

# Review of the Regulatory Framework for Legal Services in England and Wales

A Consultation Paper

March 2004





REVIEW OF THE REGULATORY  
FRAMEWORK FOR LEGAL SERVICES IN  
ENGLAND AND WALES

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## FOREWORD BY THE INDEPENDENT REVIEWER

### To Interested Parties

i. In its report published in July 2003 entitled “Competition and Regulation in the Legal Services Market”, the Department for Constitutional Affairs concluded that the current regulatory framework in England and Wales was “*outdated, inflexible, over-complex and insufficiently accountable or transparent*”. I agree, except that I might have added the word “inconsistent”. It is, however, relatively easy to criticise the current system and conclude that the status quo is unacceptable. It is more difficult to determine the best way forward, which meets the Terms of Reference. The purpose of this paper is to seek a wide spread of views on the key issues; and this will inform the report I intend to publish by the year end.

ii. The Scoping Study, which was annexed to that report, identified a number of issues that affect the regulation of legal services. Based on this work, I announced on 20 October 2003 that I would focus my Review on five regulatory matters:-

- ⌘ issues relating to the current institutional structures and what the Scoping Study referred to as “the regulatory maze”;
- ⌘ issues relating to the level of self-regulation and professionalism within the legal services industry;
- ⌘ issues relating to the handling of complaints against lawyers and disciplinary matters;
- ⌘ issues relating to unregulated providers and “regulatory gaps”; and
- ⌘ issues relating to new business structures, including employed lawyers, legal disciplinary practices and multi-disciplinary practices.

I indicated that I would look at a variety of different regulatory systems, including those of the financial services industry, the accounting profession and the medical profession.

iii. The first section of this paper provides an **Overview** of issues which are relevant to the Review. First it sets out the Terms of Reference. It then sets out some background on how the current legal services industry is organised and how it is regulated. It describes which services presently come within the regulatory net and which do not. It provides brief detail on the existing regulatory institutions. It explains some of the different classifications of lawyers, distinguishing for example between practising barristers at the Independent Bar and Employed Barristers. It explains the main legal professional practice rules which constrain the types of permitted business structures.

iv. I hope the description in the Overview will be helpful to readers. It is a simplification of the issues, and purists will have no difficulty in finding additions, conditions or exclusions to the broad description. They will recognise, however, that a full description would require a volume of considerable length; and would likely be intelligible only to the purists themselves.

v. **Chapter A** concentrates on the objectives of the regulatory regime. It is noteworthy that some of the existing regulators have no specific objectives which guide their regulatory functions and against which they judge the issues before them. So the central questions in the chapter are: what are the appropriate objectives for a regulatory regime; and how do important legal precepts, such as duty to the Court and duty to the client, affect such objectives?

vi. **Chapter B** addresses the key architectural issues around the design of a regulatory system and it suggests illustrative models. Model A is based on the principle that there should be a clear split between the representative and regulatory functions of professional bodies. It proposes that all regulatory functions move to a new regulator, the Legal Services Authority. Model B gives regulatory functions to the professional bodies, but sets up a new regulator with consistent oversight powers, the Legal Services Board.

vii. Models A and B are both constructs to aid discussion. It should be recognised that there are a number of different regulatory functions (covering areas such as entry standards and practice rules) and that a view may be taken for each function as to whether it should be vested in a new regulator (consistent with Model A) or given to the professional body, subject to oversight (consistent with Model B). There are, therefore, a variety of possible outcomes between Models A and B. There is one further important variant, labelled as Model B+, which is to require each of the professional bodies to separate their regulatory functions away from their representative functions, and with a significant lay membership. The chapter lays out some of the advantages and disadvantages of different models from a public interest perspective; and then asks the reader for views.

viii. **Chapter C** concentrates on complaints mechanisms. At present, each of the different bodies has its own complaints mechanism, subject in certain cases to oversight powers of the Legal Services Ombudsman. The Law Society is subject to additional powers vested in the Legal Services Complaints Commissioner. It would be possible to recommend that the complaints work done by each body should be removed to a single Legal Services Complaints Office, similar to the Financial Ombudsman Service. Alternatively, it would be possible to recommend that complaints should remain the direct responsibility of the relevant body, subject to consistent oversight powers. A third option would be to follow the practice in New South Wales, under which the Legal Services Commissioner provides a single gateway into the complaints system, but then, subject to an option to retain cases if he sees fit, sends professional misconduct cases approved for investigation to the relevant professional body, subject to his oversight. The advantages and disadvantages of each model is a key question in the Review.

ix. Similar issues and questions arise in the case of disciplinary issues, with which Chapter C also deals. Practice within the legal profession differs: solicitors are subject to the independent jurisdiction of the Solicitors

Disciplinary Tribunal, whose members are appointed by the Master of the Rolls. The most serious disciplinary issues at the Bar are dealt with by tribunals administered by the Inns of Court.

x. **Chapter D** turns to more detailed issues about the regulatory system. Whether the optimal model is A or B, or some variant, there is an issue about who the Regulator should be, who should appoint him and what sort of Board he should have. There is an important issue about funding. There are questions about the accountability of the Regulator, the duties upon him to consult before exercising his powers and the appeals process. These detailed questions go beyond the broad architectural questions asked in Chapter B, and will be important in determining the authority of the Regulator.

xi. **Chapter E** raises issues of definition and regulatory gaps in legal services. It could be argued that, in a discussion of regulatory systems, any analysis should start with a definition of legal services (and not, as Chapter A does, with a discussion of objectives). In practice, however, it is hard to prescribe the boundaries of any industry, and there are always questions at the margin, particularly as new services arise. Part of the existing definition of legal services for regulatory purposes is set by reference to the type of service itself, and part by reference to the type of provider. This existing definition is my starting point. But Chapter E raises questions about the mechanism and criteria for broadening and narrowing this definition and asks whether the determination of legal services for the purposes of regulation should rest with Government (as it does within the financial services industry). It then asks how this fits with the proposed different models, particularly Model A which is service driven.

xii. What Chapter E does not do is look at each service individually, nor would such an exercise be sufficient since the regulatory framework should be able to encompass, if thought appropriate, new areas that develop over time. However, in devising the framework it will be important to ensure that, if the Government determines that a particular area should be included (as it

determined in 1999 that immigration and asylum advice should be), the regulatory system is sufficiently flexible to incorporate that service with little disruption. Chapter E, therefore, asks questions to determine the basis on which services should be included or excluded for the purposes of regulation, and how the system could achieve the necessary flexibility.

xiii. **Chapter F** deals with the issue of alternative business structures. At the heart of the chapter is a distinction I am anxious to make between Legal Disciplinary Practices (LDPs) and Multi-Disciplinary Practices (MDPs). LDPs are law practices which bring together lawyers from different professional bodies, for example solicitors and barristers working on an equal footing to provide legal services to third parties. MDPs are practices which bring together lawyers and other professionals (e.g. accountants, chartered surveyors) to provide legal and other professional services to third parties.

xiv. In the case of both LDPs and MDPs it would be possible to permit a split between those who own the practice and those who manage it. Throughout this paper I use the term Manager to refer to a partner, principal or director. Thus, under the heading of "Alternative Business Structures", there is a matrix of possibilities:-

	<b>Managers and owners the same</b>	<b>Managers and owners different</b>
<b>LDPs</b>	A Practice solely offering legal services, owned by its Managers.	A Practice solely offering legal services, not exclusively owned by its Managers.
<b>MDPs</b>	A Practice offering legal and other services, owned by its Managers.	A Practice offering legal and other services, not exclusively owned by its Managers.

xv. Chapter F asks questions about the demand for, and advantages and disadvantages of, each part of the matrix. This is important. Many lawyers who argue against alternative business structures do so by raising points

against MDPs, and fail to address the issues of lawyers working together in LDPs.

xvi. Three further thoughts. First, in almost all matters covered by this consultation paper, there is relevant legislation from the European Union to be considered, and the wider international dimension should not be ignored. This paper seeks to draw attention to this as appropriate but respondents may seek to add to or subtract from what is said.

xvii. Secondly, respondents may feel that some of the questions in Chapters A to F do not fully address the real issues; or that some important questions have been missed out altogether. They are free to say so, although it would be helpful if respondents when replying followed the order in which issues are raised in the paper.

xviii. Finally, I would like to underline my wish to have the widest possible number of respondents. It would be particularly useful to hear from those who are consumers of legal services. They may well feel they have more to say on some questions, for example in connection with complaint systems, than others; and they should feel under no obligation to answer all the questions in the paper.

A handwritten signature in blue ink that reads "David Clementi". The signature is written in a cursive, flowing style.

**Sir David Clementi**

## OVERVIEW

1. The purpose of this part is to serve as background to this consultation paper and as an introduction to how the current regulatory arrangements operate.

### Background

2. In July 2003 the Department for Constitutional Affairs (DCA) published a report entitled “Competition and Regulation in the Legal Services Market”. That paper was a response to earlier consultation on competition in the legal profession. Annexed to it was a Scoping Study on the review of the regulatory framework for legal services in England and Wales. It concluded that the current regulatory framework “...is outdated, inflexible, over-complex and insufficiently accountable or transparent; it has limited capacity to adapt to a rapidly changing landscape ...and does not meet the demands of today’s market place...” The Scoping Study described the current arrangements and argued that “there is an urgent need to investigate the balance of advantage of particular elements of regulation”.

3. Subsequently, on 24 July 2003, the Secretary of State for Constitutional Affairs announced the current independent Review.

### Terms of Reference

4. The terms of reference for the Review are:-

*“To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.*

*To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.*

*To make recommendations by 31 December 2004.”*

### **Currently regulated legal services**

5. Current regulation of legal services is largely provider-based, although regulation by service has been a feature of some recent developments in the sector, for example, through the establishment of the Council for Licensed Conveyancers and the creation of the Office of the Immigration Services Commissioner.

6. Subject to the proviso that there is generally no restriction on members of the public performing legal work on their own account, six areas of legal work are reserved to qualified persons:-

- ## **conveyancing** may only be provided by solicitors, barristers, licensed conveyancers or duly certified notaries public, where the service is provided for a fee;

- ## **probate services** may only be provided by solicitors, barristers or duly certified notaries public, where the service is provided for a fee;

- ## **immigration advisory services** may only be provided by solicitors, barristers, legal executives or any other person or organisation registered with or exempted by the Immigration Services Commissioner;

- ## **notarial functions** (e.g. authorising certain legal documents for use overseas) may only be performed by duly certified notaries public;

- ## **conducting legal proceedings** (i.e. the right to conduct litigation) may only be undertaken by solicitors and, in some limited cases, barristers and patent agents;

- ## **the right to represent a client in court** (i.e. rights of audience) may only be carried out by a barrister in all courts, a solicitor in the lower courts (e.g. magistrate and county courts – unless the solicitor has obtained a higher courts qualification) and, in certain limited cases, by legal executives and patent agents.

7. For those lawyers who are members of, for example, the Bar and the Law Society, any legal service provided to a third party (including but not limited to

those mentioned above) is regulated by virtue of their being a member of that professional body.

### **Regulatory Gaps**

8. The legal services sector is subject to legislation and case law. Beyond that is the more specific “professional” regulation which is applied generally by legal professional bodies, in some cases with a requirement for oversight or approval by one or more arms of Government. This regulation takes the form of rules which are underpinned by arrangements for monitoring and enforcing their application. It will be clear from the list of reserved areas set out in paragraph 6 above that there are a number of legal services which fall outside the regulatory net unless provided by a regulated lawyer and may be provided by individuals who are not qualified lawyers. The main examples are:-

- ⌘ general legal advice
- ⌘ drafting of wills
- ⌘ estate administration
- ⌘ advice and representation on employment issues
- ⌘ claims management and claims assessment.

### **Regulatory Institutions**

9. There are a substantial number of bodies with regulatory powers, which make up the regulatory framework. Identified in the Scoping Study are:-

- (i) Lord Chancellor<sup>1</sup>
- (ii) Master of the Rolls
- (iii) Financial Services Authority
- (iv) Office of Fair Trading
- (v) Attorney General
- (vi) Judiciary
- (vii) Rule Committees
- (viii) Registrar of the Patents Office
- (ix) Legal Services Ombudsman

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<sup>1</sup> Whose regulatory powers have now passed to the Secretary of State for Constitutional Affairs.

- (x) Law Society of England and Wales
- (xi) Solicitors Disciplinary Tribunal
- (xii) General Council of the Bar of England and Wales,  
including Inns of Court
- (xiii) Institute of Legal Executives
- (xiv) Institute of Trade Mark Attorneys
- (xv) Chartered Institute of Patent Agents
- (xvi) Council for Licensed Conveyancers
- (xvii) Immigration Services Commissioner
- (xviii) Court of Faculties.

10. These bodies come with different powers and functions. Five of the professional bodies, the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys, combine regulatory functions and representative functions. Broadly, the regulatory functions of these bodies can be categorised under five headings. The first concerns conditions of entry, induction, training and continuing education issues; the second concerns practice rule making functions; the third concerns monitoring of professional standards; the fourth covers complaints; and the fifth concerns disciplinary issues. The Inns of Court also have a role in certain aspects of the profession of the Bar, in particular in relation to admission, training and disciplinary matters.

11. Above the professional bodies stand a number of “super-regulators”. The Master of the Rolls has broad regulatory oversight powers, including the right of admission to the Roll, over the Law Society. The Secretary of State for Constitutional Affairs has significant powers over many areas of practice and rules. In particular, under the Courts and Legal Services Act 1990 as amended, he has the right to approve (following proper consultation with the judiciary, the competition authorities and an advisory panel) applications from professional bodies seeking to become authorised to grant rights of audience or rights to conduct litigation to their members. Currently four professional bodies are authorised to grant general or limited rights to their members:-

- ⌘ the General Council of the Bar
- ⌘ the Law Society
- ⌘ the Institute of Legal Executives
- ⌘ the Chartered Institute of Patent Agents.

The Secretary of State has the power to call in rules relating to the grant or exercise of rights to conduct litigation and rights of audience if he considers that they are unduly restrictive. He also has powers (under the Administration of Justice Act 1985) concerning the rules made by the Council for Licensed Conveyancers.

12. Additionally, there are a number of purchasers who are able to impose service conditions on providers of legal services by virtue of their purchasing power. These include the Legal Services Commission (LSC) and the Crown Prosecution Service. The LSC, which manages the legal aid budget, funds legal services provided by firms of solicitors, by barristers and by providers in the not-for-profit sector (primarily Citizens Advice Bureaux and Law Centres). Increasingly, the funding is done under contract between the LSC and the provider. Under the contract, the LSC requires certain minimum standards of service and has the right to audit the provider. In addition to the more direct forms of regulation, legal service providers are subject to less obvious regulation in the form of procedure rules made by the various rule committees (e.g. civil procedure rules) and practice directions issued by the Heads of Division<sup>2</sup>. These control the manner in which any person, including legal professionals, will operate when conducting litigation or exercising advocacy rights in court.

13. An analysis of the overlapping functions and powers of these bodies is set out in the Scoping Study annexed to the DCA report.

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<sup>2</sup> The Heads of Division are: the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Vice-Chancellor.

## **Classification of Lawyers**

14. Within the ranks of those admitted by the Law Society and by the Bar, there are classifications which have a bearing on how the legal services market operates.

Within the ranks of solicitors there are:-

- €# solicitors in private practice, who may be sole practitioners, or work in partnership or corporate structures as directors, partners, or assistant solicitors;
- €# employed solicitors, a term for those who are employed outside private practice, typically in an industrial or financial company, or central or local government.

Within the ranks of barrister offering legal services there are:-

- €# barristers in independent practice - those who work in a self-employed capacity, typically in chambers;
- €# employed barristers - those who are qualified to practise as barristers but work in an employed capacity, typically in a commercial organisation or government, or as employees of firms of solicitors;
- €# non-practising barristers - those who have been called to the Bar, but have not fulfilled the pupillage requirements and, therefore, are restricted in their ability to practise, or who offer legal services outside the structures permitted by the Bar's Code of Conduct.

## **Permitted structures of legal enterprises**

15. There are a number of rules which are relevant to consideration of alternative business structures. Under the practice rules of the Law Society, solicitors in private practice may form partnerships but only with other solicitors. HR and IT professionals may work for a firm of solicitors but may not be partners. No split is permitted between those who are owners of a business and those who manage it.

16. Employed solicitors may give legal advice to their employer but, generally, they are not permitted to give advice to third parties, unless by exception to the rules e.g. working for trade unions or in a Law Centre.

17. Under the practice rules of the Bar Council, practising barristers cannot form partnerships with anyone, including other barristers. Thus at the independent Bar everybody is required to be self-employed. Employed barristers may work for firms of solicitors on third party business, but they may not become partners of the firm.

18. Practice rules relating to enterprises in the not-for-profit sector, where Law Centres and Citizens Advice Bureaux give legal advice and provide advocacy services, are different. Barristers and solicitors, together with others with relevant skills, can work together and provide legal services to members of the public. There is a split between those who own the enterprise, generally local government or charities, and those who manage the enterprise.

### **Principles of good regulation**

19. There is no single model for best practice in regulation of an industry that can be copied. Nevertheless, in addition to the conditions within the Terms of Reference set out above, regard should be had to the principles of good regulation set out by the Better Regulation Task Force (BRTF) and the National Consumer Council (NCC).

20. The BRTF guidelines say that regulation should be:-

- €# proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
- €# accountable: regulators must be able to justify decisions, and be subject to public scrutiny;
- €# consistent: Government rules and standards must be joined up and implemented fairly;
- €# transparent: regulators should be open, and keep regulations simple and user friendly;

☞ targeted: regulators should be focused on the problem, and minimise side effects.

21. The NCC lists good practice guidelines on self-regulation as:-

- ☞ clear objectives
- ☞ the ingredients of regulation (rules; monitoring and enforcement including the imposition of sanctions; and a redress mechanism)
- ☞ wide consultation
- ☞ a dedicated structure
- ☞ independent representation
- ☞ monitoring compliance
- ☞ public accountability
- ☞ good publicity
- ☞ adequate resources
- ☞ well-publicised complaints procedures
- ☞ effective sanctions
- ☞ performance indicators
- ☞ regular reviews.

These guidelines, along with the criteria in the Review's terms of reference, will be factors in the development of the models of regulation for legal services.

### **International considerations**

22. There are a number of relevant international considerations that will need to be borne in mind in devising any new regulatory framework. Those already identified as having a potential impact on the development of proposals include:-

- ☞ Sectoral directives to promote the cross border practice of law within the European Union on a temporary or established basis by those holding certain professional titles;
- ☞ Two recent European Commission initiatives designed to promote further competition in professional services, and to remove

administrative and regulatory obstacles to trade in services as a whole throughout the European Union;

- €# International trade obligations, for instance those stipulating basic principles governing domestic regulation and designed to ensure that the benefits of international liberalisation of world services markets are not negated by overburdensome regulatory systems at the domestic level; and
- €# Statements of international organisations, including the United Nations and the Council of Europe, on certain key concepts on the role and exercise of the profession.

# CHAPTER A - THE OBJECTIVES AND PRINCIPLES OF A REGULATORY FRAMEWORK FOR LEGAL SERVICES

## Introduction

1. The purpose of this chapter is to explore possible objectives of a regulatory regime. It also considers some of the principles which lie behind the provision of legal services and discusses their relevance for the regulatory regime. It then suggests that the task of the regulatory authorities is to use their resources where the risks to those established objectives and principles are greatest.

## The nature of existing regulation of legal services

2. Many, including those in the legal professions, take the view that the legal professions are largely self-regulating bodies:-

*“...Self-regulation starts with entering the profession, and continues through education and training. The control of the standards of entry is where the process begins, the setting of ethical standards, enforcing the standards through conduct, then handling consumer complaints...”<sup>3</sup>*

*“A continued strong self-regulatory role for the Bar is in the interests of everyone”<sup>4</sup>*

3. While there is a significant element of “self-regulation” about the way in which most of the existing legal professional bodies regulate their members, that self-regulation, in practice, operates within parameters clearly laid down by law, with the state involved in many aspects of regulation.

4. To illustrate the point, under the Courts and Legal Services Act 1990, and now the Access to Justice Act 1999, the approval of the Secretary of State for Constitutional Affairs (following his consultation with the designated judges<sup>5</sup>,

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<sup>3</sup> ‘Balancing Act’, published in the Law Society Gazette, 21 November 2003, quoting Janet Paraskeva.

<sup>4</sup> Matthias Kelly, Chairman of the General Council of the Bar – ‘Robust and Fair’ December 2003, Counsel and Bar Council Website.

<sup>5</sup> Designated judges as defined at S119 of the Courts and Legal Services Act 1990 are: the Lord Chief Justice, the Master of the Rolls, the President of the Family Division of the High Court and the Vice-Chancellor.

the Legal Services Consultative Panel<sup>6</sup>, and the Office of Fair Trading) is required before any rules of the legal professional bodies, which broadly speaking relate to the grant or exercise of rights of audience or rights to conduct litigation, can have effect<sup>7</sup>.

5. Under the Administration of Justice Act 1985, all of the rules of the Council for Licensed Conveyancers require the approval of the Secretary of State before they can have effect, and under the Solicitors Act 1974 the Law Society is required to obtain the approval of the Master of the Rolls to those of its rules not already subject to separate approval by the Secretary of State. The effect of these powers (and those in the preceding paragraph) is to create a significant, but not consistent, constraint on the autonomy of the legal professional bodies.

6. The Access to Justice Act also introduced considerable outside control in access to publicly funded legal services and the price and quality of those services. It created the Legal Services Commission (LSC), which contracts (about £2 billion annually) with lawyers and not-for-profit agencies to provide specific services. Legally aided consumers' access to lawyers is limited to those covered by such contracts, and the pricing of those services is controlled by the LSC. There is also a quality assurance system covering those contracted to provide legal aid services.

7. Over recent years, the form of regulation of legal services has, arguably, moved further towards co-regulation (exercised by government and the legal professional bodies) and away from pure self-regulation; although the system overall remains one based on a combination of self-, co-, and state regulation. Apart from a few fairly significant changes (e.g. the breaking of the solicitors' monopoly of conveyancing services and of the barristers' monopoly on higher courts advocacy) most developments that have impacted on the regulatory

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<sup>6</sup> The Legal Services Consultative Panel is a statutory body set up under the Access to Justice Act 1999 to provide advice to the Lord Chancellor about regulation of legal services.

<sup>7</sup> As set out at Sections 27 and 28 of, and Schedule 4 to, the Courts and Legal Services Act 1990, as amended by the Access to Justice Act 1999.

system have been incremental. Consequently, it could be argued that those changes have lacked the benefit of a strategic approach, resulting in a lack of cohesion and consistency in the system of regulation.

### **The objectives and principles of a regulatory framework for legal services**

8. A decision to regulate a market (in this case the legal services market) arises from the decision that leaving the activity unchecked could lead to undesirable consequences and that the benefits that will flow from regulation will outweigh the costs of that regulation. Because any regulatory system will involve the application of rules giving guidance as to acceptable standards of conduct within the area being regulated, it can lead to an increase in trust and confidence in institutions and the sector generally. And allied to the issue of trust and confidence, regulation can also lead to greater certainty of outcome for both consumers and providers. But beyond simply engendering confidence in the market, regulation has an important role to play in protecting the consumer, ensuring there are no unjustifiable restrictions on competition, that appropriate standards of education, training and conduct are maintained, and that there are appropriate redress mechanisms.

9. But there is a potentially negative side to regulation in that it can be inefficient, with rules resulting in not much more than an increase in bureaucracy and additional costs for providers and ultimately consumers, disadvantaging smaller operations which have fewer resources to deal with additional obligations.

### **The objectives for regulation of the legal sector**

10. As has been mentioned in the Overview, the five principles of good regulation established by the BRTF should underpin any regulatory system. But beyond those principles what other factors, or approaches to regulation, should any regulatory framework for legal services take into account?

11. Perhaps the first step in defining any regulatory regime is to make it clear what the objectives of the regime are. This is critical for those charged with

regulatory responsibility, since the objectives represent the criteria against which they must determine the appropriate regulatory action; and against which they will be held accountable. Objectives also need to be clear to those being regulated and other interested parties. In the case of the Financial Services Authority, for example, the four primary objectives are:-

- €# maintaining confidence in the UK financial system;
- €# promoting public understanding of the financial system;
- €# securing the degree of protection for consumers;
- €# helping to reduce financial crime.

12. For the legal sector, some of the general considerations, a number of which may overlap, are set out below:-

€# **Maintaining the rule of law** – The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. A predictable and proportionate legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against any arbitrary use of state authority and lawless acts of both organisations and individuals. Those charged with regulating the legal service providers have an important part to play in ensuring the rule of law by creating conditions necessary for the delivery of a strong, independent and effective legal services industry.

€# **Access to Justice** - It might be expected of a regulator that, having regard to the provision of services in the commercial and not-for-profit sector, he has an objective to improve access to justice for all, working closely with other bodies, such as the Legal Services Commission.

€# **Consumer considerations** - A consumer-based approach can be described as one in which the aim of the regulator is to protect and to further the interests of the consumer. The consumer's principal interests include higher quality and lower prices. In part this concerns the giving of choice to an informed consumer. In this way, the ultimate choice of whether to accept a risk is made by the consumer. A central task of the

regulator must, therefore, be to ensure that this choice is a real one. In order to do this, the regulator must ensure that the consumer has sufficient information about the standards of the services provided to take a decision as to what level of service is necessary for him.

But despite the best efforts of the regulator, consumers may not always be “informed”. So consumer driven regulation might also take the form of:- prohibiting oppressive marketing practices, raising or setting standards, information/awareness programmes to develop “informed” consumers, resolving disputes, protecting vulnerable groups etc.

€# **Competition considerations** – One of the trends in recent years has been the increased emphasis on competition. Within the legal services industry, Government has encouraged competition between lawyers from different professional bodies. The Courts and Legal Services Act 1990 gave solicitors the opportunity to acquire rights to appear in all courts. Other professional bodies, for example, the Institute of Legal Executives and the Chartered Institute of Patent Agents, have been granted limited rights of audience in court. The withdrawal of the solicitors’ monopoly in conveyancing has increased competition in this market. It must be expected that the regulatory regime should prevent unjustified restrictions on the supply of, and encourage competition in, the provision of legal services and the encouragement of choice in both the number and type of providers, subject to the proper safeguard of consumers’ interests.

€# **Confident, strong and effective legal profession** – A regulatory objective of maintaining a strong and effective legal profession (including setting appropriate entry standards and supporting new entrants to the market) will help to ensure access to justice and the maintenance of a healthy supplier base for publicly funded work and serve the public interest. It will also underpin the international efforts of our legal sector.

€# **Promoting public understanding of the citizen’s legal rights** - There is a broad obligation placed on the regulator of the financial services industry

to play a role in improving public understanding of the financial markets, so that, for example, consumers are better informed when making important financial decisions. Within the legal services industry, there is a professional obligation on lawyers to set out for clients their rights and the consequences of different options. The regulator would be expected to support this; but there is a question as to whether he has a wider duty, in conjunction with the industry, to improve consumer knowledge of some of the most commonly used parts of the law, for example, around buying a house.

**Question A1.** There are a number of important possible objectives for a regulatory system covering the provision of legal services. What objectives do you believe should form the cornerstone of a regulatory system for legal services?

### **The principles (or precepts) of the legal profession**

13. As well as delivering the regulatory objectives set out in the previous paragraphs, any regulatory framework will also need to provide for those principles, or professional precepts, which apply to the legal profession. Some of the key factors appear to be:-

€# **Independence** – Section 42 of the Access to Justice Act 1999 provided statutory underpinning to the duty to act with independence in the interests of justice; and to comply with their professional bodies' rules of conduct.

At the time the Government made it clear that:-

*“Those duties override any other civil law obligation which a person may be under, including the duty to the client or a contractual obligation to an employer or to anyone else. A barrister, solicitor, or other authorised advocate or authorised litigator must refuse to do anything required, either by a client or by an employer, that is not in the interests*

*of justice (e.g. suppress evidence). The purpose of this section is to protect the independence of all advocates and litigators.*<sup>8</sup>

⚡ **Integrity** – the codes of conduct maintained by the major legal professional bodies generally require their members to act with integrity towards clients, the courts, lawyers and others. We can interpret this to include that lawyers should never knowingly give false or misleading information and that they should honour professional undertakings. The main legal professional bodies also require their members to maintain high standards of professional conduct and professional service, and not to bring the profession into disrepute.

⚡ **The duty to act in the best interests of the client** – the codes of conduct of the main legal professional bodies require their members to act in the best interests of the client, except where it would be unlawful to do so or where the interests of justice would be compromised.

⚡ **Confidentiality** – the codes of conduct of the legal professional bodies require lawyers to keep clients' affairs confidential. Additionally, communications between a client and his lawyer may be subject to Legal Professional Privilege (LPP). In essence LPP means that certain communications between a client and legal advisor in the context of obtaining legal advice or assistance are protected from disclosure, even in legal proceedings. This feature is virtually unique to the legal profession as it is regarded as a cornerstone of the basis of the lawyer-client relationship, to a degree that is greater than in comparable professions.

**Question A2.** What aspects of professional ethics, or legal precepts, do you feel are essential to a properly functioning legal services industry and in what way should they be reflected in the regulatory system?

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<sup>8</sup> Paragraph 173, Explanatory Notes, Access to Justice Act 1999.

### **A risk-based approach**

14. The BRTF generally advocates a flexible, risk-based approach to regulation:-

*“..the level of risk involved in any activity should determine the level of protection necessary. However, the appropriate level of protection can be provided by direct state regulation, or an alternative approach.... our work shows that alternatives to direct government regulation can be effective. We do not, therefore, think that the Government should ever discount the options of self or co-regulatory regimes for “risky” areas”<sup>9</sup>*

15. This risk-based approach to regulation has also been adopted by the financial sector:-

*“We fully support the banks’ risk-based approach. This is absolutely in line with our whole approach to regulation.”<sup>10</sup>*

16. The Financial Services Authority, in drawing up its budget and determining where its resources should be deployed, takes as its starting point risks to the achievement of its four statutory objectives (see paragraph 11 above). In their audit work the approach of the Law Society and the Legal Services Commission is to deploy their resources according to perceived risks. If a risk-based approach were to be adopted for the regulation of legal services generally, it would be possible to make an assessment of the risks involved in the provision of specific types of legal service (e.g. advocacy, litigation, conveyancing, probate etc) and make a judgment as to the form of regulation which would be most appropriate for that type of activity.

**Question A3.** Do you consider that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used?

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<sup>9</sup> ‘*Alternatives to State Regulation*’, Better Regulation Task Force, July 2000

<sup>10</sup> Carol Sergeant, former Managing Director of the FSA - FSA Press Release 15 July 2002

## CHAPTER B - REGULATORY MODELS

### Introduction

1. This chapter looks at the strengths and weaknesses of different models for the regulation of legal services.

2. Five of the legal professional bodies (the Law Society, Bar Council, Institute of Legal Executives, Chartered Institute of Patent Agents and Institute of Trade Mark Attorneys) combine both regulatory and representative functions. The question of whether this hybridity of roles should continue goes to the heart of the debate on models of regulation for the legal sector. Representative functions include providing services and support for members; regulation includes setting the parameters within which members work.

3. Away from the current system of regulation in the legal services industry, there are two main models of regulation which may be considered. The first, referred to as Model A, involves stripping out all regulatory functions from the professional bodies. All these functions would be vested in, and carried out by, what is here called a Legal Services Authority (LSA), which would interface directly with the providers of legal services. Model B gives responsibility for the regulatory functions to the practitioner bodies, but creates a further tier, here a Legal Services Board (LSB), which provides oversight over all the bodies. These two models are polarised constructs and on either model there are a number of variants. This chapter discusses one such, Model B+, which involves a separation of regulatory from representative functions within the practitioner bodies.

4. Five core functions of regulation are commonly recognised as:-

(i) **Entry standards and training:** setting minimum standards of entry qualifications, usually linked to educational achievement, for candidates wishing to become “qualified”. It also encompasses matters such as continuing professional development.

(ii) **Rule making:** formulation of rules by which members are expected to work and to adhere.

(iii) **Monitoring and Enforcement:** checking the way in which members carry out their work, in the light of the prescribed rules, and enforcing compliance if rules are broken.

(iv) **Complaints:** systems for consumers to bring complaints about providers who have served them poorly, focused on redress to the consumer.

(v) **Discipline:** powers to discipline members where that person is, for example, professionally negligent, or in breach of the professional rules, focusing on action against that individual.

5. A fundamental issue is whether it is appropriate to combine the regulatory functions of a professional body, where the public interest has primacy, with the representative functions, where the interest of the members has primacy. Scepticism arises where bodies introduce new rules, or hold on to existing rules, which reflect the clearly expressed interests of their members; and then argue that such rules are in the public interest. Many also see a conflict in those instances where professional bodies negotiate fee rates on behalf of members.

6. Proponents of the current hybrid system generally recognise that there are conflicts, but argue that the best place to resolve them is within the professional body itself. Opponents argue that the manner in which such conflicts are dealt with is better brought out into the open, with a clear distinction between those who represent and those who regulate; clear, distinct roles for organisations increase transparency and aid accountability.

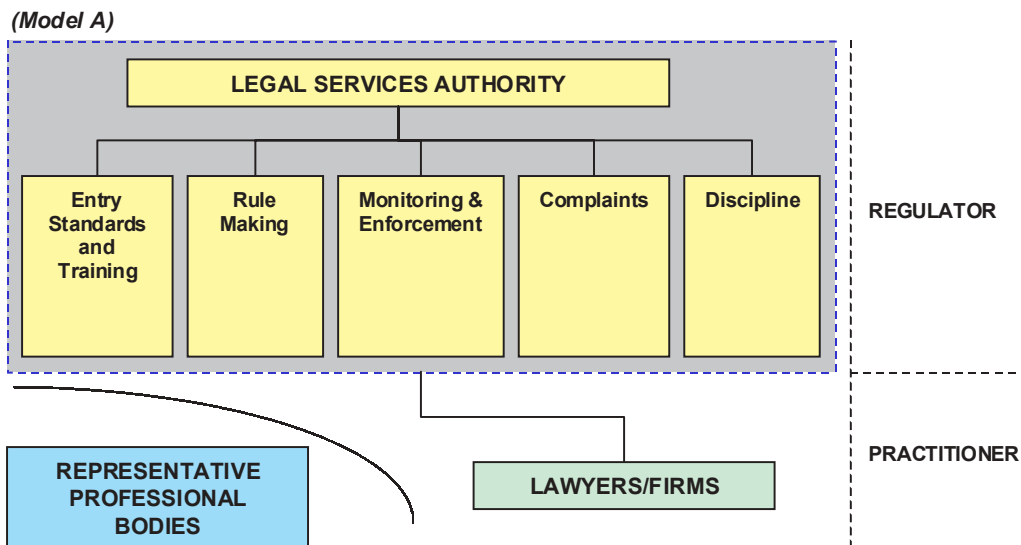
7. In this chapter, we deal with the first three regulatory functions listed above: (i) entry standards and training, (ii) rule making, and (iii) monitoring and enforcement. Public concern is often focused on two further regulatory functions: (iv) complaints, and (v) disciplinary matters, which may be considered the most outward facing of the regulatory functions and where

deficiencies in performance are most readily apparent. These two areas are dealt with in Chapter C below. However, it is evident that the fundamental question of principle regarding a regulatory/representative split runs across all five regulatory functions.

**Model A**

8. Under Model A, the LSA has all regulatory functionality vested in it by statute and exercises those powers itself. All regulatory functions are removed from the professional bodies, leaving them with their representative functions. The LSA is the overarching regulator for the professions/services within the regulatory net. Model A takes a service driven approach to regulation.

9. The LSA functions could be analogous to those that the Financial Services Authority possesses – including the setting and enforcement of the rules and codes governing service provision; giving guidance and advice on general policy; and exercising investigative, enforcement and disciplinary powers.



10. Among the suggested advantages of a Model A type approach are the clear independence of the regulator, clarity of purpose for both regulator and representative bodies and consistency of rules and standards across the professions and services. An independent regulator would be well placed to make tough, fair enforcement decisions and to facilitate lay/consumer input into the decision making processes. It would be possible for the regulator to bring greater consistency to some aspects of the legal services industry. For example, the rule making committee could be sub-divided so as to deal with rules for specialist services such as advocacy, conveyancing and immigration. This would permit the promulgation of one standard considered to be best practice and in the public interest, rather than the current differences in practice rules which exist in some areas.

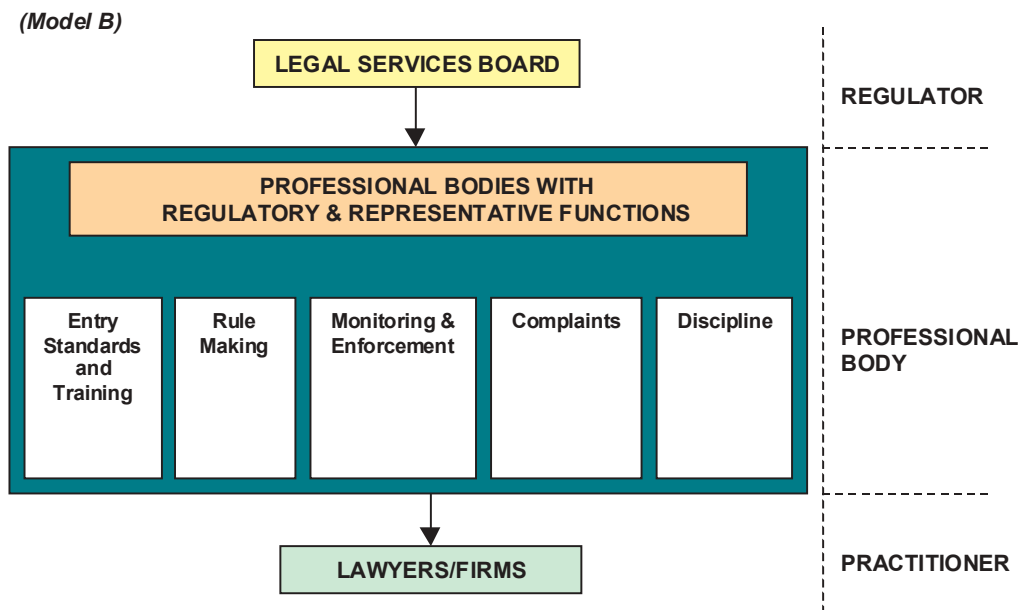
11. One regulator, concentrating on services, might also better accommodate newly regulated services, and the regulation of Legal Disciplinary Practices and, if appropriate, Multi-Disciplinary Practices.

12. Disadvantages might include creating an overly bureaucratic and inefficient organisation, with consequent issues of costs and unwieldy procedure. A further argument, often cited, is that it fails to recognise the significance of strong roots within the professions and their importance on the international stage. Divorcing the regulatory functions from the professions might lessen the feeling of responsibility professionals have for the high standard of their profession and their willingness to give time freely to support the system.

### **Model B**

13. A more limited reform would involve keeping regulatory functions in the hands of the existing professional bodies such as the Law Society and Bar Council, but establishing central oversight over these organisations. Under this model, regulatory functions would be given to the professions in addition to their representative functions, subject to oversight by the LSB. The LSB, as central regulator, would accordingly approve the rules, practices and

procedures of these organisations; it might oversee enforcement of the rules but it would not take over their direct regulatory functions. Model B takes a profession driven approach to regulation.



14. Features of Model B are that it retains the professional bodies in the regulatory framework but inserts an extra tier, the LSB, in an oversight capacity. Regulatory functions could be vested in the LSB but then delegated to the professional bodies to be carried out.

15. Possible advantages of a Model B approach are that it balances the benefits of consistency and improved transparency through the oversight regulator with the maintenance of direct regulatory control of professional bodies over their members. Keeping regulation close to those who provide the services might be cheaper, whilst professions might have more stringent

standards on wrongdoing, given their vested interest in keeping up standards and sustaining public confidence in the providers.

16. Disadvantages might include the perceived lack of independence and inability to involve the consumer consistently in regulatory decisions. There would be no split of representation from regulation. By maintenance of a profession-centric approach, there might be a lack of standardisation of rules across service type. Professional-led regulation sits uneasily with the regulation of LDPs and MDPs which cut across professional boundaries.

### **Variants of Models A and B**

17. Models A and B may each be considered polarised approaches. Under Model A, all regulatory functions are vested in a new regulator outside the professional bodies; under Model B they are all given to the professional bodies, subject to oversight. But in a decision between placing a regulatory function outside a professional body or having it within, one could decide separately for each function. So there are a number of variants between Models A and B. This section looks at entry standards and training, rule making, and monitoring and enforcement. Complaints and discipline are dealt with in the next chapter.

18. There are arguments for and against placing any of the regulatory functions with the professional representative body. **Entry standard setting**, covering admission to a profession, is generally restricted to those meeting certain educational or other quality standards, and also may be considered to be the place where the professional standards, reflected in the rules, start to be promulgated. The setting of standards requires careful judgment between setting the standard too high, and restricting entry, and setting the standard too low, and not maintaining proper levels of competency. The OFT has said that *“a requirement to have demonstrated basic competence is clearly justified where consumers are not well placed to assess the quality of service, as is usually the case in markets for professional services.”*<sup>11</sup> Currently, the

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<sup>11</sup> ‘*Competition in professions*’ March 2001

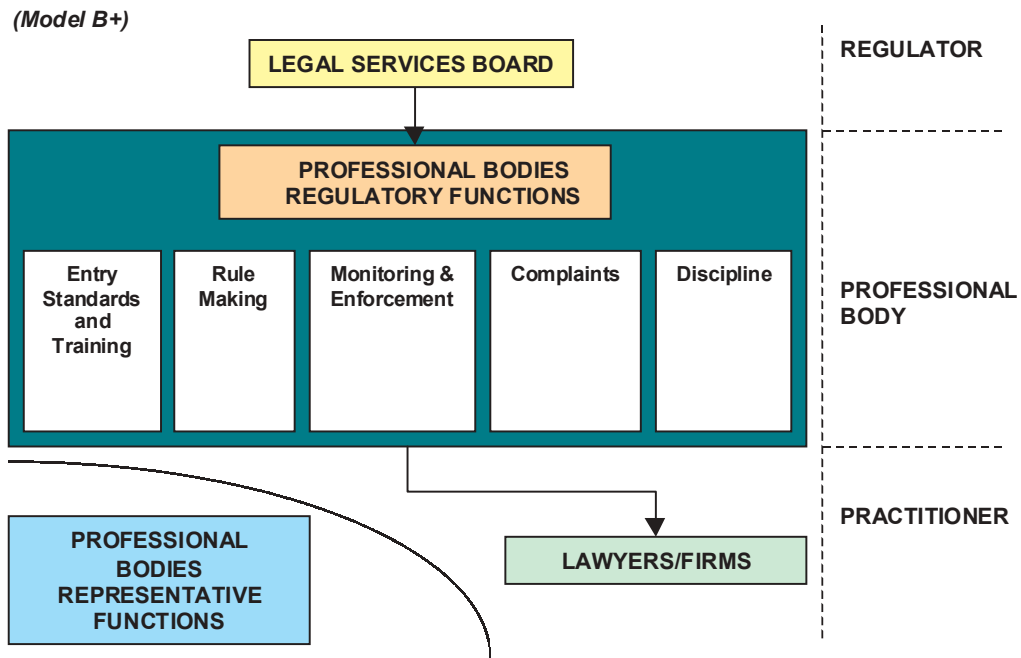
approval of the Secretary of State is required before the standards proposed by the Inns of Court for admission and training for student barristers (i.e. the Consolidated Regulations of the Inns of Court) can have effect. Within the operation of the Inns, it is clear that judges play a significant role, and indeed the President of the Inns is a senior judge. The Law Society sets standards of entry for students but admission to the Roll is by the Master of the Rolls.

19. **Rule making** as a regulatory function may be seen to be part of the way a profession ensures that its members operate to high standards of conduct and performance. It could be argued, therefore, that it is a function needing to be kept close to the providers. The counter to this is the level of inconsistency that may develop in the operation of rules covering the same service type; and the consumer voice may be better facilitated if taken out of the professional body's control. There are also procedural questions such as how quickly a rule may be changed if the governance procedures inside the professional body are unwieldy. An alternative would be to take out rule making according to service type, e.g. advocacy, putting that into a separate committee and thereby ensuring consistency across service type, irrespective of provider.

20. **Monitoring and enforcement** is a key function if there is to be public confidence in the rule making process and a genuine desire for the public interest to be at the heart of the rule. Whilst this regulatory function could be divorced from the process of rule making, and it might be considered that independent monitoring would have more teeth, it could be thought incongruous to ask a professional body to enforce rules it had not itself drawn up, despite any practitioner expertise that had been brought to bear in the process.

21. A possible solution is to leave these three regulatory functions together at professional body level, subject to consistent oversight by the LSB, but to require that the professional bodies split their regulatory arm from the representative arm, with separate governance arrangements. It might be

expected that the regulatory arm would have a significant lay content. We refer to this as Model B+.



22. The main additional advantage over those under Model B is the increased transparency of operation and clarity of purpose that should follow from a representative/regulatory split.

23. The disadvantages of the Model B approach are largely replicated under this model, though the concerns about keeping regulatory and representative functions together would be mitigated.

24. In broad terms the financial services industry follows Model A, with all regulatory powers vested in the Financial Services Authority. The Financial

Reporting Council (FRC), through its Professional Oversight Board for Accountancy (POBA), has an independent role overseeing the way in which the professional accountancy bodies themselves exercise their regulatory responsibilities in relation to their members; this feature is close to Model B. The Medical profession is a hybrid, closest to Model B+. The British Medical Association is the representative body of the profession. The General Medical Council (GMC), whose membership includes a majority of elected medical practitioners, is the primary regulatory body. The GMC is subject to oversight by the Privy Council in relation to many of its regulatory functions. The Council for the Regulation of Healthcare Professionals also operates in an oversight capacity, as it can report on the performance of the GMC. The key feature of the medical regulatory structure is that, whilst it could be described as self-regulatory (subject to oversight), there is a clear distinction between regulatory and representative functions.

**Question B1.** What do you see as the broad advantages and disadvantages of Model A in comparison with Model B? In particular, what do you see as the strengths and weaknesses of (i) combination and (ii) separation of regulatory from representative functions?

**Question B2.** Which model best meets the criteria of the terms of reference?

**Question B3.** If it were felt appropriate to separate regulatory and representative functions within professional bodies as is envisaged under Model B+, how might it best be achieved?

### **Powers**

25. Under the Courts and Legal Services Act 1990 (CLSA), the Secretary of State has powers to authorise bodies who wish to grant rights of audience or rights to conduct litigation, or to revoke such designation. He also has power over the rule making process in relation to these two areas; authorised bodies have to submit such rules or changes thereto to him for approval, and he can also "call-in" any such rules that he believes to be unduly restrictive in effect. The CLSA also provides for some powers of licence and revocation to be

vested in the Secretary of State relating to rights to provide probate and conveyancing services. Further the Secretary of State has powers to give general directions to the Legal Services Ombudsman regarding the discharge of functions.

26. The Financial Services Authority has powers to authorise or de-authorise a "person" (firm or individual) unless the person is authorised in another Member State. The FRC's POBA has power to de-designate a professional body if minimum standards of monitoring and discipline are not met.

27. Under Model A it is envisaged that the existing powers of the Secretary of State would be granted to the LSA. Under Model B, powers relating to individuals or firms could be further devolved to the existing cadre of front line regulators, but with the LSB also having "call-in" powers to reach down into the operation of the professional bodies either to direct or revoke as necessary. An example might be to ensure consistency of the rules applying to a particular type of service or in relation to the composition of the professional body's decision-making boards.

28. The above paragraphs deal with the devolution of powers from Government to the Regulator to deal with the regulatees. Notwithstanding the importance of the Regulator having a high degree of independence, there remains the question as to whether Government should retain some residual powers to instruct the Regulator. This is a question that was faced in connection with the Financial Services and Markets Act 2000, where in the event very restricted powers were reserved to the Treasury to direct the FSA, these being where a reference has been made to and a report issued by the Competition Commission<sup>12</sup>; where a direction is needed to ensure compliance with international obligations<sup>13</sup>; and regarding the contents of the FSA's annual report<sup>14</sup>.

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<sup>12</sup> Sections 163 & 308, Financial Services & Markets Act 2000 (FSMA).

<sup>13</sup> Sections 405 & 410, FSMA.

<sup>14</sup> Paragraph 10(1)(d), Schedule 1 to FSMA.

**Question B4.** What powers would you wish to see delegated from the Government to the Regulator?

**Question B5.** What powers to instruct the Regulator would you wish to see Government retain?

### **International**

29. The regulatory framework for legal services in England and Wales should, amongst other benefits, enable providers to compete effectively in the modern domestic and rapidly expanding global marketplace. To that end, any changes to the regulatory framework must not be counterproductive in terms of inhibiting the competitiveness of legal service providers in England and Wales. The revised framework must also take full account of the impact of the UK's international obligations.

30. The regulatory environment is a factor in the choices made by providers about where they might best locate their operations. This is, of course, not specific to the legal services sector although it applies equally to it. A consideration in devising a framework would be the impact of any resultant regulatory change in England and Wales on the neighbouring jurisdictions in Scotland and Northern Ireland.

31. Also to be considered is the effect of measures such as:-

- €# The existing European legal framework facilitating the provision of legal services across the European Union and the European Economic Area;
- €# The potential impact of new Community measures in the fields of competition and internal market policy;
- €# World Trade Organisation agreements in services and, in particular, those provisions of the General Agreement on Trade in Services relating to domestic regulation. Broadly, those provisions stipulate that domestic regulation should be based on objective and transparent criteria, not more burdensome than necessary and, in relation to

licensing procedures, not in themselves a restriction on the supply of the service; and

- €# Statements of international organisations, including the United Nations and the Council of Europe, on certain key concepts on the role and exercise of the profession and access to justice.

32. A new regulatory system should, therefore, look to:-

- €# preserve and, indeed, where possible extend the competitiveness of the sector;
- €# be capable of administering existing obligations effectively, whether European or international; and
- €# be flexible enough to accommodate new market and regulatory developments going forward.

**Question B6.** What international considerations should influence the design of appropriate regulatory arrangement of legal services within England and Wales?

## **CHAPTER C - COMPLAINTS AND DISCIPLINE**

### **Introduction**

1. This chapter focuses on the two regulatory functions of complaints handling and discipline. All the legal practitioner bodies have complaints and discipline systems, but we outline the current procedures operated by the Law Society and the General Council of the Bar. By way of comparison, we also refer to some aspects of the systems used in the financial, accountancy and medical professions, and in the legal profession in New South Wales, Australia.

2. Generally, within the English and Welsh legal professions, a complaint must be made in the first instance to the service provider where the complaint originates. If the complainant is not satisfied, the complaint may be referred to the relevant professional body. Uncertainty may occur in identifying which professional involved in the provision of the service is responsible for the complaint: for example, in a court room situation where it is unclear whether the advocacy barrister or instructing solicitor is the cause of complaint, or where there are supervision arrangements affecting the service, e.g. an employed barrister being supervised by a solicitor. Allied to this is the fact that the procedures and remedies may differ across the various redress routes.

### **Complaints against Solicitors**

3. The Law Society is responsible for regulating the conduct of solicitors. It deals with complaints through its Office for the Supervision of Solicitors (OSS). Although the OSS is funded and managed as part of the Law Society, the Council has guaranteed that the OSS will be wholly independent of the rest of the Society so far as the handling of individual complaints is concerned. Rule 15 of the Solicitors Practice Rules requires solicitors to have in place in-house complaints handling procedures, which must normally be followed before a client complaint is made to OSS. Under a voluntary 'consumer redress scheme', OSS first attempts to conciliate between client

and solicitor. If this fails, OSS conducts a formal investigation. OSS categorises complaints into two broad headings:-

⌘ **Inadequate professional service (IPS)** – e.g. not carrying out clients’ instructions, creating unreasonable delays etc. If OSS upholds a complaint, it can reduce a solicitor’s bill, order a solicitor to pay compensation to a client of up to £5,000, or tell a solicitor to correct a mistake and pay the costs involved.

⌘ **Professional misconduct** – e.g. not keeping a client’s business confidential, failing to pay money over to a client when due etc. If OSS upholds a complaint that does not contain an element of IPS it cannot award compensation to the client, but it can discipline a solicitor by issuing a reprimand. The Law Society can also place conditions on a solicitor’s practising certificate, but this can be appealed to the Master of the Rolls. Serious cases may be referred to the Solicitors Disciplinary Tribunal. OSS does not deal with most negligence cases, which must be pursued through court proceedings.

### **Law Society Independent Commissioner**

4. On 1 November 2002, the Law Society created the new post of Independent Commissioner, with the primary role of overseeing the Society’s Consumer Redress Scheme.

### **Discipline of Solicitors**

5. The Solicitors Disciplinary Tribunal (SDT) is constituted under Section 46 of The Solicitors’ Act 1974. It is independent of, but funded (with the exception of lay members) by, the Law Society. The Master of the Rolls appoints the SDT members. Its principal function is to hear allegations against solicitors of unbecoming conduct or breaches of their conduct rules. It is open to anyone to make an application to the SDT, although most applications are made by OSS, following investigation there. The Law Society may refer cases itself, for example, following an inspection by its Forensic Investigations Unit. The SDT sanctions are against the solicitor and include striking a solicitor off the Roll. It does not award compensation. Appeal from a decision of the SDT lies to the Queen’s Bench Division of the High Court.

**THE SYSTEM OF COMPLAINTS HANDLING AND DISCIPLINE FOR SOLICITORS**

**CONSUMER**

Complaint

**SOLICITOR/FIRM**

Must normally be considered in first instance under firm/solicitor's **"in-house" complaints procedure**. Client must be informed of outcome in writing (Rule 15)

**Complainant satisfied** – no further action

**Complainant not satisfied**

**OSS**

OSS – will consider the complaint and decide whether it is empowered to deal with the matter

**OSS able to deal** – under 'Voluntary Redress Scheme' attempt to conciliate

**OSS not able to deal** – advise complainant, and inform about LSO

**Complainant satisfied** – no further action

**Complainant not satisfied** – OSS commences formal investigation

OSS Considers complaint relates to **inadequate professional service**

OSS Considers complaint relates to **professional misconduct**

**OSS upholds complaint**, sanctions solicitor and awards costs/compensation to complainant as appropriate

**OSS rejects complaint**, advises complainant, and informs them about LSO

**OSS upholds complaint**, sanctions solicitor, but cannot provide compensation to complainant. Serious cases referred to SDT

**SDT**

SDT hears case **and finds against solicitor**. Disciplines solicitor, but unable to provide compensation to complainant

SDT hears and **dismisses case**

**HIGH COURT**

**Appeals** against decisions of the SDT lie to the High Court

**LSO**

LSO can consider handling of a complaint by OSS

## Complaints against Barristers

6. To become a barrister, a person must be admitted as a student to one of the four Inns of Court. Students must then complete certain examinations, “keep terms” (i.e. attend a specified number of events of an educational or collegiate nature arranged by, or on behalf of, an Inn), pay a fee, and sign the “Call Declaration” in which, importantly, they undertake to abide by the code of conduct maintained by the General Council of the Bar.

7. The Bar Council requires that all barristers in independent practice “(i) must deal with complaints made to him promptly, courteously and in a manner which addresses the issues raised, and (ii) must have and comply with an appropriate written complaints procedure and make copies of the procedure available to a client on request”<sup>15</sup>. Any complaints made to the Bar Council are received by the Bar’s Complaints Commissioner, who is not a lawyer. The Commissioner may dismiss complaints he considers unfounded, with which he considers the Bar is not able to deal, or where he is able to broker a conciliation<sup>16</sup>. Complaints are categorised into two broad types:-

- ⌘ **Inadequate Professional Service** - e.g. delay in dealing with papers, poor or inadequate work on a case etc. The Bar can require a barrister to: apologise to a client, repay fees, or pay compensation up to £5000, but only if the complainant is the barrister's client.
- ⌘ **Professional Misconduct** - e.g. misleading the court, not keeping client affairs confidential, acting against a client's instructions or best interests etc. These complaints are dealt with under the Bar’s disciplinary procedure.

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<sup>15</sup> Rule 403(d) of the Bar’s *Code of Conduct*.

<sup>16</sup> The Bar will not deal with certain complaints, e.g. against judges (where the judge is a barrister), about a barrister’s private life or non-professional work (unless there is criminal or similar misbehaviour involved) etc. It generally does not consider negligence claims, except in some cases containing an element of inadequate professional service. For negligence claims of high value the Bar may advise complainants to pursue their claim through the courts.

## **Discipline of Barristers**

8. If the Commissioner considers a complaint may be justified, he will refer it to the Professional Conduct and Complaints Committee (PCC) of the Bar Council. The Bar Council also raises a number of complaints against barristers itself for breach of practising rules (e.g. failure to comply with continuing education or insurance requirements). Such complaints are referred direct to the PCC and are not considered by the Commissioner. When sitting, the PCC comprises some 18 barristers and two members of the Bar Council's panel of lay representatives. The PCC cannot dismiss a complaint unless the lay members agree.

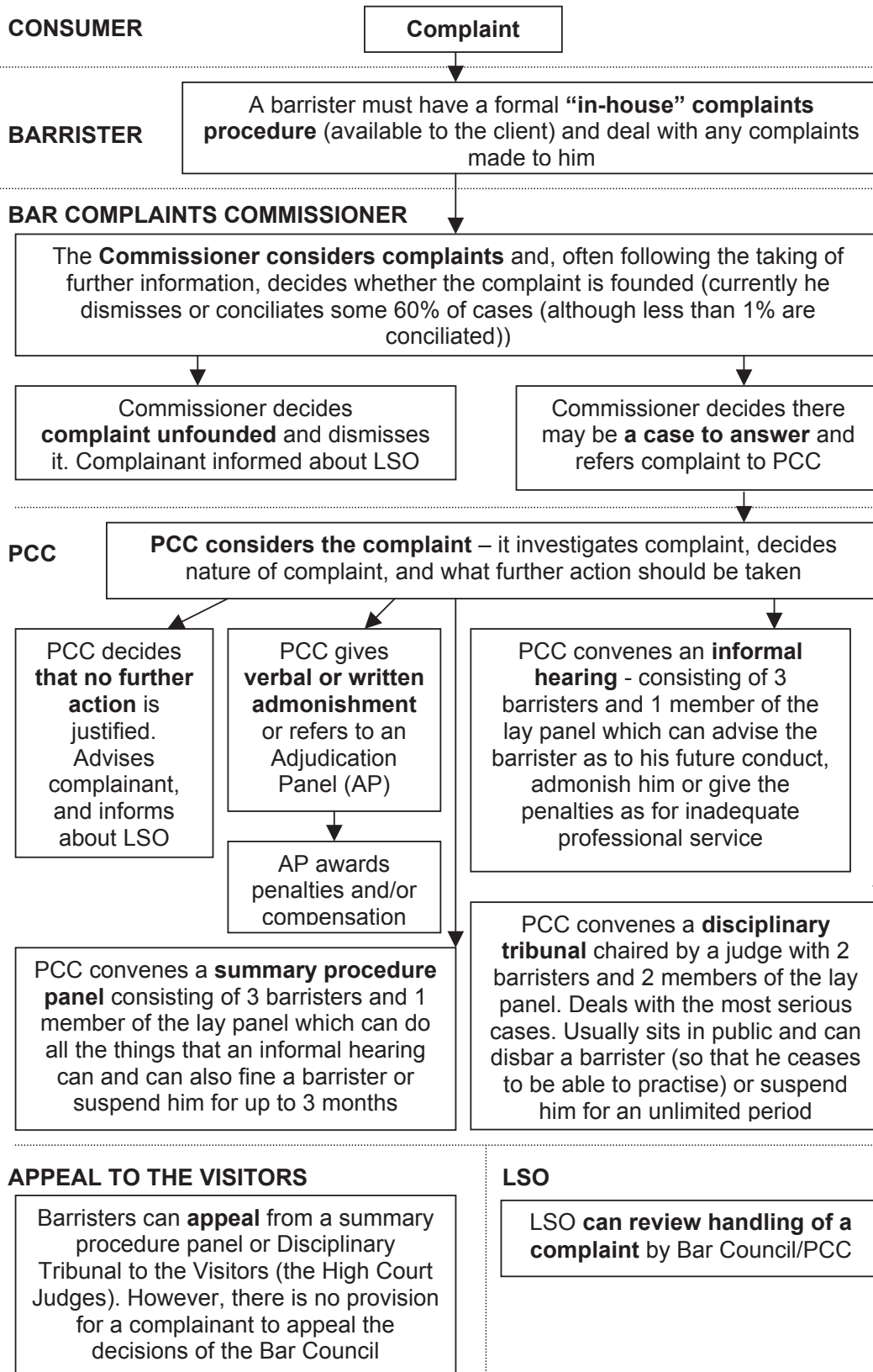
9. If the complaint involves only **inadequate professional service**, the PCC will refer the case to an Adjudication Panel (chaired by the Commissioner, with two barristers and one lay member). The Panel determines whether the complaint is founded and decides what the penalty should be, including any compensation to the complainant.

10. If the complaint involves **professional misconduct**, the PCC can refer the complaint to:-

- ☞ an informal hearing;
- ☞ a summary procedure panel; or
- ☞ a disciplinary tribunal of the four Inns of Court - the Tribunal, administered by the Inns of Court, deals with the most serious cases, and can disbar a barrister, or suspend him for an unlimited period.

Each of the above has a mixture of barrister and lay representation. Professional misconduct matters cannot be subject to an award of compensation, but where any inadequate professional service arises out of a case of misconduct each of the bodies above can sanction or award compensation to the same degree as the Adjudication Panel.

## THE SYSTEM OF COMPLAINTS HANDLING AND DISCIPLINE OF BARRISTERS



11. Barristers can appeal from a summary procedure panel or disciplinary tribunal to the Visitors of the Inns, selected from the ranks of the High Court Judges. There is no provision for a complainant to appeal to the Bar Council against its decisions, although he can refer a complaint to the Legal Services Ombudsman.

### **Other legal bodies**

12. Other providers of legal services, such as legal executives and licensed conveyancers, also have complaints and disciplinary procedures. Where work is being carried out under the supervision of a solicitor there are some overlaps with the OSS system, for example, complaints may be handled by the individual's own professional body and the OSS.

13. **Legal Services Ombudsman (LSO)** – The LSO was established under the Courts and Legal Services Act 1990 and investigates the handling of a complaint by lawyers' professional bodies<sup>17</sup>. If the LSO considers a complaint has not been investigated properly, the Ombudsman can recommend the body review the matter again. The Ombudsman also has the power to investigate the original complaint but to date this has been used infrequently.

14. **Legal Services Complaints Commissioner (LSCC)** – The Access to Justice Act 1999 provides for the Secretary of State to appoint an LSCC in the event of a legal professional body failing to handle complaints effectively and efficiently. The LSCC could be given powers to make recommendations about complaints systems, to set targets for the handling of complaints, to require the body to submit a plan for complaints handling, and to levy fines. In September 2003, it was announced that the current LSO would be appointed on an interim basis to act as LSCC for the Law Society pending consideration of this Review's findings.

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<sup>17</sup> Professional bodies under the LSO's remit are currently the Law Society, the Bar Council, the Chartered Institute of Patent Agents, the Council for Licensed Conveyancers and the Institute for Legal Executives.

## **Other professions**

15. In the financial services sector, consumer complaints and redress (but not compensation on insolvency) are dealt with separately by the Financial Ombudsman Service (FOS), with disciplinary matters resting with the Financial Services Authority. A pattern of behaviour identified by the FOS may result in the FOS making a reference to the FSA for possible regulatory action. Rules set down by the FSA require providers to have in-house complaints handling procedures, which must be followed before a complaint can be made to the FOS. A practitioner or firm can seek judicial review of a FOS decision and a complainant retains the right to pursue his originating complaint through the courts.

16. In the accountancy sector, members/firms are generally required to investigate any complaints received. There are six accountancy bodies which may investigate complaints or other matters coming to their attention which raise an issue of misconduct. However, for all members of the sector, there is within the FRC a single Accountancy Investigation and Discipline Board (AIDB), to hear cases of public interest; other cases continue to be dealt with by the individual accountancy body of the member concerned. The normal channel of reference to the AIDB for public interest cases is from the accountancy body primarily concerned. However, the AIDB can call in cases whether or not they have been referred to it by an accountancy body. In cases of proven misconduct, members/firms may be fined, reprimanded or excluded from membership. Decisions are subject to an appeal procedure operated by a separate Appeals Committee.

17. In the medical profession, complaints are usually made first to the relevant local organisation (e.g. hospital, GP surgery etc). If a complainant is unhappy with how the complaint has been handled by a local NHS organisation, he can apply for an independent review and ultimately put his complaint to the Health

Service Ombudsman. Complaints of a serious nature about an individual doctor can be referred to the General Medical Council (GMC). Anyone can refer a doctor to the GMC but many referrals are made by the organisations which employ or contract them. The GMC's procedures have recently been reviewed but, under the current legislation, the GMC can only take action against a doctor's registration if the doctor has been convicted of a criminal offence; if the doctor is found to have committed serious professional misconduct; if his performance is found to have been seriously deficient; or if the doctor's health makes him unfit to practise. If a doctor is found guilty of serious professional misconduct by the GMC, he can be struck off the register, suspended, have conditions attached to his registration, be admonished, or (exceptionally) no action may be taken. The GMC does not impose fines and cannot award compensation. A doctor can appeal against a decision of the GMC to the High Court. The Council for the Regulation of Healthcare Professionals may refer certain decisions of the GMC to the High Court, if, for example, it considers that the sanction imposed was unduly lenient.

**18. The legal profession in New South Wales** – The Office of the Legal Services Commissioner (OLSC) is the single point of entry for all complaints. While they may in practice do so, there is no requirement for providers of legal services to have considered a complaint before it is considered by the Commissioner. Once a complaint has been received, the OLSC may retain the handling of it, or he may decide to pass it to the relevant professional body. He monitors, and can review, its decisions, or can order a re-investigation. Cases involving potential misconduct are referred to a separate statutory Legal Services Tribunal. The OLSC can reprimand a lawyer, order mediation, refer to costs assessors or the Legal Services Division of the Administrative Decisions Tribunal (ADT). The Tribunal can order compensation, order lawyers to undertake further education, reprimand and fine lawyers, and suspend or strike them off. Appeal lies to the ADT Appeals Panel, but the Supreme Court of New South Wales retains overall jurisdiction.

The OLSC receives operational funding from the state Public Purpose Fund, the cost of which is recouped from those activities it oversees.

### **The choices**

19. As with the regulatory functions discussed in Chapter B, the high level choice rests between taking responsibility for complaints away from the professions (consistent with Model A) or leaving it with the professions, subject to oversight (consistent with Model B). A further choice is in the separation of the handling of complaints from disciplinary matters. Currently discipline is generally removed from the handling of complaints. This distinction is particularly clear in the case of the Solicitors Disciplinary Tribunal, which, while it maintains valuable practitioner input (e.g. by membership on disciplinary panels), is a statutory Tribunal fully independent of the Law Society. However, whatever structure is put in place, there is, in practice, always likely to be an interrelationship between the handling of complaints and the dispensing of discipline.

20. The current systems for dealing with complaints are most closely allied to the structure proposed at Model B. In discussion of the models in Chapter B, some of the advantages and disadvantages of the models were explored. One argument made is that the professional bodies cannot run a system that is, and is perceived to be, fair, since their approach is likely to be profession led, not consumer facing. Model A (which removes the regulatory functions from the professional bodies) clearly separates complaints from the representative influence and, therefore, permits the system to be independent, responsive to consumers and free from capture, and the perception thereof. A feature of a new system could be a single gateway for consumers into the complaints system. A disadvantage could be that it removes responsibility from the professions and may be seen as allowing them to wash their hands of ownership of, or the ability to learn from, complaints.

21. Model B keeps the professional bodies involved in dealing with their own complaints and allows the peer pressure driver on standards to continue; but it suffers from real or perceived lack of independence; and maintains a number of possible avenues for the consumer to follow to achieve redress. Model B+ may mitigate the argument regarding lack of independence because it separates more clearly the regulatory and representative functions of professional bodies. Under both Models B and B+, complaints systems would be subject to oversight by the Regulator who could ensure consistency of redress and establish some precedents on case handling.

22. The New South Wales model may be seen as a way of retaining the single independent gateway of Model A, while keeping the professions closely involved in the handling and decision making process. This can be attractive to both the professional bodies and to the public. The former can see the advantages in public perception of an independent gateway, while the latter are reassured by the presence of an independent mechanism for the sifting of their complaints.

23. A requirement for an in-house complaints handling process at practitioner level would be essential under any model. It would keep the practitioner involved in the system and provide the incentive for them to deal with complaints efficiently and effectively. Failure to comply with decisions could become a regulatory matter.

24. Under any model the regulatory framework can allow a separation of the two functions of complaints and discipline. Under Model A there could be a separate complaints body that would be able to “speak” to the Regulator, where disciplinary functions would lie. This is broadly similar to the system operated in the financial sector, where the Financial Ombudsman Service deals with consumer complaints, but is able to refer serious matters to the Financial Services Authority (FSA) for disciplinary action. Through its Regulatory Decisions Committee, the FSA is able to take a range of

disciplinary measures, from the issue of a public rebuke to the withdrawal of permission to a firm or individual to provide financial services.

25. The extent to which disciplinary functions should be separate from professional bodies is an issue for careful regulatory design, in particular given the need for the process to provide proper safeguards for the practitioner and to be ECHR compliant. Arguably there are merits in arrangements such as the Solicitors Disciplinary Tribunal which are external to, and independent of, the professional bodies (with both lay and practitioner involvement in the Tribunals).

26. As discussed above, in the case of the Financial Reporting Council, all six accountancy bodies have their own arrangements but are to be covered, for important public interest cases, by a single disciplinary board, the Accountancy Investigation and Discipline Board. This raises the issue of the advantages and disadvantages of having one single uniform disciplinary body for all lawyers, either for all disciplinary issues, or solely for the most serious cases.

**Question C1.** Should service complaints (which are consumer centred) be operationally split from professional conduct and disciplinary issues (which are centred on the practitioners and their professional bodies)?

**Question C2.** In connection with complaints, what are the advantages and disadvantages of a) having a uniform complaints organisation, independent of the bodies, similar to the FOS or b) each body remaining responsible for its own complaints? Is the New South Wales example a useful model?

**Question C3.** If you believe that each body should remain responsible for its own complaints, what form of regulatory oversight would you wish to see?

**Question C4.** How do you think that disciplinary arrangements should relate to the underlying practitioner bodies? Is there a case for one single uniform disciplinary body for all lawyers?

## **Funding complaints and disciplinary systems**

27. It is usual for the costs of a complaints system to be borne by the providers of the service (and not the public purse). A regulatory framework will have to be funded sufficiently to enable it to function properly and in a timely fashion but without imposing an undue burden on those required to fund it. The cost of dealing with complaints against providers of services is likely to be passed back to the consumer by the provider by way of increased fees or charges. In the legal services industry, the cost is collected through the practising certificate or annual fees. OSS are in the process of introducing an “end polluter system”, whereby costs will be charged at the end of the complaints process if fault is found. The cost of the LSO is currently funded by the Government through the Department for Constitutional Affairs’ budget. The LSCC will be paid for by the profession(s) on whom it has an effect. The SDT is funded by the Law Society (with revenue from practising certificate fees), but the DCA pays travel and subsistence for lay members.

28. The FOS’s annual budget is subject to approval by the FSA and based upon forecasts of caseload over the coming year. Its funding has two main components:-

- €# A general levy on all firms for the operation of the FOS.
- €# Standard case fees relating to cases brought against the firm and closed by the FOS. They are non-refundable even if no fault is eventually found – a no-fault polluter pays system.

The funding is determined each year through a consultation exercise and forms part of the annual budget. Additionally, a supplement to pay for the establishment of the FOS was levied over the first three years.

29. With the FSA itself, there is no separate funding stream identified for discipline. It is funded from the overall periodic fees levied on financial service providers.

30. The Accountancy Investigation and Disciplinary Board is funded by the individual accountancy professional bodies. The AIDB has power to issue

orders to recover its costs. The main source of funding for the General Medical Council is the annual retention fee charged to registrants.

**Question C5.** What should be the mechanism for funding the handling of complaints?

**Question C6.** What should be the mechanism for funding the handling of disciplinary processes?

## CHAPTER D - GOVERNANCE, ACCOUNTABILITY AND RELATED ISSUES

### Introduction

1. This chapter explores some of the detailed issues about how the new regulatory system might work. The issues covered are:-

- ⌘ The Regulator: board or individual
- ⌘ Board structure and composition
- ⌘ Appointment process and tenure
- ⌘ Independence and qualifications of the Regulator
- ⌘ Accountability mechanisms
- ⌘ The Regulator's duty to consult
- ⌘ Appeals process
- ⌘ Funding issues
- ⌘ Law Officers and the regulatory system.

2. Respondents are requested to consider how their answers to the questions might differ according to the regulatory model chosen (as discussed in Chapter B).

### **The Regulator: board or individual**

3. A regulator may be either an individual or a board. When the utility regulators were first set up in the 1980's following privatisation, single person regulators were common, but the trend now is towards a board. Examples are the Financial Services Authority (FSA) which is controlled by a board led by a Chairman and Chief Executive Officer, and the Financial Reporting Council (FRC), which has a board with a Chairman and Chief Executive Officer who oversee the work of subsidiary boards.

**Question D1.** Should the Regulator be a board or an individual?

## **Board structure and composition**

4. The rest of this chapter assumes that the Regulator is to be a Board, headed by a Chairman and, if thought appropriate, a Chief Executive, together “the leadership” of the Regulator. The Board might include other senior executives employed by the regulatory authority, but it would be appropriate for the majority of the Board to be non-executive directors, where a balance may be struck between those who are legal practitioners and those who are lay members. For example, the National Consumer Council (NCC) recommended that *“the governing bodies of self-regulatory schemes should include a majority of independent representatives – if possible up to 75%”*.<sup>18</sup>

5. The FSA Board’s composition is dictated by the Financial Services and Markets Act 2000 (FSMA). The FSA now has a Chairman, for whom this is his main responsibility, and a full-time Chief Executive. The remaining members of the board are three managing directors and eleven non-executive directors. Some of the non-executives come from the financial services industry and the others from a variety of backgrounds, including public policy institutions and higher education. With the exception of the Deputy Governor (Financial Stability) of the Bank of England, who is ex officio a non-executive director, all were appointed on their own merits.

**Question D2.** What sort of Board should the Regulator have and how should it be constituted? What would be an appropriate split between practitioner involvement and lay content in the Board? As regards the practitioner content, would you favour the inclusion of individuals on their merits, or formal representatives from different parts of the industry?

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<sup>18</sup> ‘Better Business Practice’, NCC, January 2001, p13 and ‘Three Steps to Credible Self-Regulation’ NCC, March 2003, paragraph 5.

## **Appointment process and tenure**

6. Appointment arrangements differ between regulatory models. All the non-executives (except the one ex officio member referred to above) of the board of the FSA are appointed by the Chancellor of the Exchequer, following a Nolan process<sup>19</sup>. In the case of the Financial Reporting Council the Chairman, Deputy Chairman and the three directors representing business, the accountancy profession and investors are appointed by the Secretary of State at the Department of Trade and Industry. All other appointments are made by a nominations committee of the FRC.

7. In the legal services sector, the responsibility for appointing the leadership of the Regulator would be an important power. One proposal is that the power should rest with the judiciary. Another proposal is that it would rest with the Secretary of State who would be required to consult with the judiciary. The remaining appointments might be made in the same manner as for the leadership, or by some other mechanism. One would expect all appointment processes to follow Nolan guidelines.

8. The tenure of appointment is important for continuity and seeing through of changes. One arrangement might be an appointment for a minimum three year term, followed by one possible renewal. A second option might be a five year non-renewable term. A balance is required between autonomy and removal. If the person with power to appoint also has the power to remove the incumbent, there must be clear criteria to protect the Regulator's independence.

**Question D3.** Who should appoint the leadership of the Regulator? With whom should that person consult? How should the appointments of the other directors of the Board be made?

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<sup>19</sup> The Committee on Standards in Public Life (the Nolan Committee) recommended that the seven principles which should underpin public life are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The Office of the Commissioner for Public Appointments followed Nolan in devising a code of practice for Ministerial appointments to public bodies.

**Question D4.** What period should the appointments be for? In what circumstances and by whom could directors be removed?

### **Independence and qualifications of the Regulator**

9. The independence of the Regulator goes to the heart of whether the regulatory system can be seen as free of capture from both governmental and professional interests. There is a good argument, given the important role that the judiciary has historically played, that the leadership of the Regulator should be drawn from the judiciary. Others would argue that the leadership will need to be consumer facing and independent by background from the legal services industry that has to be regulated. It is of interest that the Legal Services Ombudsman, with significant regulatory power in the area of complaints, cannot be a lawyer.

**Question D5.** Having regard to the need for independence both from Government and providers of legal services, what qualities and background would you wish the leadership of the Regulator to possess? Is there anything you believe it would be important for the leadership of the Regulator not to be?

### **Accountability mechanisms**

10. Key accountability lies to Parliament, to Ministers and to the public. Methods include appearances before Select Committees, the laying of annual or other reports and annual general or other public meetings.

11. In the financial services sector, the Chairman and Chief Executive are regularly called to appear before the Treasury Select Committee. The FSA reports annually to the Chancellor and is answerable to him. It publishes an annual report and holds a public meeting on an annual basis which the public can attend.

12. The Legal Services Ombudsman (LSO) is required to make an annual report to the Secretary of State on the manner in which functions have been discharged which is then laid before Parliament. Other reports may be required as the Secretary of State sees fit.

13. The Regulator's position in relation to those being regulated may take the form of, for example, consultation exercises and practitioner representation on the Board rather than strict accountability. Both Models B and B+ envisage a significant element of regulatory power being with practitioner bodies.

**Question D6.** What mechanisms would you propose to ensure the accountability of the Regulator: (1) to Parliament; (2) to Ministers; (3) to public interest groups? Is there anyone else to whom a Regulator for legal services should be accountable and how?

#### **The Regulator's duty to consult**

14. Good practice indicates that a Regulator should carry out appropriate consultation before exercising some or all of its powers. What is appropriate consultation may differ according to the power being exercised. It may go so far as requiring the concurrence of certain consultees. There will also be matters of due process in carrying out the consultation process, for example, whether and how responses to consultation should be published and utilised in making regulatory decisions.

15. In exercising his powers under the Courts and Legal Services Act 1990 to grant or revoke authorisation of a body, or approve rule changes in respect of rights of audience and rights to conduct litigation, the Secretary of State must consult the designated judges (namely the Lord Chief Justice, Master of the Rolls, President of the Family Division and Vice-Chancellor) but also does consult the OFT and the Legal Services Consultative Panel. The Secretary of

State does have the power to call in a rule of his own volition, if he believes it may be anti-competitive. In this case he must consult with all of the above.

16. The Legal Services Consultative Panel is a statutory body set up to provide advice to the Secretary of State on matters relating to the provision of legal services and has a role in education, training and standard setting.

17. The Master of the Rolls can make regulations regarding the practices of the Law Society (e.g. about admissions to the Roll), and in so doing must obtain the concurrence of the Lord Chief Justice and the Secretary of State. The Law Society can make professional rules about the conduct and practice of solicitors, other than those referred to in paragraph 15 above, with the concurrence of the Master of the Rolls. Both of these areas of consultation are set out in the 1974 Solicitors Act.

18. The FSA has a statutory duty to consult with both its practitioner and its consumer panels on the extent to which its policies and practices are consistent with its statutory duties. It must also consult on proposed new rules and take account of and respond to any public representations made to it about the rules. The FSA itself consults on the general levy imposed on all firms.

**Question D7.** What consultation arrangements would you wish to see the Regulator follow before exercising its powers?

### **Appeals process**

19. An effective appeals process forms part of the checks and balances of a regulatory system. An appeals process may simply examine whether processes have been correctly followed, or it may be able to re-open the original case. The LSO for example has the power to do both, but in the main does the former. There is no appeal against the LSO's decisions, only a judicial review of the administrative process. There may also be different

appeal processes dependent on the type of decision, and on whom it rests. For example FOS decisions cannot be appealed. They are binding in law on the firm, but a complainant can take court action if dissatisfied.

20. Appeals against decisions of the Regulatory Decisions Committee of the FSA lie to the Financial Services and Markets Tribunal (known as 'Finsmat'). Appeals on a point of law are referred to the Court of Appeal, and may ultimately be taken to the House of Lords.

21. In the current system of regulation of legal services there is little avenue of appeal from the rule making decisions of the professional bodies, since the rules are subject to approval by oversight regulators. However, judicial review would be available for lack of due process, or reference to OFT if a rule was felt to be anti-competitive. OFT could also challenge a rule on competition grounds.

22. In financial services, appeals against FSA rules go to the OFT or to judicial review. A firm can write to the OFT, objecting to the rule on anti-competitive grounds. Alternatively a firm can put the matter to judicial review if arguing that the rule is unfair or irrational.

23. In the Financial Reporting Council, an appeal against a decision by its rule making oversight board on its statutory functions would be via a judicial review to the High Court.

**Question D8.** To where should the right of appeal against decisions made by the Regulator lie? On what matters should appeal be permitted?

### **Funding issues**

24. How the regulatory system is funded and the mechanism for collection of fees are fundamental, not only to the reality and perception of independence, but also to its ability to meet its regulatory objectives. It is generally the case

that the regulated pay, at least in part, for the regulation, although likely indirectly passing the cost on to the end consumer. But this contribution by the regulatee should not be used to direct or curb the activities of the Regulator.

25. Currently in the legal sector the cost of regulation carried out by the professional bodies themselves is raised on their membership through Practising Certificate or annual fees. In the case of the Council for Licensed Conveyancers, their regulatory functions are funded through licence fees, and the Immigration Services Commissioner is funded through the Home Office, with any receipts being repaid to the Home Office. The cost of the LSO is currently borne by the taxpayer, whereas the Legal Services Complaints Commissioner will be funded by the professional body on whom its powers have been implemented. There are also the “hidden” costs of regulation, which are carried by the taxpayer at large. Examples are the Master of the Rolls’ regulatory functions in regard to the Law Society and the role of the Secretary of State and those with whom he consults in relation to authorised bodies’ rule changes.

26. Funding for the FSA is largely raised by two main fee types. Periodic fees are payable annually by all regulated firms and provide most of the funding; application fees paid by applicants are a contribution to the cost of authorisation or, in the case of an exchange market, recognition.

27. In the Financial Reporting Council, funding is to be split equally into thirds between the professional bodies being regulated, the Secretary of State and the business sector. Following agreement on funding level, the FRC will then divide the total budget and allocate it amongst its boards. However it should be noted that the FRC’s activities go well beyond the regulation of the professional bodies subject to it.

28. Under Model A the Regulator would need to collect the funding as a direct levy on practitioners or their practices, whereas under Model B the front-line

Regulator might be used as the intermediary, who would then recharge it. Under any model the cost will likely be passed on to the end consumer, and any extra cost should therefore be outweighed by benefits to consumers.

29. Under any scheme there needs to be both enforcement remedies should the levy not be paid (e.g. de-recognition of a professional body or removal of an individual's right to practise) and some form of back up funding to ensure that funding is continuous in the event of a default.

30. There are a number of possible formulae to reach a charge rate. Under Model A, possibilities include a straight split across practitioner numbers; a risk based approach either by type of organisational form or by type of service provided; or an income based levy. Possibilities under Model B include a proportionate levy by membership size or a risk based approach based on regulatory weakness.

**Question D9.** This section refers to the funding issues arising from different models. What would be your suggested mechanism for dealing with these issues?

### **Law Officers and the regulatory system**

31. The Law Officers in England and Wales are the Attorney General and the Solicitor General. They are the chief legal advisers to the Government and in certain cases represent the Government in Court. They also carry ministerial responsibility. The Attorney General, in his role as Government Minister, is responsible for the Treasury Solicitor's Department, H.M. Crown Prosecution Service Inspectorate, Customs and Excise Prosecutions Office and the Legal Secretariat to the Law Officers. He also superintends the Director of Public Prosecutions as head of the Crown Prosecution Service, and the Director of the Serious Fraud Office. Both the Attorney General and the Solicitor General are ex officio members of the Bar Council. The Attorney General is leader of the Bar, attends meetings of the Bar Council and usually chairs its Annual

General Meeting. He also receives copies of all disciplinary determinations made on barristers.

**Question D10.** What relationship should there be between the Law Officers, the Regulator and professional bodies with advocacy rights?

## CHAPTER E - REGULATORY GAPS

### Introduction

1. It is clear that the landscape of regulation for legal services is punctuated with gaps, overlaps and anomalies. For example, some service providers are doubly regulated (such as solicitors providing non-incident financial advice, regulated both by the Law Society and the Financial Services Authority). There is a mix of provider and service based regulation: everything done by a solicitor is regulated by virtue of his professional status, whereas service regulation has developed in areas such as immigration and conveyancing. Some services, such as general legal advice, are regulated if provided by, for example, a solicitor or barrister, but are otherwise unregulated. There are only six areas which are regulated (by virtue of their being reserved to those who are appropriately qualified).

#### Regulated

Probate

Immigration

Conveyancing

Notarial functions

Rights to litigate

Rights of audience

#### Unregulated

General legal advice

Will drafting

Employment advice

Claims assessment & management

2. From the unregulated list above, one can see that there are a number of services which most people would regard as legal services, but which are not regulated and can be carried out by the man in the street. The consumer may, therefore, buy such services from providers who are regulated by virtue of their professional status, or from unregulated providers. Included in these services are the writing of wills and the management of claims for personal injury cases. In February 2000, the Government looked into the operation of

claims assessors in the Blackwell Report<sup>20</sup>, but decided to take no further action.

3. It is difficult to prescribe the boundaries of any industry, and there are always questions at the margins, particularly as new activities develop. The FSA faced similar problems in defining financial services. The Financial Services and Markets Act 2000 indicated the broad scope of activities which could fall under the FSA's regulatory net, but provides the Treasury with the powers to require the inclusion of other services by enabling order.

4. It should be noted that certain services which fall outside the regulatory net may be subject to some control, for example, if the provider has a contract with the Legal Services Commission which has audit rights over such providers.

5. An example of the inflexibility of the current regulatory framework is that, when the Government decided that the provision of immigration and asylum advice needed to be regulated, the current system could not accommodate it. Consequently, the Immigration Services Commissioner was set up by the Immigration and Asylum Act 1999. One result of establishing a Commissioner to regulate immigration advisers is that a monopoly of solicitor providers has been avoided and other competent providers in the field may (if registered with the Commissioner) continue to practise.

6. It is generally agreed that it is for Government to decide which types of legal services should be regulated. These are public policy decisions for Ministers, albeit it must be expected that the Regulator would have a need and a right to make his views known. It may be simplistic to say that Government sets policy and regulators carry out the appropriate implementation against set objectives, but this broad split between Government and regulatory roles seems appropriate. Government will have to assess the impact of any proposal, as it does today, and undertake detailed

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<sup>20</sup> The Report of the Lord Chancellor's Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers, February 2000.

analyses of costs and benefits in order to determine where the public interest lies. This may involve considerable work, as is illustrated by the many issues surrounding claims assessors looked at in the Blackwell Report. It might be envisaged also that, whenever Government identifies a new field in the legal services market that might be regulated, a process of consultation with stakeholders and the public would take place and advice would be taken.

7. Whether a service should be regulated or unregulated may be weighed by the advantages and disadvantages of regulation. Some points to be considered are:-

- €# provision of information: regulated services may help bridge the asymmetry of information in cases where there is an informed provider and uninformed consumer;
- €# improved quality: the service may be of poor quality if not regulated;
- €# a level playing field: its absence may drive people out of business because of the burden of regulatory cost and distortions in competition. A level playing field would require that the regulatory burden falls evenly on persons who provide the services, whether they are qualified or not;
- €# cost: in principle, regulation protects the consumer against failure – but regulation is a cost. That cost is likely to be passed on to the end consumer of the service provided;
- €# choice: the difficulty for the consumer lies in making an informed choice, knowing what level of service, in terms of value and quality, he might obtain and whether or not he is protected in any way against a failure in that service. Regulated services should offer greater protection to the consumer, for which they may choose to pay;
- €# access: consumer friendly services, run as commercial concerns, may provide easier and cheaper access to justice to some consumers than might the conventional high street solicitor's firm;
- €# a competitive market: regulation may be seen as an unnecessary restriction in the provision of services in the market place.

**Question E1.** Should the Government have power to determine which legal services should be included in, or removed from, the regulatory framework? What consultation with the Regulator, with the providers of legal services, and with public interest groups, should there be in reaching these decisions?

**Question E2.** What are the main factors one should consider in determining whether a service requires regulation?

8. One objective of this Review is to recommend a framework which could provide the flexibility to bring new services into the regulated area, if deemed necessary. The market in legal services will continue to change (as it did in the immigration field) and new as yet unidentified fields will develop. It is possible, by the same token, that some fields in the future will need deregulation, although to date the industry has seen only the opening up to competition of a regulated service (as in conveyancing), not complete deregulation. For example, Government decided in 2003 that, as part of its programme to modernise the legal services market, it would exercise statutory powers to open up the probate market to new providers. Currently only solicitors, barristers and duly qualified notaries public may make applications for grants of probate, if such work is done for profit.

9. The need is for a framework that is flexible enough to encompass new areas with consistency across the piece. Model A promulgates a service driven approach in which the LSA exercises direct regulatory power, and would therefore be able to encompass different or new services direct, and would not be dependent on existing frontline regulators (i.e. the professional bodies). Further it is likely to be easier to ensure consistency across service type under Model A. A consequence of this model may be heightened pressure on the definition of what a legal service is, or on the identification of categories of legal services to be regulated, in the move away from a provider basis of regulation.

10. Unless Government wanted to give exclusive rights to existing professional bodies, Model B may suffer from its reliance on existing structures, in particular the professional bodies. A new body or bodies would have to be created in the manner of the Immigration Services Commission whenever a service was brought within the regulatory net, with the consequence of further proliferation of bodies. A possible alternative would be that a new service could be attached to an existing purely service regulator.

11. The FSA is an example of a flexible regulator. The Financial Services and Markets Act 2000 does not prescribe the activities to be regulated by the FSA but broadly outlines the areas it may control, leaving it to the Treasury to decide the detail by statutory instrument. If an instrument is made to bring in new areas of activity, part of the FSA's role is to "*...design and implement systems for overseeing business doing these activities once regulation starts*".<sup>21</sup> New areas continue to be added by the Treasury extending the FSA's powers, for example, general insurance services will be under the FSA's remit by 2005.

**Question E3.** What characteristics of the regulatory framework would facilitate the inclusion of new services within the regulatory net, or the exclusion of a service presently included?

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<sup>21</sup> FSA website: Factsheet 2, *Mortgage and general insurance regulation – what's changing?*

## CHAPTER F - ALTERNATIVE BUSINESS STRUCTURES

### Introduction

1. Following the consultation “In the public interest?”<sup>22</sup> the Government expressed its support<sup>23</sup> for the principle of enabling legal services to be provided through alternative business structures. Indeed, as far back as 1990<sup>24</sup>, the Government of the day had paved the way by removing the main statutory barriers to the formation of alternative business structures.

2. There are constraints on the forms of business structures lawyers can set up to deliver their services. These are spelt out in the Overview. The most easily recognisable organisational form which dominates the provision of legal services to consumers is the high street solicitor, practising either on his own or in partnership with other solicitors. Nobody other than a solicitor (or a registered European lawyer or registered foreign lawyer) may be a partner, director or principal of a legal practice, in the sense of managing the business. (For the rest of this chapter, reference will be made to the term “Manager” to denote such persons). And nobody other than solicitors who manage the practice may own it.

3. Depending on the client’s needs, a solicitor could either engage the services of another professional in the same field, say a barrister, for his client, or refer him to a completely different professional such as an accountant. And in some cases, the referral may be to someone who is not a member of any professional body.

4. This chapter concentrates on examining how best new business structures might provide legal services, while still subject to regulation within a framework which protects the public interest by upholding the core regulatory objectives discussed in Chapter A.

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<sup>22</sup> ‘*In the public interest?*’ Lord Chancellor’s Department, July 2002

<sup>23</sup> ‘*Competition and regulation in the legal services market*’, Department for Constitutional Affairs, July 2003

<sup>24</sup> Section 66, Courts and Legal Services Act 1990

5. At the heart of this chapter is a distinction that needs to be made between Legal Disciplinary Practices (LDPs) and Multi-Disciplinary Practices (MDPs)

6. Legal Disciplinary Practices are law practices, which bring together lawyers from different professional bodies, for example solicitors and barristers working on an equal footing, to provide legal services to third parties. They may permit others (e.g. HR professionals, accountants) to be Managers, but these others are there to enhance the services of the law practice, not to provide other services to the public.

7. Multi-Disciplinary Practices are practices which bring together lawyers and other professionals (e.g. accountants, chartered surveyors) to provide legal and other professional services to third parties. They do not solely provide legal services; indeed legal services might be a small part of their work.

8. In the case of both LDPs and MDPs it would be possible to permit a split between those who own the practice and those who manage it.

9. Thus, under the heading of “Alternative Business Structures”, there is a matrix of possibilities:-

	<b>Managers and owners the same</b>	<b>Managers and owners different</b>
<b>LDPs</b>	A Practice solely offering legal services, owned by its Managers.	A Practice solely offering legal services, not exclusively owned by its Managers.
<b>MDPs</b>	A Practice offering legal and other services, owned by its Managers.	A Practice offering legal and other services, not exclusively owned by its Managers.

10. It is important in the debate on alternative business structures to consider each of the four boxes. Many lawyers who argue against alternative business structures do so by raising points against MDPs, but do not address the issue of lawyers working together in LDPs.

11. The next section deals with issues raised by LDPs. Thereafter the additional issues raised by MDPs are considered. As discussed in the chapter, these alternative business structures would require changes to the practice rules of the major professional bodies.

### **Legal Disciplinary Practices (LDPs)**

12. Under the LDP concept, members of the legal profession from allied disciplines would combine to offer legal services to the public. Thus, a barrister, a solicitor and a conveyancer could form a business together, offering legal services.

13. Within the LDP, they might have as a Manager another person, such as an IT expert, or a Human Resources specialist, to help take forward the business. The key point would be that the business would remain the provision of legal services to the public.

14. In permitting individuals other than lawyers to be Managers (as defined), LDPs would reflect the current reality, certainly in large practices where high quality individuals from other professions already play an important role in managing the legal practice, often sitting on the Executive Committee of such practices.

15. In the existing conventional law firm model, those who manage the practice also own it. But another dimension to LDPs is the possibility that ownership of the business is separated from its management. In other words, those who manage the various forms of practice described above, and have the responsibility for the provision of legal services to consumers, are separate from those who own the business, who may not be from the legal profession. Such owners might for example be investors in the business, but only have a passive role in the day to day running of the business. Thus in the LDP model the legal practice might in fact be owned by another firm, such

as a bank or an affinity group, which might be unconnected with the business of legal services.

16. This would not be remarkable in the world of commerce, where the distinction between the ownership of a business and the management of it is well understood. And the focus of regulation too, generally, is on the running of a business, rather than on its ownership, although there remains an issue about who would be “fit to own” an LDP. By this is meant the criteria that a regulator might consider relevant in determining whether a firm offering legal services should be owned or controlled by a particular person or group of persons - for example, whether the would-be owners were of good repute; free of criminal convictions; solvent and trustworthy.

17. The notion of lawyers working for *non-legal* owners who are unconnected with the provision of legal services is not new; indeed the practice is quite commonplace. Approximately 20% of all solicitors, and 21% of barristers, work outside of private practice as employed lawyers in organisations such as large PLCs, local authorities, trade unions or accounting firms. In some of these organisations lawyers sit on the board of directors (or its equivalent).

18. There is, however, one important distinction in providing legal services as employed lawyers within a non-legal business, and offering legal services within a private legal practice. This distinction is that, apart from a few exceptions, the former are not permitted to act<sup>25</sup> for anyone other than their employer. For example, they cannot usually provide legal advice to customers of their employer, or to members of the public.

19. The various models set out in this chapter envisage that employed lawyers would be providing legal services directly to clients of their employer, i.e. members of the public. For many consumers, who engage only once or twice in a lifetime with the legal services market, typically in a conveyancing

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<sup>25</sup> E.g. Solicitors Practice Rule 4. See The Law Society, *The Guide to the Professional Conduct of Solicitors* and Paragraph 502, Part V, Bar's *Code of Conduct*

transaction, the possibility of a wider range, and new forms, of legal service provision could hold potential benefits in terms of quality of service and lower costs.

20. The alternative business structures being considered in the Review could help to liberalise further the conveyancing market. Given the commoditised nature of many conveyancing transactions, LDPs with a range of skilled legal professionals, including conveyancing specialists and property lawyers, have potential in this area. As with other services, there would have to be a counterweight of an appropriate degree of regulation to afford the necessary degree of protection for consumers. These are considered further below.

21. One important area where an LDP model already works to the benefit of the community is in the not-for-profit sector, in particular the concept of Law Centres. These Law Centres provide a free and independent professional service to people who live or work in the catchment areas. They are funded mainly by grants from various sources and can employ solicitors, para-legals and barristers. Those funding the work of the Centre (such as local authorities) are not involved in the day to day management of the operations. And those managing its operations are not always lawyers, but skilled business managers.

22. A key exception to the regulatory rules is that despite not being a lawyer-owned entity, subject to certain conditions, solicitors (and those whom they supervise), barristers and other legally qualified (and unqualified) personnel employed by a Law Centre are permitted to deal directly with members of the public.

23. Under the professional rules of the Bar, barristers who are employed within a legal advice centre, defined either as a Law Centre which falls under the Law Society's exceptions, or a centre designated by the Bar Council, may provide legal services to the public. Self-employed barristers are also permitted to provide occasional services for such centres on a pro bono basis.

24. Although there are certain exceptions in terms of compliance with professional rules, safeguards remain in place for the consumer, notably that:-

- (i) a solicitor of suitable standing has to be responsible for the work of para-legals or non-lawyers in the Law Centre;
- (ii) clients can complain to the Office for the Supervision of Solicitors (OSS) about legal services provided by the Centre, where that work was done by, or under the supervision of, a solicitor;
- (iii) barristers providing services at Law Centres are subject to the professional rules of the Bar, and clients can complain directly to the Bar Council about services provided by a barrister there.

25. A lawyer from a member state of the EU<sup>26</sup> has the right to practise law in the non-reserved areas in the UK, and a lawyer from a non-EU country can register with the Law Society as a Registered Foreign Lawyer, and have full partnership status in UK firms. Thus, firms of solicitors in England and Wales, which have foreign lawyers working as full partners, could arguably also be regarded as a form of LDP. One is therefore left with the situation that while a lawyer from, say, the United States can be a partner (without requalifying) in an English firm of solicitors, an English barrister cannot.

26. Arguments in favour of LDPs include the view that they could potentially attract new capital and fresh ideas into the provision of legal services; increase the choice of legal firms for which lawyers could work; and increase the choice for consumers. It is also argued that, with increasing specialisation in the legal field, there are likely to be cost efficiencies for the customer in that a range of legal professionals suited to meeting a customer's requirements would be under the same roof, thus avoiding unnecessary transactional costs in lawyer selection.

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<sup>26</sup> Under the Establishment of Lawyers Directive 98/5/EC, a lawyer from a member state of the EU has the right to practise law, under their home title, in another member state, subject to registration with, and regulation by, the host State's Bar or Law Society.

27. The arguments against include concerns that there might be a reduction in consumer choice, particularly in rural areas, if new entrants concentrated on the best pieces of business; also, that allowing non-lawyers to be a manager in a legal practice raises issues of ethics; and that, unless there are proper safeguards about fitness to give advice, they might be difficult to regulate.

28. In judging the arguments for and against, it should be recognised that, as noted above, a form of LDPs does actually exist in the Law Centres. They do handle client monies. They do permit lawyers from different professions to work and to act as Managers together. They do allow a split between ownership and management. Proponents point to the fact that in many cases these legal practices provide excellent service to their communities; opponents argue that allowing such practices in the commercial sector, with the introduction of the profit motive, would change the ethic of such practices to the detriment of the consumer.

### **Regulatory considerations for LDPs**

29. As stated in Chapter B, the regulatory framework needs to be capable of delivering the five functions of regulation which are generally regarded as important to the regulation of the profession, covering:-

- ☞ entry standards and training
- ☞ rule making
- ☞ the monitoring and enforcement of professional standards
- ☞ complaints
- ☞ discipline.

30. Under the current arrangements, the regulatory body for each legal profession is directly able to ensure delivery of all five key functions of regulation by directly enforcing its rules on, for example, the individual solicitor or barrister.

31. In the case of LDPs, the focus would be more diffuse. On the one hand it would be the case that the LDP would include a discrete group of legal professionals from broadly similar professions, with most likely a shared ethos. But to avoid mismatches of different professional rules, and because some of the Managers might not belong to any professional body, it would be necessary to also focus regulation at the level of the business, and not just on the key individuals within it. The possible regulatory bodies to do this are discussed in Chapter B, the main choice being either a new Regulator (Model A) or through a designated professional body (Model B), which would become the “Lead Regulator”.

32. While it would be for the regulatory authority to set rules it considers appropriate, we anticipate that the focus of regulation would primarily be on the business and those managing it, rather than its owners (where they are not involved in the management of the business). But, as noted in paragraph 16 above, fitness for ownership may be a factor that the regulatory authority might take into consideration. The Regulator would also need to consider conflict of interest issues, for example, where in acting for a client a lawyer faced issues which affected the interests of the owners of the business.

**Question F1.** Is there potential demand, from users and providers, for Legal Disciplinary Practices (LDPs)?

**Question F2.** How do you see the advantages and disadvantages of LDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

**Question F3.** What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any, would you wish to see imposed on LDPs in the area of ownership (i.e. moving from the top left hand box of the matrix in paragraph 9 to the top right)?

**Question F4.** Is there any reason why the regulatory system should distinguish between practices in the commercial and the not-for-profit sector?

**Question F5.** What body would you expect to regulate LDPs? What, if any, additional safeguards do you believe need to be put in place to protect the consumer?

### **Multi – Disciplinary Practices (MDPs)**

33. A further set of issues arises from the more commonly discussed Multi – Disciplinary Practice (MDP). By this is meant a business structure having as Managers at least one lawyer and one non-legal professional, which provides legal services to the public, as well as the services of another profession. Thus, for example, a lawyer and an accountant could be in a practice together to provide legal and accounting services to its clients. The practice could be structured as a partnership, incorporated firm, or a network of affiliated firms or practices. Something akin to a multi-disciplinary approach already exists on the high street as a result of market innovation to accommodate customer needs through a variety of arrangements such as referrals. But these are working arrangements between different legal entities, rather than the creation of one legal entity. It should also be noted that working links have been forged between large international accounting firms and their associated legal practices.

34. As with LDPs, a variant of MDP could be the participation of a third party who might not be a member of any profession at all, but be involved by virtue of his business acumen, a contribution of capital or personal contacts.

35. As with LDPs, it would also be possible for ownership of an MDP business to be separate from management of the business. But this does raise further regulatory issues which are considered below.

36. As identified earlier, many solicitors, barristers and other legal professionals manage to work together outside of private practice as employed lawyers, and also work alongside professionals from different disciplines, such as accountancy, without undue problems. The fact that the owners of these organisations feel the need to employ a *range* of

professionals (and non-professionals) to deliver their objectives indicates that one market solution to meeting corporate needs is, in effect, to create a form of multi-disciplinary practice in-house.

37. Among the advantages of MDPs is that they might bring about greater choice, for both consumer and professional, through the creation of new types of practice which would be innovative: for example they could provide for certain transactions to be delivered through “one-stop” shops. Thus the different professionals within the MDP could complement each other’s skills, and their combined skills might be harnessed to the benefit of the customer at lower cost than were the customer to engage these professionals separately.

38. Set against these are also some disadvantages. These include concerns as to how MDPs could be regulated, conflicts of interest and whether ethical and professional standards shared by any single profession would be compromised when working with a diverse range of professionals (and non-professionals).

39. In the light of recent developments in corporate business, both in the UK and overseas, concerns have been raised regarding corporate governance and the importance of independence and objectivity in professional activities. The trend of corporate governance is towards greater disclosure by professionals of possible conflicts leading, for example, to much greater disclosure by auditors of non-audit work done on behalf of clients.

### **Regulatory issues specific to MDPs**

40. There are some issues which are likely to be of specific relevance to MDPs, which the regulatory framework would need to address.

41. Firstly, and probably most importantly, there is the issue of **regulatory reach**: how could a legal services regulator exercise power over people who are not lawyers, nor supervised by lawyers? With MDPs, the regulatory focus would be diffused since there would be the involvement of members of other

professions, who might have different codes of practice in areas such as client handling.

42. Secondly, the primacy of **ethical considerations** may vary significantly between different professions: for example the independence of legal advice could be compromised by the lawyer's financial interest in the MDP when, say, it involved a transaction which his other non-legal partners had arranged for the client.

43. A related inhibitor to the development of MDPs is the issue of **legal professional privilege** (LPP). In essence, LPP means that certain communications between a client and legal advisor in the context of obtaining legal advice or assistance are protected from disclosure, even in legal proceedings. This feature is virtually unique to the legal profession and is regarded as a cornerstone of the basis of the lawyer-client relationship, to a degree that is greater than in comparable professions.

44. The difficulty facing an MDP would be a lack of clarity for its clients as to whether LPP applied only in respect of legal matters discussed with a legal professional (who was bound by the rules regarding LPP), or whether it applied equally to all members of the MDP. Non-legal professionals may not be covered by these same rules; and in certain cases have quite different codes: for example auditors in the accountancy profession have a duty to prepare an objective report on the accounts of a business. Such objectivity could be compromised were it to be fettered by considerations of having to treat certain information as privileged.

45. It may be argued that the client could be persuaded to waive his legal professional privilege in return for the greater advantages of receiving the benefits of the expertise of the non-legal professionals in the MDP firm. But for the ordinary man in the street such a choice is unlikely to be an informed choice.

46. It is relevant that, following consultation, the Government concluded in July 2003<sup>27</sup> that there should be no alteration to the scope of legal professional privilege, mainly on the grounds that the drawbacks in terms of public interest would outweigh the potential benefits.

### **Regulating MDPs**

47. MDPs would be in the business of offering a mixture of legal and non-legal services. There is no certainty that legal services would necessarily be the primary business. The issue of lawyer control is complicated by the fact that both in the managing of the business, and its ownership, there could be a significant non-lawyer element, bound by different professional rules (or none at all) and with an interest in promoting a variety of services other than law.

48. One option for MDPs might be to insist that legal services are the primary business of the MDP. Non-lawyers would be free to become Managers or owners of the business, provided that lawyers were in control of managing the business.

49. The advantage of having lawyers in control is that it is likely to be a more certain way of ensuring that the fundamental attributes of the legal profession are maintained. With lawyers in control, the regulatory reach would be relatively direct because it would not rely on considerations of other non-legal professionals.

50. Regulating the business entity (see paragraph 31) could also be a solution to the problem of lawyers having to discipline non-lawyers. Short of punishing the business entity, for example, by withdrawing its licence/authorisation to practice, there is a risk that some non-lawyers, especially non-professionals, might feel themselves to be immune from discipline. This might also create the perverse incentive for the firm to leave all matters of dubious ethical integrity to the non-lawyer furthest from the scope of discipline, safe in the knowledge that even if he or she were to be “caught”, there would be no disciplinary consequences. To meet these issues regulation of the firm (e.g.

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<sup>27</sup> *‘Competition and regulation in the legal services market’*, DCA, July 2003.

by licence/authorisation), as well as regulation of the individual, would be by one of the regulatory bodies discussed in Chapter B.

51. One drawback to insisting that lawyers are in control is likely to be that other professionals would find it preferable to have de facto multi-disciplinary alliances, such as formalised referral arrangements, rather than be part of a business structure where lawyers predominated. Indeed, some professions may not permit lawyers to be in control. Under the EU's 8<sup>th</sup> Company Law Directive, for example, accounting firms which carry out statutory audits are required to be under the majority control of "qualified individuals" which is effectively defined as various recognised types of accountants, e.g. Chartered Accountants.

52. The alternative to having lawyers in control would be to have a more open structure where lawyers and legal services were only an equal or even a minority component of a firm which offered multiple services, such as accounting, legal and estate agency. The obvious challenge in this situation would be to ensure that the essential principles underpinning the legal profession, for example, independence and legal privilege, were maintained.

53. One way of doing this might be to have collaborative arrangements between the regulator for the legal profession and other regulators. Where a "lead regulator" is established, such arrangements might be more easily facilitated. This situation would not be entirely without precedent: at present, for example, if a firm of solicitors were to offer a significant range of financial services to their clients, the Financial Services Authority would be the regulator for this aspect of the practice's business. But "collaborative regulation" is unlikely to be feasible if there were not a regulatory body of equivalent standing. One possibility, therefore, might be to limit the professions with whom lawyers may establish MDPs to those professions which were governed by some form of regulatory underpinning, which the legal services regulator recognised as sufficiently strong and with which it would be willing to do business.

54. Another option might be to seek to protect the MDP's legal professionals' independence or ability to adhere to their profession's rules from interference by non-lawyers in the MDP. This would rely on the latter agreeing to observe the "ring-fence" around lawyers. But ultimately it begs the question of how binding such agreements would be.

55. In all these options, for a regulator to reach the sort of diverse mix of professionals (or non-professionals) who would be likely to be involved in running an MDP business, it would be necessary for it to have authority over the business structure.

**Question F6.** Is there potential demand, from users and providers, for MDPs?

**Question F7.** How do you see the advantages and disadvantages of MDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

**Question F8.** What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership (i.e. moving from the bottom left hand box of the matrix in paragraph 9 to the bottom right)?

**Question F9.** What body would you expect to regulate MDPs? Would your answer be different if lawyers were not in a majority? What, if any, additional safeguards do you believe need to be put in place to protect the consumer, and to ensure respect for independence and integrity in the exercise of professional judgment?

### **International dimensions**

56. Some jurisdictions, such as the District of Columbia in the USA, New South Wales in Australia, and certain European countries, e.g. Germany, permit the formation of alternative business structures but they do so with fairly strict limitations. Many jurisdictions though are wary about permitting

them. The decision making body of the American Bar Association (ABA), for example, rejected the recommendations of one of its own Commissions<sup>28</sup> to relax the ban on MDPs. A number of City law firms already operate as international businesses and enjoy a significant standing with large global clients. Some clients might be concerned if legal services in England and Wales were to be delivered other than through conventional business structures; others might be attracted to finding a variety of professional services under one roof. But in any event MDPs, if they were introduced, would be a permitted business structure, not a mandatory one. Firms wishing to continue with their present arrangements would, of course, remain free to do so.

**Question F10.** What are the international implications for the legal professions in England and Wales if legal services were allowed to be delivered through alternative business structures?

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<sup>28</sup> ABA Commission on Multidisciplinary Practice, established August 1998; recommendations rejected by a wide margin by ABA House of Delegates in July 2000. The Commission was then disbanded.

## HOW TO RESPOND

Responses should be with us by **noon on Friday 4 June 2004**.

We would be grateful if you could send your response to us by e-mail, in MS Word. The e-mail address is:

**regreviewresponse@dca.gsi.gov.uk**

If you wish to send your response by post, please send it to:-

Mrs Susan Samuel

Review of the Regulatory Framework for Legal Services

2<sup>nd</sup> floor

Selborne House

54-60 Victoria Street

London SW1E 6QW

Tel: 020 7210 1454

Fax: 020 7210 2664

If you have any queries or complaints about this document, please contact Mrs Samuel.

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The Reviewer may wish to publish responses to this consultation paper in due course. **Please ensure your response is marked clearly if you wish your response or name to be kept confidential.**

Further copies of this consultation paper can be obtained from Mrs Samuel at the above address or by phoning 020 7210 1454 or 020 7210 0695.

The consultation paper is also available on the Review website at:-

[www.legal-services-review.org.uk](http://www.legal-services-review.org.uk)

*Editorial Note: Wherever "he" appears in the text, both "he" and "she" should be read.*

*The photograph on the front cover is by courtesy of the Corporation of London.*



