully from the point of view of buyers of legal services as it has not received much attention in the public debate thus far.

Conclusion

Overall we would like to make it clear to the Committee that we believe that the Legal Services Regulation Bill will have a significant and positive impact on consumers and could have a positive impact on legal costs in the longer term. The proposed regulatory set-up encompasses many of the features we would recognise in a competitive, transparent and accountable profession. As such consumers can feel confident that the legal profession in the future will be regulated with the public interest at its heart. I welcome the views of the Committee and we are happy to answer any questions or assist the Committee in its enquiries in any other way.

Annex – Schedule 1 Principles Relating to Legal Costs

1. A Legal Costs Adjudicator shall apply the following principles in adjudicating on a bill of costs pursuant to an application pursuant to *section 94*:

- (a) that the costs have been reasonably incurred, and
- (b) that the costs are reasonable in amount,
- (c) where a bill of costs relates to the costs as between party and party, if, in addition to the principles at *paragraphs* (a) and (b), it is reasonable to expect the party from whom payment is sought to indemnify the party whose costs are the subject of the bill of costs on the basis of the matters and items in the bill of costs and the amounts claimed in respect of such matters and items.

2. In determining whether the costs are reasonable in amount a Legal Costs Adjudicator shall consider each of the following matters:

- (a) the complexity of the legal work concerned;
- (b) the difficulty and novelty of the issues involved in the legal work;
- (c) the skill or specialised knowledge relevant to the matter which the legal practitioner has applied to the matter;
- (d) the time and labour that the legal practitioner has reasonably expended on the matter;
- (e) the importance of the matter to the client;
- (f) the urgency of the matter to the client and whether this urgency requires or required the legal practitioner to give priority to that matter over other matters;
- (g) the place and circumstances in which the matter was transacted;
- (h) the number, importance and complexity of the documents that the legal practitioner was required to draft, prepare or examine;
- (i) where money, property or an interest in property is involved, the amount of the money, or the value of the property or the interest in the property concerned;
- (j) whether or not there is an agreement to limit the liability of the legal practitioner pursuant to *section 44*;
- (k) whether or not the legal practitioner necessarily undertook research or investigative work and, if so, the timescale within which such work was required to be completed;
- (l) in the case of a matter or item as respects the remuneration of a solicitor, the level of overheads and other costs associated with the provision of legal services generally;
- (m) in the case of a matter or item as respects the remuneration of a barrister, the level of overheads and other costs associated with the provision of legal services by barristers generally.