

## Conclusions

### I The 'monopoly situation'

95. We are required by the terms of our reference to investigate and report whether a monopoly situation exists in relation to the supply of services of solicitors in Scotland. We are also required to limit consideration to agreements and practices relating to the advertising by solicitors of their professional services, whereby they conduct their affairs as mentioned in section 7(2) of the Fair Trading Act 1973. By virtue of section 7(1) and (2) of the Act a monopoly situation exists if the supply of services of solicitors in Scotland is, to the extent of at least one-quarter, supply by or to members of one and the same group consisting of two or more persons who, by any such agreements or practices, so conduct their respective affairs as in any way to prevent, restrict, or distort competition in connection with the supply of the services.

96. Restrictions on advertising, touting and publicity are governed by Rule 1 of the Solicitors' (Scotland) Practice Rules 1964 and by Rule 3 of the Solicitors' (Scotland) Practice Rules 1969; both rules were made by the Council of the Law Society of Scotland under section 20 of the Solicitors' (Scotland) Act 1949 and approved by the Lord President of the Court of Session. They are part of the professional code of conduct of solicitors. We have set out the nature and extent of these restrictions in Chapter 2. It is clear that the restrictions provide, and that the profession accepts, that (apart from some minor and limited exceptions) all forms of personal advertisement and publicity and of touting are forbidden to solicitors. Solicitors are not therefore allowed to use any form of advertising as a means of competing with one another for business, and it follows from this that the restrictions on advertising involve some restriction of competition.

97. Accordingly at least one-quarter (in fact the whole) of the supply of services covered by the reference is by members of one and the same group consisting of persons who so conduct their respective affairs as to restrict competition in connection with the supply of those services. We conclude that a monopoly situation as defined in section 7(1)(c) and (2) of the Fair Trading Act exists by virtue of agreements or practices of the kind specified in the reference, and that it exists in favour of solicitors in Scotland.

### II The public interest

#### Advertising and solicitors' responsibilities

98. The objections to advertising by solicitors, as put to us by the Council of the Law Society of Scotland, are set out in Chapter 4. We consider the validity of these objections in the following paragraphs. It may be that the objections themselves spring partly from a feeling, common in the professions, that advertising is undignified, commercial rather than professional and incompatible with the status and image which solicitors want

for themselves. No doubt mere distaste for advertising on such grounds plays some part in the opposition to it, but it does not follow that the arguments advanced against advertising on public interest grounds have no validity.

99. The main case against advertising by solicitors appears to have two parts. The first is that the relationship between solicitor and client is one of trust, in which the client's interests have to prevail, and be deemed by the public to prevail, over the solicitor's interests. The client is not normally in a position to assess the value and soundness of advice offered to him by a solicitor and it is therefore essential that the client should be able to feel confident that it is offered in good faith and without ulterior motive. The most obvious example of this is that a client should be confident that a particular piece of advice is not given because it will lead to lucrative business for the solicitor. It follows that nothing avoidable should be done which might tend to undermine this confidence and destroy the necessary relationship of trust. The Council argued that, if solicitors advertised, they would appear to be acting in a commercial rather than a professional way and that because of this the relationship of trust would be destroyed or, at least, damaged. A client would no longer have the same degree of confidence that any advice given to him was disinterested and that the solicitor would always act in the client's interests and not (where there was a possible conflict) in his own.

100. The second part of the case is that some professional men, especially solicitors, owe a duty to society which goes deeper than their duty to their clients. The Council said that, if it was accepted that the rule of law was essential to any nation's constitution, the role of the lawyer was especially important in preserving and distinguishing the rights of both the individual and the society in which he lived. It was difficult to think of another profession which had to bear a greater series of obligations beyond that involved with any particular client. The Council considered that advertising of the kinds prohibited was incompatible with carrying out the wider duty imposed on solicitors. Collective advertising of an informative kind should, however, be permitted and was indeed in the public interest.

101. We do not accept the implication that behaviour of a commercial nature, and in particular advertising, necessarily leads to mistrust: it may indeed create trust. However, we accept that the relationship between client and solicitor is, and must be, one of trust, and that anything which might undermine this relationship should be avoided. The question is whether such a relationship would in fact be undermined if solicitors were to advertise individually.

102. In our view the tradition of the solicitors' profession is such that the great majority of solicitors act as a matter of course in a correct way towards their clients, that they habitually put their client's interests first and that it would be alien to them to do otherwise. The temptation to depart from the high standards required of the profession no doubt exists, but we do not believe that solicitors would be likely to succumb to it more easily or more frequently merely by reason of the supposed contamination of advertising; the traditions of the profession and the sense of responsibility of its members are in our view

too strong for this to happen. It follows that we do not think that advertising would lead to solicitors becoming any less worthy of trust than they are at present. In reaching this view we have recognised that an additional aspect of the relationship between solicitor and client is the fact that a solicitor's service may involve holding clients' money in trust; we do not regard restrictions on advertising as having any bearing on this.

103. There is, however, the question whether solicitors would appear to their clients to be less worthy of trust if they advertised, even though there would, in our view, be no justification in fact for this. In our judgment the answer to this question is that, if there were certain limits on the advertising (see paragraph 125), this would not be the case. The public is well accustomed and is constantly exposed to a great deal of advertising of all kinds and, although it may well take a sceptical view of some kinds of advertising, we do not believe that advertising itself necessarily leads the public to take a sceptical view of the trustworthiness of those who supply the goods or services advertised. It is difficult to believe that solicitors' clients are so naive as not to recognise that there is inevitably a commercial element in their relationship with their solicitors; but the relationship of trust exists in spite of this. We do not think there is a serious risk that the situation would be altered if solicitors were allowed to advertise within limits, but it does not follow that there is no kind of advertising which could have the harmful effects envisaged by the profession. If misleading or extravagant claims were made this might lead to deterioration of the public's confidence in the profession and also to a loss of confidence within the profession; but in our view it is highly unlikely that the great majority of solicitors would advertise in this way, since they would recognise that inappropriate advertising was self-defeating. Nevertheless the possibility should be recognised and guarded against.

104. As to the point that advertising is incompatible with the discharge of the wider obligation to society (see paragraph 100), the same factors as we have considered in paragraph 102 lead us to believe that the solicitors' attitude to this obligation, and the way they discharge it, would not in fact be affected by advertising if it were contained within certain limits (see paragraph 125).

105. The Council also argued that, if an individual solicitor or firm were to advertise that he or they did certain types of work, this could be misleading and might lead to errors which could have a most serious effect on clients and which could never be corrected. There was a 'unique finality' about much of the work of solicitors. We attach little weight to this argument. As stated in paragraph 103 above, we think that the public is well accustomed and constantly exposed to much advertising of all kinds. We do not think there would be any risk of the public being misled in this respect or any increased risk of errors being made.

106. To sum up, it is our view that the argument is overstated that advertising would damage or destroy the necessary relationship of trust with the client and adversely affect the wider, public obligations of solicitors. We do not think

that in general either of these consequences would follow if solicitors advertised. Nevertheless we think that there is a case for the continuance of a degree of restriction on advertising by solicitors.

### **Possible disadvantages of advertising restrictions**

107. There appear to us to be two principal objections to the restrictions on advertising currently imposed on solicitors. These are first that they deprive users and potential users of solicitors' services, and also potential entrants to the profession, of helpful information which might otherwise be available to them, and secondly that they reduce the stimulus to efficiency, to cost-saving, to innovation, to the setting up of new practices, and to competition amongst solicitors. We shall consider both these objections in the following paragraphs, together with a third objection concerning the possible effect of the restrictions on covert means of attracting business and on public confidence in the profession.

### **Information to the public**

108. There are no doubt some situations in which the public, particularly private individuals, do not realise that a problem has a legal content and that they would benefit from the advice and assistance of a solicitor; but it seems to us unlikely that the present restrictions on advertising have any significant effect on the ability of most individuals and of organisations merely to recognise the need for a solicitor, or indeed to find one. More important is the difficulty, which several witnesses mentioned, of finding a solicitor who is accustomed and prepared to handle a particular type of business. Not all witnesses who made this point argued that there was therefore a need for individual advertising by solicitors; some argued simply that more information should be supplied about the services which solicitors can supply and that information about particular solicitors' services should be available in referral lists, directories, yellow pages and so forth.

109. The Council accepts that it is up to the profession to meet the need for the public to be better informed about services which solicitors can provide and also about the availability of individual solicitors or firms of solicitors and the types of work they do. The Council has in recent years taken steps towards meeting this need, by means which we have described in detail in Chapter 2, and which include expenditure of £30,000 on certain informative publicity and the introduction of referral lists of solicitors willing to accept referrals from organisations such as Citizens' Advice Bureaux. It is now working on a scheme for a general directory of this kind to be made easily available to members of the public. We welcome this activity on the part of the profession and we hope that, in any event, it will continue. In particular we attach importance to the arrangements for the introduction of the proposed general directory.

110. However, we consider that such activity, undertaken by the Council on behalf of the profession as a whole, is not likely to be an adequate substitute for individual advertising. Individual advertising is likely to be more effective than mere lists and directories in disseminating information about the kinds of work undertaken by particular solicitors or particular firms, and about special services or facilities available (for example unusual office hours or

foreign languages spoken). In addition, in so far as there is a need to educate the public about solicitors' services, individual advertising is likely to be more effective than collective advertising in increasing awareness on the part of the public of the need for a solicitor in various situations, or, where there is awareness already, in getting it acted on.

111. Moreover, although it is intended that the directory will give information about the areas of work which solicitors will undertake, the Council considers that there are formidable problems in devising and controlling methods whereby any indication can be given of quality or specialisation, and the directory will not (certainly for some years to come) give any such indication. While such problems may be presented by a directory prepared and sponsored by the Council, we see no reason why solicitors, if they were allowed to advertise individually, should not announce that they specialise in some particular branch of the law (provided that such claims were not unfounded).

112. Accordingly, it is our view that, valuable as the Council's activities are in this field, individual advertising would be likely to yield additional useful information or spread information more effectively. Such additional information would be useful not only to the general public but also to potential new entrants to the profession. We think that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they prevent the public and potential new entrants being given information about the services offered by individual solicitors or firms of solicitors which it would be useful for them to have, and which in our view could be allowed to be given without undue risk of abuse.

#### **Efficiency and the competitive situation**

113. With regard to the second objection mentioned in paragraph 107, the possibility is that the restrictions on advertising deprive the more efficient solicitors' practices of something which might help them to expand at the expense of the less efficient; that, by depriving practices which wish to introduce new methods or new kinds of service of some part of their means of attracting demand, they discourage innovation; that similarly they may make it more difficult to set up practices, and that, in so far as enhanced competition among suppliers may be expected to stimulate efficiency and so contribute to cost reduction, the restrictions may be expected to produce contrary, disadvantageous effects.

114. The Council said that there was no evidence that removal of the restrictions would sharpen competition or that the restrictions diminished the incentive for solicitors in Scotland to improve efficiency and introduce new methods. On the contrary, pressure of business and difficulties in recruiting and retaining suitable staff provided more than adequate incentives. And the Council itself was active in the fields of improving efficiency and of innovation.

115. We know of no method of making a quantitative comparison between the present state of efficiency of solicitors' practices and their hypothetical state of efficiency if advertising were permitted. There is at least no obvious reason for supposing that freedom to advertise would lead, on average, to a lower degree of efficiency than exists at present. The Council doubted whether free-

dom to advertise would lead to any net gain in cost efficiency or whether there would be any reduction in costs to the clients. We do not dispute that some advertising cost might be incurred simply to neutralise the advertising initiated by other solicitors, thereby raising total costs without causing any re-allocation of business. But not all advertising would be of this kind. Moreover, we think it likely that some practices are more efficient than others (either generally or in some branches of activity), so that re-allocation of some work could improve the efficiency with which the work as a whole was carried out. Finally, it seems to us likely that solicitors in general would see no advantage in advertising on a lavish scale, though on occasions some firms might wish to spend relatively heavily in an attempt to expand their business (for example in order to secure such economies of larger scale as might be available to them in the employment of more specialised staff).

116. As regards innovation, we accept that the profession has not stood still and that, for example, it has been active in trying to promote simplification of 'judicial procedures'. But the decision whether or not actually to introduce innovatory methods or services into an individual practice, particularly if the introduction would involve capital expenditure or expansion of staff, can depend upon the amount of additional business that could be handled as a result of new methods and that could be expected as the result of new services. Not all practitioners will wish to take the risk; and at present some of the more enterprising who might wish to do so might be deterred by the consideration that they would be unable to make proper use of these methods or services through their inability to increase their business by advertising.

117. As to the establishment of new practices (whether partnerships or individual practitioners), the Council argued that the restrictions did not prevent anyone from setting up in the profession, adding that advertising by a young and inexperienced solicitor would mislead the public. We do not agree. We think that the restrictions must indeed impede new practices in their efforts to establish themselves. This we regard as undesirable since, to the extent that they discourage the setting up of new practices, potential competition is reduced, and the incentive to efficiency and a high standard of service to the public is diminished. We have commented on the dangers of misleading the public in paragraph 105.

118. It is our view that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they have an adverse effect on the competitiveness and efficiency of the profession, on the introduction of innovatory methods and services and on the setting up of new practices.

119. There is another aspect of the matter related both to the supply of information and to competition. Solicitors in Scotland do not compete only with other solicitors. Over a wide range of business, for example advice on investment and insurance matters, they compete with others including firms of accountants and stockbrokers and banks. There are no restrictions on advertising by banks comparable to those on advertising by solicitors, and stockbrokers now enjoy a substantial measure of freedom to advertise; we have

recommended in earlier reports<sup>1</sup> that the restrictions on advertising by stockbrokers and accountants should be relaxed. Similar relaxation in the case of solicitors should thus both provide the public with more information on how best to obtain help in such matters and also increase competition. These results we would regard as in the public interest. Indeed they would seem to apply with special force to the solicitor in Scotland as a 'general man of business'.

### **Effect on the public's attitude to the profession**

120. We considered the possibility that the present restrictions on advertising, by imposing a limitation on the use of explicit claims in advertisements, might enhance the importance of other less direct means of attracting business. These means might be entirely honourable, such as, for example, the acquiring of a reputation by unsolicited newspaper publicity (see paragraph 74) or on the other hand they might be less creditable. But in either case there would be no claims in a form open to challenge. We also considered the possibility that public confidence in the profession might be diminished, rather than increased, by restrictions on advertising which preclude any open attempt at promoting an individual practice and which thereby deter solicitors from acknowledging frankly that they are in business to make a living. We doubt whether these efforts are likely to be sufficiently serious or widespread to justify condemnation of the restrictions on this ground alone. However, the possibility of these adverse effects strengthens the case, on public interest grounds, against the present restrictions.

### **Advertising in relation to the profession's international position**

121. The Council pointed out that advertising restrictions in the EEC and other countries were broadly the same as those in England and Wales and in Scotland. If the UK were to introduce unilaterally some form of liberalisation, this 'would be viewed with a certain amount of dismay'. The Council did not seem to attach much weight to this consideration. Nor do we. We recognise that professional opinion in overseas countries could have a powerful influence upon the ability of British solicitors to practise there if they were not regarded as conforming with the local rules or conventions. A solicitor in Scotland might decide that it was inadvisable to advertise here by any method which was not allowed abroad; this could possibly mean that he would decide not to advertise at all. We do not regard this as a reason why solicitors should be debarred from advertising in the United Kingdom.

## **III Conclusions**

122. As indicated in paragraph 97 we conclude that a monopoly situation exists in favour of solicitors in Scotland. We further conclude that the monopoly situation results in disadvantage to the public interest in that the existing restrictions on the advertising of solicitors' services (i) prevent the public and

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<sup>1</sup> 'A report on the supply of stockbrokers' services in relation to restrictions on advertising'—1976.

'A report on the supply of accountancy services in relation to restrictions on advertising'—1976.

potential new entrants to the profession being given information about the services offered by individual solicitors or firms of solicitors (paragraphs 108 to 112), (ii) are likely to have disadvantageous effects on the competitiveness and efficiency of the profession generally, on the introduction of innovatory methods and services and on the setting up of new practices (paragraphs 113 to 119), (iii) may in some degree enhance the importance of other, less open and challengeable, methods of attracting business and detract from public confidence in the profession (paragraph 120). We have considered the various benefits claimed to result from the restrictions but find that the disadvantages outweigh the advantages to the public interest. We conclude therefore that the monopoly situation operates, and may be expected to operate, against the public interest. Within our limited terms of reference, we have not found that any steps (by way of uncompetitive practices or otherwise) are being taken by solicitors in Scotland for the purpose of exploiting or maintaining the monopoly situation, nor have we found that any action or omission on the part of these solicitors is attributable to the existence of the monopoly situation.

#### IV Recommendations

123. It does not follow from our conclusion in paragraph 122 about the disadvantageous effects of the existing advertising restrictions upon the public interest that solicitors should henceforth be allowed to advertise without any restriction. We recognise, indeed, that there is a case for the continuance of a degree of restriction on the advertising of solicitors' services. Some kinds of advertising could lead to a deterioration in the public's confidence in the profession, and also, through deterioration in confidence within the profession, to impairment of the profession's ability to carry out those special responsibilities which it is in the public interest that it should assume (paragraph 100). We recognise that no clear distinction can be drawn between informative and promotional advertising, since all individual advertising by solicitors would inevitably contain a promotional element. This is no doubt why the present rules severely limit publicity of all kinds, the only permitted kinds being those with a minimum of promotional content which are regarded as essential to inform the public of the availability of solicitors' services or desirable in the interests of the profession as a whole. This, basically, is where we disagree with the Council. We accept that there are some kinds of advertising which, if permitted and indulged in, could have harmful effects in the context of the solicitors' profession and its services, and that there should continue to be a safeguard against the risk that individual solicitors' practices might bring disrepute upon the whole profession by the methods or matter of their publicity. But we think that, for these purposes, the line between allowed and disallowed advertising does not have to be drawn where the Council now draws it, and that a new approach, providing considerable scope for advertising, is required. In paragraphs 124 *et seq* we describe the arrangements which would, in our view, substantially remedy the adverse effects, as summarised in paragraph 122, of the present restrictions while they would continue to provide the necessary safeguards.

124. Subject to certain specific restraints (see paragraph 125) we would see nothing improper or harmful to the relations between solicitors and the public

in allowing firms of solicitors to advertise to the extent and by the methods they think fit. Such publicity, whether by way of advertisements in the press or other news media or of circulars or by any other means, could not only draw attention to the existence of a firm and the qualifications of its members but also describe the nature of the practice, including allusions to particular classes of client to whom services were offered or to particular kinds of service which were offered. Nor would we see any objection to the firm, should it think it appropriate, drawing attention to any other features of the practice, for example the convenience of its location, its expedition in dealing with clients' affairs or the level of fees which it charges. The above considerations apply with equal force to individual solicitors as to firms. A firm (or individual) which advertised in such a way would, to an extent, be inviting custom, including the custom of other solicitors' clients; and it might, perhaps, be inviting particular kinds of custom. But the public are well aware that solicitors are in practice for the purpose, among others, of earning a living. We do not think they will be surprised or shocked if members of the profession invite custom explicitly and informatively. Nor, given the appropriate restraints, do we think such advertising will be likely to create any new risk of misleading the public or adversely affecting the ability of solicitors to discharge the wider public obligations required of them. Although, as we have said in paragraph 109, we welcome the collective activity of the profession (particularly in connection with the work on referral lists and the proposed directory) and hope that it will continue, we would nevertheless expect that the increased freedom to advertise would be conducive to improvements in communication and relations between the public and the profession, would serve to promote the efficiency of the profession and would facilitate the introduction of new methods. We would also expect that it would make it easier for new practices to establish themselves.

125. We consider that Rules 1 and 3 of the Solicitors' (Scotland) Practice Rules 1964 and 1969, which place a general prohibition on advertising and soliciting business, should be terminated and replaced by a rule which would permit any solicitor in Scotland to use, whenever he thinks fit, such methods of publicity as he thinks fit, provided that :

- (1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.
- (2) Such publicity should not contain any inaccuracies or misleading statements.
- (3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should not be of a character that could reasonably be regarded as likely to bring the profession into disrepute.

126. Since we do not agree with the ways in which the profession has exercised its power to regulate advertising, we have considered the question of representation on the bodies concerned with the formulation and enforcement of the advertising code of the profession. Provided that the basic changes we

regard as necessary are made in the present code, we see no need for any change in the existing arrangements other than those mentioned in paragraph 33.

127. Although we have outlined the substance of the general rule on advertising which we propose, we think that there should be consultation between the Council and the Director General of Fair Trading before the rule is formulated in precise terms. We have described in paragraph 29 details of the application of Rules 1 and 3 on a number of matters. Such details have been the subject of rulings, which, though not part of the Rules, are concerned with the application of the present general principle to particular circumstances and with the regulation of those exceptional forms of advertising and publicity that are at present permitted. Given a rule such as we suggest, we would see no need for additional provisions relating to such matters as are mentioned in paragraph 29 (for example nameplates, stationery, directories and the like, broadcasting and letters to the Press).

128. When formulated in more precise terms, a rule such as we have outlined need be neither vague nor unenforceable. The disciplinary powers of the Council will remain intact; it will still ultimately be for the Professional Practice Committee and the Disciplinary Committee to determine whether a member has been guilty of unbecoming conduct and, if necessary, to apply the appropriate penalties. Our recommendation is made in the expectation that the Society, the Council and the relevant committees will accept that advertising, subject to the conditions we propose, will not henceforth be regarded as in any way improper for solicitors; and it is our intention that the expression, in paragraph 125 (3), 'of a character that could reasonably be regarded as likely to bring the profession into disrepute' should be understood accordingly. It is also in this expectation that we have said, in paragraph 126, that we see no need for modifications, other than those already recommended by the Council, of the arrangements for the formulation and enforcement of the code.

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