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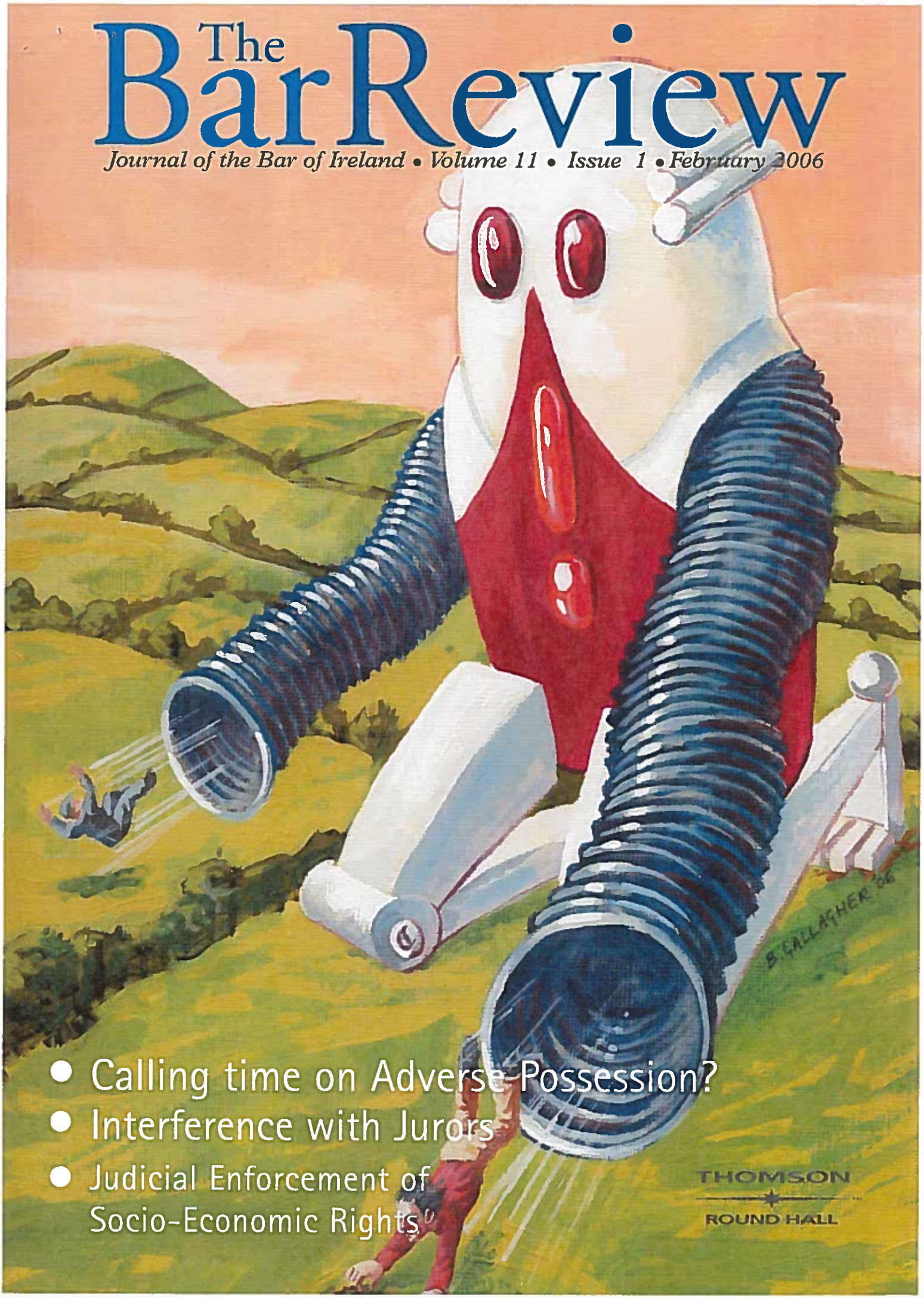

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THOMSON
ROUND HALL

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Editorial Correspondence to:

Eilis Brennan BL,
The Editor,
Bar Review,
Law Library,
Four Courts,
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
e-mail: *eilisebrennan@eircom.net*

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For all subscription queries contact:
Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
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For all advertising queries contact:
Directories Unit, Sweet & Maxwell
Telephone: + 44 20 7393 7000

Design: the Design Room T: 497 9022 Cover Illustration: Brian Gallagher T: 497 3389 E: bdgallagher@eircom.net W: www.bdgart.com

The Regulation of the Legal Professions.

Address by Minister for Justice, Equality and Law Reform, Michael McDowell delivered at the Historical Society, Trinity College Dublin. "That regulation of the legal profession should be reformed"

With self-regulation, division into two branches and a clear demarcation of functions, the legal professions are always vulnerable to accusations of restrictive practices within each profession and between them. The legal professions are not unique in this regard. High cost is usually the underlying basis for claims of restrictive practices in any of the professional services, whether it is accountancy, medicine or the legal service. This frequently leads to calls for deregulation to remove all competitive restraints resulting, in theory at least, in lower consumer costs and higher quality service.

Two Professions Or One?

A fundamental issue for consideration is whether we should have separate professions of solicitor and barrister or whether we should have a single, fused profession of attorney.

The answer to that question, I think, has to be decided by reference to whether either system is likely to deliver a fairer, more accessible, more economic, higher quality service to the citizen and to society. In favour of a fused system are advanced the arguments of non-duplication, organic specialisation, and simplicity. Few have argued with conviction that a fused profession would work out cheaper to the client. And no international comparative evidence has ever suggested that fusion means cheaper law in any comparable state or system. It would appear that there simply is no evidence that amalgamating barristers and solicitors into commercial firms would, of itself, reduce costs to citizens and society.

On the contrary, basic economic theory would suggest that permitting the emergence of such fused firms would tend to increase, rather than diminish, the monopoly power of those firms which could fence in the best counsel as partners or as employees. One only has to look to the accountancy profession for evidence that the emergence of large, blue chip firms with international links is not always associated with cut-throat competition with smaller undertakings on fees. Which is not to say that there is no competition or tendering in the accountancy sector. There is. But big firm dominance in law and accountancy is simply not generally associated with low consumer cost. And there can be little doubt that giving the largest law firms an opportunity to fence off the commonage of the Bar would limit access for smaller law firms to talented barristers on terms of equality for most people in our society.

Apart from economic theory, there are other qualitative, social issues. Ending a situation in which smaller solicitors practices across the country would have equal access as of right to the best advocates in the system would have potentially serious implications for the tone and fairness of our adversarial system of justice. The model of access to an independent referral bar through small scale solicitors undertakings has significant social advantages which are not simply economic.

In our system, the courts operate on the basis of advocacy to a far greater extent than other systems, which are much more a paper process. Ensuring significant "equality of firepower" in terms of advocacy as a matter of course gives the lone citizen or the marginalized group a far better chance of being equal in the eyes of the law as a matter of fact as well as in constitutional theory.

The professional obligation of the Bar to be prepared to accept instructions on either side of an issue (the so-called "taxi-cab" principle) has meant that the under-dog has always had a good chance of proper representation, even for unpopular causes. That rule has enabled many solicitors to act as pioneers in ground-breaking litigation. It has also meant that "no foal, no fee" cases were taken. In the era of the time sheet, large firms with the best advocates would be under huge pressure to avoid that type of work.

Fusion would also probably end the practice of prosecutors and defenders being chosen as advocates from the same pool of advocates in the area of criminal law. That could have serious implications for the criminal justice system.

If I thought that a fused profession of attorneys would yield a better result in economic, social or equity terms, I would support fusion. But I have to say that I am not merely unconvinced by the argument for fusion; I am convinced that fusion would more likely lead to a worse result in economic, social and equity terms.

Reform of the Legal Professions

But the existence and maintenance of two professions does not mean that the separate professions are immune from reform. On the contrary, there are many aspects of the professions that should be reviewed - some which relate directly to the consequences of separation.

For instance, maintaining rules which keep the professions distinct does not justify rules and practices that are arbitrary and indefensible. Mobility between the two branches of the profession should be facilitated to the greatest extent compatible with the existence of the distinction between solicitor and barrister. Subject to the minimum safeguards, solicitors and barristers should be able to opt into the other profession with minimum formality.

Direct public access to the services of each branch of the profession should be maximised. Competent solicitors do not want or need to act as post boxes for barristers. Competent barristers do not want or need to handle clients' accounts and property. Barristers who want to form partnerships with solicitors should simply become solicitors. Mixed partnerships between barristers and solicitors would simply end the taxi-cab rule. A barrister who was in partnership with a solicitor or who was employed by a solicitor would simply cease to be a barrister in the commonly understood meaning of the term. He or she would effectively be a solicitor who performed advocacy - something that the law already permits.

In that context, solicitors who undertake court-room advocacy work are entitled to total equality of esteem with barristers doing the same work. It is wrong and indefensible that they should ever feel any "cold breeze" from any quarter, still less a sense of being frozen out. It is important that the judiciary and the Courts Service at every level makes that entitlement to equality of esteem a day to day reality.

Partnerships among barristers, in my view, would not reduce the costs of barristers services to clients but would tend to increase the monopoly power of the partnerships. As things stand, a barrister has no separate financial stake in his or her practice that can be sold, shared or bequeathed, And that is how things should be, from the point of view of the economic interests of society. Barristers should remain independent individual undertakings as sole practitioners. Cost sharing and team work among barristers should, however, be encouraged and permitted.

The distinction between senior and junior counsel in relation to costs and fees should cease to exist as a matter of law and practice. If either rank is to remain, in my view, it should be advisory only as to competence and experience and not a matter of public law. In my personal view, the involvement of Government in admitting barristers to the "inner bar" is an anachronism.

In short, I strongly believe that further reforms of the legal professions are necessary and that a distinction between solicitors and barristers should not be used as a pretext for preserving practices that are indefensible or self-serving.

I also very much welcome the positive attitude to change lately adopted by the Bar Council and the Law Society. Knee-jerk defensive reaction in the past to preserve the status quo ill-became professions whose members well know that there must be change as part of a modern effective legal system. I know of no complex, economically successful society in which lawyers have failed to prosper. But there are many cases where legal conservatism and self-interest threatened the capacity of society to prosper and develop. Far reaching change is also needed in the management of court time and business. Justice delayed is justice denied. But that is for discussion on another occasion.

Legal Services Ombudsman

Self regulation is not now in vogue among the commentariat - except that is in the context of the press itself. I am someone who believes in self regulation wherever possible. I believe for instance that self-regulation in the case of solicitors has generally been very good. Of course, it is backed up by a statutory process. I have noted the views of lay people who serve in the Law Society's disciplinary system that the regime is, in their view, very strict and exacting and somewhat unforgiving. It is far from the "old boys club" that some would claim.

I believe that both barristers and solicitors should have disciplinary procedures that are open and transparent and in which the lay component is in the majority. I am glad that the professions have signalled that they will embrace this proposal for reform.

To further protect clients of the legal service, I am in the process of strengthening the mechanisms for dealing with complaints against both solicitors and barristers. Self-regulation must deliver the highest standards of professional integrity for the protection of clients. There is a public interest in ensuring a high level of confidence in the manner the professions regulate their affairs.

Just prior to Christmas the Government agreed my proposals to establish on a statutory basis a Legal Services Ombudsman. The Ombudsman will oversee the handling by the Law Society and Bar Council of three classes of complaint against solicitors and barristers, namely inadequate services, excessive fees and misconduct.

- The key function will be to provide a forum of appeal for clients of solicitors and barristers who are dissatisfied with the outcome of a complaint made to the Law Society or Bar Council.
- The Ombudsman will also conduct quality control checks on disciplinary cases that are not appealed.
- Entry to the professions will also be monitored by the Ombudsman who will report annually to me and the Oireachtas on the adequacy of numbers admitted to each profession. This will ensure that entry is not determined by the profession's financial interest but by society's needs.

Provision for the Legal Services Ombudsman will be included in a Civil Law (Miscellaneous Provisions) Bill currently being drafted and which I expect to publish this spring with a view to enactment before the end of this year.

Legal Costs – Value for Money

The issue of legal costs and fees is rarely out of the news. It's a subject upon which everyone has something to say. Recently, we have had controversies concerning legal costs which have undermined the confidence of many in the legal profession. These controversies give rise to public comment, which reflects unfairly on the vast majority of barristers and solicitors who endeavour to do their job fairly and provide their clients with the best service possible. However, it remains the case that there is a great deal of uncertainty about legal costs, especially where costs are visited upon the losing party in a civil action, a party who has had no input into how those costs arose. This isn't good for the legal profession or the general public.

Many people feel that access to the Courts has become prohibitively expensive. Many people feel that simple Circuit Court actions are now far beyond the capacity of many reasonably well off people to contemplate. In many family cases, the legal costs have become another catastrophe for families in crisis. Many people believe that there is little or no downward competitive pressure on many aspects of legal costs - even though conveyancing, for instance, is now becoming competitive.

The Haran Report

There is a widespread perception that the present system of deciding on legal costs is one in which lawyers, in the broadest sense of that term, determine their own incomes by rules which lawyers interpret and apply, and with little public interest input. There is a need to take steps to address the costs issue.

In 2004, I told an Oireachtas Committee that I intended to address these issues. In late 2004, I established the Legal Costs Working Group - chaired by Paul Haran, a former Secretary General of the Department of Enterprise, Trade and Employment - to examine the issue of the costs of civil litigation. With Government approval I asked the Group to examine the present level of legal fees and costs arising in civil litigation and the system and arrangements in place in the State relating to the taxation of costs. I also asked them to make recommendations for initiatives or changes in this area which would lead to, or assist in, a reduction of costs associated with civil litigation, would improve accessibility to justice and provide for greater transparency. The Group finalised their report late last year and, just before Christmas, I brought the report to Government to secure its endorsement of the Report's recommendations.

I am now going to take the necessary steps to implement the recommendations.I intend to empower the consumer of legal services - the client - and give him or her the information they need to make informed choices. I intend to transform the way in which legal costs are determined and, where legal costs are disputed, how costs are to be

assessed.

Implementation

I am pleased to announce that the noted accountant and businessman, Desmond Miller, FCA, has agreed to act as Chairman of an implementation advisory group which will oversee the steps necessary to complete the transformation towards the new system.

Substance of the Reform

There are three main strands to the Report.

Firstly, the Report recommends the replacement of the existing taxation of costs system (by the "taxing masters") with a new regime which would comprise the establishment of:

- a legal costs regulatory body to formulate recoverable cost guidelines based on an assessment of the amount of work reasonably required to be done in typical cases
- a written assessment process, based on the recoverable cost guidelines prescribed by the regulatory body, to be carried out by a Legal Costs Assessment Office where legal bills are disputed; and
- an oral appeals process conducted by an Appeals Adjudicator.

Put simply, it is recommended that costs guidelines should be based on an assessment of the amount and nature of work required to be done in a case. The "work done" principle is central to the Report's recommendations. Recovery of costs for "work agreed to be done but not done" will end. For instance, the Group recommends that the solicitor's instructions fee be broken down into its component parts. A similar approach should also be adopted in relation to the counsel's brief fee. All fees should be itemised and it must be clear to the client what they are being charged, why they are being charged and the basis upon which they are being charged.

Section 27 of the Court and Court Officers Act 1995 already permits the Taxing Master "to examine the nature and extent of any work done, or services rendered or provided". But it has not worked.

As the Report notes, notwithstanding the opportunity the provision presents to scrutinise legal fees by reference to work done, "rule of thumb" practices are still employed, for example, in the fixing of Junior Counsel's fees. Indeed, given the recommendation that costs should primarily be recoverable by reference to work done, the Group considered the almost universal practice whereby Junior Counsel is paid two thirds the rate of Senior Counsel as unacceptable and unfair given its arbitrary nature.

It is also my intention to radically strengthen the law in relation to the charging of percentage deductions from awards by solicitors and barristers.

Empowering the Client

Secondly, the report calls for significant improvements to be made in the quality and quantity of the information that a solicitor is required to provide to clients and the manner in which it is to be supplied. It is vital to ensure that clients get full and up to date information on the costs implications of their cases. This information should be provided at the critical stages of the process to aid the clients in making informed decisions. And it is important that clients should be given ample opportunity at all stages to terminate proceedings and prevent the further escalation in costs.

To this end the Report recommends that:

- the costs agreement letter issued by solicitors (as provided for by section 68 of the Solicitors (Amendment) Act 1994) be amended to provide the client with more detailed information
- unless the circumstances clearly preclude it, clients should be afforded a cooling-off period from receipt of their costs agreement letter before proceedings are commenced
- periodic updates be provided
- solicitors be obliged to notify clients of material developments in the conduct of litigation; and
- clients be given 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 to the costs of the opposing party).

Many civil actions are, of course, run on a "no foal, no fee" basis. It's important to note that the Group do not recommend that we depart from this arrangement which has long been a part of our system. The Report states that this system provides an opportunity for persons of modest means to engage a solicitor to vindicate their rights. This system has served us well and compares favourably, indeed, with the system in the neighbouring jurisdiction.

It is also my intention to put in place a clear statutory obligation on solicitors to negotiate and agree fees of barristers and experts in the interests of the client. The courts' jurisdiction to award costs will be required to be exercised in the context of a duty on lawyers to fully advise on the availability of alternative dispute resolution where that is appropriate.

Finally, the Report recommends a number of legislative and procedural changes to reduce delays in court hearings and generally designed to expedite the legal process. The intended effect of these recommendations is to introduce more certainty into the area of legal costs in civil litigation and to provide a simple and more transparent system for determining costs where disputes arise.

As will be seen from the Report, the Group's recommendations are wide-ranging and, when implemented, they will represent a very significant change in the manner in which legal costs are determined and assessed. The recommendations span the operational, policy and legislative areas and it is clear that a deal of preliminary work will be required before the new systems can be put in place. That is why Desmond Miller's Implementation Group is being established immediately.

I have no doubt that once the new costs arrangements have been put in place and have bedded into the legal system, the market for civil legal services will become more predictable, consistent and transparent to consumers. This transparency will also make it easier for consumers to recognise competitive prices for the services they require and facilitate access to the State's system of justice.

Conclusion

The new measures I am taking in the form of an Ombudsman and on legal costs will transform the provision of legal services. Taken with important initiatives already put in place to tackle the so-called compensation culture in the Civil Liability and Courts Act 2004 and the establishment of the Personal Injuries Assessment Board, the legal system is changing rapidly. This change is essential to ensure that the legal system and the legal professions continue to meet the requirements of our modern dynamic economy. A modern, dynamic economy is good for lawyers too. Ireland was recently rated the most open, enterprising state in the EU and the third most open, enterprising

state in the world.

Our society is becoming more complex in tandem with our increasing prosperity. The legal system has a key function in oiling the wheels of progress. We must ensure that the legal professions continue to adapt. I am sure that the package of measures taken already and those on the way will equip the legal system and the two legal professions to react to the changing needs of a mature and progressing modern economy.

I very much welcome the new realism of the legal professions about the need for modernisation and reform. My advice to the members of the profession is to take the lead in reform. Don't just be self regulating - become the engines for professional reform as well. I warmly acknowledge the huge changes that have already occurred - in education, professional development, and in increasing the size of intakes. I acknowledge and salute those changes. But on the very important issue of "value for money", an issue which is very often the most difficult for professional bodies to deal with because of the implications for the members' incomes, I say that far-reaching change is needed there too. I am inviting the members of the legal profession to accept that "value for money" reform is as inevitable as it is difficult. It won't go away as an issue. It will be on any Minister's agenda and will happen.

As a lawyer and as a person who has experience of the workings of both professions, I might be accused of being conflicted in this matter. I think, however, that the record shows that I have a grasp of the need for reform and of the means to bring it about. The measures taken by the Tanaiste and by me in relation to the compensation culture have been effective and fair. Lower insurance premia are the result., The legal profession has adapted to the new reality. Ireland has benefited.

On "value for money" reform, everyone stands to gain in the medium and long term. Now is the time to deliver that change. ●