Legal Systems Assignment

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Assessment Task

"The Competition Authority's study of the legal profession has been a comprehensive, detailed, and, eventually, fruitful process. The common objective of the authority's recommendations is to remove unnecessary and disproportionate restrictions so that consumers can benefit from greater competition in the provision of legal services."


Discuss the proposals for reform of the legal profession by the Competition Authority and the degree to which they have been rolled out to date.

Introduction

Undoubtedly, the Competition Authority's study of the Irish legal profession has been a comprehensive and detailed one, but the question as to whether this process has been 'fruitful' still remains a contentious point. The Competition Authority underwent pressure from the IMF to reform regulation in the Irish legal system, so as to bring the country into accordance with EU policy. This essay will focus on several of the pivotal reforms that were demanded; abolition of the sole trader rule, an improved legal complaints authority, the development of the LSRA, and the prohibition of pricing methods which are not advantageous for consumers.

Sole Trader Rule

The sole trader rule exists in Ireland to prevent barristers from forming chambers, barrister firms, or partnerships. This issue has been defended for its merits by the Bar Council, and attacked by the Competition Authority for its harsh and out-dated place in society. Paul Gallagher argues that the sole trader rule not only ensures that the practising barristers remain motivated and ethically sound, but, equally, it affords the court a degree of reliability in regards to the barristers’ actions as being genuine, “Judges know that the individual barrister is aware that it is his/her reputation which is on the line and that it is he or she who must maintain the trust of the Court”.1 Equally, this accountability is mutual, as the barrister realizes that he alone decides how his work will be judged, and he is free from the fear of liability that may be conferred onto him by chamber members, “There is no pressure on the individual barrister to account to other partners”.2 Furthermore, Gallagher notes that the removal of the sole trader rule actually infringes on the safety of the consumers, as the calculations for competition exclude aspects such as their effect on the ethical standards, which are in place for the benefit of both the court, and the public.3 Conversely, William Prasifka explains that this interpretation of the situation is misleading and simply incorrect. He

argues that the sole trader rule will undoubtedly increase the degree of competition in the market, and will do so by unifying the professionals, as firms would have departments dealing with the sourcing and billing of clients, which would be drastically more economic than individuals working for the same purpose. His contention is that the abolition of the sole trader rule will be wholly economically beneficial to the market, stressing that, “The fallacy of arguing that a sole trader rule promotes competition lies in making the all-too-common confusion of competition with rivalry”. In effect, the abandonment of restrictions on barrister partnerships would lead to a greater diversity in the powers of barristers. Barristers working for companies would be eligible to defend their employees in court, and, importantly, barristers with specialised areas of study could congregate into partnerships, which would lead to brand recognition and would increase competition in the market. Furthermore, in opposition to Gallagher’s contention, Isolde Goggin argues that a firm or partnership would enable not only a dilution of workload, but could equally enable barristers to approach cases or disputes which would erstwhile have seemed overly perilous and could have been detrimental to the character and, ultimately, livelihood of a sole trader, "They are better able to take on riskier cases, knowing that the partnership is less exposed to the risk of failure than the sole trader barrister model – the risk may be spread over more than one set of shoulders".

Ultimately, it is undoubtedly true that the Legal Services Regulation Bill has thoroughly scrutinized many aspects of the Irish legal system, weighing both the benefits and flaws of our system. However, it is difficult to judge these actions as being fruitful, given both the divided opinions and the convincing arguments in favor and in opposition to it, as well as the fact that partnerships will only be allowed outside of the Law Library, as shown in recent amendments to the bill, “The Bar Council retains the right to refuse membership of the Law Library to barristers in employment, partnerships or new business models such as multi-disciplinary practices or limited liability partnerships”.

Legal Services Regulatory Authority
The Legal Services Regulatory Authority (LSRA) will, in effect, inherit the regulation of solicitors from the Law Society. The LSRA will be central to the implementation of a myriad of changes to affect the legal profession. The establishment of the Legal Practitioners Disciplinary Authority, the replacement of the Office of the Taxing Master with the Office of the Legal Costs Adjudicator, and general cost reduction programmes are merely a selection of duties which fall within this body’s remit. An interesting aspect of this authority’s role revolves around the changes it will enforce regarding the

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6 Isolde Goggin, ‘Competition and the structure of the legal profession’ (Lecture) (November 25 2011) 11
7 Arthur Beesley, ‘Lobbying offensive blunts overhaul of legal services’ Irish Times (November 20 2015)
professions of barristers and solicitors. It will permit solicitors to be elected to Senior Counsel, and it will allow for, and regulate, advertising of barristers to the public. In addition, it allows for ease of access, as the public currently experiences a barrier to direct contact with barristers; namely, solicitors. The bill promises that, “An individual or business needing legal advice will have a choice between approaching a barrister or a solicitor directly for legal advice”. This function not only benefits the consumer in allowing for greater and less constrained choices of legal representation, but, equally, enforces the economic motif of the bill’s aim, as Goggin states, “allowing the consumer to bypass the additional cost of a solicitor and directly approach a barrister for legal advice, where this suits you and the barrister”. Yet another role of the LSRA revolves around the possible conversion of our dualistic legal profession into a single entity. However, within this aspect of the LSRA arises an integral issue in opposition of the bill; the governmental invasion of the legal profession. They can only implement this change to the system on the provision that a minister accepts their report “on such day or days, within one year of the completion and submission to the Minister of the report”. O’Higgins explains the close connection between the LSRA and the government, “The LSRA will be appointed by Government. It will report to the Minister and to the relevant committees of the Oireachtas on financial and administrative matters”. Unsurprisingly, some see this relationship as an affront to the constitutionally guarded separation of powers, as it clearly oversteps the rational and realistic role of the state in the matters of the legal profession. As Mark Ellis argues, “The bill, as it stands now, represents, in my opinion, one of the most extensive and far-reaching attempts of a government to control the legal profession”. Equally, the connection between the LSRA and the government becomes more worrying when it becomes apparent that the bill’s severe proposed reforms are clearly affecting the legal profession to a greater scope than was required, as O’Higgins explains,

“It is unquestionable that the legislation goes far beyond what was detailed in the Troika Programme, exceeding therefore what the Competition Authority, in their wisdom, felt was appropriate, namely an independent overseeing authority which overarches both professions”.

In this light, it appears that although the goals of the bill seem reasonable and partially suited to the consumers, and aspects of the professions, it is clear that the reform as was announced originally by Alan Shatter went beyond ‘fruitful’ and entered a territory to which it did not belong; the bill attempted to control the legal profession to an absurd degree, and without the changes to the bill provided by Frances Fitzgerald, it is likely that none of these reforms would have been afforded the opportunity to be employed.

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8 Legal Services Regulation Bill 2011 Section 73
9 Isolde Goggin, ‘Competition and the structure of the legal profession’ (Lecture) (November 25 2011) 3
10 Legal Services Regulation Bill 2011 Section 1(3)
11 Kevin O’Higgins, ‘A New Dawn” The Solicitors Magazine (Dublin, 12 October 2011) 11
12 Mark Ellis, ‘A dangerous message to weaker jurisdictions’ (2011) (December) Law Society Gazette 4
13 Kevin O’Higgins, ‘A New Dawn” The Solicitors Magazine (Dublin, 12 October 2011) 11
Legal Practitioners Disciplinary Authority

A fundamental goal for the LSRA is to institute the development for the Legal Practitioners Disciplinary Authority (LPDA), which will embody the roles of the current Solicitors Disciplinary Tribunal (SDT). This reform generates issues for the Law Society, and for bar associations, notably the simple fact that the regulation of standards for the legal profession will be cut from their duties, and this could, consequently, result in less dedication by practitioners to higher standards of practice. When similar reform was proposed in the UK, David Clementi argued that,

"Leaving day-to-day regulatory rule-making and oversight as far as possible at the practitioner level is more likely to increase the commitment of practitioners to high standards; such commitment is important, particularly in the area of professional conduct rules, where rules of behaviour and ethical standards should be seen as an aid to raise standards, not as a constraint to be circumvented".  

It is difficult to ignore the blatant failings of this proposal, with the obvious issue being the idea of ‘lesser sanctions’, which result from the LPDA verifying a complaint against a solicitor. Remarkably, these sanctions will be required to be signed by both the solicitor and complainant, and refusal to do so leads to the issue being referred to the Solicitors Disciplinary Tribunal. One can easily predict that this system will not only fail in its attempt to hasten the complaint process, but will equally result in both time and money being squandered, as solicitors will be forced to appear before the tribunal, taking time away from their work. Equally, in a system such as this, a minor complaint which is, to the complainants mind, unsatisfyingly adjudicated upon, can be referred to the SDT, which could be extremely damaging to the solicitor’s livelihood. Equally hazardous to the practicing solicitors is the authority’s redefining of the term ‘misconduct’. The bill has broadened this term to the vague and far-reaching concept of an act or omission where, “the legal practitioner has fallen short, to a substantial degree, of the standards reasonably expected of a legal practitioner". The ambiguity of the bill’s wording leads one to realize that the definition of misconduct now opens up disputes on unclear ground and, most importantly, allows for claims of misconduct to be brought by non-clients, which could lead to maltreatment of the service. If, as many bill supporters proclaim, the abolition of the sole trader rule will aid in reducing liability for practitioners, this area of reform clearly allows for unfair and disproportionate sanctions and threats to those involved in the legal profession. As Kevin O’Higgins warns,

“...The propensity by which practitioners will fall foul of the new regime will make it inevitable that more and more of us decent hard working and honorable

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14 David Clementi, ‘Review of the regulatory framework for legal services in England and Wales’ (December 2004) 34  
15 Legal Services Regulation Bill 2011 Section 45(1)(b)
colleagues will unwittingly come under the wrath of the new regulator and with
momentous consequences for us from both a regulatory and professional
prospective”.16

Moreover, this insensitive new proposal goes on to abase the legal profession by
demanding 10% of the costs to be provided by both the Law Society and the Bar
Council, with the remaining 80% being divided between both aforementioned bodies
based on the proportion of complaints each receives. This not only seems to indicate
that solicitors will more commonly be charged for complaints, but, in turn, negates the
paramount goal of the bill; competition, notably in regards to pricing. If solicitors will
be charged annually for the LPDA, clearly their hourly rates will account for this, thus
damaging the public. In this regard, the Competition Authority has clearly overstepped
its prerogative, and has, plainly, not only been wholly un-‘fruitful’, but has been
explicitly detrimental to both the legal profession and to the general public.

**Pricing Methods**

The aspect of the Legal Services Regulation Bill which can be considered both beneficial
and necessary for the general public, is that of competitive and fair pricing for clients.
This section of the bill was modelled partially upon the Millar and Haran Report
November 2006, which outlined several cost reductions which would benefit
consumers, such as, “the view that solicitors and barristers should be obliged to have in
place a proper system of time-recording and that bills in relation to legal costs should, as
appropriate, be supported by time record”.17 Although this suggestion was not included,
they did make several proposals according to costs, such as,

“A legal practitioner shall not, without the prior written agreement of his or her
client, deduct or appropriate any amount in respect of legal costs from the amount
of any damages or moneys that become payable to the client in respect of legal
services that the legal practitioner provided to the client”.18

Not only are practitioners going to be required to give full notice and a comprehensive
summary of the costs their services will entail, they shall also be prohibited from falsely
applying exorbitant fees for work done by juniors, “The lack of transparency in legal fees
has enabled anti-competitive practices to persist such as the two-thirds fee (junior
counsel charging a fee at two-thirds of the senior counsel’s fee)”.19 As a result of these
procedures, the legal profession’s costs will become more transparent and will,
undoubtedly, ensure that clients can fully understand the prices involved, and can
easily consider their representation options more readily. This will clearly aid in the

\[\text{16} \text{ Kevin O’Higgins, ‘A New Dawn” The Solicitors Magazine (Dublin, 12 October 2011) 9} \]
\[\text{17} \text{ Desmond Miller and Paul Haran, ‘Report of the legal costs implementation advisory
group’ (2006) 12} \]
\[\text{18} \text{ Legal Services Regulation Bill 2011 Section 89(2)} \]
\[\text{19} \text{ Isolde Goggin, ‘Competition and the structure of the legal profession’ (Lecture)
(November 25 2011) 7} \]
competitive aspect of the legal system, proving that the Competition Authority’s reform proposals have proven fruitful.

**Conclusion**

In conclusion, the Competition Authority’s reforms have taken an in depth look at both the inadequacies and, in truth, the exploitation of consumers in the legal profession. In reality, any supposition to the true ‘fruitfulness’ of the bill remains merely conjecture until such time as the bill develops into an act. Viewing the English legal system, it is clear that if this bill is to prove successful, it will require dialogue with practitioners.
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2. David Clementi, ‘Review of the regulatory framework for legal services in England and Wales’ (December 2004)


7. Isolde Goggin, ‘Competition and the structure of the legal profession’ (Lecture) (November 25 2011)

8. Legal Services Regulation Bill 2011

