A SUBMISSION TO THE REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

This submission focuses on Paragraphs (a) "Improving procedures and practices" and (e) "Achieving more effective and less costly outcomes".

Probably (see below) most people who become parties to litigation would welcome a system where:

- The relevant facts, the issues in disagreement, the legal principles, witnesses, and documents each party relied on would all be set out in a single document for whose accuracy and completeness lawyers as well as clients would normally be responsible. (With some exceptions, for example as between a plaintiff and a Third Party or when a client had lied convincingly to his lawyers.)

- Consequently, lengthy opening speeches would be excluded.

- Lawyers' "duties to the Court" would carry more weight than at present. For example, they would be bound not to waste a judge's time, including by verbosity and by contesting issues not genuinely in contention, and liable to sanctions for doing so.

- Lawyers so sanctioned would not be indemnified by their clients.

- The successful party would be repaid in full the costs he or she had incurred, not, as now, only part of them, an inherently unjust system. (The distinction between solicitor and client and party and party costs would be abolished, and lawyers who over-charged or did unnecessary work to pad their bills would be liable to sanctions.)

- Legal bills would be simplified, and regulated by outsiders, not by lawyers.

- In suitable cases, costs incurred in good faith by the losing party would be paid by the State.

I said "probably" above, because neither I nor any member of the group is qualified to express an opinion on what litigants or other clients of lawyers would welcome. Astonishingly, your group does not include one person representing the interests of litigants or other citizens. It is composed of:

- Representatives of the two branches of the Irish legal profession, that is, of people whose interests are directly in conflict with the probable preference of litigators for a cheap and speedy justice system.

- Judges, none of whom now have a similar conflict of interests, but all of whose backgrounds are in the legal profession and some if not all of whom are members of the barristers' professional body

- Civil Servants from relevant Government and Court Departments.

It is chaired by a judge.

The *raison d'etre of e*very member of your group is to serve the public, and in particular those members of the public who need access to justice. Yet your group includes no representative of those you exist to serve. In a mature democracy, one would expect that the only question about who should serve on a group such as yours would be whether it would consist exclusively of representatives of the public or whether it should include a minority of lawyers. That it would consist only of providers of services, with no users, should be unthinkable.

It is hard to understand why, on the question of how civil justice in the State should be delivered, the assumption that "Mummy knows best" should prevail. It may be an assumption, promulgated by lawyers and inadequately challenged, that the legal system is too complicated for laypeople to understand. It may be (though this seems rather far-fetched) an inherited assumption, going back many years to the days when justice was delivered by an inerrant monarch ("Rex non potest peccare") or his nominee, to subjects who had no say in how it should be delivered. It may illustrate the powerful influence that lawyers seem to exercise over political thinking. (Probably the most extreme example in recent years of lawyer dominance was the Terms of Reference, composition and conclusions of the "Working Group on a Court of Appeal".)

However this assumption developed, it is inconsistent with democracy, and, hence, in principle, with the Constitution (Arts 5 & 6). No Minister should again establish a group so constituted and with such functions. If any Minister was so wrong-headed, those nominated should refuse to serve on a group so obviously so unbalanced.

As a separate matter, it should be recognised that practising lawyers aim to maximise fee incomes, and that lawyers' organisations have an additional interest in protecting their members from reforms that might render some of them redundant. Such aims constitute conflicts of interest that in my view disqualify representatives of such groups from serving on a group such as yours.

There is another, practical, argument against policy on the administration of justice being formed or even influenced by groups constituted as yours is, that is one dominated by judges and other lawyers. When I qualified as a solicitor in 1956, there were seven High Court Judges, five appellate judges and not excessive delay in processing trials and appeals. Today, the figures are, respectively, forty and twenty. Numbers of practitioners in both branches of law have increased similarly, though it is hard to make relevant comparisons, since not all solicitors and not all barristers practise in the Courts. The cost to the taxpayer of maintaining the Courts must have increased enormously. During those years anecdotal evidence is that the cost to litigants of seeking justice has increased considerably, as have the incomes of successful solicitors and barristers. (It is said that in the 1960s & 1970s solicitors devised tax avoidance schemes for their clients and thereafter for their clients and themselves.)

This is doubtless satisfactory to the lawyers concerned, but the ability of this country to attract inward investment, and of businesses, both indigenous and from abroad, to function is currently threatened by, among other things, the high cost of litigation and of insurance, which relates to the cost of litigation.

Throughout that time, the legal profession, including judges, effectively determined how justice would be delivered. Those sixty plus years have seen substantial increases in both the number and the incomes of lawyers, and have correspondingly been bad, first for those seeking justice and secondly for taxpayers who support a legal system that seems to be expanding out of control. In my view, we need a new approach, where, among other things, advisory groups and other bodies forming policy would not be constituted as yours is.

This is not to accuse your group, other like groups or lawyers generally of consciously manipulating the legal system to their advantage, but to note an established fact. Any market system (and the Courts can be described as such a system, where customers pay for just determinations of their disputes) involves customers and suppliers, and in the Courts System lawyers, including judges, are suppliers. If such a market is regulated by suppliers, it will inevitably operate to their advantage. A logical and probably essential first step in reforming the system so as to make access to justice more widely available is to diminish the influence of suppliers and increase that of consumers – or, more accurately in this instance, to give consumers a voice. Appointing a working group such as yours, dominated by suppliers and with no representation for consumers, is the reverse of that strategy.

It may seem unreasonable for a submission such as this to criticise the composition of your Group without proposing any alternative. I do not think I can do more than offer tentative suggestions. First, I submit that the initial question should be whether the Group should consist exclusively of non-lawyers or whether it should include a minority of lawyers. Given that the purpose of any such group must include simplifying legal processes, and that this will decrease lawyers' incomes or the numbers of lawyers or both, it would seem that practitioners have a conflict between the purpose of the Group and their own and their colleagues' interests, and that they would self-disqualify. It might seem reasonable that such a group should include a judge, but ideally he or she should not be a member of either of the two lawyers' professional bodies, and should not risk being suspected of seeking to influence the group's activities by chairing it. Lay people might be recruited in part by asking bodies with much experience of litigation to nominate representatives. Bodies like insurance companies, including medical insurers, and perhaps the media might be asked to nominate members who would have experience of the Defendant role. It is harder to identify suitable Plaintiff representatives. Trade Unions might be one possibility, since many would over the years have had members involved in personal injuries claims. Patients' groups might be another source, for similar reasons. But recent experience suggests that randomly selected groups of people who are invited to address issues they have not previously dealt with perform admirably and responsibly.

A group of non-lawyers, even if it also included a judge, reviewing the litigation process could very easily find itself out of its depth if it did not have legal advice. I suggest, therefore, that any such group should be authorised to retain legal advisors. I think they should certainly include a solicitor and a member of the Bar, and have an open mind on whether the group would require the services of a Senior and a Junior. The lawyers' role should be advisory only, not deliberative, since the issues to be considered wold almost inevitably include some where their interests as practitioners might cause a conflict. A lawyer-client relationship would have to exist, because the lawyers retained would have to recognise and accept that they might be called upon to give advice contrary to their interests and those of their colleagues. They should report to the Chair of the Group,and this would be

an additional reason for the judge member of the group not chairing it, as dialogue between judge and legal advisors might tend to exclude lay members.

Note: the reference to lawyers' "duties to the Court" appeared above in inverted commas. This represents my view that while the duties it refers to are normally enforced by courts, they are not owed to the Court in which lawyers appear, but to the community in which they are licensed to practise. Some lawyers assume their duties are owed only to their clients, not to others or to the wider community. I disagree. I think lawyers have duties to the community, in return for having permission (and largely a monopoly) to practise law for reward. These duties include ensuring that the services will be as efficient, (which includes both expeditious and cheap) as possible, and that while the duties may seem to be owed primarily to the individual lawyer's client, it is not owed exclusively to the client. Both individually and communally, I consider lawyers have a moral duty to the community, both in influencing how the legal system is constructed so as to deliver the best possible service to the community it exists to serve, and in how they deliver legal services.

A SUBMISSION TO THE REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

This submission relates to Paragraph (c) of the Group's areas, "Encouraging alternative methods of dispute resolution", and is distinct from one I am also submitting, relating to paragraphs (a) and (e)

I think I can express it most clearly by offering a short description of the introduction of mediation in and Ireland in the 1960s. The arrival on the Irish scene of mediators most of whom were not lawyers was at first received unfavourably by lawyers, especially solicitors, who saw it as an intrusion by another professional group into what had traditionally been their "turf". But with time, lawyers came to accept mediation and a number trained as mediators.

Most lawyers who did so took training that followed a different model from that adopted by the earlier mediators. These early mediators normally held a series of meetings with their clients, usually lasting for an hour or at most two hours, they saw both (or in multi-party disputes all) their clients together and encouraged direct communication between clients. They did not exclude lawyers, but did not encourage lawyers to attend, and when lawyers wanted to attend, the mediation model dictated that they did so as advisers, not representatives: the clients still spoke for themselves, not through their lawyers. If agreement emerged from the process, it was not recorded in binding form until the parties had reviewed it in draft, and, if they so chose, took legal advice on it. If mediators produced a record of what their clients had agreed, it was normally stated not to be legally binding, and was expressed in informal language.

Most lawyer-mediators adopted a model by which they met their clients only once, set aside a specific, unlimited time for the session, encouraged lawyers to act as spokespeople for their clients, and practised "shuttle-mediation", by which the parties and their lawyers occupied separate rooms, and the lawyer-mediator shuttled between the rooms, carrying arguments and proposals back and forth until agreement was reached. Once that happened, under this model the bargain was at once committed to paper and signed, becoming legally binding.

The difference between the two approaches indicates a difference between their objectives. Normally, the aim of a lawyer-mediator is to help his or her clients to settle a

dispute that might otherwise be litigated. The aim of the "traditional mediator" is to help the clients to resolve conflicts, so that they may continue to interact in the future. Simple settlement of a presenting dispute is not sufficient if an underlying conflict will prevent or inhibit future co-operation. This type of mediation is generally – and I think correctly - thought to be the better choice for people who need to collaborate after the presenting issue has been dealt with. Its approach is based on a belief that people who want or need to continue to interact should be encouraged to communicate directly, not through others, that they may need time to re-establish a disrupted relationship (hence the series of sessions instead of one open-ended one) and that a relationship they negotiate for themselves is likely to serve them better than one imposed on them or pushed at them by advisers, however well-intentioned. This is also a reason – though not the only one – why a traditional mediator's "Note of Understanding" is expressed to be non-binding. Second thoughts are not merely not discouraged: the assumption is that if one party, on further thought, has reservations about the bargain he or she has reached, it will not operate satisfactorily, and it is in the interests of both to review it.

For this reason, traditional mediation is "non-directive." Its vocabulary distinguishes between a *dispute* between people who will henceforth be strangers to each other) and a *conflict* between people who will interact in future, and between "settlement" (of a "dispute") and "resolution" (of a conflict). It is particularly useful to couples with children in common who end their cohabitation but plan to continue to act as parents to their children. The needs of people in that situation are largely met by the State-run Family Mediation Service, whose services continue to be free to all clients, and which accordingly has a near-monopoly in mediating conflicts between such people.

A substantial proportion, probably more than fifty percent, of people seeking mediation are nowadays directed – largely by lawyers - towards mediators who practice shuttle mediation rather than to those who mediate "traditionally". Very likely, it serves most of them at least as well as, if not better than the "traditional approach. But some, who may want or need to interact in the future, and who accordingly need resolution of their conflict, not merely settlement of their dispute, may suffer from making the wrong choice of mediator.

Unfortunately, this distinction is not recognised in the legislation, and is not widely understood among lawyers. Clients who are caught up in a disagreement which they do not want to litigate (as why would they?) are likely to consult their lawyers about mediation and whom to appoint as a mediator. Understandably, lawyers are likely to recommend mediators that they know, and very often the people they know as mediators will be people they also know as professional colleagues. That may mean that some clients who would be better served by a "traditional mediator" will find themselves working with a "settlement mediator" and will not get the service they need.

There must also be a danger that "traditional mediators" (who, as indicated above, cannot effectively compete with the free Family Mediation Service) will not be able to support themselves financially by doing this useful work, and that that way of mediating may cease to become available to people who need it. That would be a loss to the community

I suggest your Group would perform a valuable service by ensuring, first, that lawyers become aware of the distinction drawn above, and the value to some of their clients of being recommended to the professional best suited to their needs, and secondly, so far as possible, that the valuable profession of "traditional mediator" is preserved by ensuring that a reasonable flow of work is directed towards its practitioners. I am sorry that I cannot think of any suggestions I might make to you about how to do this. I can only suggest that this is an area where the needs of some clients may be served less well than they might be, a

professional service of potential value to the community is at risk and is therefore worth attention.