

COMPETITION AUTHORITY REPORT ON SOLICITORS AND BARRISTERS

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INTRODUCTION

The Competition Authority Report¹ with its strangely inverted title “Solicitors and Barristers” published in December 2006 (hereinafter called the Report) is a sequel to the *Study of Competition in Legal Services* (hereinafter called the Preliminary Report) published in February 2005.² It was written following consideration of submissions made by the legal profession, and seems destined to set the agenda for reform of the profession over the next few years. It must, therefore, continue to command attention. The purpose of this article is to review the Report and to refer to some subsequent developments relating to matters treated in it.

At the time of the publication of the Preliminary Report, I expressed the view that it would do little to cure the central malaise of the legal system, which is that costs at their present level are a substantial deterrent to those contemplating the assertion or defence of their legal rights.³ There is nothing in the more limited recommendations of the final report to make me alter that view. While it is superior in presentation, and rectifies some of the egregious errors in the Preliminary Report, its analysis of complicated issues, such as the permissible business structures for practising lawyers, advertising and professional charges, is not exhaustive, and at times is questionable. By asserting that the likely benefits of competition must be assumed and cannot easily be quantified, it absolves itself from the task of

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¹ The Competition Authority, *Competition in Professional Services: Solicitors and Barristers* (Dublin: The Competition Authority, 2006).

² Competition Authority, *Study of Competition in legal services: Preliminary Report* (Competition Authority, 2005).

³ “How good is the Authority’s draft report on the legal professions?”, (2006) 14 *Competition* 9.

examining the facts in detail. An over-ready tendency to recommend English solutions, evident also in the Preliminary Report, without making a thorough up-to-date analysis of what has happened there, is symbolised by its image of the barrister. The wigged figure is depicted not at any Irish legal venue, but crossing the Strand in London, on his way into the Royal Courts of Justice.

End of Self-Regulation

Fundamental to the conclusions of the Report is the view that competition has been impeded in both branches of the legal profession, by regulations governing entry and practice made by the profession itself. Self-regulation, it is argued, is inevitably biased in favour of the profession rather than the consumer of its services or other outsiders; accordingly, it needs to be overseen by a Legal Services Commission, so constituted that the majority of its members are not practising lawyers.

Thus stated, it sounds admirable in principle. It is in line with what is happening in the financial sector and elsewhere. However, under the recommendations in the Report, power to make regulations in the first instance would still be vested in the professional bodies. The Commission's effectiveness would depend on the willingness and ability of its members to second-guess these professional bodies in making regulations and vetoing those made by these bodies. There could, it must be said, be justifiable disquiet if the proposed power of the Commission to direct the making of new regulations or the amendment of old ones led to far-reaching changes of the kind that should be reserved to legislation enacted by the Oireachtas, which has, in the past, provided a measure of independent regulation of solicitors. Advertising regulations, the subject of detailed, if not altogether satisfactory, legislation as recently as 2002,⁴ is an example of an area where this would be controversial. None of these difficulties are canvassed in the Report.

As regards the enforcement of regulations, the Report notes the introduction, in line with the Competition Authority's

⁴ Solicitors (Amendment) Act, 2002; Solicitors (Advertising) Regulations 2002.

Preliminary Report, of proposals for legislation creating a legal services ombudsman, to hear appeals against the handling of complaints by professional regulatory bodies.

However, there is no detailed critique in the Report of this proposed legislation, which was published six months earlier, in June 2006, and entitled the Civil Law (Miscellaneous Provisions) Bill 2006, the provisions of which have now been incorporated in the Legal Services Ombudsman Bill 2008. It seems that the Competition Authority may not have brought itself fully up to date on it.⁵ By limiting the role of the legal services ombudsman to an oversight one, intervening only where the manner in which the professional body has handled a complaint is defective, the Bill imposes significant limits on the ability of that officer to provide redress. Such redress would appear not to be available where a complaint is turned down because the professional regulatory body prefers to accept the version of events put forward by the member of the profession against whom the complaint is made.

The inadequacy of a divided complaints procedure, for a client who does not know whether the fault is with the solicitor or the barrister, to which reference was made in the Preliminary Report, is not teased out. In England this has led to the creation of an Office for Legal Complaints, to which complaints against both barristers and solicitors are to be directed in the first instance.⁶ However, even this kind of provision would not offer the prospect of satisfactory redress where the fault of which complaint is made may possibly be attributable to the administration of the courts or some other public office.

⁵ The Report does refer (para. 3.20) to the provision in the Bill giving the Legal Services Ombudsman the right to recommend to the Law Society that a payment should be made out of its Compensation Fund to a person making a complaint against a solicitor. It suggests that the legal services ombudsman should be entitled to order such payment to be made both by the Law Society and the Bar Council. But, somewhat carelessly, this suggestion is not carried through into the formal recommendations in the Report.

⁶ Legal Services Act, 2007.

I. ENTRY TO THE LEGAL PROFESSION

In regulating entry, the Report envisages that the monopoly exercised by the two branches of the profession in providing education should be abrogated, and other institutions licensed by the proposed legal services commission to give such courses. In the past, King's Inns has drawn criticism on itself for the quality of barristers' education, while the solicitors' Law Society has been suspected of using its entrance examination to restrict entry excessively. But the situation, the Report acknowledges, is now much better at both institutions, albeit not, it maintains, above all criticism.

Doubtless, it would facilitate entry to the profession if courses were provided in centres outside Dublin. This makes sense when there are law schools at several centres – the complete separation of university and professional education, it may be remarked, is out of step with what happens in other professions. But it may be doubted if standards set by a legal services commission would differ much from those set by the professional bodies, if only because the non-professional element on the commission would probably lack the expertise to decide on appropriate standards. It may also be doubted if greater numbers qualifying would result in more entering practice, or if a larger entry to the profession would reduce fees, especially at the higher end of the market; the high fees at the Bar, of which much complaint is made, have persisted despite the existence of a large corps of underemployed barristers. The Report may be faulted for relying solely on general assertions about the benefits of competition in education and easier entry to the profession, rather than conducting a detailed examination of the defects in the present education system (including the scarcity of bursaries for the less well-off), and of the actual factors that are inhibiting effective entry to practice or to particular branches or levels of practice.

Rather strangely, the Report does not advert to the inclusion among the functions of the legal services ombudsman, under the Civil Law (Miscellaneous Provisions) Bill 2006, of the assessment of the adequacy of the admissions policies of the profession. This is now incorporated in the Legal Services Ombudsman Bill 2008. Doubtless, bad-minded folk will have

seen this provision as a ploy by the Minister for Justice who prepared the 2006 Bill (Michael McDowell, a bencher of King's Inns), to head off the recommendations in the Preliminary Report (now reiterated in the Report itself) that would undermine the monopoly position of the King's Inns and the Law Society in relation to legal professional education. The only regulation envisaged in the Bill is an annual report by the legal services ombudsman to the Minister, with an assessment of whether "the number of persons admitted to practice as barristers and solicitors ... is consistent with the public interest in ensuring the availability of such services at a reasonable cost".⁷ The Report should surely have joined issue on the adequacy of such regulation, and compared it with the regulation of monopolies in other sectors.

II. CONVEYANCING SERVICES

The Report repeats the recommendation that the solicitors' monopoly in conveyancing should be modified by legislation allowing persons other than solicitors to qualify as conveyancers. The assertion that one does not require to be a fully qualified solicitor to do conveyancing efficiently is supported, not by any independent assessment of the conveyancing process in this country, but merely by pointing out that a separate conveyancers' profession has been created in England and some other comparable common law jurisdictions. The evidence of lower fees in England, where a conveyancers' profession was created over twenty years ago, is less than compelling, especially when it emerges that English conveyancers account in all for only for only 5% of the market, and many of them are former solicitors.⁸ The argument that, because conveyancers would be able to form limited companies, they would have a lower cost base, tempts a riposte questioning why solicitors are not permitted to do likewise.

One would have expected a body concerned with competition to have attempted a realistic analysis of the operation

⁷ Legal Services Ombudsman Bill 2008, s. 15(1)(b).

⁸ Report, para. 27.

of the market for conveyancing services. Because a conveyance is a discrete transaction, it lends itself to the exact quotation of fees and shopping around by consumers. That, and the lack of much scope for a premium performance conferring extra benefits on consumers in such transactions, produces more downward pressure on fees than in other areas of legal work, such as litigation. Certainly, it is now counted as a generally less profitable area of legal practice, and so probably less in need of the kind of stimulus given by more competition.

The Report recommends a conveyancing council with responsibility for regulating the training, qualification and operation of conveyancers. It envisages a code of ethics and a compensation fund similar to that for solicitors. The recommendation in the Preliminary Report, that financial institutions should be permitted to provide conveyancing services, is not repeated; instead, it is proposed that the issue should be left to be decided by the Conveyancing Council. As this is a matter presently governed by legislation, on which there are strong arguments either way, it may be questioned if it should be left to a regulatory body to decide without reference to the Oireachtas or even to government.

III. PROBATE SERVICES

Strangely, the Report does not discuss the restriction to solicitors of the right to draw up wills and to make application for probate and the administration of estates. This is in spite of the omission having been pointed out by the present author in a critique of the Preliminary Report.⁹ The Fair Trade Commission Report into Restrictive Practices in the Legal Profession published in 1990 recommended the abolition of this restriction, arguing that the entry of financial institutions into this market would be facilitated if they did not have to employ independent solicitors. Its recommendation that banks and building societies should be allowed to offer services in this area was not acted upon in the Solicitors (Amendment) Act, 1994. The Act did provide for credit unions to offer such services, but the necessary

⁹ See (2006) 14 *Competition* 9, at 13.

regulations to bring the provision into effect were never made. Solicitors are not uncommonly appointed executors in wills, so giving rise to an unusual market situation with potential for abuse, in that the client retaining the solicitor to render a service is not the person to whom the service is rendered. It might fairly have been expected that the resulting absence of some of the normal disciplines of competition in the market for these services would have engaged the attention of the Competition Authority.

IV. SWITCHING BETWEEN THE TWO BRANCHES OF THE LEGAL PROFESSION

In 2006, in the wake of the Competition Authority's Preliminary Report, the King's Inns and the Bar Council removed rules restricting solicitors who had practised as such for at least three years from embarking upon practice as barristers – they had to cease practice as solicitors three months before embarking on practice at the Bar, and could not accept instructions from solicitors with whom they had been associated in practice.¹⁰ In the light of this, the Report concludes that all unnecessary rules have been removed. Surprisingly, it does not address the position of solicitors who have not been in practice for three years, and who are now required to undertake the King's Inns education course before being allowed to practice at the Bar.

The Report notes that any barrister wishing to become a solicitor is required to sit courses and pass examinations in professional practice, conduct and management and must, save in exceptional circumstances, spend at least six months in the office of a practising solicitor. It recommends that the Law Society should follow the lead of the Bar Council and King's Inns, removing unnecessary barriers to switching, and ensuring that it is frictionless. What, one may ask, is meant by frictionless switching? What are unnecessary barriers, given the fact that the public has a direct access to solicitors it does not have to barristers, and that barristers have no training in certain aspects of solicitors' practice, such as keeping accounts? Some more

¹⁰ See Report, paras. 4.109, 4.119.

concrete recommendation should surely have been attempted in the Report.

V. DIRECT PUBLIC ACCESS TO BARRISTERS

In relation to barristers in practice, the Report goes further than the Preliminary Report, in suggesting that there should be unlimited direct access for legal advice; at present, such access for advice is limited to expert clients such as chartered accountants and public bodies. The Report's recommendation may be faulted for failing to clarify the scope of requests for advice, in particular, whether they would include requests to draft agreements and transfers of property that would lead to payments of money. A consequence of direct access, not considered in the Report, is that the barrister giving advice to a client may be asked to recommend a solicitor to take on the conduct of litigation arising from the advice. This could compromise the present role of solicitors in providing totally independent advice to clients as to when it is in the client's best interests to retain counsel, and advising on who would be the most suitable counsel.

On direct access in contentious matters, *i.e.* litigation, the Report is more tentative in its conclusions, although it is asserted at one point that such direct access would be beneficial to consumers. It is recommended that the implementation of direct access should be examined in more detail by the proposed legal services commission. Direct public access to barristers has been a central issue in discussions on the reform of the profession, here and in other jurisdictions where there is a divided profession. The Bar sees its status as an "independent referral profession" as fundamental to its character.¹¹ It is disappointing not to have the issues fully teased out by the Competition Authority, and a thorough analysis provided of the situation in comparable jurisdictions. The avoidance of the issue in the Report follows the Preliminary Report, where a recommendation was made for limited direct access, copied without acknowledgment or analysis from the reforms made in England.

¹¹ Bar Council, *Study of Competition in Legal Services* (Dublin: Law Library, 2005), ch. 2.

The English rules, it may be noted, have departed from a prohibition of direct access in certain classes of litigation, but barristers are still required not to do work that is not barristers' work. This prevents them from handling funds, collecting evidence or conducting correspondence, but the exact limits are unclear. At present, the Code of Conduct of the Bar of Ireland does not attempt any exhaustive statement of the work that a barrister may or may not do.

A more thorough examination would have opened up the general question of whether a more rational division of the legal profession would be between advocates, who would deal with all aspects of litigation, and other lawyers. In contrast to England, where solicitors have to qualify themselves to act as advocates in the superior courts, Irish solicitors have had, since 1971, an automatic right of audience in all courts. Few have exercised this right above the District Court, and it may be felt that there are enough disincentives, without having a formal restriction, to discourage solicitors who are not competent in advocacy from embarking on it. However, against a background where there is under-employment among solicitors, they may become less reticent. If solicitors embark on more advocacy in the superior courts, barristers might come to regard their own rule denying direct access to the public as operating against their interests, and opt to react by giving the public direct access and providing all litigation services. This would reshape the profession.

VI. BARRISTERS AS SOLE TRADERS

Another recommendation in the Report, that would undermine what the Bar sees as its essential character, is the abolition of the rule that barristers must operate as sole traders. It must be said that the Bar Council has not helped their case by implausible arguments that barristers would be less willing to take on unpopular cases, and would be less frank with the court if they had to consider the reactions of other barristers in a partnership or chambers.¹² Already, the Bar has modified its rules so as to allow

¹² For a telling refutation of these arguments, see William Prasifka, "Frozen in time; a critique of the sole trader rule" (2007) 12 (3) *Bar Review* 124, at pp.128-9. For a re-iteration of the arguments made by the Bar see Gallagher,

barristers to employ other barristers to do specific tasks for them, as long as they do not employ them on a salary as general assistants. It has been made permissible for barristers to share offices and other facilities outside the Law Library, while continuing to subscribe to the Library. It is not clear if these facilities may, as at the English Bar, include the employment of a clerk who would negotiate their fees. What is clear is that barristers sharing facilities may not form a partnership, or promote themselves as a group. The Report recommends the removal of both these prohibitions.

The formation of partnerships between barristers goes beyond what is permitted in any country with a legal profession divided between barristers and solicitors. As partners in normal course could not act against one another, it would reduce the choice of barristers available to litigants in individual cases. This, and the enhanced bargaining power of a partnership, would tend to have an upward influence on fees. The grouping of barristers in chambers, while still operating independently, does not reduce choice in that they may still act for opposite sides in litigation or other transactions. This is the system at the English Bar.

The Report proceeds from what is described as “the basic tenet ... that the market will give rise to the business structure or structures which are most efficient”.¹³ What is meant by “efficient” is not clarified immediately. It seems to embrace lower costs and better service. The Report also observes that groups of barristers could build a shared reputation and realise economies of scale in advertising. In the case of partnerships, the benefits mentioned are an increased pool of knowledge, a reduction in transaction costs, new ways of doing business, shared risk, and the ability to adapt to meet clients’ needs. It is also claimed that entry to the profession would be facilitated, because young barristers could be employed by a group or partnership.

It may be remarked that the benefits to barristers and those to consumers of legal services are not distinguished from one another in this analysis. As the expenses or costs incurred by

“A response to the Competition Authority’s recommendation that the sole trader rule be abolished”, (2007) 12 (4) *Bar Review* 134.

¹³ Report, para. 5.54.

barristers are small relative to legal fees, savings in such costs are unlikely to have much bearing on legal fees. It is difficult to see how it benefits consumers of legal services that barristers enhance their reputation by osmosis, not necessarily related to individual merit, by acquiring a group reputation; the system of briefing barristers through a solicitor, who is in a good position to observe barristers, affords clients better guidance than some vague group reputation attaching to a chambers or partnership. It is also difficult to see how it benefits consumers of legal services that barristers are able to advertise more economically but not necessarily more informatively. Advantages, such as shared risk, would not necessarily be passed on to consumers by barristers whose bargaining position is enhanced by grouping together. Knowledge is already pooled among barristers in the Law Library, with its tradition that any member must help another seeking assistance on a legal point. While entry may be made easier for beginners taken on by chambers or by a partnership, the entry of others may be inhibited, as in England, where it has been found impossible to get going as a barrister without being in chambers. The prediction of the Competition Authority, that barristers in the Law Library could still compete effectively when chambers became the norm for the more successful, is speculative.

The effect of partnerships and, to a lesser extent, chambers on the English model, must be to enhance the bargaining position of their barristers in negotiating with clients.¹⁴ It is difficult to avoid the conclusion that the sole trader rule is self-denying as far as barristers are concerned, especially now that the rule preventing one barrister from employing another as an assistant to prepare a case, which may have been detrimental to fledgling barristers, has been largely abrogated. What must be doubted is whether, in the long run, the Bar will want to maintain the sole trader rule. Their recent acceptance that barristers may share expenses and facilities looks like a first step towards chambers on

¹⁴ This was the argument which persuaded Sir George Bain that the Bar of Northern Ireland should maintain its prohibition on barristers forming associations with one another: Legal Services Review Group, *Legal Services in Northern Ireland: Complaints, Regulation, Competition* (London: The Stationery Office, 2005), para. 6.40.

the English model, where groups of barristers present themselves collectively and have a clerk (or set of clerks) to negotiate fees and often effectively redirect work between barristers in the chambers. Barristers establishing themselves in offices outside the Law Library are likely to come to resent having to subscribe to the Law Library, if they do not use its facilities. It is a gap in the Report that it does not even examine, let alone reach a conclusion, on the rule requiring practising barristers to subscribe to the Law Library, which was condemned by the Fair Trade Commission in 1990.¹⁵

VII. EMPLOYED BARRISTERS

The Report's recommendation that barristers employed by the State, business or some other organisation should have a right of audience in all courts is logical when employed solicitors have, since 1971, enjoyed this right. But it is a shortcoming of the treatment that the issue of an employed barrister being able to brief practising barristers without the intervention of a solicitor is not addressed. Nor is the alternative of employed barristers being allowed to transform themselves into employed solicitors considered as a solution.

VIII. SENIOR COUNSEL

The Report reiterates the recommendation in the Preliminary Report, that the government should establish more objective criteria for awarding, monitoring and withdrawing the title of senior counsel. It notes the agreement of the Bar Council to the establishment of criteria and procedures designed to ensure that the title operates effectively as a quality mark. How much the result will differ from the present practice, under which the government acts on the basis of advice from senior legal figures, may be doubted. The proposal that senior counsel might be deprived of that status if their work falls below a certain standard sounds unworkable, and is likely to be a dead letter.

¹⁵ Fair Trade Commission, *Report of Study into Restrictive Practices in the Legal Profession* (Stationery Office, 1990), para. 7.155.

Of more significance is a recommendation, opposed by the Bar Council, that solicitors should be eligible to be appointed senior counsel and, in that capacity, be entitled to lead junior counsel and senior counsel of more recent standing who appear in court with them. This is in line with what happens in England and also Northern Ireland, and is a logical corollary of the solicitors' little-exercised right of audience in the superior courts. The Bar Council have rested their case for maintaining an independent referral Bar on the argument that it does not inhibit competition, because litigants have the alternative of direct access to solicitors to present their case in court. The Bar can be accused of trying to have it both ways, in demanding that solicitor advocates, however competent, should continue to be denied the hall-mark of quality that the rank of senior counsel confers.

It betrays, perhaps, an inconsistency in the position of the Bar Council on court advocacy. They argue that the administration of justice is imperilled unless cases are presented in court by barristers who are sufficiently independent of their clients, and dependent on their reputation with judges, that they can be relied upon to discharge their overriding duty not to deceive the courts. The assumption of the argument is that solicitors are less likely to honour this duty. Its logic is that solicitors, especially employed solicitors, should not be entitled to act as advocates. But this case is no longer made in relation to the superior courts, and has never been made in relation to the lower courts. It sits uneasily with a rule allowing barristers to have retainers from individual clients, which could be inimical to their independence. It all leaves the impression that the real concern of the Bar is to retain the dominant position of barristers in the more remunerative advocacy.

IX. LEGAL DISCIPLINARY PARTNERSHIPS

The Report retreats from the recommendation of the Preliminary Report, that barristers should be allowed to form partnerships with solicitors in legal disciplinary partnerships. This recommendation had been supported by the argument that such partnerships would create a one-stop service, and avoid two mark-ups. Both branches of the profession had raised difficulties

as to how barrister/solicitor partnerships could be regulated in a divided profession, and put forward a scenario where the influx of barristers into legal disciplinary partnerships would deprive small solicitor offices spread around the country of the back-up they now enjoy from the Bar. Rather than confront these arguments, the Report recommends that the matter should be further researched and considered by the legal services commission. No reference is made to the Legal Services Bill in the United Kingdom, published in May 2006, which provides for partnerships between barristers and solicitors, albeit in the context of a divided profession where solicitors have no automatic right of audience in the superior courts, and only a small minority have availed of the facility to qualify themselves to exercise this right.¹⁶

X. MULTI-DISCIPLINARY PARTNERSHIPS

The issues of public policy, as opposed to competition, involved in having regulation by a single profession is also the reason given in the Report for not making a definite recommendation on multi-disciplinary partnerships between solicitors and other professionals, such as accountants, or allowing non-solicitors to have a financial interest in solicitors' firms, which would, it is argued, have the advantage of increasing access to capital, reduce risk for solicitor owners and enable the retention of high-quality non-solicitor staff.¹⁷ The Legal Services Act 2007 in the United Kingdom, the bill for which was published before the appearance of the Report, makes provision for this.

XI. ADVERTISING

The Competition Authority was faced with a situation where, in order to discourage litigation, legislation enacted as recently as 2002 had imposed severe restrictions on advertising

¹⁶ These provisions have been carried forward into the Legal Services Act, 2007.

¹⁷ Report, para. 5.165.

by solicitors, especially in the area of personal injuries.¹⁸ This limits what can be achieved immediately by way of reform of regulations by the proposed legal services commission. However, the Report reiterates the Competition Authority's conviction that advertising necessarily benefits consumers, and invokes what it describes as international evidence on these benefits. It recommends a role for the legal services commission monitoring and analysing solicitor advertising, and promoting reform where "this will be consistent with public policy objectives and beneficial to consumers of legal services".¹⁹

The Report names prohibitions in the present regulations that are worthy of review, such as that on advertising in buses, or on making references to calamitous events, or on sending free copies of books and articles to prospective clients. It disagrees with the approach in the present regulations of listing the forms of advertising that are permitted (a white list) as well as those that are prohibited (a black list). It states a preference for reliance solely on black lists, provided that they are not all encompassing, because of the tendency of white lists to stifle "innovative and creative ways of advertising and delivering legal services".²⁰

The tentative approach to solicitors' advertising is at odds with the definite recommendations in the Report relating to advertising by barristers. In response to the Preliminary Report, the Bar Council had indicated support for expanded advertising by barristers, who had previously been permitted only to place their names and specialisations on the Bar Council website and in the Law Directory.²¹ However, no new regulations had been promulgated by the time the Report was ready. The Report recommends that advertisements by barristers should be permitted, as long as they do not give false or misleading information, or bring the administration of justice into disrepute, or are not in bad taste. It is not clear why an equally concise recommendation could not be made in relation to solicitors.

¹⁸ Solicitors (Amendment) Act, 2002; Solicitors (Advertising) Regulations 2002.

¹⁹ Report, para. 5.279.

²⁰ Report, para. 5.272.

²¹ Bar Council, *Study of Competition in Legal Services* (Dublin: Law Library, 2005), ch. 7.

The effectiveness of such a rule would depend on whether the Legal Services Commission decides on what brings the administration of justice into disrepute or is in bad taste, or leaves it largely or wholly to the discretion of the professional bodies.

The failure of the Report to make its own comprehensive analysis of the advantages of relaxing restrictions on advertising in the context of the Irish legal profession is disappointing. The examination of the rules in other jurisdictions is thin. Reference to three or four studies of advertising in particular contexts in the United States, only one of which relates to legal services, is inadequate to sustain the assertion in the Report that advertising necessarily benefits consumers. The statement in the Report that truthful and objective advertising is in the interests of the consumer may be true, but does not put the matter much further without an examination how far this is, or can be, achieved in the context of the market for Irish legal services.

What needed to be questioned was whether rules permitting advertising, while restricting the meaningful information that can be given to consumers, are beneficial to them, given that it adds to the cost of legal services overall, and that the lawyers best able to afford expensive advertising are unlikely to be new entrants. At present, meaningful information on fees is limited by the prohibition in the Solicitors (Amendment) Act, 2002, on stating a willingness to give a free consultation or to act on a “no win no fee” basis. It is also limited because of the difficulty of conveying information in advertisements on likely legal fees for classes of work, where the amount and difficulty and importance of the work varies from case to case. In the case of litigation, this difficulty is compounded by the prohibition, now enshrined in the Solicitors (Amendment) Act, 1994, of quoting fees for litigation that are a percentage or proportion of the amount recovered or at stake, which would be some guide to prospective clients. The alternative of advertising hourly rates is not possible, unless there are uniform hourly rates for all categories of work and is not meaningful unless lawyers all work at the same speed. Advertising is likely to be informative for consumers, and so help new entrants, only where it relates to discrete items of non-contentious work, such as a conveyance or the winding up of the estate of a deceased where, under the existing law, it is

permissible to quote percentage fees. But this, it may be noted, is a method of calculating fees not favoured by the Competition Authority, which affirms in the Report its conviction that fees should be related to work done, not the value of the property involved.

The usefulness of advertising as a means of informing consumers on the quality of legal services provided, may also be questioned. While it might be useful to know the areas of work done or desired by lawyers, claims of expert knowledge, which the Report recommends should be permitted, are not objective in the absence of third-party assessment. This would be difficult to devise. Reference to experience in litigation, although clearly useful, can be deceptive, with its implication that success was due to the merits of the lawyer, rather than the case. Reference to other work done is inhibited by the requirements of professional confidentiality.

The most useful function of advertising for the consumers of legal services may well be to alert them to their legal rights, and when they would benefit from consulting a lawyer. Ironically, this is inhibited by the present solicitors' regulations, which prohibit advertisements encouraging persons to make personal injury claims. The Report suggests that these safeguards might be modified now that extra safeguards and sanctions have been introduced by legislation to counter vexatious litigation in this area. But it makes no definite recommendation. Advertising alerting the public to their legal rights, and the advisability of consulting a lawyer, is probably best done by the Law Society. This is now happening.²²

In-person solicitation and circulars are the most useful form of advertising to new entrants, and so of most potential benefit to the consumers of legal services. It is a gap in the Report, as it was in the Preliminary Report, that this form of advertising receives no proper consideration. The Preliminary Report passed no adverse comment on the prohibition in the solicitors' regulations of personal solicitation of potential clients at inappropriate locations, such as adjacent to a scene or situation affecting a

²² Wilkinson, "Advertisement Survey Reveals Split Opinion", (2007) 101 (9) *Law Society Gazette* 14.

potential client, or near a garda station, prison, or courthouse.²³ The rationale of this rule is to prevent unscrupulous solicitors taking advantage of clients in vulnerable situations. The Report might, as I suggested in my critique of the Preliminary Report, have considered whether some more focused measure to meet this objective could be devised; solicitors might, for example, be required to give potential clients a circular from the regulatory authority with information on their rights when they engage a solicitor, advising them not to commit themselves immediately, and to consider obtaining independent advice.

The Code of Conduct of the Bar no longer has a provision prohibiting touting, as in-person solicitation used to be described. It is not clear whether it is governed by the restrictions on advertising. The Report quotes the Bar Council as expressing fears that advertising might degenerate into touting for business, so indicating that in-person solicitation is still unacceptable at the Bar. In-person solicitation has more potential to assist fledgling and other under-employed barristers than other methods of advertising, and would have merited consideration in the Report.

Whatever one's views on whether any significant benefits are likely to result from advertising by lawyers, it is difficult to justify restrictions on advertising for legal services when advertising is allowed for other goods and services. But the present situation, where advertising is permitted generally, while restricting the useful information that may be conveyed and inhibiting in-person solicitation, is arguably the worst of all worlds.

XII. FEES

In order to ensure that competition is effective to keep down fees, the Report recommends that lawyers should quote fees in advance of undertaking work for clients. Already, this is required of solicitors by the Solicitors (Amendment) Act, 1994, s. 68, except where it is not possible or practicable, in which case clients must receive an estimate or, if that is not possible or practicable, a statement of the basis upon which charges are to be

²³ Preliminary Report, ch. 9.

made. In cases where the amount of work involved is not predictable, solicitors have generally taken the view that it is not possible to quote a definite fee or even give an estimate, and have tended to quote hourly rates, or otherwise state that the fee will be what is appropriate having regard to the complexity of the item, the difficulty and novelty of the questions involved, the skill, specialised knowledge and responsibility required of the solicitor, the time and labour expended, the importance of the cause or matter to the client, the amount of money or value of property involved and a number of other kindred matters listed in the rules of court as relevant.²⁴ In cases of disagreement, the client may require the solicitor to have the fees assessed by a taxing master, who is a full-time salaried officer of the court appointed from the ranks of the solicitors' profession. Generally, the taxing master makes his determination on the basis of the testimony of legal costs accountants as to the prevailing rate for the appropriate standard of lawyer; unless the taxing master reduces the disputed fee by one-sixth, the client is liable to pay a court fee of 6% of the bill, as taxed, as well as the costs incurred by the solicitor contesting the taxation.

It is a complex area, and the Report abbreviates its treatment of it, pointing out that it has been considered in a report of the Legal Costs Working Group published in November 2005,²⁵ whose recommendations to ensure more detailed and accurate fee letters than those required by the Solicitors (Amendment) Act, 1994, s. 68, are endorsed. The Group had recommended that charges should:

- Be furnished to the client within a stated time-frame;
- Contain *(a)* details of the work to be done and *(b)* the estimated costs thereof or the daily or hourly charges applicable;
- Contain a “cooling off” provision (showing costs incurred or unavoidable, and those which will ensue if the case is proceeded with);

²⁴ RSC Ord 99, r 37(22)(ii).

²⁵ Department of Justice, Equality and Law Reform, *Report of the Legal Costs Working Group* (Stationery Office, 2005)

- Be regularly updated; and
- Give clients the opportunity to cease their action before any material increase in expenditure is incurred (subject to the knowledge that a litigant who abandons litigation may be liable for the costs of the opposing party).²⁶

One aspect of this is that barristers and solicitors would no longer be permitted to quote a global “brief fee” and “instructions fee” for their services, but would have to break their fees down to cover stages in the work to be done.

A client is likely to be interested in overall cost, and the usefulness to the client, as well as the feasibility, of breaking down charges in this way may be doubted.²⁷ Moreover, the quotation of a fee, whether it is overall or broken down, may not be possible without an examination of the facts of the case. This examination would probably make it impossible for a lawyer, who has quoted a fee to a prospective client and is not retained by that person, to act for another party to the same litigation or other transaction. Apart from the possible unfairness to the lawyer involved, this could seriously limit consumer choice, especially in specialised areas. Such problems, which do not arise for the generality of goods and services, are not teased out either in the report of the Competition Authority or that of the Legal Costs Working Group.

While the report of the Legal Costs Working Group, endorsed by the Competition Authority, recommends that barristers and solicitors should have the alternative of giving an estimate of fees or quoting hourly rates, the subsequent report of the Implementation Advisory Group published in 2007 goes further in making the quotation of hourly or daily rates mandatory, instead of being merely an alternative to an estimate.²⁸ Such rates, as the Competition Authority has admitted, may give little useful information to the client; they are subject to

²⁶ *Report of the Legal Costs Working Group*, para. 6.11.

²⁷ See further on this Collins, “Legal Costs: A House Less Bleak”, (2008) 13 (3) *Bar Review* 69.

²⁸ *Report of the Legal Costs Working Group*, paras 5.26-5.32; Department of Justice, Equality and Law Reform, *Legal Costs Implementation Advisory Group Report* (Stationery Office, 2007), para. 2.1.

the infirmity that they depend on the speed of work of the individual lawyer, and are difficult for a client to police.²⁹

As regards percentage fees, the Report does not recommend any change in the prohibition of fees “calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client”.³⁰ Nor does it explore the rationale of this prohibition. It has its historic roots in the view that lawyers might be diverted from their overriding duty to the court if they have a financial interest in the outcome of a client’s litigation; it was part of a general rule that precluded lawyers from acting on a “no win no fee” basis, and is difficult to justify on its former basis now that the general rule has gone. The rule prohibiting percentage fees is defended in the Report because fees fixed on this basis do not correspond to work done or the costs incurred. Yet, in the existing free market, as the Report recognises, lawyers’ fees have been more closely related to the amount at stake than to other factors such as hours of work.³¹ The Competition Authority has not seen fit to apply its expertise in economics to explaining why this happens and whether it is inevitable.³² A requirement that hourly rates should be quoted would not prevent those rates reflecting the amount at stake. Neither in the Competition Authority Report, nor the two subsequent reports on legal costs, is there any concrete proposal to ensure that this does not happen.

The Fair Trade Commission, in its report on restrictive practices in the legal profession published in 1990, recommended

²⁹ *Report of the Legal Costs Working Group*, para. 6.36; see Collins, “Legal Costs: A House Less Bleak”, (2008) 13 (3) *Bar Review* 69.

³⁰ Solicitors (Amendment) Act 1994, s. 68(2).

³¹ *Report of the Legal Costs Working Group*, paras. 6.60-6.61, where reference is made to an analysis of fees by UCD economist Vincent Hogan showing that 90% of the variation of solicitors’ instruction fees can be explained by adding 9% of the amount awarded to a base amount of €7500, and 80% of the variation of in barristers’ fees, can be explained by adding 1.8% of the amount awarded to a base amount of €930. To the same effect see also *Report of the Legal Costs Working Group*, Appendix 2.

³² It is, perhaps, explicable on the basis that lawyers feel entitled or able to charge higher fees when they assume a greater responsibility, while clients tend to look for better lawyers, even if these lawyers charge more, where more is at stake, because the skill of these lawyers is perceived as making a difference that justifies the extra expense.

that solicitors and clients should be free to agree fees calculated on a percentage basis.³³ Percentages can be adjusted to allow for the amount of work required and the skill required of the lawyers involved, and are not necessarily inconsistent with giving due weight to these factors. They offer consumers a better basis of comparison, so making competition more effective. Consumers may also prefer them, as providing an incentive to a better performance. They are allowed in other areas of commercial activity. It is an omission in the Competition Authority Report not to have analysed fully why they should continue to be prohibited for litigation. It is also an omission, albeit in the opposite direction, not to have questioned the exception made in the Solicitors (Amendment) Act, 1994, allowing percentage fees for debt collection litigation.

The prohibition of percentage fees in the 1994 Act does not apply outside litigation, and it has been commonplace for solicitors to base their fees for conveyancing and for probate or the winding up of estates on the value of the property involved; in the case of conveyancing, the Solicitors' Remuneration General Orders and the Land Registration Rules prescribe a percentage that may not be exceeded without advance agreement with the client.³⁴ The Report states that percentage fees are bad value for the client and represent a kind of price discrimination, in that the price is not related to the cost of providing the service, which, it asserts, depends on the level and complexity of the work involved. There is, however, no discussion whether such price discrimination should be outlawed. The Report merely notes an increasing tendency of solicitors to quote "flat fees" for conveyancing and probate work. The only recommendation made is the rather anodyne one, that the Law Society should promote awareness among clients that they do not have to pay fees on a percentage basis.

After the publication of the Preliminary Report, and before the publication of the Report the subject of this article, the Bar adopted a rule in their code of conduct in line with the Solicitors

³³ Fair Trade Commission, *Report of Study into Restrictive Practices in the Legal Profession* (Stationery Office, 1990), para. 12.181.

³⁴ Solicitors' Remuneration General Orders, 1884-1972; Land Registration Rules, 1972 (S.I. No. 230 of 1972).

(Amendment) Act, 1994, s. 68, that imposed the same requirements, as to providing a statement of charges by barristers, as are imposed on solicitors.³⁵ As elaborated in 2008, this requires barristers to give a detailed description of the work expected, and an estimate of the likely costs, except in small cases, or where the client agrees.³⁶

Obviously, the same kind of problems arise for barristers as for solicitors, in cases where the amount of work involved cannot be predicted at the time the barrister is first retained in a case. In the case of barristers retained by solicitors, it may be doubted if it would be advantageous to the client to have a firm advance quotation, especially if it is couched in terms of hourly rates. Clients are likely to resent being charged for time spent by barristers waiting for cases to come on, while barristers may feel unfairly treated if they are not paid for time that they have kept free from other commitments when cases are settled before a full hearing. At present, the fact that solicitors are repeat customers is a restraint on barristers taking advantage of the absence of prior agreement to mark outsize fees. What may happen is that barristers mark up a fee when they achieve a result in excess of expectations, but this practice, with its built-in incentive for barristers to perform well, is probably not all that objectionable to the instructing solicitor or the client, especially in the context of “no win no fee” understandings.³⁷

A feature of the Report is that it places exclusive reliance on competition to keep fees down, within a context where they are agreed beforehand. There is no reference to the long-standing statutory right of the courts to intervene to have fees agreed between solicitor and client set aside as being unfair. In *A&L Goodbody v. Colthurst* in the High Court in 2003,³⁸ Peart J. made clear that the requirement in the Solicitors (Amendment) Act,

³⁵ Bar Council, *Code of Conduct for the Bar of Ireland* (Dublin: Law Library, 2006), rule 12.6.

³⁶ Collins, “Legal Costs: A House Less Bleak”, (2008) 13 (3) *Bar Review* 69, 75.

³⁷ For a suggestion that this already happens in family law cases see Bar Council, *Legal Costs Submissions* (Dublin: Law Library, 2005), para. 10.19.

³⁸ *A&L Goodbody Solicitors v. Colthurst* [2003] I.E.H.C. 74 (unreported, High Court, Peart J., November 5, 2003).

1994, that a solicitor should specify fees when taking instructions was “intended to provide greater protection to clients of solicitors in the matter of costs, but was not intended as a substitute for the statutory role of the taxing master who is charged with the task of ensuring that a client is only charged appropriately for services rendered, upon a bill of costs being presented for taxation”.³⁹ The fairness of fees agreed in advance, even against a background of free and vigorous competition, may be questionable. So, where there are multiple actions arising out of a single incident or similar set of facts, a solicitor who acts for several plaintiffs will be able to command in the market the same fee per case as one who appears for one, notwithstanding that there may be much less work per case involved in doing several. Similarly, regular clients can generally ensure that they are charged less than once-off clients, even if fees are agreed in advance, although the work done for each is the same. If the fee agreed between lawyer and client cannot be challenged on taxation as unfair, clients will have lost some of their existing protection against being overcharged.

Underlying the whole treatment in the Report, as in the Preliminary Report, is an assumption that lawyers’ fees are unduly inflated, and that they can be reduced considerably if fees are quoted in advance and clients are enabled to shop about knowledgeably as between lawyers. This is what would happen if there were what economists call perfect competition with a homogenous product and an omniscient purchaser. In that case fees might be expected to fall to the level that is sufficient to keep enough lawyers sufficiently employed to remain in the profession. In fact, the market for legal services is far from perfect; legal services are not a homogenous product, for the simple reason that lawyers differ significantly from one another in performance; also, clients have an inexpert view of the merits of different lawyers. The inflation of lawyers’ fees may be attributed to the imperfect nature of the market, resulting from the variation in the perceived merits of different lawyers and, in many spheres of legal work, the importance of having, if possible, a better lawyer than one’s opponent. These are the same kinds of inflationary forces as enable business executives who deliver a

³⁹ *A&L Goodbody* (previous note), at p. 8.

premium performance to demand premium salaries. In these circumstances, advance quotation of fees and the other reforms recommended in the Report will not necessarily make much difference to the overall level of fees.

If lawyers are obliged to provide clients with hourly rates, disputes are likely to centre on whether the work done should have taken as long as it did. The Report has endorsed the recommendation of the Legal Costs Working Group, that the present procedure of an oral hearing before the taxing master should be replaced by a written procedure, involving submissions to a legal costs assessment office, with an appeal by way of an oral hearing to an appeals adjudicator.⁴⁰ The Report adds the recommendation that persons other than practising solicitors should be eligible for appointment to the assessment office or as appeals adjudicators to that office. It may be doubted whether persons other than those with experience of practice would have the expertise to adjudicate on whether the work should have been done more rapidly.

As an additional protection to solicitors taking advantage of clients not being informed of their rights, the Report recommends that the Law Society should, in consultation with the National Consumer Agency, establish a consumer information page on the website. It is puzzling why the Report does not go further, and insist on all clients receiving a written statement informing them of their rights when they retain a solicitor. It is also puzzling that it was left to the subsequent Legal Costs Working Group report to recommend an amendment of the present law, that a client need not be advised by a solicitor of the right to have a bill taxed until a dispute arises.⁴¹

The Report notes that the Bar has amended its code of conduct so as to abolish the rule that a barrister may not take over a case until satisfied that any barrister previously briefed in the case has been paid. However, the common law right of a solicitor, known as a lien, to retain the file of a client pending payment, remains in force. The Report recommends its abolition by legislation, because it may create delays and increase the cost of

⁴⁰ *Report of the Legal Costs Working Group*, ch. 7.

⁴¹ *Report of the Legal Costs Working Group*, para. 7.19.

switching from one solicitor to another. The Competition Authority was obviously unmoved by the rather shoddy argument put forward by the Law Society, that solicitors would retaliate to the abolition of their lien by not undertaking *pro bono* work or even work on a “no win no fee” basis; the latter, it must be said, would not be in their own interests, as they act only when convinced of the merits of a case.⁴² What is not clear is how important this lien is in practice, given the claim by the Law Society that it intervenes readily to prevent reliance on it. Switching lawyers is more likely to be inhibited by the cost of having to pay two sets of lawyers. There is no reason why a second lawyer should give credit for work done by the first lawyer, if the second lawyer has to master the facts from the beginning.⁴³ Except in cases where the service given by the first lawyer has been defective or that lawyer has withdrawn from the case without justification, there is no reason why some, at least, of the agreed fee should not be paid. These problems, which are further complicated where lawyers act on a “no win no fee” basis, are not addressed in the Report.⁴⁴

XIII. RECOVERABLE COSTS

The general rule governing litigation that “costs follow the event”, by virtue of which an unsuccessful litigant is usually ordered to pay the costs necessarily incurred by the successful party, gives rise to the need to determine in individual cases what costs may be recovered.⁴⁵ In the absence of agreement, their

⁴² Law Society, *Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority* (2005), para. 2.5.

⁴³ For a contrary opinion see Fitzgerald, “Competition and the Legal Profession” (Irish Centre for European Law: 24 April 2007), where she states: “[w]e cannot understand the current system whereby the client is required to pay off the first solicitor, before seeking an alternative legal adviser”. Available at: http://www.consumerconnect.ie/eng/News+_Research/Press%20Releases/Ann%20Fitzgerald%20ICEL%20speech.html.

⁴⁴ On this point, see Binchy and Casey, “Transferring files between solicitors”, [1996] *Law Society Gazette* 381.

⁴⁵ RSC Ord. 99, r. 11. Costs may be ordered to be assessed on a solicitor and client basis, covering all costs that are not unreasonably incurred or of an unreasonable amount, but this is exceptional.

amount is generally adjudicated by a taxing master, in a process known as taxation of costs.⁴⁶ At the adjudication, evidence is submitted on behalf of the parties by legal costs accountants about the work done and the prevailing rate for such work. As the fees charged by barristers and solicitors have tended to be linked largely to the amount of awards, costs awarded on taxation have tended to be linked to these awards as well.

The Preliminary Report recommended that the taxing master should not consider the size of an award when assessing the costs to be recovered by the other side, but should have regard only to the work undertaken by individual lawyers.⁴⁷ Following submissions from the Law Society and the Bar Council respectively, that account should be taken of the risk taken by a solicitor who acts on a “no win no fee” basis and of the value of the work to the client, the Competition Authority amended its stance, and the Report recommends that legal costs on taxation should “be primarily assessed on work undertaken by individual lawyers, not primarily on the basis of the size of the award as is currently the case”.⁴⁸ This follows what had been recommended in the report of the Legal Costs Working Group.⁴⁹ Surprisingly, despite strong objections expressed in both reports to costs based on the amounts at stake in litigation, there is no reference in either report, let alone any recommendation, in relation to rules of court governing civil suits in the District Court and for undefended debt

⁴⁶ In principle, the court hearing the case may measure on the spot the costs of cases before it, but this happens only exceptionally, and is confined to simple cases: see Kennedy and O’Flaherty, “Measure for measure: The Jurisdiction to Measure Costs”, (2008) 13 (1) *Bar Review* 15. In Circuit Court litigation, costs recoverable from another party are determined by the county registrar, who must be legally qualified. In District Court cases they are determined by the judge hearing the case.

⁴⁷ Preliminary Report, para. 12.23.

⁴⁸ Report, para. 6.52. For submissions which led to this recommendation see Law Society, *Response of the Law Society of Ireland to the Preliminary Report of the Competition Authority* (2005), para. 12.26; Bar Council, *Submissions to the Implementation Advisory Group on the Report of the Legal Costs Working Group* (Dublin: Law Library, 2006) para. 2.110.

⁴⁹ Department of Justice, Equality and Law Reform, *Report of the Legal Costs Working Group* (Stationery Office, 2005), paras. 5.22-5.23; see Department of Justice, Equality and Law Reform, *Legal Costs Implementation Advisory Group Report* (Stationery Office, 2006), para. 3.2.

cases in the High Court, both of which provide for the recovery of costs on the basis of the amount claimed or awarded.⁵⁰

To improve the process of determining recoverable costs, the Report recommends that the legal costs assessment board proposed by the Legal Costs Working Group be given responsibility to formulate guidelines for recoverable costs for work done and also to adjudicate on such costs in individual cases.⁵¹

The nub of the matter would be the guidelines adopted. Even if, as the Report recommends, recoverable costs are based primarily on work undertaken, the problem remains of valuing that work. Is there to be an hourly rate and, if so, what rate? Is any account to be taken of the experience or skill of the lawyers involved, and how is this to be assessed? How much account may still be taken of the size of the claim or the award? As the tendency of fees in a free market is to rise, largely to reflect the amount at stake, any restriction of the right to take account of the amount at stake in determining recoverable costs is likely to undermine appreciably the right of successful litigants to recover the costs they have incurred. This, it is argued by members of the profession, could have grave consequences for impecunious plaintiffs, forcing them to settle for less adequate representation, and so producing a situation in which there would not be “equality of arms” in litigation against well-resourced opponents.⁵² Also, a point shrewdly not made on behalf of the profession, it could also result in such plaintiffs having to pay over a more substantial share of the damages they recover to their lawyers than happens at present.

In the Report, the Competition Authority acknowledges the danger that any ceilings for recoverable costs could become a focal point inhibiting competition, but then discounts this danger because competition would be so stimulated by the other

⁵⁰ RSC Ord. 99, r. 39; District Court Rules 1997 (S.I. No. 93 of 1997); District Court (Fees) Order 2004 (S.I. No. 446 of 2004).

⁵¹ See *Legal Costs Implementation Advisory Group Report* (Stationery Office, 2006), ch. 2, where the establishment of a separate legal costs regulatory board is recommended for the purposes of drawing up guidelines.

⁵² See O’Dwyer, “The Haran Report on Legal Costs”, (2006) 11 (4) *Bar Review* 107.

measures it had recommended.⁵³ It is difficult to see how competition between lawyers would operate to bring down fees, as there would be no incentive for any lawyers appearing for a successful litigant to mark a fee less than what would be recoverable.

The profession agree that recoverable costs should not be based solely on the amount at stake although, as noted, they insist that the value of the work to the client should be a factor taken into account.⁵⁴ They also argue that factors such as the difficulty of the matter, the skill and experience of the lawyer, the risk a lawyer assumes in acting on “a no win no fee” basis, as well as the amount of work involved, have to be taken into account, and this can be achieved only if there are no scales or even rigid guidelines, but a decision is made in the individual case taking all factors into consideration. This leaves at large the problem of how these factors are to be assessed and weighed against one another in the individual case. The profession suggests no alternative to an assessment of their effect on the “going rate”, which is really what happens at present.

It is interesting that the latest report on legal costs, that of the Implementation Advisory Group chaired by accountant Desmond Miller, seems to lean towards the position of the profession rather than the Competition Authority, or even the Legal Costs Working Group whose conclusions it was set up to implement. Its report, published in November 2006, accepts that the value of a claim would have to be taken into account in formulating guidelines as to recoverable costs, and says nothing about its not being a primary factor.⁵⁵ It also accepts that guidelines should be formulated in the light of fees being charged generally.

It is an objection to the adoption of the “going rate” as a benchmark for recoverable costs that in some classes of litigation, notably personal injuries cases taken on behalf of plaintiffs on a “no win no fee” basis, the “going rate” is inflated, because fees are

⁵³ Report, para. 6.81.

⁵⁴ Bar Council, *Submissions to the Implementation Advisory Group on the Report of the Legal Costs Working Group* (Dublin: Law Library, 2006).

⁵⁵ *Legal Costs Implementation Advisory Group Report* (Stationery Office, 2006), ch. 3.

generally negotiated with clients who do not have to pay, and so have no interest in negotiating fees downwards.⁵⁶ The indemnity system, as the Fair Trade Commission pointed out in 1990, creates a most unusual market situation, in that payment is not made by the party to whom the services are rendered.⁵⁷ Obviously, the normal disciplines of the market are then absent. There is most scope for abuse if the fee is not fixed until it is ascertained that it will be paid by the other party.⁵⁸ But even where fees are fixed in advance, there is likely to be little pressure to keep them down, when it is anticipated that another party will pay them.

Even if it is accepted in principle that the “going rate” is an appropriate basis for determining what costs should be recovered from another party, there is the difficulty of establishing a “going rate” in a context where fees differ as between lawyers according to their skill and expertise. It may result in a party recovering fees for an expensive team of lawyers when it could have had its case adequately presented by lawyers charging lower fees or a lesser number of lawyers.

While a generous allowance for recoverable costs may work in the interests of penniless litigants, it works against the interests of litigants of limited means, who may be deterred by the prospect of having to pay large sums in respect of costs if they are unsuccessful. They are most likely to be deterred when the amount at stake is not large or the likely outcome is uncertain. Some protection is afforded by the allocation of litigation involving smaller sums to the Circuit Court and the District Court, where the hearings are more cursory

⁵⁶ Committee on Court Practice and Procedure, *29th Report: Enquiry to Examine all Aspects of Practice and Procedure relating to Personal Injury Litigation* (Stationery Office, 2004), Chapter 6. For contrary argument, that the going rate is established by what the insurance companies who act for defendants in personal injuries cases are prepared to allow, see Bar Council, *Legal Costs Submissions* (Dublin: Law Library, 2005), paras 7.2, 7.3.

⁵⁷ Fair Trade Commission, *Report of Study into Restrictive Practices in the Legal Profession* (Stationery Office, 1990), para. 12.137; *Report of the Legal Costs Working Group* (Stationery Office, 2005), para.5.2.

⁵⁸ See *Superquinn v. Bray UDC* [2001] 1 I.R. 459, where it is recorded that senior counsel acting for the victorious defendants sought a fee of €100,000 in a case where senior counsel for the unsuccessful defendant marked €17,000. On taxation the €100,000 was reduced to €18,000.

and the costs that may be recovered are less.⁵⁹ But there are classes of litigation, notably constitutional actions, judicial review and company law matters, where there must be a full hearing in the High Court, however little is involved. Litigants have to weigh the possibility that, if they are unsuccessful, they may find themselves saddled with costs based on going rates for high court litigation and a possible appeal to the Supreme Court. This has been identified as a factor inhibiting litigation in these areas.⁶⁰

An alternative to reliance on the “going rate”, or arbitrary guidelines that would address this problem, would be to limit recoverable costs by reference to what the party from whom recovery is sought has spent on legal fees, and the time taken to put its case; due allowance would, of course, have to be made for differences in the amount of work reasonably required on behalf of different parties.⁶¹ A party would then have the option of running litigation economically, and resisting a claim for disproportionate costs from a successful party who chooses to run a case less economically. This would improve access to justice by

⁵⁹ There are elaborate provisions imposing liability for extra costs incurred on those who take actions in a higher court than is necessary to obtain the remedy obtained: Courts Act, 1981, s. 17 (as inserted by Courts Act, 1991, s. 14). However, the costs of litigation taken in the District Court and the Circuit Court may be inflated by appeals taken to the Superior Courts, and litigants may end up paying costs resulting from the errors of the judges in the lower courts.

⁶⁰ O’Sullivan, “Environment groups claim costs unfair in public interest cases”, *Irish Times* 26 November 1998. See *Duggan v. Stoneworth* [2000] 2 I.L.R.M. 263: this was an unsuccessful application made as a litigant in person by a dissenting shareholder, resisting the compulsory acquisition of his shares by a bidder who had acquired 80% of the shares. It was of sufficient merit to necessitate a reserved judgment in the Supreme Court. While the Companies Act explicitly permitted a dissatisfied dissenting shareholder to appeal to the High Court against a compulsory acquisition, the award in this case, in defiance of precedent, of costs (which amounted to IR£70,000) against an unsuccessful applicant, has created a deterrent that is likely to make recourse to this safeguard not worthwhile for dissenting shareholders. On this case generally see Lysaght, “*Duggan v. Stoneworth*: The Compulsory Acquisition of Shares”, (2000) 21 (7) *Company Lawyer* 221.

⁶¹ At present, reference is occasionally made to fees paid to an opposing party’s lawyers in assessing recoverable costs, but it is as a guide to market rates rather than a factor in its own right: see *Crotty v. An Taoiseach* [1990] I.R. 617; *Superquinn v. Bray UDC* [2001] 1 I.R. 459.

diminishing the deterrent effect of costs on persons of limited means asserting or defending their legal rights. In so doing it would address a central malaise of the legal system.⁶² But, unlike increases in legal aid or more assured and better remuneration for those appearing for impecunious plaintiffs, such a measure would tend to diminish rather than increase the earnings of lawyers. While it is understandable that it should not engage the avowed concern of the profession for access to justice, it is disappointing that it should be disregarded by a body such as the Competition Authority, whose concern should be to protect consumers.

Another issue left alone in the Report is the practice by which lawyers acting for successful litigants charge them fees over and above what is recovered from the other side in respect of costs. This has the effect that successful plaintiffs are not compensated fully for their loss or injury, while successful defendants are out of pocket, so enabling unmeritorious plaintiffs to get settlements that are not merited from defendants who are reluctant to incur legal costs that cannot be recovered fully. Concerns about this were fanned by revelations in the early 1990s that solicitors for plaintiffs in personal injuries actions were charging clients 10% of the damages awarded or agreed, in addition to costs recovered from the defendants.⁶³ The Fair Trade Commission report published in 1990 mentions the possibility of prohibiting fees in excess of those recovered from the defendant.⁶⁴ But, in the subsequent legislation, it was not considered feasible to go beyond requiring solicitors to notify in general terms a client if, in the event of success, the fees chargeable by them would exceed those recovered from the other side.⁶⁵ In 2006 the issue was highlighted when solicitors acting for parties seeking redress from the residential institutions redress board were exposed charging fees over and above what they had agreed to accept in full settlement of

⁶² This malaise is accentuated because a party against whom an appeal is taken can find itself liable for the cost of the appeal and the re-hearing although both have been necessitated by judicial error.

⁶³ Fair Trade Commission, *Report of Study into Restrictive Practices in the Legal Profession* (Stationery Office, 1990), para. 12.147.

⁶⁴ Fair Trade Commission Report (previous note).

⁶⁵ Solicitors (Amendment) Act, 1994, s. 68(1).

their fees.⁶⁶ While the practice was unprofessional in that context because of that agreement, the right to charge the client more than is recovered from an unsuccessful opponent in ordinary litigation subsists.⁶⁷ Lawyers justify such additional fees by reference to the distinction between necessary (or party and party) costs that can generally be recovered from an unsuccessful opponent in litigation and reasonable (or solicitor and client) costs that are not, as a rule, fully recoverable.⁶⁸ The difference can be as large as one-third. The arcane distinctions between party and party costs and solicitor and client costs are not easily understood. Doubtless, lawyers making add-ons to what is recovered from a vanquished opponent would argue that they are agreed by the client in an open competitive market, but it is a market where on the demand side the resources of those purchasing the service and their consequent ability to pay is boosted artificially by the operation of the indemnity rule.

CONCLUSION

While the Report may merit criticism both for its sins of commission and omission, the process of which it is the culmination has not been without value. The two legal professions have been forced into a process of self-examination of the kind that is essential for all human institutions and both, especially the Bar, have made reforms of their own volition. The Report's recommendation, prompted by the profession, that the tests in the Irish language should be abolished, has been given legislative effect – not an earthshaking development, as they had largely become a formality.⁶⁹ Other recommendations, such as that for a more independent rational model of regulation for the

⁶⁶ McGarry, "Tribunal to hear 22 complaints on solicitors", *Irish Times*, 10 January 2006.

⁶⁷ See Sheehan, "Willie O'Dea seeks probe for new legal rip-off claims: concerned minister intervenes on army deafness double-pay complaints", *Sunday Independent* 11 December 2005.

⁶⁸ "It has always been the case that party and party costs are not calculated on the basis that the client will be fully indemnified in respect of all costs, except in exceptional cases", *Quinn v. South-Eastern Health Board* [2005] I.E.H.C. 399 (High Court, unreported, Peart J., 30 November 2005), at p. 13.

⁶⁹ See Legal Practitioners (Irish Language) Act, 2008.

profession, are welcome in principle, but need to be worked out in more detail. On too many important matters, the analysis is not exhaustive, or the issue is shelved to be solved by other bodies.

If, as is stated at the beginning of the Report, the legal profession is in need of substantial or root and branch reform, the Report's recommendations cannot be said to be more than a blueprint, sometimes of a dubious character, for some modest pruning.