

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

FINAL REPORT

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

Contents

	Page
Foreword: -----	1
Chapter A: - The Objectives and Principles of a Regulatory Framework for Legal Services -----	14
Chapter B: - Regulatory Models -----	24
Chapter C: - Complaints and Discipline -----	51
Chapter D: - Governance, Accountability and Other Related Issues -----	81
Chapter E: - Regulatory Gaps -----	92
Chapter F: - Alternative Business Structures -----	105
Appendix 1: - List of Respondents -----	140
Appendix 2: - Slaughter and May Advice -----	146
Appendix 3: - Ernst & Young Report -----	152
Notes about the Review: -----	163

FOREWORD

To the Secretary of State for Constitutional Affairs

1. I have pleasure in submitting my Review of the Regulatory Framework for Legal Services in England and Wales.

2. I was appointed on 24th July 2003 and 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.”

3. This Review follows closely the order of the issues raised in the Consultation Paper that I published in March 2004¹. That paper raised a number of questions, and behind it lay three particular concerns:-

i) a concern about the current regulatory framework 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legal services market’ the Department for Constitutional Affairs concluded that the current regulatory framework was *“outdated, inflexible, over-complex and insufficiently accountable or transparent”*. Nothing that I learnt during the 18 month period of my Review has caused me to doubt the broad validity of the Government’s conclusion. The current system is flawed. In part the failings arise because the governance structures of the main front-

¹ Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper, 8th March 2004

line professional bodies are inappropriate for the regulatory tasks they face. A further cause is the over-complex and inconsistent system of oversight regulatory arrangements for existing front-line regulatory bodies: the Law Society is overseen in many of its functions by the Master of the Rolls; much of the Bar Council's work and that of the Council for Licensed Conveyancers and the Institute of Legal Executives by the Department for Constitutional Affairs; the Office of the Immigration Services Commissioner by the Home Office; the Chartered Institute of Patent Agents by the Department of Trade and Industry; and the Faculty Office² by the Archbishop of Canterbury. There are no clear objectives and principles which underlie this regulatory system; and the system has insufficient regard to the interests of consumers. Reforms have been piecemeal, often adding to the list of inconsistencies. The complexity and lack of consistency has caused some to refer to the current system as a maze³.

ii) a concern about current complaints systems There is considerable concern about how consumer complaints are dealt with. The concern arises at a number of levels: at an operating level, there is an issue about the efficiency with which the systems are run; at an oversight level, there is a concern about the overlapping powers of the oversight bodies; and at a level of principle, there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of the responses to the Consultation Paper expressed dissatisfaction with the current arrangements.

iii) a concern about the restrictive nature of current business structures The business structures through which legal services are delivered to the public have changed little over a considerable period. The

² The Faculty Office is the front-line Regulator for notaries.

³ Ann Abraham, in the Annual Report of the Legal Services Ombudsman 2001/02 entitled: The Regulatory Maze

most easily recognisable structure is the high street solicitor, practising either on his own or in partnership with other solicitors. But business practices have changed. In particular the skills necessary to run a modern legal practice have developed; but whilst those with finance or IT skills may sit on the management committee of a legal firm, they are not permitted to be principals in the business. There is concern also about whether the restrictive practices of the main legal professional bodies can still be justified, in particular those which prevent different types of lawyers working together on an equal footing. There is pressure for change from those who represent consumer interests, but also from many in the legal profession, particularly the Law Society who have made a strong case for liberalisation of law practices.

4. There is a relationship between the concerns set out above. For example, one of the difficulties which stands in the way of new business structures is that the current framework does not easily allow regulation of such structures. In the past, the Government has declared itself in favour of new business structures; and, as noted, one of the aims of this Review has been to propose an appropriate regulatory framework.

5. The Terms of Reference include the word 'independent' twice. I infer that the first reference calls for independence of the legal profession from outside influences, particularly from Government; and that the second reference calls for a regulatory framework which is independent in representing the public and consumer interest of those being regulated. Replies to the Consultation Paper from representatives of the legal profession have drawn my attention most often to the first reference. I judge that both are important.

6. In line with the Terms of Reference the Review seeks a regulatory approach to encourage competition. The grain of Government legislation over the years has been in the direction of encouraging greater competition

between different types of lawyer. The Administration of Justice Act 1985 permitted licensed conveyancers to compete with solicitors in the conveyancing market. The Courts and Legal Services Act 1990 enabled solicitors to acquire rights of audience in higher courts, previously the preserve of members of the Bar; and since then two other professional bodies have been allowed to grant limited rights of audience to their members. Today there are around 2000 solicitors with higher court rights; and a significant amount of advocacy, primarily in the lower courts but increasingly in the higher courts, is done by solicitors. At the same time there are a large number of barristers, such as those who advise on tax or conveyancing issues, whose job is similar to many solicitors. The cultures of the Bar Council and Law Society are markedly different; but whilst they may remain separate professional bodies they cannot be regarded as separate professions.

7. Against this background, a number of observers have wondered whether I might recommend that there should be fusion between the Bar Council and the Law Society. There would be advantage in such a move in areas such as education, and it would ease some of the existing regulatory and competition issues. But I do not make such a recommendation in this Review, because I regard issues of mergers between overlapping professional bodies, or for that matter de-mergers within existing professional bodies, as ones for the bodies themselves and their members. The regulatory framework needs to be able to accommodate either merger or de-merger. It needs to recognise too that, whilst the Bar Council and Law Society account for a significant part of the legal services industry, there are other bodies that the system needs to accommodate, in particular the Institute of Legal Executives, the Office of the Immigration Services Commissioner, the Council for Licensed Conveyancers, the Chartered Institute of Patent Agents, the Institute of Trade Mark Attorneys and the Faculty Office. I note that the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys co-operate on a variety of issues;

they submitted a joint response to the Consultation Paper and it cannot be ruled out that at some point they might choose to merge their organisations.

8. If this Review favours greater competition between lawyers, it also seeks to permit competition between different types of economic units: for example, between sole practitioners, lawyers working in chambers, unlimited partnerships, limited liability partnerships and companies. There are advantages and disadvantages in each type of economic unit. I do not believe that the public and consumer interest are always better served by one type of economic unit as against another. The Review favours a regulatory framework which permits a high degree of choice: choice both for the consumer in where he goes for legal services, and for the lawyer in the type of economic unit he works for.

9. In this debate it is important to distinguish between facilitative and mandatory proposals. The key recommendations in this Review in the area of business structures are intended to be facilitative. Whilst I accept that sole practitioner status, when combined with the chambers system, has merit as a way to provide advocacy services, and I accept also that the partnership model adopted by many solicitors has significant strengths, I do not accept that other structures for the provision of legal services should not be permitted.

10. Whilst it is plain that there is competition between lawyers within the current system, and the proposals in this Review are intended to increase this, I have learnt that certain lawyers dislike being described as part of an industry. They see a conflict between lawyers as professionals and lawyers as business people. The idea that there is a major conflict is in my view misplaced. Access to justice requires not only that the legal advice given is sound, but also the presence of the business skills necessary to provide a cost-effective service in a consumer-friendly way. In the Consumers'

Association's summary⁴ of a survey of those dissatisfied with legal services it comments: *"The biggest cause of dissatisfaction was delay. According to one respondent 'it would have been quicker to do a course in conveyancing'. Cost also ranked highly: 'We feel that we were misled as to costs from the very start.' "* Research shows that complaints arise as much from poor business service as from poor legal advice. If certain lawyers continue to reject the notion that they are in business, such complaints will continue until they are indeed out of business.

11. The issue of costs is an important one: high quality legal services are important to society, but of limited value if available only to the very rich or those paid for by the State. In developing business systems to minimise costs whilst maintaining high standards, there is no reason why lawyers should not work alongside those with other skills, for example in finance or IT; and the Review makes recommendations designed to facilitate this. In proposing reforms designed to encourage cost-effective practices, there is no suggestion of diminution in standards, either in the quality of legal advice provided or in the ethical standards of practitioners.

12. The current regulatory regime incorporates some strands of regulation which are based around professional bodies, and some which are based around particular services. Whilst it would be intellectually tidy to move strongly towards either a professionally based regulatory system, or one which is service based, it would come at a price and some degree of hybridity is likely to remain. The change in regulatory emphasis which is proposed in this Review is a shift in emphasis towards regulation of the economic unit and away from regulation of individual lawyers. This is particularly relevant for the regulation of new business practices which bring together lawyers from different backgrounds; but it also has relevance for some existing legal

⁴ *Regulating Legal Services, Point of Law* Campaign Briefing, Which? October 2004

practices, where regulatory emphasis needs to be on practice management and systems as much as on individuals.

13. In the Department for Constitutional Affairs' statement dated 26th May 2004⁵ on the issue of QCs, the Government proposed an interim arrangement for the appointment of QCs. It also proposed a long-term market study to assess how *“to help consumers choose the best legal services for themselves”*. The Government's statement went on to say: *“The interim scheme will then be reviewed to see if it is consistent with the Clementi recommendations and any results of the market study.”* This Review has not inquired into the QC system; but it does propose a regulatory framework in which the Regulator is likely to take an interest in how the system operates. Given the objectives of the Regulator discussed in Chapter A, the Regulator is likely to want to understand what the 'kitemark' is awarded for; the fairness of the system, recently amended, under which candidates are selected; why, in a profession which stresses the importance of independence, the kitemark is finally bestowed by the State rather than the profession itself; and whether the system as a whole operates in the public interest.

14. The issues which this Review has inquired into are raised using the same chapter headings from A to F as in the Consultation Paper.

15. **Chapter A** proposes that the first step in defining the regulatory regime should be to make clear what the objectives of the regime are. The Chapter proposes six primary objectives for the regime. These would be the objectives against which the Regulator must determine the appropriate regulatory action; and against which it would be held accountable. The Chapter also looks at legal precepts or principles, such as a lawyer's duty to the client, which should be incorporated within the regulatory arrangements.

⁵ DCA press release, 26th May 2004

16. **Chapter B** addresses the key architectural issues around the design of a regulatory system which meets the Terms of Reference; and it looks at the arguments around the different models set out in the Consultation Paper. It also looks at the costs of different models. The Chapter concludes that regulatory functions are best dealt with by a model based on what the Consultation Paper referred to as Model B+. This model provides for the setting up of an oversight regulator, the Legal Services Board (LSB), vested with regulatory powers which it would delegate to recognised front-line bodies, where it was satisfied as to their competence and that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, had been made. The Chapter discusses the current governance arrangements of the Law Society and the Bar Council and concludes that they are inappropriate for the regulatory tasks they face.

17. **Chapter C** concentrates on complaints mechanisms. It examines the problems which exist with the current system and possible solutions. The Chapter concludes that for reasons of independence, simplicity, consistency and flexibility a single independent complaints body for all consumer complaints should be adopted. The Office for Legal Complaints (OLC) would be independent in dealing with individual complaints but would need to work closely with the LSB to ensure that regulatory oversight served to minimise complaints at source. The OLC would be part of a single regulatory framework, with the LSB at its head.

18. Issues about professional conduct, including disciplinary action, would be handed down to the front-line bodies. The Chapter's overall conclusion is that the disciplinary systems of the front-line regulators work reasonably well and could be left, subject to a small number of changes, broadly as they are.

19. **Chapter D** focuses on the governance and accountability issues around the LSB. It proposes a Board of between 12 and 16 members with both

Chairman and Chief Executive being non-lawyers. It makes proposals for how such appointments should be made. It sets out arrangements for consultation with relevant parties and explains how the LSB might be accountable to Parliament, to Ministers, to the public and to practitioners. It comments on the process for appeal from decisions of the Regulator; and it looks at how the regulatory system might be funded.

20. **Chapter E** raises issues of definition and regulatory gaps. The Chapter includes a broad definition of the 'outer circle' of legal services; and then sets out a definition of the 'inner circle' of reserved legal services which may be carried out only by those authorised to do so. It discusses the asymmetry which arises in respect of outer circle services, which come within the regulated net if provided by practitioners such as solicitors, but are unregulated if provided by practitioners outside a front-line body. It proposes that the determination of how widely the regulatory net should be cast should rest with Government, and suggests criteria which would be employed in the relevant cost/benefit analysis accompanying any change.

21. **Chapter F** looks at issues around the permission of alternative business practices. Legal Disciplinary Practices (LDPs) are law practices which bring together lawyers from different bodies to provide legal services to third parties. The Chapter proposes that non-lawyers should be permitted to become principals or 'Managers' of such practices, subject to the principle that lawyers should be in a majority by number in the management group. It also proposes that outside ownership should be permitted, subject to a 'fit to own' test and also to a number of safeguards built around the identity of those who manage the practice and the management systems they employ. Within England and Wales outside ownership is already permitted in respect of legal practices which provide licensed conveyancing services; it is proposed that it should, subject to safeguards, now be permitted in other areas of the legal services market.

22. In the regulation of LDPs, Chapter F proposes that the focus of the regulatory system should be upon the economic unit, rather than the individual lawyer. Recognised front-line regulatory bodies would apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements that the recognised body had in place.

23. Chapter F also looks at Multi-Disciplinary Practices (MDPs). These are practices which bring together lawyers and other professionals to provide legal and other services to third parties. There are considerable issues in connection with such practices, in particular that of regulatory reach since the LSB would have no jurisdiction beyond the legal sector. The setting up of a regulatory system for LDPs would represent a major step towards MDPs, if at some subsequent moment it were determined that there were appropriate safeguards to permit such practices.

24. Taken together the proposals set out in Chapters A to F form my recommendations for a new framework. I believe this framework would represent a considerable advance on the *“outdated, inflexible, over-complex and insufficiently accountable or transparent”* regime which currently exists. The establishment of the LSB as a single oversight regulatory body, separate from Government Departments where many of the oversight functions currently sit, and the split in front-line bodies between their regulatory and representative functions, should provide a framework independent of Government in which to promote competition and innovation, including in the area of alternative business structures. By giving the LSB clear regulatory objectives, by requiring it to consult in respect of any major decision and by insisting that it reports to, among others, Parliament, it should be a transparent and accountable Regulator. By giving the LSB powers over all

existing front-line bodies and powers to recognise new bodies, the system should be able to be consistent, comprehensive and flexible. In a number of ways, in particular through the LSB as a regulator which counts consumer protection among its statutory objectives and through the OLC as a single complaints body independent of the existing professional bodies, the new system should better serve both the public and the consumer interest. The analysis of costs suggests that the OLC, as a single complaints body, might yield some savings compared with the current system with its many complaints handling and oversight bodies. Taken together the LSB and OLC should not impose on the system any materially greater burden of cost than the current arrangements.

Research and survey work

25. In reaching these views I have taken into account a significant amount of research and survey work which has been published about the operation of the legal services sector. I regard some of these as particularly relevant: for example, the research work set out in the Scoping Study⁶ which preceded this Review, published by the Department for Constitutional Affairs in July 2003, and the survey published in summary form⁷ by the Consumers' Association in July and in October 2004.

26. This Review has commissioned two pieces of research. The first, carried out by MORI, is being published⁸ concurrently with this Review. The second relates to the cost implications of the different regulatory models covered by this Review. In June 2004 I appointed Ernst & Young to carry out work in this area. Their Report is contained in Appendix 3.

⁶ Annex B to *Competition and regulation in the legal services market* CP(R2) 07/02 DCA, July 2003

⁷ *op. cit.* and *Which?* July 2004

⁸ On our website www.legal-services-review.org.uk

Process

27. A word about the process I have followed in reaching my recommendations. As noted above, I was appointed on 24th July 2003. On 8th March 2004 I published the Consultation Paper and interested parties were asked to reply by 4th June. During the 12 week consultation period the Regulatory Review team held a number of meetings in England and Wales: in Bangor, Birmingham, Bristol, Cardiff, Exeter, Leeds, Lincoln, London, Manchester, Newcastle and Norwich. In addition we attended many meetings organised by other bodies, a number of them organised by the Law Society in regional centres and two helpfully arranged by the senior judiciary.

28. I have received 265 responses to the Consultation Paper. They have come from a variety of sources: existing bodies and individuals with regulatory functions; organisations who speak for the consumer; lawyers; academics; and members of the public. Collectively they have provided a significant amount of evidence that I have used in forming my recommendations. I would like to thank those who took the trouble to contribute to the debate, and particularly those who are not themselves in the legal services sector. A list of respondents is contained in Appendix 1.

29. I have used the period since 4th June to follow-up on a number of points with key interested parties. These have included the Law Society and the Bar Council and I should add that I have received courtesy and co-operation from both bodies.

30. I have also had the opportunity to discuss the issues at length with the Advisory Panel that I announced on 8th March 2004. The members of the Panel are: Stephen Locke, Baroness Neuberger DBE, Neil Rickman, Edward Walker-Arnott, Graham Ward CBE and Robert Webb QC. I would like to thank them for their considerable help over the last few months. As I

indicated at the time of announcement, I remain solely responsible for the recommendations.

31. I am also very grateful to the team who worked with me on the Review, and particularly the Secretary, Sheila Spicer, who worked ceaselessly to ensure that the Report was delivered on time. No doubt some will argue that we have missed points; but I believe that, thanks to the efforts of the team, the key high level points on which Ministers will need to reach decisions have been thought through after proper consultation and with due care.

What happens next?

32. What happens next is a matter for Ministers. Whilst some lawyers will continue to argue that the current system 'ain't broke', I believe there is strong evidence of the need for major reform: (i) to the regulatory framework which, as described in the Government's own Scoping Study, is flawed; (ii) to the complaints system which needs change to benefit the consumer; and (iii) to the types of business structures permitted to provide legal services to the consumer, which have changed little over a significant period. It is for Ministers to determine whether they wish to press ahead with reform.

33. Reform will not be easy. Whilst there is pressure for change, from consumer groups and also from many lawyers, reform will be resisted by other lawyers who are comfortable with the system as it is. Lawyers who are opposed to the reforms in this Review will either argue that I am mistaken and have failed to understand the special characteristics that set the law apart, or call for further research and consultation, kicking reform into the long grass. Changes will require significant political commitment, partly to meet the expected criticism from some lawyers and partly because reform will need primary legislation, which requires scarce Parliamentary time.

34. I hope that Ministers, and subsequently Parliament, will conclude that reform is necessary. In my view it is long overdue.



Sir David Clementi
December 2004

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

Introduction

1. The Consultation Paper sought to explore the possible objectives of a regulatory regime for legal services and to consider some of the principles which lie behind the provision of those services by lawyers. In terms of the operation of the regulatory framework, the Consultation Paper also considered whether regulatory authorities should use their resources where the risks to those established objectives and principles were greatest.

2. A decision to regulate a 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 should 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.

Objectives of the Regulator

3. The Consultation Paper proposed that the first step in defining the regulatory regime should be to make clear what the objectives of the regime should be. 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.

4. In general I favour a short clear list of objectives, much along the lines of those which direct the work of the Financial Services Authority (FSA). In the case of the FSA, the four primary objectives can be summarised as:-

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

5. The Regulator will need appropriate objectives, whether it is a direct Regulator under Model A as the FSA is; or if it follows Model B, or some variant, where it acts as an oversight regulator.

6. Almost all respondents appeared to support the view that the Regulator of legal services should operate to a set of clearly defined objectives.

7. The Consultation Paper identified six possible key objectives for any Regulator of legal services:-

- i. **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 both citizens and commerce against any arbitrary use of state authority and unlawful acts of both organisations and individuals.

The Consultation Paper suggested that those charged with regulating legal service providers should have an important part to play in ensuring the rule of law by creating conditions necessary for its delivery.

- ii. **Access to justice** – The Consultation Paper also suggested that a Regulator of legal services should have the objective of improving access to justice for all. Access to justice has a geographic dimension (and issues such as rural access are discussed in the context of LDPs in Chapter F), but it is critically also an issue about access for those who are disadvantaged and in particular those who cannot afford to pursue their legal rights. The Regulator will be concerned that access is proportionate; it cannot be provided for all issues irrespective of cost. Thus it would be expected that the Regulator would want to work closely with other bodies, such as the ‘not-for-profit’ sector providers and the Legal Services Commission.

- iii. **Protection and promotion of consumer interests** – Given the asymmetry of information which exists in the provision of legal services between provider and consumer, the Regulator has a duty both to protect and to further the interests of the consumer. The consumer's principal interests include higher quality and lower prices. In part this includes 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.

The Consultation Paper suggested that the Regulator of legal services should have a twin duty in respect of consumers: first to ensure that consumers have sufficient information about the standards of the services provided so that they are able to take informed decisions about these services; and second, given that consumers may not always be ‘informed’, to have powers to act in the market, for example, to prohibit oppressive marketing practices, raise or set standards, develop information/awareness programmes, resolve disputes and protect vulnerable groups.

- iv. **Promotion of competition** – The Terms of Reference refer to a regulatory framework that would best promote competition. The

Consultation Paper acknowledged that one of the trends in recent years had been the increased emphasis on competition. It noted that, specifically within the legal services industry, the Government had encouraged competition between lawyers from different professional bodies. Against this background, the Consultation Paper proposed that any Regulator of legal services should have as an objective the prevention of unjustified restrictions on the supply of, and encourage competition in, the provision of legal services and the promotion of choice in both the number and type of providers, subject to the proper safeguard of consumers' interests.

- v. **Encouragement of a confident, strong and effective legal profession** – The Consultation Paper suggested that a regulatory objective of maintaining a strong and effective legal profession (including setting appropriate entry standards and supporting new entrants to the market) would help to ensure access to justice, the maintenance of a healthy supplier base for publicly funded work and continued support for *pro bono* initiatives, thereby serving the public interest. It would also underpin the international efforts of our legal sector.

- vi. **Promoting public understanding of the citizen's legal rights** – Drawing on the financial services industry as an example, the Consultation Paper suggested that any new legal services Regulator should maintain the professional obligation on lawyers to set out for clients their rights and the consequences of different options. It questioned whether the Regulator should have 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.

8. In terms of the appropriateness of the six objectives set out above, most respondents to the Consultation Paper felt that those identified were broadly

the right ones. Some respondents took the view that the objectives did not fully cover all of the key issues. They proposed minor changes to the regulatory objectives set out in the Consultation Paper. In most cases these sought to expand on, or give additional emphasis to, existing parts of the text which supported each objective. Where additional objectives were put forward by respondents they were for the most part either subsets of the objectives set out above, or the result of a combination of some or all of those objectives. However, a number of comments provided insights which merit particular consideration.

9. The Bar Council commented, in connection with the six objectives:-

“....whilst this is an admirable list of policy considerations to which any regulator of legal services should have regard, it seems to us that it does not directly state what we would understand to be the basic purposes of regulation – namely, to seek to ensure that members of a professional body (or other providers of a relevant service) are (a) suitably qualified and (b) observe appropriate ethical standards.”

10. My view is that this is a rather profession centric view of *the “basic purposes of regulation”*. Nevertheless it is an important point; and it might be that the drafting of the objective of a ‘confident, strong and effective legal profession’ should specifically refer to the need for those covered by the regulatory framework to be suitably qualified and in particular to the need for high ethical standards. Other respondents, such as the First Division Association (the association representing senior civil servants, including members of the Government Legal Service) also referred to the adoption of standards:-

“By “standards” we mean two elements - Firstly, proper professional competence, which goes beyond entry standards, which is the element mentioned in the Paper. There are also continuing professional development obligations on legal practitioners, as there are in many professions.”

Proper professional competence, including continuing professional development, should be an important part of the new regulatory framework. This Review, and in particular Chapter F, has much to say about greater competition between lawyers and liberalisation of the way in which they conduct business; but none of this is intended to lower the standard of legal advice provided or the ethical professional standards of practitioners.

11. In contrast to the Bar Council's view, the Consumers' Association in its response raises concern about singling out a 'strong and effective legal profession' as a specific objective:-

"In our view a 'strong and effective profession' is one that successfully exerts power and influence with decision-makers. The interests of the profession do not always coincide with the public interest. A strong and effective legal profession may or may not ensure a healthy supplier base for publicly funded work. The detailed objectives set out within that paragraph are more usefully brought within access to justice and competition."

Whilst it is possible to see a strong legal profession as a sub-set of access to justice, I continue to see it as an objective in its own right, not least because, beyond our own borders, the profession in England and Wales has a significant international standing. English law and English lawyers are often chosen for international transactions; and the regulatory framework should seek to enhance this standing and certainly not to damage it.

12. The Law Society welcomed the introduction of the specific objective of 'promoting public understanding of the citizen's legal rights', and commented in its response to the Consultation Paper that:-

"This has not, hitherto, formally been regarded as a regulatory responsibility of the Law Society, although the Society has been increasingly active in this field."

13. The National Consumer Council (NCC) also welcomed the specific objective but argued in its response that the objective did not go far enough:-

“The objective to promote public understanding of citizens’ legal rights does not go far enough because it fails to distinguish between consumer information and consumer education. The notion of consumer education is concerned with knowledge, understanding, values, skills and attitudes, and is necessary to obtain the most from information and advice. With the combination of information, education, advice and redress in place, consumers may become empowered rather than just informed. Empowered consumers also have the confidence to make their voices heard – a really important dimension. So, for the objective concerning consumer considerations, we would rather the emphasis was put on empowering consumers, which helps them become the enablers of competitive markets.”

In general I agree with this point. The regulatory system should be concerned with education, advice and redress as well as information. But in the precise drafting it will be important not to impose upon the framework more than it could possibly deliver. In particular, education about legal rights and processes presupposes basic educational standards for those reaching adulthood, an important issue but one beyond the reach of the legal regulator.

14. As already mentioned, a number of respondents have proposed minor changes to the regulatory objectives set out in the Consultation Paper and to the text which supports each objective. However, it has not been the intention of this Chapter to draft precisely the necessary objectives. The precise wording of statutory objectives would be subject to detailed analysis by Parliamentary draftsmen, and subsequent examination by Parliament itself. Whilst I do not believe it sensible to attempt that detailed analysis here, I do believe that the six objectives set out in this Chapter can provide the core around which a regulatory framework for legal services can be built.

Professional Principles/Precepts

15. The Consultation Paper recognised that, as well as setting regulatory objectives, any regulatory framework for legal services would need to ensure that the professional codes and standards to which lawyers operated were consistent with certain professional principles and precepts. The Consultation Paper identified the following key principles and precepts:-

- **Independence** – Lawyers have a duty to act with independence in the interests of justice;
- **Integrity** – The codes of conduct maintained by the main legal professional bodies generally require their members to act with integrity towards clients, the courts, lawyers and others, 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 generally 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; and
- **Confidentiality** – The codes of conduct of the legal professional bodies generally require lawyers to keep clients' affairs confidential. Communications between a client and his lawyer may be subject to Legal Professional Privilege (i.e. certain communications between a client and legal adviser in the context of obtaining legal advice or assistance are protected from disclosure, even in legal proceedings).

Whilst these principles and precepts should be contained within professional codes applicable to lawyers, some might also be included in legislation governing the legal profession, as they are at present. For example, sections 27 and 28 of the Courts and Legal Services Act 1990⁹ place on those exercising

⁹ As amended by section 42 of the Access to Justice Act 1999

litigation and advocacy rights a duty to the court to act with independence in the interests of justice.

16. As with the objectives of the Regulator, most respondents acknowledged the existence and importance of precepts and principles in the provision of legal services, and that those identified in the Consultation Paper were broadly the right ones. There were some suggested additions.

17. The General Council of the Bar suggested that there should be included, an additional principle that a lawyer should not discriminate in the provision of his or her services (e.g. in respect of gender, ethnic origin, beliefs or opinions about the nature of the client). There is merit in this suggestion; however, I take the view that issues of discrimination are generally provided for in law. As such it is not clear that a specific principle is necessary or appropriate. If the principle of non-discrimination were to be included, it could be argued that other principles of human rights, or principles such as freedom of information, should be specifically referred to.

Risk Weighting of Objectives and Principles

18. A number of respondents noted that the Consultation Paper did not attempt to rank either the regulatory objectives or legal principles/precepts in order of their importance, with some respondents taking the view that there were aspects which merited a particular weighting. For example, some lawyers emphasised the independence and integrity of lawyers:-

“.... from our perspective perhaps the key objective is the need to maintain the independence and integrity of the legal profession and to balance this correctly with serving the public interest.” Allen & Overy.

19. I appreciate that respondents are likely to place a different weighting on each of the principles, or objectives, depending on their own perspective. However, I consider that it should be for the Regulator, operating a risk based approach to regulation, to judge the relative importance of each consideration

on a case by case basis. A risk based approach is one under which regulatory objectives or principles become a central consideration in determining how regulatory powers and resources are used.

20. Most respondents supported the concept of a risk based approach to regulation as discussed in the Consultation Paper. Some questioned how any new Regulator might discharge its duties on the basis of risk; others put forward suggestions, for example that regulatory efforts should be concentrated in certain sectors (such as where services are provided to the public rather than commercial institutions). Precisely how any new Regulator should discharge its regulatory functions on the basis of risk would be for it to determine, against the risks which it perceived at the time to its statutory objectives and to the principles and precepts of the profession. It would be wrong to try to constrain the Regulator here in making what may be fine judgements, which would vary depending on the circumstances; and accordingly I make no proposals about the ranking of objectives.

Conclusion

21. I conclude that the first step in defining the regulatory regime should be to make clear what the objectives of the regime are. The Chapter proposes six primary objectives of the regime. These would be the objectives against which the Regulator must determine the appropriate regulatory action; and against which it would be held accountable. I consider that the legal precepts or principles, discussed in this Chapter, should be incorporated within the regulatory arrangements.

CHAPTER B – REGULATORY MODELS

Introduction

1. This Chapter looks at the strengths and weaknesses of different models for the regulation of legal services. It also looks at what powers should rest with each party in the regulatory structure.

2. The regulatory system was described in the Scoping Study annexed to the Government's report published in July 2003 entitled 'Competition and regulation in the legal services market'. Some of the bodies described in the Scoping Study are front-line regulators, some are oversight or super-regulators.

3. Among the front-line practitioner bodies, five combine regulatory and representative functions: the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys.

4. Among the oversight regulators, the Secretary of State 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 Bar Council;
- the Law Society;
- the Institute of Legal Executives; and
- 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 as amended) concerning the rules made by the Council for Licensed Conveyancers. The Master of the Rolls has broad regulatory oversight powers over the Law Society, including the right of admission to the Roll.

5. The Consultation Paper set out two main regulatory models. The first, referred to as Model A, involves stripping out all regulatory functions from the front-line practitioner bodies. All these functions would be vested in, and carried out by, a Legal Services Authority (LSA), which would interface directly with the providers of legal services. Model B gives responsibility for the regulatory functions to front-line practitioner bodies, but creates a Legal Services Board (LSB), which provides consistent oversight in respect of all the bodies.

6. The Consultation Paper made clear that these two Models are polarised constructs and on either model there could be a number of variants. The variants arise because it is possible to take a different view about each of the regulatory functions; it is not necessary that all should be given to the new regulator, under Model A, or all given to front-line practitioner bodies, subject to oversight, as envisaged under Model B. One important variant, labelled as B+, would be to require each of the front-line bodies to separate their regulatory functions from their representative functions.

7. The Paper identified five core functions of regulation:-

- entry standards and training;
- rule making;
- monitoring and enforcement;

- complaints; and
- discipline.

As in the Consultation Paper, this Chapter deals with the first three functions. Chapter C deals with complaints and discipline.

8. The key functions of a body with representative powers would include representation in areas such as rates of pay for legal work, practising rights internationally, policy issues for government and other interested parties, information services for members and information for prospective members and clients.

9. Against this background the Chapter takes the issues in the following order:-

- paragraphs 10 to 25 examine the case for bodies splitting their regulatory and representative functions;
- paragraphs 26 to 32 look at the advantages and disadvantages of Model A and Model B+;
- paragraphs 33 to 40 look at governance issues for front-line bodies with regulatory powers, concentrating on the Bar Council and the Law Society;
- paragraphs 41 to 52 look at the position of other front-line regulatory bodies;
- paragraphs 53 to 60 look at issues around the powers of the Legal Services Board, and the application of international law to the regulation of legal services;
- paragraphs 61 to 69 examine the issue of costs in respect of different regulatory models; and
- paragraphs 70 and 71 set out broad conclusions.

Regulatory and representative functions

10. As noted above five of the legal 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 both regulatory and representative functions. The Consultation Paper made clear that one of the central issues of this Review is to explore whether this hybridity meets the Terms of Reference.

11. The distinction between regulatory and representative functions of a professional body is not a theoretical concept incapable of being applied in practice. Under the Access to Justice Act 1999 professional bodies are required to distinguish between the two functions and to break them out separately in the annual practising certificate fee, and they have done so.

12. In determining whether regulatory and representative functions need to be separated, I judge that four aspects of the Terms of Reference have particular relevance:-

- (i) that the regulatory arrangement chosen should promote the public and consumer interest;
- (ii) that it should promote competition;
- (iii) that it should promote innovation; and
- (iv) that the regulatory arrangement should be transparent.

Each of these is dealt with in turn.

13. The first consideration relates to the public and consumer interest. The majority of respondents to the Consultation Paper argued that on these grounds the regulatory and representative roles of professional bodies should be split. For example the Council for Licensed Conveyancers stated in their response to the Consultation Paper: *“It is difficult to understand how one body can effectively both regulate a profession and also represent and lobby for its interests without prejudice to either its regulatory or representative functions.”* There is a conflict of interest between the two roles which should be tackled.

In a regulatory body the public interest should have primacy. Issues such as changes in practice rules should be examined, not against the wishes of the membership, but against the test of the public interest. In a representative body the interests of the membership should have primacy. It is hard to conclude that the decision by the leadership of the Law Society in the mid 1990s to restrict funds to its complaints handling operation was anything other than a body placing its representative interests ahead of its regulatory responsibilities, to the detriment of the public and consumer interest.

14. Even where a body does place the public interest ahead of that of its members, there remains an issue of perception. For example, it may be that each of the restrictive practices to be found in the practice rules within the Law Society or at the Bar has operated in the public interest. But, perhaps because many senior lawyers have been conditioned by the system that they grew up with, there is a perception that the issues have not historically been addressed with the vigour and independence to be expected of a regulatory body.

15. Just as there can be criticism that professional bodies give insufficient weight to the public interest, so there can be criticism from members of professional bodies that their respective bodies give insufficient attention to representative needs. For example, many high street solicitors have argued in the past that the Law Society has not represented their interests sufficiently in areas of the law which have been opened up to competition.

16. There has also historically been criticism from employed barristers and non-practising barristers that the Bar Council has not given sufficient weight to regulatory issues which affect them. Professional bodies carrying out regulatory functions in the public interest should deal with their members in an even-handed way. But on the basis of the evidence collected in this Review, I formed the view that the Bar Council places the interests of the employed Bar second. Indeed this position was in part acknowledged by the then Chairman

of the Bar who wrote in the Bar Council's Annual Report published in April 2003 that *"it is no longer acceptable, in the twenty-first century, for the employed Bar to be treated as second-class citizens"*.

17. In terms of the public interest, the potential conflict between regulatory and representative issues is most clear in those issues which deal with the negotiation of fees for lawyers. Both the Law Society and the Bar Council have fought hard in recent years on behalf of their members in connection with rates for legal aid work. It is reasonable that a representative body should use its influence in the interests of its members to raise remuneration levels funded by the State; but the function of representing members in such matters sits uneasily with the regulatory responsibility to act in the public interest.

18. The Terms of Reference require that the regulatory framework should promote competition. It is, however, particularly difficult for professional bodies who combine both regulatory and representative roles to deal with competition issues. Regulatory bodies should be expected to encourage open competition, subject to maintaining quality standards; representative bodies have a legitimate right to fight their corner, warning that the public may suffer if the market is opened too widely. This is a difficult set of conflicting issues for one body to balance. The dual role caused difficulty for the Law Society in its consideration of the extension of conveyancing rights beyond its own monopoly in this area. It also caused difficulty for the Bar Council which fought hard to protect the monopoly rights of its members in higher courts, and to prevent their extension to solicitors, under the Courts and Legal Services Act 1990.

19. In addition to competition, the Terms of Reference refer to the regulatory system encouraging innovation. The Law Society has sought to carry through reforms to its practice rules. But it has been clear that, in some cases where change has been proposed by the leadership, it has been held back by the

difficulty of getting it through its large representative Council. The Bar Council has argued that it regularly reviews its own practices and makes changes where it considers it appropriate. But there is little evidence that the Bar has been a force for innovation in customs and practice. It fought hard against the extension of higher court rights to solicitors, referred to above. It did introduce changes to the rules on direct access under the 'Bar Direct' proposals; but the more recent proposed change to direct access, set out in the Kentridge Report¹⁰, was not a proactive step by the Bar, but a reactive response to the Office of Fair Trading's challenge in its report 'Competition in professions'.¹¹

20. There is a further complication, and one which touches upon transparency, in connection with the Bar. It is that the Bar Council shares regulatory responsibility in respect of some functions with the Inns of Court. These shared regulatory functions include education, entry standards and disciplinary issues. The four Inns (Middle, Inner, Gray's, Lincoln's) have responsibilities for training students, for the granting of scholarships and for admission (individuals must be called to the Bar by one of the four Inns) and they also have an important role in the disciplinary process.

21. The Inns are run by benchers, new benchers being elected by existing ones from among the distinguished members of their respective Inn. Under an Agreement reached in 1987, updated in August 2001¹², the Inns agreed "*to accept and to implement the general policies laid down from time to time by the Bar Council*" subject to certain conditions. The document states that the Agreement has no force in law and that any Inn may cancel the understanding with 12 months notice. The Agreement followed the report

¹⁰ Report of the Committee to the Bar Council, under the chairmanship of Sir Sydney Kentridge QC, 18 January 2002

¹¹ *Competition in professions*, A report by the Director General of Fair Trading, March 2001

¹² Introduction and Constitutions of the General Council of the Bar and of the Council of the Inns of Court and of the Inns of Court and the Bar Educational Trust, 31 August 2001

written by Lord Rawlinson dealing with uncertainties in the relationship between the Bar Council and the Inns.

22. The Agreement, including the right of cancellation, has allowed some to argue that the Inns have real power, underlined by the fact that at the head of each Inn is often a senior judge (this year there are three Court of Appeal judges and one retired Law Lord) with precedence over the barristers who run the Bar Council; and that this position of strength is further underlined by the fact that, through their property interests, the Inns have wealth and contribute significantly to the Bar Council's finances. By contrast others argue that, whatever may be said in the Agreement and whatever may be the financial arrangements, regulatory power has now irreversibly transferred to the Bar Council. The truth probably rests somewhere in between. The Agreement contains a complex formula for dealing with deadlock between the parties. This has never been used and in practice it appears that matters of particular concern to the Inns, for example the issue of deferral of call, proceed in a consensual manner, often at the speed of the slowest. A key body, and at the centre of determining the consensus between the Bar Council and the four Inns, appears to be the Council of the Inns of Court. A number of people at the Bar, and almost everybody outside the Bar, seem to be unaware of the existence of this important body.

23. In my discussions with the Bar Council and with the Inns there was a recognition from some that the Agreement should be revisited. As things stand, it would be hard for any Reviewer to conclude that it is clear where regulatory authority, and hence responsibility, lies as between the Bar Council and the Inns.

24. As noted, my Terms of Reference include a requirement to propose a framework that promotes the public and consumer interest, promotes competition, promotes innovation and is transparent. The framework needs to meet these criteria, and be seen clearly to do so. For the reasons set out

above, I do not believe that the current combination of regulatory and representative powers, in particular within the Law Society and the Bar Council, permit a framework that gets close to meeting this requirement. I do not believe that the combination of functions results in the public interest being consistently placed first. I do not believe that the combination provides the right incentives to encourage competition. I do not believe that it provides a framework for promoting innovation. Finally, I do not believe that at the Bar the arrangements between the Bar Council and the Inns are satisfactory, and they are plainly not transparent.

25. A key recommendation of this Review is that the regulatory and representative functions of front-line regulatory bodies should be clearly split.

The relative advantages of Model A and Model B+

26. The Consultation Paper argued that a split between regulatory and representative functions could be achieved in a number of different ways. Model A provides the clearest split since all regulatory functions are removed to the Legal Services Authority. Model B+ leaves the front-line regulatory functions at practitioner body level, subject to consistent oversight by the Legal Services Board, but requires the bodies to split their regulatory arm from their representative arm, with separate governance arrangements.

27. The broad arguments for Model A are that:-

(a) the principle that the regulatory framework should be independent of those being regulated is better achieved by Model A since it removes one of the self-regulatory elements within the framework;

(b) the creation of a single regulator simplifies the system, involving far fewer regulatory bodies. In turn this is likely to lead to clearer lines of responsibility and greater accountability for the objectives of the regulatory system set out in Chapter A;

(c) a single regulator provides a clear forum for dealing with any conflicts in objectives within the regulatory regime. It is better that resolution of such conflicts rests within one accountable body, rather than in separate bodies where deadlock may arise;

(d) a single regulator is likely to give rise to greater consistency, providing a single coherent system of authorisation, supervision and investigation. This arises in part because Model A takes a more service driven approach to regulation. It would be possible to divide the rule-making body so that it was able to make rules for different services such as, for example, advocacy, conveyancing and immigration; and this might lead to a more even 'playing field' and in turn to increased competition. Such a shift to service driven regulation, away from professionally driven regulation, might be accompanied by a more consumer driven approach, one that emphasised the need to satisfy the consumer rather than sustain the standing of the professional provider;

(e) a single regulator should permit significant flexibility in the system. New services to regulate would not require new bodies to deal with them, as the decision in 1999 to regulate immigration services led to the creation of the Office of the Immigration Services Commissioner. Similarly it would make it easier to regulate Legal Disciplinary Practices which bring together lawyers from different professional backgrounds; and

(f) a single regulator should facilitate more consistency in training and entry standards, permitting common training between different legal service providers and making it easier to transfer between them.

28. Many of the strengths of Model A can be preserved within Model B+. Model B+ rationalises the oversight function that is currently disparately held by, among others, the Secretary of State for Constitutional Affairs and the Master of the Rolls into one regulatory Board. That Board will have clear

objectives against which it will be held accountable; and the front-line regulators to whom regulatory functions may be delegated will act in support, being part of one regulatory system.

29. The specific arguments for Model B+ are that:-

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

(b) whilst the principle that the legal profession should be independent of Government can be met under Model A, it is more clearly demonstrated in Model B+, where front-line regulatory powers can be exercised at practitioner level. It is a point stressed in most submissions from lawyers, but by others as well;

(c) the consistency promoted by Model A can also be achieved in Model B+, with the LSB setting minimum standards to which front-line regulators would need to adhere in order to be recognised to carry out regulatory functions. Contrary to the argument in paragraph 27(d) above, precise uniformity in standards that a single regulator might lead to may not always be in the public interest or lead to greater competition. Some degree of choice in the type of provider, and the regulatory rules under which they operate, is to be welcomed, subject to a minimum standard being met. It is a point that is made in the submission of the Council for Licensed Conveyancers who argue that not all providers of this reserved service need follow the same rules. The Bar Council makes a similar point in its submission: that the need for consistency in the regulatory regime should not be equated with uniformity, the requirement that an identical set of rules should apply to all lawyers. The Office of Fair

Trading also draws attention to the possibility of regulatory choice and competition which Model B+ allows for, putting the LSB *“in a position to both encourage such competition, but also to step in if it appeared that such competition was weakening regulation to the point where this was endangering consumer protection”*;

(d) whilst, as noted in paragraph 27(e), Model A provides significant flexibility in respect of new services, Model B+ does provide a degree of flexibility for an oversight regulator. The LSB could be empowered in respect of such new services: (i) to authorise new bodies to regulate their members offering these services; and (ii) to allow existing bodies to take on regulation of these services. As noted in paragraph 54 below, the LSB would have power to regulate direct, although the intention is that it should be an oversight regulator; and

(e) putting all regulatory functions into one body guarantees that it would become a large organisation; it runs the risk that it might become a large and unwieldy organisation. Model B+, which leaves much of the work with front-line bodies, is less vulnerable to this.

30. A further argument in favour of Model B+ is that the practical transitional arrangements would be much easier to organise than for Model A. Only a small number of jobs involved in oversight functions would need to move to the new oversight regulator; the great majority of positions would remain as they are, in the front-line regulatory bodies. The risk of losing regulatory expertise during any transitional period would be much reduced.

31. It could be argued that the B+ proposal is reminiscent of the financial services industry before the Financial Services and Markets Act 2000 (FSMA), with a large number of front-line regulatory organisations (some under the oversight regime of the Securities and Investments Board) overlapping in their responsibilities; and that this is a discredited model. It

should be recognised, however, that the backgrounds of the financial services industry and of the legal services industry are quite different. In the financial services industry the big players had no real history of self-regulation: prior to the FSMA the banks were regulated by the Bank of England and the insurance companies by the Department of Trade and Industry (and for a few years by HM Treasury). For these large players the issue of regulatory independence did not arise. It should be recognised also that wider issues about systemic stability, which can be addressed more easily in a Model A framework with a single regulator, do not arise to anything like the same degree in the legal services as in the financial services industry.

32. In judging the strength of the arguments between different models, it is clear that a B+ model would build on the current system to a greater extent than Model A. It is true that, if one started from scratch, with no history of professional bodies with strong roots, one might conclude that Model A should be preferred for its clarity and flexibility. But even those who are critical of what they see as the self-serving nature of the current professionally based arrangements would recognise strengths. The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally. These strengths would suggest that the failings of the system, identified in the Scoping Study and covered in this Review, should be tackled by reform starting from where we are, rather than from scratch.

Governance issues for front-line regulatory bodies

33. If regulatory functions, subject to oversight, were to be given to front-line bodies along the lines of Model B+, there would remain the issue of how the split between regulatory and representative functions should be achieved and appropriate governance arrangements. Currently both the Law Society and the Bar Council fall well short of good governance practice for a regulatory body. Regulatory bodies should have lay involvement in their decision making functions. The Law Society has some lay involvement in certain sub-

committees; and its main Council of 105 includes 5 lay members. The Bar Council again has some lay involvement in sub-committees, but the Council itself, with around 120 members, has no lay content. The size and make up of both the Law Society Council and the Bar Council are representative in nature. They are inappropriate for a decision making regulatory body.

34. There is a further governance difficulty that both bodies face in their regulatory role and it is the requirement that their Chairman should change on an annual basis, in office long enough for the incumbent to want to ensure that no damage is sustained 'during his watch' but not long enough to see through difficult change. Such a short term of office might be appropriate for a representative role, but not for a senior regulatory position. Nobody could seriously suggest that the Chairman of the FSA, or the President of the General Medical Council, should change annually. It may be that it would be more difficult to find suitable candidates, but this is an issue that the professional bodies must face if they wish to retain serious involvement in regulatory matters.

35. A key question, asked in the Consultation Paper, is how a separation under Model B+ might be achieved. There are two broad options. One possibility would be institutional separation to create separate bodies for regulation and representation, similar to the split within the medical profession between the General Medical Council and the British Medical Association. The other option would be to ring-fence the regulatory function from the representative function within a single body.

36. The argument in favour of separate institutions is that it makes the split transparent. Against this it would add to the number of bodies which form part of the legal system and is likely to increase costs. Whilst it would be expected that ring-fencing, within a single institution, of regulatory functions away from representative functions would require separate executive and

policy teams, it would be possible for a number of common services to be provided under a single senior administrative officer.

37. The Bar Council's response to this specific issue, and to the broader issue of its governance arrangements, is that there is scope for reform. In a letter to me of 21st September 2004 the Chairman of the Bar Council states:-

"We do consider that there is scope for achieving greater transparency and independence of our regulatory functions and that, in particular, the role of the Inns, the role of lay people and some ring-fencing could be considered."

38. The Law Society's response has gone beyond recognition of the scope for reform to consideration of some of the detail. It argues in its response to the Consultation Paper that:-

"The Society also agrees that, in order to retain public confidence, regulatory and representational functions must be – and must be seen to be – clearly separated in any governing body's work."

Last year the Law Society set up a Governance Review Group chaired by Baroness Prashar, First Civil Service Commissioner. Key points of the interim report¹³ included the proposals that:-

- (i) to deliver greater effectiveness, integrity and transparency, the governance of the Society's regulatory and representative functions should be clearly separated;
- (ii) there should be a new Regulatory Board responsible for the Society's regulatory functions;
- (iii) to be effective, the Regulatory Board should have 15 to 20 members;
- (iv) to deliver better public accountability, half of the Regulatory Board should be independent members;

¹³ Governance Review Group: Interim Report to the Law Society's Main Board and Council, May 2004

(v) to deliver fairness and inclusiveness, all members of the Regulatory Board should be appointed on merit through a transparent and independent procedure; and

(vi) the Chair (who could be either a solicitor or independent member) should be elected by and from the Regulatory Board.

39. The Law Society has considered these interim proposals and in principle accepted the case for ring-fencing its regulatory from its representative functions; but it has not agreed on the details of how it might be implemented. The recommendation of this Review is that it should be a statutory requirement for a front-line regulatory body to separate out its regulatory and representative functions, but that in regard to detailed governance arrangements the body would need to satisfy criteria laid down by the LSB. There needs to be consistency of criteria, which would not necessarily require uniformity of structure. The recommendations of the interim report by the Governance Review Group represent a good check-list of criteria which the LSB might take into account. In addition to requiring a body to take steps to ensure that the regulatory functions are kept separate from, and not subject to, the representative body, the report calls, as noted above:-

- for a much smaller Regulatory Board;
- for half of the members to be independent; and
- for members to be selected through an independent process based on merit.

Where the LSB was not satisfied that the governance arrangements for a front-line regulator were sufficient, it should be empowered to call for further measures, including the right finally to insist upon institutional separation. If the LSB is to remain an oversight regulator, and have only a small staff itself, it needs to have confidence that the underlying regulatory boards are satisfactorily constituted. The powers of the LSB are discussed further in paragraphs 53 to 60.

40. The B+ Model described above relates to the regulation of members that each front-line body admits to membership. It cannot automatically extend to regulation of others. The question of who should regulate Legal Disciplinary Practices, which are legal practices that bring together lawyers admitted by different bodies, as well as permitting as principals others who are not lawyers at all, is discussed in Chapter F.

Other front-line regulatory bodies

41. The arguments above relate primarily to the position of the Law Society and the Bar Council. The regulatory model chosen needs also to accommodate other bodies with front-line regulatory responsibilities.

42. The Institute of Legal Executives (ILEX) carries out both regulatory and representative functions. However, most of its members work for solicitors' firms and are, in practice, regulated by the Law Society. The LSB would need to be satisfied that the representative functions of ILEX did not influence the regulatory side.

43. The Chartered Institute of Patent Agents (CIPA) carries out both regulatory and representative functions and would need to take the necessary steps to satisfy the LSB that a proper separation had been made. The broad activity of patent work is an unreserved activity¹⁴ and is not the preserve of members of the Institute. However, CIPA is a recognised body under the Courts and Legal Services Act 1990 and is able to grant to its members rights of audience in court and rights to litigate. It is this part of Institute members' work which brings it within the regulatory net (see Chapter E).

44. A degree of oversight of CIPA's work is provided by the Patent Office, which is an agency under the Department of Trade and Industry. In particular

¹⁴ Copyright Designs and Patents Act 1988

the Patent Office has oversight of qualifying examinations. It is proposed that oversight powers should move to the LSB, removing the Patent Office from a regulatory role, although it would be expected that the LSB and CIPA would wish to consult with the Patent Office in respect of relevant changes to regulatory arrangements.

45. The position of the Institute of Trade Mark Attorneys (ITMA) is broadly similar to CIPA, except that it is not at present a recognised body under the Courts and Legal Services Act 1990. However it has applied for such recognised body status. In principle Ministers have approved the application and it remains subject to an Order in Council to be laid and debated in Parliament over the next few weeks. If Parliamentary approval is obtained, this would place ITMA on the same footing as CIPA.

46. The Council for Licensed Conveyancers is solely a regulatory body, and there should be no difficulty in it fitting into a Model B+ framework. In its response, as already noted, the Council argues strongly that there needs to be clear separation between regulatory and representative functions; and it argues also for improved oversight arrangements.

47. The Notarial Profession also already distinguishes between regulatory and representative functions. It is distinctive amongst legal providers in England and Wales because the profession is primarily concerned with documents which are to take effect abroad and not in this country. Front-line regulatory powers are exercised by the Master of the Faculties through the Faculty Office. Under ecclesiastical law¹⁵, the Master of the Faculties is also Dean of the Arches and Auditor¹⁶, and this joint role must be held by one person, who must be a senior lawyer and a member of the Church of England. Under the Ecclesiastical Licences Act 1533 the Archbishop of Canterbury is effectively

¹⁵ Ecclesiastical Jurisdiction Measure 1963, s.13(i).

¹⁶ Dean of the Arches and Auditor has no regulatory responsibilities for notaries.

the oversight regulator. The Faculty Office's response to the Consultation Paper noted that I had found the system "*somewhat anachronistic*".¹⁷

48. The majority of notaries are also solicitors and it would be better in my view if the oversight function of this secular legal activity moved from the Archbishop to the LSB. In its response to the Consultation Paper, the Faculty Office argues that this might be difficult since the international recognition of notaries in England and Wales rests in part on the independence of the Archbishop. But the LSB will also need to be able to demonstrate independence from Government (as discussed in Chapter D). It should be emphasised that the proposed changes relate solely to the secular legal activities of concern to the Master of the Faculties.

49. The position of the Immigration Services Commissioner (ISC) is complicated by two issues. The first is that the ISC is both a front-line regulator and an oversight regulator. The ISC has told me that approximately 80% of his resources are spent on direct regulatory functions and 20% on oversight functions. The second issue is that his jurisdiction covers not only England and Wales but also Scotland and Northern Ireland.

50. The ISC directly regulates those immigration advisers and immigration service providers who are not members of designated professional bodies (DPBs) and decides if they are 'fit and competent'. The ISC has oversight powers in respect of DPBs (where members provide similar services). The professional bodies designated by the Immigration and Asylum Act 1999 are: the Law Societies of England and Wales, of Scotland, and of Northern Ireland; the Bars of England and Wales, and of Northern Ireland; the Faculty of Advocates in Scotland; and ILEX. The ISC reports annually to the Secretary of State at the Home Office. He keeps under review the list of DPBs and must notify the Secretary of State at the Home Office if he considers that a body is failing to provide effective regulation in this field.

¹⁷ In Scotland the link between notaries and the Church ceased in 1560.

51. So far as England and Wales are concerned, it is proposed that the dual role of the ISC should cease, and the oversight function in respect of the designated bodies within England and Wales (the Law Society, the Bar Council and ILEX) moved to the LSB. This would leave the ISC as a front-line regulatory body, in turn answering to the LSB. In respect of England and Wales he would no longer report directly to the Secretary of State at the Home Office, although the ISC and the LSB would want to consult carefully with the Home Office in respect of any proposed changes in rules or standards.

52. In respect of Northern Ireland and Scotland, in the absence of any further change, the ISC would remain as he is, retaining his dual role. I would regard this as an unsatisfactory position but issues in respect of these jurisdictions are outside my remit.

Powers of the Legal Services Board and the application of international law to the regulation of the legal profession

53. Under the Courts and Legal Services Act 1990, 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 those two areas; authorised front-line 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.

54. The recommendation in this Review is that these oversight powers of recognition and 'call-in', presently held by Government, should be vested in the Legal Services Board. In addition, and to provide the LSB with the maximum regulatory flexibility, I consider that these powers, which currently include only certain practice rules, should be extended to include all rules of those bodies regulated by the LSB. Indeed, as far as is practicable, I recommend that all regulatory powers be vested in the LSB, with the LSB

required to delegate day-to-day regulatory operations (subject to its oversight) to recognised front-line bodies, where such bodies satisfy the LSB that they are competent to handle regulatory functions and have set appropriate governance arrangements to deal with such functions without conflict. The LSB would retain the right to carry out regulatory functions direct, in the absence of a recognised front-line body. But it is intended that as far as possible the LSB should be a small oversight body, so delegation should be expected, subject to the LSB's satisfaction about competence and governance arrangements as set out above.

55. As noted, it is recommended that the LSB, consistent with the delegation of day-to-day regulatory matters to front-line recognised regulatory bodies, would have the power to approve rule changes by recognised front-line bodies, and the power of 'call-in' in respect of existing rules. It would exercise its powers against the stated objectives of the regulatory regime discussed in Chapter A. This would include a public interest test and a competition test.

56. It is for consideration whether, as suggested by the Office of Fair Trading in their response, the LSB should have an obligation to seek competition advice from the OFT when exercising its powers to approve professional rules or applications from professional bodies to be recognised *"for the purposes of qualifying and supervising members to provide services"*. I would favour such an obligation on the LSB; and it would mirror the current obligation within the Courts and Legal Services Act on the Secretary of State to consult when exercising his powers in this area.

57. I recommend against primary legislation vesting regulatory powers direct with front-line practitioner bodies. In the first place it could introduce significant inflexibility. The Law Society's regulatory powers derive primarily from statute, and this has created problems, including the inability to introduce the liberalisation reforms within the 'Legal Practice Plus' proposals, because of the inflexibility of the statutory framework. It might also inhibit

mergers and de-mergers of front-line bodies if they take their regulatory powers from statute. Further, vesting the regulatory powers in the LSB makes clear that the front-line bodies take their regulatory powers from the Board; and it reduces the prospect of regulatory deadlock. These arrangements would give the LSB significant powers as an oversight regulator; but its powers would be circumscribed by transparency and accountability arrangements to be expected of a regulator, as discussed in Chapter D; and there would remain the safety net of judicial review.

58. The arrangements set out in this Chapter would require primary legislation, not least because the current arrangements are in large part statutory and would have to be repealed. Any new arrangements would need to be consistent with European Community law. Additionally they ought to take into account what the United Nations has said about the role of lawyers; and also take into account standards and conventions in other international jurisdictions, particularly within the European Community. These issues are important, self-evidently because the proposed regulatory system would need to be consistent with any applicable international law, but also because any arrangements which ignored international standards and conventions might affect the ability of lawyers in England and Wales to continue to compete successfully overseas. The latter point is particularly stressed in the submission from the City of London Law Society.

59. European Community law does not mandate required structures for the regulation of lawyers. The Bar Council draws attention to a resolution of the European Parliament which supports self-regulation as having a necessary role to play in the regulation of the liberal professions. But recent case law of the European Court of Justice if anything confirms that Member States retain the power to regulate the legal profession to a very considerable degree, even down to setting fee rates. In Case C-35/99 *Arduino*, the Court confirmed that the Italian system for regulating the legal profession was not an agreement between undertakings – which would fall within Article 81 of the

Treaty which prohibits agreements which appreciably restrict competition – but a state measure, given that the Government retained substantial decision-making power and controls. Although the Italian Government was bound under Article 3(1)(g) of the Treaty not to introduce measures which would unduly distort competition, it was entitled to take proportionate measures for regulating the profession in the public interest, including setting fee levels for the Italian Bar. There was no suggestion that Government intervention of this kind infringed Community principles. Commissioner Monti, commenting on that judgment in a speech to the Bundesanwaltskammer in March 2003, said:-

“The Arduino judgment clarifies that Member States have the right to regulate a profession. This is no surprise as in the absence of harmonisation at the European level, Member States have the primary responsibility for defining the framework in which professions operate. It went on to say that Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control.”

60. I have looked carefully at what the United Nations basic principles say about the role of lawyers. I have also looked at how the legal profession is organised in a number of different European states. The legal advice I have received on these and related issues is set out in Appendix 2. The conclusion I draw is that none of these considerations would prevent a Model B+ arrangement and practice of the type I propose, established under UK primary legislation. EU law recognises that law societies and bar associations may be subject to oversight. International bodies should welcome a model where the oversight function would come from an Independent Regulator with clear objectives, rather than as at present a model where much of the oversight rests with Government Departments. The analysis does not suggest that a Model A arrangement is precluded either. But the detailed governance arrangements for a Legal Services Authority, its

relationship with the professions and its independence from Government, would require further consideration.

Costs

61. The Consultation Paper commented that the issue of costs would be an important one to look at before reaching a conclusion on the preferred model for a regulatory framework. A number of respondents said that Model A would be more expensive. They provided no data to support this assertion. Ernst & Young were commissioned to report on the costs of the current system and on the possible costs of the changes discussed in this Review. Their Report is set out in Appendix 3.

62. The Ernst & Young Report indicates that the cost of the regulatory system for 2003/04 was of the order of £81 million (up from approximately £69 million in the previous year). The total revenue of the industry is estimated to be over £18 billion¹⁸ (the legal aid budget itself is £2.0 billion) and, based on this estimate, the rough cost of the regulatory system is well below 1%. It is recognised that this is the external cost, and that the full cost would need to include the internal costs which practitioners bear in areas such as compliance.

63. The total estimated system cost of around £81 million in 2003/04 may be broken down between, on the one hand, the regulatory costs of entry standards and training, rule making, and monitoring and enforcement, and on the other, the costs of complaints and discipline. Consistent with paragraph 7 this Chapter deals with the first three functions (in total £46 million); Chapter C deals with complaints and discipline (in total £35 million).

¹⁸ External survey data: ONS 2002, EUROMONITOR 2004

64. The cost attributable to the first three regulatory functions of £46 million is an estimate, and subject to a number of points. Of these, one of the most important is that members of professional bodies, in particular the Law Society and Bar Council, and their sub-committees, give much of their time free. This is not included in the above costs. A further complication arises from judging the time cost of oversight regulators such as the Master of the Rolls and Government Ministers.

65. Of the cost of the first three regulatory functions, the largest constituent part is unsurprisingly the Law Society. The Bar Council is the next largest element. In reaching a judgment about the optimal structure, however, it is the aggregate cost of the system that matters, rather than the cost of any individual part. The Bar Council in its submission refers to the cost-effectiveness of their system. But, of course, they are regulating a branch of the legal profession which is primarily dealing with referred work. It is not the cost of their system which is critical to reaching conclusions, but the total cost of the regulatory framework.

66. The Ernst & Young Report attempts to judge how the costs might look if either Model A or Model B+ were adopted. The key assumptions on which the estimates have been based are set out in their Report and it should be recognised that there is a significant element of judgment in the analysis. In practice a good deal would depend upon how the regulatory body chose to interpret its role under either model.

67. The broad estimate of the costs of Model A is around £47 million, similar to the cost of the current system. In the case of Model A it has been assumed that costs would rise, if regulatory functions were moved to a single regulator, from less uncoded practitioner time. Against this, there would be certain economies through collapsing various front-line regulators into one body.

68. The broad estimate of the costs of Model B+ is around £50.5 million. The main additional cost is that of the new Legal Services Board, estimated at around £4.5 million. The Board needs to have the resources to deal with its oversight functions in an efficient manner. It is a point made by the Council for Licensed Conveyancers who write:-

“Changes to statutory rules proposed by the current regulators have been delayed because of the lack of clear guidelines and procedures for their approval by the DCA. Whatever model is adopted the processes for the future scrutiny and amendment of Rules must be both speedy and efficient.”

Relative to the current system, some savings would arise under Model B+ from bringing existing oversight regulators together. The additional cost of Model B+ would be less if a higher cost were attributed in the costing of the current system to the time of Ministers and the Master of the Rolls.

69. On the assumptions set out in the Report, the costs of Model B+ would be more than those of Model A. But the transitional costs and risks of moving to Model A, referred to in paragraph 30 above, are likely to be greater. Overall I do not believe, notwithstanding the element of estimate this exercise has involved, that the issue of differential cost should be a key determining factor in the choice between Model A and Model B+.

Conclusion

70. I conclude that regulatory functions (other than complaints and discipline which are the subject of Chapter C) are best dealt with by what the Consultation Paper referred to as Model B+. It provides for the setting up of an oversight regulator, the Legal Services Board, and separation of regulatory from representative functions within the front-line regulatory bodies. I believe that this builds on the existing system. There are good arguments for preferring this arrangement, and the discussion on international issues suggests nothing that is incompatible with international law and practice. I

think that the issues around costs are not decisive in the choice of regulatory models.

71. I conclude that the way to give effect to the proposals is to vest regulatory powers with the Legal Services Board, with powers to delegate to front-line regulators where it is satisfied as to competence and satisfied also that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, have been made. At present the governance arrangements made by the Law Society and the Bar Council (together with the Inns) are inappropriate for their regulatory functions.

CHAPTER C – COMPLAINTS AND DISCIPLINE

Introduction

1. The Consultation Paper set out the broad arrangements of the two main legal front-line regulatory bodies in England and Wales (the Law Society and the Bar Council) to deal with complaints and disciplinary matters. It argued that, in respect of complaints, the high level choice rests between (i) taking responsibility away from the front-line bodies to a single independent consumer complaints body; or (ii) leaving consumer complaints with the front-line regulatory bodies subject to oversight, akin to the system which exists at present. Similarly, in respect of discipline, the high level choice lies between having a single disciplinary system covering all lawyers, or leaving the disciplinary arrangements largely as they are, with front-line bodies dealing separately with their own members. From responses to the Consultation Paper, the major focus of attention, particularly in the case of those representing consumers, was on the manner in which lawyers deal with complaints and provide redress to consumers, not on the manner in which lawyers deal with disciplinary issues.

2. This Chapter takes the issues in respect of complaints in the following order:-

- paragraphs 4 to 15 summarise the existing complaints handling arrangements;
- paragraphs 16 to 33 set out issues with the existing complaints handling and oversight arrangements;
- paragraphs 34 to 46 deal with possible reforms to the complaints handling and oversight arrangements;
- paragraphs 47 to 56 set out the duties and powers of the Office for Legal Complaints (OLC) and the protocol for delegating matters to the front-line bodies;

- paragraphs 57 and 58 deal with issues around the classification of complaints;
- paragraphs 59 to 63 deal with practitioners' 'in-house' complaints handling arrangements;
- paragraphs 64 to 66 consider possible governance arrangements for the OLC and its relationship with the LSB;
- paragraphs 67 to 69 set out the costs associated with complaints systems; and
- paragraphs 70 and 71 deal with the funding of the complaints systems.

3. The Chapter then turns to disciplinary issues and deals with them in the following order:-

- paragraphs 72 to 78 describe the existing disciplinary arrangements;
- paragraphs 79 to 82 set out issues with the current system;
- paragraphs 83 and 84 deal with possible changes to the system; and
- paragraphs 85 to 87 deal with costs and funding associated with disciplinary arrangements.

Finally, paragraphs 88 and 89 set out the broad conclusions of this Chapter.

COMPLAINTS

Existing complaints handling and oversight arrangements

4. **The Law Society** is responsible for regulating the conduct of solicitors and for handling consumer complaints. Until recently both functions were carried out by the Society's Office for the Supervision of Solicitors (OSS). However, following a recent reorganisation the OSS has ceased to exist. It has been replaced by a new Consumer Complaints Service (CCS) which deals with all consumer complaints, and by the Compliance Directorate which deals with disciplinary matters.

5. The CCS is independent of the rest of the Society in the handling of individual complaints. However, it is funded and managed by the Law

Society, and the Law Society Council has historically been involved in policy issues around classification of complaints, organisation and funding.

6. Solicitors are required by Rule 15 of the Solicitors' Practice Rules¹⁹ and by the Law Society's Guide to Professional Conduct of Solicitors to have in place 'in-house' complaints handling procedures²⁰ which must be followed before a complaint is made to the CCS. These require solicitors to advise their clients how to make known any concerns they have about the service provided. Solicitors are then required to investigate the complaint within the practice, and at the conclusion of the review to provide a response to the client in writing. A client who is not satisfied must be provided with information about the CCS and its role.

7. There are three broad categories into which complaints may be divided. These categories remain, but the new Law Society operational system leans towards a functional split in case management, between cases where redress may be due and those which relate to conduct matters. The three categories are:-

- **Inadequate professional service (IPS)** - e.g. not carrying out a client's instructions, or allowing unreasonable delays. If the CCS upholds a complaint, it can provide redress by reducing a solicitor's bill, ordering a solicitor to pay compensation to a client of up to £5,000, or telling a solicitor to correct a mistake and pay the costs involved.
- **Professional misconduct** - e.g. not keeping a client's business confidential or failing to pay money over to a client when due. These issues may often amount to IPS and so redress may be provided where appropriate. If a complaint does not contain an element of IPS, redress cannot be awarded. Wherever professional misconduct is found, whether or not it amounts to IPS, the Law Society can discipline a solicitor by issuing a reprimand. The Law Society can place conditions on a solicitor's

¹⁹ Solicitors' Practice Rules 1990

²⁰ Law Society Guide to Professional Conduct of Solicitors, section 13.07

practising certificate. Serious cases may be referred to the Solicitors Disciplinary Tribunal.

- **Negligence** is a legal concept and cases of negligence are likely to include instances of either inadequate service and/or misconduct. The Law Society will not usually become involved in claims of negligence made against a solicitor, unless there are also elements of IPS (and the loss is within the CCS's redress limit of £5,000) or professional misconduct. Instead, a client who considers his solicitor has been negligent will be advised to make a claim against the solicitor. Advice may be offered through a panel of solicitors' firms willing to act on behalf of claimants. Claims will normally be dealt with by the solicitor's professional indemnity insurer. In cases where any claim is rejected, a client will normally have to go to court in order to pursue the claim.

8. **The Bar Council** is responsible for handling complaints against barristers and requires chambers to have a formal complaints procedure. Barristers are required to deal with complaints promptly, courteously and in a way which addresses the issues raised, and Heads of Chambers have a duty to ensure compliance with these rules.

9. If a complaint is not resolved at practitioner level, complainants may make a formal complaint to the Bar's Complaints Commissioner, who is not a lawyer. The Commissioner may dismiss a matter where he considers it outside the Bar's remit (in which case it is not counted as a formal complaint), or where he considers it to be unfounded. The Commissioner may also attempt to broker a conciliation.

10. The Bar Council categorises elements of complaints into the same three broad headings:-

- **Inadequate professional service** – the Bar can require a barrister to apologise to a client, to repay fees and/or to pay compensation of up to £5,000.
- **Professional misconduct** – e.g. a serious error or misbehaviour which may well involve some element of dishonesty or serious incompetence. The Bar Council cannot award compensation to the client but it can take disciplinary action against the barrister concerned.
- **Negligence** – like the Law Society, the Bar Council will not generally consider negligence claims, except in some cases containing an element of inadequate professional service. For claims of over £5,000 the Bar may advise complainants to pursue their claim through the courts.

11. The Bar can deal with a barrister for both misconduct and inadequate professional service in respect of the same complaint.

12. If the Bar's Complaints 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 itself also raises a number of complaints against barristers 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 around 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.

13. 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.

14. **Other professional/regulatory bodies** - the Consultation Paper also explained that other providers of legal services, such as legal executives and licensed conveyancers, have complaints procedures which follow broadly similar principles.

15. **Oversight** - there are two important oversight arrangements:-

- The **Legal Services Ombudsman (LSO)**, established by the Government in 1990, cannot be a qualified lawyer and is completely independent of the legal profession. The function of the LSO is to investigate the handling of individual complaints about solicitors, barristers, patent agents, legal executives and licensed conveyancers by their respective front-line bodies where a referral is made to her. The LSO has the power to recommend or order that compensation for loss, distress or inconvenience is paid to the complainant by the practitioner and/or by the front-line body. There is no maximum limit on the compensation the LSO can award. The LSO may also recommend that the front-line body reconsider the complaint, or that it exercise its powers in relation to the lawyer complained about – for example, the power to discipline a lawyer. The LSO has the power to investigate the original complaint but to date this has been used infrequently. The LSO can also make recommendations to the front-line body about its arrangements for handling complaints. The services of the LSO are free to consumers.
- In February 2004, the Secretary of State for Constitutional Affairs formally appointed the existing LSO to act also as independent **Legal Services Complaints Commissioner (LSCC)**²¹. For the present, the LSCC's powers have been limited to oversight of the handling of complaints about

²¹ Section 51 of the Access to Justice Act 1999 provided for the appointment of a Legal Services Complaints Commissioner.

solicitors by the Law Society. However, it is open to the Secretary of State to extend the powers of the LSCC to include other bodies should he consider them to be handling complaints unsatisfactorily. The LSCC has the power to set targets for the handling of complaints, make recommendations about the complaints system, and require the Law Society to submit a plan for improved complaints handling. The LSCC can impose a penalty on the Law Society for failure to perform in respect of complaints handling.

Issues in connection with the existing complaints handling and oversight arrangements

16. There are a number of issues which arise from the manner in which complaints are dealt with by the existing front-line and oversight bodies.

These issues concern:-

- (i) the record of complaints handling by the front-line bodies;
- (ii) the level of confidence in the independence of the current system;
- (iii) the consistency and clarity of redress arrangements for consumers in respect of front-line bodies with overlapping activities; and
- (iv) the overlaps in the current oversight regime.

Each is dealt with in turn.

17. The record of complaints handling against solicitors has been the subject of much criticism over recent years. In particular, several recent annual reports of the LSO have been critical of deficiencies in the system. In the main, concerns have centred around the issues of substantial delay in dealing with complaints, and questionable quality in terms of the outcome. This was initially attributed to poor management of the complaints handling process, and inadequate resourcing.

18. The Law Society was set various complaints handling targets by the Department for Constitutional Affairs. Between January 2003 and November 2004 these included a range of targets: 60% of its investigations to be closed within 3 months, 75% within 6 months, 85% within 12 months, 97% within 18

months and the remaining 3% within 21 months. It was also set a target linked to the quality of case handling. However, there were concerns that it was failing to achieve these targets. In particular, the LSO's Report April-September 2003 stated:-

“The targets for the speed and quality with which the OSS is expected to complete its work have been established by the Department for Constitutional Affairs and were reduced for the current year to reflect serious problems that the OSS was experiencing in recruiting staff and delivering new IT systems. Even with these reductions, the statistics show that the OSS is currently falling well short of its agreed targets.”²²

19. In her most recent report²³ the LSO noted that, with the reorganisation of the CCS, there has been some improvement in terms of quantity of the cases dealt with, although concerns about the quality of handling remain.

20. In November 2004, the LSCC set a range of new targets for the Law Society requiring them to close at least 55% of complaints within 3 months, 75% of complaints within 6 months, 85% of complaints within 9 months, 92% of complaints within 12 months, and 98% of complaints within 18 months. The LSCC also required that all complaints over 18 months should be referred to the Law Society's Compliance Board. In addition, the LSCC has set targets aimed at improving customer satisfaction and the quality of decisions made by the CCS.

21. It is difficult to draw a direct comparison between the Bar Council and the Law Society in terms of volume of complaints, predominantly because of the nature of the services provided, and because the Bar is primarily a 'referral' branch of the profession, so that the majority of consumers access their barrister through a solicitor. Of those who do complain to the Bar Council,

²² *Breaking the Cycle*, The Office of the Legal Services Ombudsman, Interim Report, April to September 2003, published in November 2003

²³ *In Whose Interest?* - Annual Report of the Legal Services Ombudsman for England and Wales 2003/2004

over 1 in 3, and an increasing number over the last 4 years, argue that their complaint has been dealt with unfairly and appeal to the LSO. This is a much higher level of appeal from the front-line body up to the oversight body than is the case for solicitors. It raises general issues about how the complaint is dealt with and how the decision is communicated to the complainant. Against this it should be recognised that, given the adversarial nature of much of the Bar's business, there will be winners and losers. Further, the Bar Council fairly makes the point that most appeals are without success.

22. The Kentridge Report²⁴ acknowledged that as the Bar moves towards permitting a wider level of direct access (with clients accessing barristers' services without first instructing a solicitor) this is likely to have an impact on the number of complaints and the complexity of case handling:-

“We also think it likely that there would be an increase in the number of complaints made against barristers, whether justified or not, not least because lay clients who instruct barristers directly will not have the assistance of a solicitor to help them judge whether a barrister's conduct has been appropriate. There is also a risk that they may not have understood the limitations of the services which barristers are able to provide.”

23. The introduction of new forms of legal practices (e.g. Legal Disciplinary Practices dealt with in Chapter F) may also add to the complexity of complaints handling if barristers join these entities in significant numbers.

24. There are also concerns about the independence of complaints handling systems operated by the front-line regulatory bodies. Many of the responses to the Consultation Paper from members of the public or organisations representing them indicated that this was contributing to a lack of public confidence in the legal professions:-

²⁴ op. cit.

“We believe that consumer confidence in lawyers’ ability to deal with complaints against their fellow professionals has been irreversibly undermined”. Legal Action Group.

25. The lack of independence adds to the feeling held by many consumers that they are at a particular disadvantage in raising a complaint against a lawyer. While a clear split between the regulatory and representative functions of the front-line bodies, as envisaged in Chapter B, might reduce public concerns about the lack of independence in complaints handling by those bodies, it is unlikely to remove those concerns completely. The LSO’s response to the Consultation Paper commented:-

“It is clear from the contact that the Ombudsman’s Office has had with many thousands of customers of legal services, that very many continue to feel disenfranchised by the legal process itself and disadvantaged in any attempt that they might make to pursue a complaint about a lawyer. In an age in which it is often claimed that consumers are more confident and better informed than ever, I suspect that (despite anecdotes to the contrary) this is much less the case in the area of legal services than in other service sectors. I therefore urge the development of new systems and structures that are characterised by a commitment to transparency, accessibility and inclusivity.”

26. Whilst the introduction of the CCS appears to have made some initial improvement in the speed of handling of complaints, it is no more independent than its predecessor, the OSS, and appears unlikely to command any greater public confidence in the independence of its decisions.

27. There is a further issue which results from the existing arrangements and it is that they have the potential to create inconsistency and a lack of clarity about the avenues for redress in the mind of the consumer, most noticeably where a complaint is made about both a solicitor and a barrister, or where

there is uncertainty in the mind of the consumer as to where a fault actually lies:-

“...there is a confusion in the mind of the user of service between the responsibility of the barrister and the solicitor in any individual matter...”

Immigration Services Commissioner.

“It can be extremely difficult for consumers who are not regular users of legal services to know exactly where things have gone wrong. For example in a court, the circumstances giving rise to the complaint may be the result of acts or omissions by the barrister or instructing solicitors. Consumers are not generally well equipped to decide where duties of one professional end and another begin.” Consumers’ Association.

28. The LSO sees significantly fewer complaints generated by members of the other front-line bodies. In part this is a reflection of the smaller size of these other bodies within the legal services sector. Nevertheless these other bodies do give rise to issues that need to be addressed. One of these is the overlap which exists between complaints systems for providers of legal services, such as ILEX members, and the CCS system where the work is being carried out by an individual under the supervision of a solicitor. There is a potential confusion for the consumer in that complaints may be handled either by the individual’s own front-line body, or by the CCS, with different processes and the possibility of a different outcome.

29. The picture is further complicated because the extent to which other front-line bodies fall within the jurisdiction of the LSO is not consistent. In some cases, the LSO is empowered to consider complaints generated as a result of only some of the services that may be provided by a practitioner. For example, in the case of patent agents, the LSO only deals with complaints about advocacy services provided by members of CIPA.

30. With respect to the oversight bodies for complaints that are outlined in paragraph 15, the overlaps and fragmented oversight arrangements which are discussed in relation to the other regulatory functions in Chapter B are also a feature of the arrangements in this area.

31. The recent appointment of the LSCC with powers over a particular body impacts on the pre-existing powers of the LSO. The LSCC is taking over the target setting and monitoring/analysis of the CCS currently done within the Department for Constitutional Affairs, but with the new power to fine for failure. It is difficult from the outside to understand why it was considered that the LSCC's powers could not be given to the LSO, but that a new post could be held concurrently by the same person. In the enabling legislation for each, in many places the wording for the LSO and the LSCC is identical and the two offices are mirror images in many respects. The Explanatory Notes to the Access to Justice Act 1999²⁵ in respect of the LSCC explain that the sections *"largely mirror the provisions for the post of Legal Services Ombudsman...so that the two posts could be combined, if considered appropriate"*. However, the two offices are not being combined or even co-located – the LSO operates from Manchester and the LSCC's office is in Leeds. In September 2003, when announcing the appointment of the LSCC, the Secretary of State for Constitutional Affairs said that the current LSO would be appointed as an interim measure to act as LSCC for the Law Society pending consideration of this Review's findings²⁶.

32. In addition to the LSO and the LSCC, the Secretary of State at the Department for Constitutional Affairs, the Master of the Rolls, the Financial Services Authority, the Patent Office and the Immigration Services Commissioner are all providers of varying degrees of external oversight of complaints. But the landscape also includes the Law Society's Independent Commissioner, appointed by the Master of the Rolls, who acts as auditor of

²⁵ Paragraph 197

²⁶ DCA press release, Friday 26th September 2003

the Law Society's complaints handling operation with no front-line case investigation role. The Bar's Complaints Commissioner is not an oversight regulator but a front-line complaints handler, appointed by the Bar Council.

33. Having regard to my Terms of Reference, I do not believe that the current system delivers sufficient independence from the legal practitioner, nor that it provides appropriate levels of consistency and clarity. The current system is not well suited to offer flexibility, either to accommodate new legal providers being brought within the net (as discussed in Chapter E) or to permit alternative business structures where lawyers from different backgrounds may work together (as discussed in Chapter F). The present oversight arrangements are confused.

Possible reforms to the complaints handling and oversight arrangements

34. In respect of roles of front-line and oversight regulators there are a number of solutions. As noted in paragraph 1, the high level choice rests between (i) taking responsibility away from the front-line bodies to a single independent consumer complaints body; or (ii) leaving consumer complaints with the front-line bodies subject to oversight, a system similar to that which exists at present. There is a third option (iii) of having a single point of entry, with all consumer complaints being passed down to the front-line bodies to deal with them. This would essentially be a 'post office' role, although there is a possible variant under which complaints may be sifted into different categories or types of complaints.

35. I do not favour either variant of option (iii) as I see a 'post office' role for consumer complaints, with no power to deal with the substance of complaints, as adding an additional layer to the process, and delivering little added value.

36. In terms of option (ii), if this were to be followed there would be a benefit in bringing some rationalisation to the oversight function. But this would, in my

view, not deal sufficiently with the issues of independence and consumer confidence that come from leaving complaints handling with front-line bodies, or with the issues of simplicity and consistency.

37.I conclude that a single independent complaints handling body for all consumer complaints is the best way forward. It would sweep up the complaints handling units of the front-line bodies and the main oversight bodies. Such an arrangement would have the benefit of:-

- providing a system which is independent of the legal profession;
- providing a single system with one point of entry for all consumer complaints, making the system simpler for consumers;
- bringing greater consistency and clarity of process; and
- bringing greater flexibility, in particular making it easier to accommodate alternative business structures.

It would also enable the collection of data which could be used as a valuable source of information on which to make informed decisions about where to target efforts to improve service delivery across front-line bodies.

38.The argument for an independent complaints handling body is supported by the LSO who commented in her response to the Consultation Paper:-

“Whatever the balance of the arguments surrounding the retention by the professional bodies of complaints handling, the idea itself has lost any legitimacy - consumer culture has moved on. I am convinced that an independent overarching regulator and an independent complaints-handling office would be the minimum acceptable outcome of any reform following the present review.”

39.The National Consumer Council also agrees that a single system for complaints is the best way to provide a fair and consistent complaints handling system:-

“We have a strong preference for a uniform complaints organisation, independent of the professional bodies.....having a single gateway would improve access to the complaints system.”

40. The Consumers' Association also prefers a single complaints handling body and comments in its response to the Consultation Paper that:-

“The attraction of a uniform complaint-handling organisation is the simplicity for consumers of a one-stop shop.”

41. It is important that the creation of a single complaints handling authority is not seen as an opportunity for front-line bodies to wash their hands of complaints. It is to be expected that the new arrangements will involve front-line bodies and create mechanisms to enable the regulator and practitioners themselves to learn from complaints, so that they can act as an upward driver on quality standards. In addition practitioners will have an incentive to take a close interest since the system will be funded, as it is primarily at present, by practitioners.

42. Some have argued that any change from the existing arrangements should be made only where an existing system can be demonstrated to have failed and where there is evidence that any new system would result in complaints being handled more efficiently, speedily or satisfactorily. In terms of existing arrangements, the Bar Council in particular has argued that it should not have change imposed on it because of the failure of others.

43. But the arguments for a single independent complaints system made by the LSO, the National Consumer Council and the Consumers' Association go well beyond the failures of the Law Society. I believe that the single complaints system should cover complaints against all lawyers and conclude that it would be wrong that an exception should be made for the Bar.

44. If an exception were to be made it would create an exception to:-

- the objective that a consumer complaints system should have a high degree of independence from the relevant front-line body;
- the objective of simplicity, important for consumers who seek clarity of system and particularly where there is uncertainty about whether the complaint is against an instructing solicitor or a barrister;
- the objective of consistency, important at a time when the Bar is taking some steps towards permitting greater direct access; and
- the objective of flexibility, in making it easier to provide for new forms of business structure where, for example, barristers and solicitors may work together.

45. The Legal Services Ombudsman in her response comments on the issue of exceptions as follows:-

“The removal of complaints handling from the professional bodies is likely to generate a measure of resentment from those whose record of complaints handling is satisfactory. There now exists an understandable feeling that the 'good' are in danger of being penalised for the failures of the relatively poor. Whilst I can appreciate this reaction, I consider it misconceived. For reasons of accessibility and consistency, it would be inappropriate to create a system in which some complainants were able to approach a new independent complaints-handling organisation, whilst others were required to complain to the appropriate professional body. As importantly, any new regime should not be perceived as a penalty for failure but rather as an attempt to bring regulation (including complaints handling) into line with prevailing assumptions about consumer redress...”

46. I conclude that a single independent complaints organisation, covering all the front-line regulatory bodies, should be formed. Provisionally I refer to it as the Office for Legal Complaints (OLC). While independent in handling complaints, the OLC should come under the general supervision of the LSB, with the LSB having the power of appointment to, and dismissal from, the

complaints body (see paragraphs 64 to 66 below). The OLC should ensure that front-line regulatory bodies are engaged in the complaints handling process by developing feedback loops to enable the profession to learn from complaints, so that they can act as an upward driver on quality standards.

Duties and powers of the Office for Legal Complaints and protocol for delegating matters to the front-line bodies

47. The creation of the OLC would provide a single system, which is free to consumers. The system would cover all consumer complaints against providers of legal services regulated by the Legal Services Board.

48. Whilst the OLC should have responsibility for dealing with individual complaints, it should also have a more strategic role (in conjunction with the Legal Services Board) for example in the setting of targets for the handling of 'in-house' complaints by practitioners. It should also have the responsibility of overseeing the appropriateness of the indemnity insurance schemes and compensation fund arrangements operated by the front-line bodies, with particular emphasis on ensuring these provide satisfactory protection for consumers.

49. The aim of the OLC should be to provide quick and fair redress to consumers in whatever form may be appropriate, without undue reference to classification issues discussed further in paragraphs 57 and 58. I therefore propose that once a complaint has been received, the OLC should first attempt to mediate the complaint between the complainant and the practitioner. Where this fails the OLC should have the power to investigate a complaint further. In doing this, the OLC should have the power to require the practitioner complained about to provide any information or documents that may be required to assist the OLC in its investigation of the complaint.

50. The OLC will determine a complaint by reference to what is, in its opinion, fair and reasonable in all the circumstances of the case. It should have the

power to award redress to the consumer, and this might include the power to:-

- require a lawyer to make an apology to a complainant;
- order a reduction in fees;
- require that work be re-done and faults remedied; and
- make an order for redress up to a limit to be prescribed by the LSB.

51. Subject to any right of appeal available, orders made by the OLC and accepted by the complainant should be binding on the practitioner. In circumstances where the practitioner refuses to meet the terms of a binding order issued by the OLC, it may be appropriate for a financial award made by the OLC to be capable of enforcement, as if it were a court judgment, and to report the matter to the front-line body concerned.

52. When considering a complaint, should the OLC reach the view that there may have been some element of professional misconduct by the practitioner, it should refer that aspect of the complaint to the front-line body concerned. The handing-down by the OLC of conduct matters to the front-line body will require close liaison between the parties. As is discussed later in this Chapter, the prosecution of conduct matters relating to practitioners will rest with the relevant front-line body. But, where there were novel or contentious considerations or matters which raised issues about the wider public interest, I consider there should be a reserve right to prosecute the conduct complaint in front of the appropriate tribunal of the front-line body. It is for consideration whether this reserve right should be exercised by the OLC, who would already be familiar with the case, or with the LSB, who would have oversight responsibility in respect of matters of policy.

53. In general it is unsatisfactory to delay the provision of redress to a complainant (where the OLC considers such redress may be warranted) pending the outcome of any disciplinary hearing, which may take considerable time. I therefore consider that the OLC should, where it

considers the circumstances of the case merit, provide appropriate redress to the complainant in parallel with its referral of the matter to the front-line body concerned for further investigation of the conduct issue and possible disciplinary action. The granting of redress should not be permitted to prejudice the determination of any related misconduct case.

54. In relation to the possibility of appeals against a decision of the OLC, there are various options, including a right of review by a panel, full rights of appeal or no rights of appeal. I do not express a recommendation as to which should be selected. I recognise that, overall, the system of complaints handling and appeal would have to safeguard the rights of both complainants and practitioners to a fair process. However, given that an objective in creating the OLC is to provide quick and appropriate redress from an independent body with the minimum of formality, I hope that a fair process can be achieved without the introduction of elaborate appeals mechanisms, which may prolong the uncertainty of outcome for all parties.

55. The OLC should also maintain regular dialogue with the front-line bodies and the LSB in relation to the passing down of general statistical information on the profile of complaints. This will help to highlight important learning messages which need to be passed down to practitioners.

56. The OLC should also engage with other major stakeholders (e.g. consumer groups), in order to ensure that consumers are appropriately informed about the complaints handling process. The OLC should publish an Annual Report, setting out its performance in terms of complaints handling and that of the front-line bodies.

Classification of complaints

57. As explained earlier in the Chapter, front-line bodies make a distinction between different elements of complaints and classify them into the three main headings:-

- (i) inadequate professional service;
- (ii) professional misconduct; and
- (iii) negligence.

However, consumers generally make no such distinction and simply seek redress for what they see as injustice. The previous section set out a system designed to provide quick and fair redress to consumers, in whatever form may be appropriate without undue reference to classification issues. The fact that current complaints handling systems cannot generally provide this redress in cases of professional misconduct or negligence is frustrating to many consumers. For example, many consumers are likely to find it hard to understand that a complaints handling authority could not provide compensation for a serious case of professional misconduct, but does have powers to award up to £5,000 for the less serious matter of inadequate professional service. To advise a complainant that they need to pursue their case for redress in the courts, with the associated need to engage another solicitor, is unsatisfactory.

58. Whilst the consumer may not be concerned with the classification of the complaint, the system proposed cannot wholly by-pass the issue since the practitioner is likely to be concerned. Negligence is a legal concept and the practitioner has rights, including under the European Convention on Human Rights and the Human Rights Act 1998. So whilst it might be appropriate for the OLC to be in a position to make an award against the practitioner without undue reference to matters of classification, it should not be able to do so without limit. Further, the level of award that could be imposed by the OLC without reference to the courts would be of concern to insurers. The level would need to be set in a proportionate manner, with regard to the conflicting pressures; and it is proposed that it should be set from time to time by the LSB, after due consultation with the OLC and other interested parties, such as the front-line bodies and insurers. High value cases will still have to go in front of the courts, if they cannot be resolved by other means (e.g. mediation).

In-house complaints handling

59. There are also questions about the way in which rules that govern the complaints handling process are interpreted prior to formal referral of a complaint to the OLC. For example, Rule 15 of the Solicitors' Practice Rules²⁷ requires that solicitors should have in-house complaints handling arrangements. However, there is some evidence that this rule has not been applied in a consistent way by members of the profession:-

*“This Rule passed by the Law Society required firms to have their own complaints mechanisms and improve the information that they provide to clients on accepting instructions. The rule was either derided or misunderstood by a sizeable proportion of the profession. Resistance took various forms including non-compliance and a grudging compliance, through prolix and incomprehensible client care letters which perverted the aims of clarity and good communication.”*²⁸

60. There has been much debate about the current requirement for lawyers to have in-house complaints arrangements which clients must exhaust before they take their case to the various existing complaints authorities.

61. On the one hand it is right that lawyers should have the opportunity to resolve a complaint before the matter escalates, creating unnecessary stress and cost for all concerned. In their response to the Consultation Paper, the Better Regulation Task Force underlined the desirability of an effective in-house complaints handling procedure at practitioner level. Many responsible lawyers will not only want to do this, but they will also want to learn from complaints and regard them as a valuable means of gathering consumer information which might help them to improve their service delivery. Conversely, there are accounts of consumers who are deterred from making a complaint because currently they have little choice but to pursue their

²⁷ op. cit.

²⁸ *Self-regulation and the market for legal services*, Professor Moorhead, Cardiff Centre for Ethics, Law and Society, Cardiff University, 2004

complaint with a lawyer, who may have been the cause of considerable distress to them. This situation may be exacerbated in the case of sole practitioners or smaller firms where a distinct complaints handling wing does not, because of their small size, exist.

62. Taking these considerations into account, and because resolution of a complaint at the local level is likely to be quicker, cheaper, and less onerous for all concerned, I favour an approach under which lawyers would be required to have an 'in-house' complaints handling system which conforms to clear standards prescribed by the Regulator, and that consumers should be required to complain to their lawyer in the first instance. However, I consider there are two instances in which a consumer should be able to take their complaint to the OLC before conclusion of the in-house procedure:-

- if they do not receive an initial acknowledgement within a short period of making a complaint (the period to be specified by the OLC); or
- if it has not been possible to resolve the complaint with their lawyer after a reasonable period from the complaint being made (again the period to be specified by the OLC).

63. In addition, I am sympathetic to the argument that in cases where there is evidence of a difficult and possibly acrimonious relationship between a consumer and a lawyer over an extended period, the complainant should be permitted to take their complaint direct to the OLC. However, I would not wish to see this as 'opening the gates' in relation to any more general direct access to the complaints authority.

Possible governance arrangements for the OLC and its relationship with the LSB

64. The primary issue to be addressed is whether the single complaints body should be a self-standing body with its own statutory objectives or, although separately staffed and branded, part of the LSB framework. The argument in favour of it being self-standing is that its focus would be, and clearly seen to

be, on resolving complaints in the public interest. The argument against is that this objective is plainly encompassed within the objectives of the LSB itself, discussed in Chapter A. If the LSB had no level of oversight over how complaints were handled, it could not meet the regulatory objectives set for it. In meeting the objective of 'Protection and promotion of consumer interests' set out in Chapter A there would be two regulatory bodies; and whilst it might be clear that the handling of individual complaints fell to the OLC, systemic failures by lawyers or their front-line regulatory bodies which generated consumer complaints might fall to both the LSB and the OLC.

65. My view is that it would be better to develop one regulatory system: a framework with the LSB at its head which incorporates the OLC. The LSB would have oversight powers over the OLC in respect of systemic and policy issues, but would have no rights in respect of individual complaints. The Financial Ombudsman Service (FOS) represents a precedent in this regard. Whilst it has a separate board, its overall functions and its budget are subject to oversight by the FSA, which appoints the members of the FOS board. This degree of oversight should aid co-operation and avoid duplication. Nevertheless, I am aware that the Government, in its N2+2 Review within the financial services industry, is looking at the relationship between regulator and complaints body, and there may be lessons from that review which should inform the debate in respect of the legal services industry.

66. Subject to any lessons learned from the N2+2 Review, I consider that the OLC should have a board structure, the chair of which should be a non-lawyer. The board should have a lay majority, but should include members of the legal professions regulated by the LSB. All appointments should be based on merit following a 'Nolan' procedure.

Costs associated with the various complaints systems

67. The costs relating to complaints systems are set out in the Ernst & Young Report in Appendix 3. The current system costs approximately £29 million to run. The main cost rests with the Law Society's complaints handling body. However, the figure also picks up the relevant costs of the other front-line regulators and of the oversight regulators.

68. The Ernst & Young Report estimates that the cost of a new single complaints body, the OLC, would be approximately £23 million. Whilst there would be costs of transition to the new body, there would be significant savings from the elimination of the complaints handling activities of a considerable number of bodies.

69. Notwithstanding these potential savings, the decision to recommend a single independent complaints handling system is not driven by costs but by the other advantages, for example in demonstrable independence and clarity, that the OLC would introduce.

Funding the complaints system

70. It is usual for the cost 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, but without imposing an undue burden on those required to fund it. The cost of dealing with complaints about 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 sector, the cost is collected through the practising certificate or annual fees. The CCS has partially introduced a 'polluter pays' system, in which costs are 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 primarily by the professions over which it has oversight.

71. I take the view that the cost of any new complaints handling system for the legal sector should not be borne by the taxpayer. The cost should be funded in part by means of a general levy across the front-line regulatory bodies, and in part by payments from those against whom a complaint has been upheld – the ‘polluter pays’ principle. The precise levels will need to be determined by the OLC, in discussion with the LSB, and following proper consultation.

DISCIPLINE

Existing disciplinary arrangements

72. **Law Society** - The Solicitors Disciplinary Tribunal (SDT) is constituted under Section 46 of the Solicitors Act 1974. It is independent of, but funded by, the Law Society (with the exception of lay members who are paid for by the Department for Constitutional Affairs). The Master of the Rolls appoints the SDT members.

73. The SDT’s principal function is to hear allegations against solicitors of unbecoming conduct or other breaches of their conduct rules. It is open to anyone to make an application to the SDT, although most applications are made by the Law Society, usually following investigation by its Compliance Directorate. Other than in exceptional circumstances, hearings of the SDT are held in public and take place before three members - two solicitors and one lay person. The Tribunal usually pronounces its order immediately. Its findings are published about eight weeks later, and these are documents of public record. The SDT can suspend a solicitor for a fixed or indefinite period, reprimand a solicitor, fine a solicitor (fines are payable to HM Treasury), and ban a solicitor’s employee from working in a law practice without the consent of the Law Society. Appeal from a decision of the SDT lies to the High Court.

74. **The Master of the Rolls** - As noted in Chapter B, the Master of the Rolls has a wide variety of functions pertaining to the legal profession, and the Law Society in particular. In relation to disciplinary matters he hears appeals from practitioners on the imposition by the Law Society of conditions on their

practising certificates. Such conditions may be that the solicitor cannot practise a certain area of law, or only in supervised practice.

75. Bar Council - If a complaint about a barrister involves professional misconduct, the Professional Conduct Committee can refer the complaint to:-

- an informal hearing;
- a summary procedure panel; or
- a disciplinary tribunal of the four Inns of Court.

76. Each of the above has a mixture of barrister and lay representation. For the most serious disciplinary cases barristers will appear before a disciplinary tribunal of the four Inns of Court. This Tribunal is chaired by a judge with two barristers and two members of a panel of lay representatives. Barristers can appeal from the Disciplinary Tribunal to the 'visitors'²⁹, who are High Court Judges appointed by the Lord Chief Justice.

77. Other legal service providers - There are similar disciplinary tribunals in place to hear and determine cases against other authorised legal practitioners, e.g. legal executives and licensed conveyancers. While there is some variation in the way these tribunals are structured and operate, each nevertheless acts in a similar way to the SDT and the Inns of Court disciplinary tribunals, by seeking to maintain the principles of independence, impartiality and fairness.

78. In general, the tribunals established to hear and determine cases against members of the legal professional bodies are directly funded by the bodies concerned.

²⁹ Hearings Before the Visitors Rules 2002

Issues with the current system

79. Most responses to the Consultation Paper emphasised the need for continued independence in the various systems, both from the front-line bodies and the Government. Most took the view that such a degree of independence was vital in order to command the confidence in the system of both the professions and the public. Although many felt satisfied with the existing arrangements, there were some concerns about funding arrangements. It was felt by some that the various disciplinary tribunals should not be funded directly by the professional bodies in respect of whose members they are making a determination, in order to achieve both real and perceived independence.

80. There are also issues about the degree of transparency in respect of some of the systems in operation, and about the absence of consistency. Concern was expressed about both the constitution of, and final outcome from, the spectrum of tribunals:-

“There should be coherence on penalties and enforcement as well as standards and consistency of investigations...” Immigration Services Commissioner.

81. One further area for consideration lies in the system operated by the Inns of Court, in which the judiciary plays an important role in the disciplinary process for those barristers who appear before them. The argument put to me for the involvement of the judiciary is the experience judges bring in determining matters relating to advocacy. But no similar arrangement in respect of matters of court work exists for members of the Law Society, or other legal professional bodies whose members are entitled to exercise a right of audience.

82. A further issue relates to the role of the Master of the Rolls. Notwithstanding his judicial seniority, the appeals by solicitors he is required to hear, referred to in paragraph 74, are often of relatively minor significance.

Possible changes to the system

83. Some respondents suggested there should be a single disciplinary authority for all lawyers, and argued that this might reduce costs and bring more consistency. Others have argued that the existing arrangements operate efficiently and effectively and that no changes should be made.

84. While the creation of a single disciplinary tribunal for all lawyers would encourage consistency and mean that over time greater efficiency in determination of disciplinary cases might result, the benefits would largely be at the margin. There were few major concerns raised in respect of the existing disciplinary arrangements. This is, perhaps, unsurprising given that arrangements need to be subject to ECHR considerations; and that if there were material deficiencies these would already have been subject to legal challenge. My view is that it would be reasonable to maintain the existing disciplinary arrangements, but to consider modest changes intended to address some of the issues raised above:-

- Involvement of the judiciary in disciplinary arrangements – At paragraph 81 above, I noted that members of the judiciary do sit on disciplinary tribunals convened by the Inns of Court, but not on tribunals in respect of other legal professional bodies dealing with matters of court work. The extent to which the judiciary is involved in such matters, and the application of the principle that judicial involvement should be even-handed in respect of lawyers where their work impacts on the operation of the courts, is an issue for the judiciary to consider.
- Appeals to the Master of the Rolls – In order to remove the anomaly of the Master of the Rolls considering cases against disciplinary decisions taken by the Law Society, referred to in paragraph 82, I propose that any such appeals should be made instead to the High Court.
- Review of tribunal powers – In order to ensure the consistency and continued appropriateness of their powers, each disciplinary tribunal should be required to review its powers and to provide a report annually to the LSB, including statistical information on the number of cases dealt with

and the outcomes. It should be open to the LSB or the Tribunal concerned to recommend to the Secretary of State for Constitutional Affairs any variation in the powers of any Tribunal, or the modification of any other arrangements or procedures they may consider appropriate. The Secretary of State should have the ability to amend such powers or arrangements of any of the disciplinary tribunals, by means of secondary legislation.

Cost and funding of the disciplinary system

85. The changes to the existing disciplinary arrangements proposed above should have no material effect on the costs of these arrangements, the total cost of which as set out in the Ernst & Young Report amounts to approximately £6 million.

86. Questions have arisen about whether the current system of funding the SDT should change, in order to establish its administrative as well as its decision making independence from the Law Society. One possibility would be that SDT costs could be covered by a direct charge by the SDT on Law Society members, rather than through the Law Society itself. Under the proposed arrangements in this Review, one further suggestion to ensure appropriate funding and enhance independence is that the LSB should fund the disciplinary tribunals from the amounts it levies on the front-line regulators for the cost of regulation.

87. I am not, however, convinced that such changes are necessary. The funding of tribunals would come from the regulatory arm of the front-line body. The LSB would have powers of oversight over the disciplinary arrangements made by the front-line bodies. Where it was not satisfied that sufficient arrangements had been put in place, or that sufficient resources had been made available, by the respective bodies to ensure propriety and independence, it would have powers to call for changes.

Conclusion

88. This Chapter has covered the working of the complaints systems within the legal services sector. For reasons of independence, simplicity, consistency and flexibility, I conclude that a single independent complaints handling body for all consumer complaints is the best way forward. This should be no more expensive than the current system and might be cheaper. The proposed Office for Legal Complaints would form part of the single LSB framework, and would cover all front-line regulatory bodies covered by the LSB.

89. Issues about professional conduct, including possible disciplinary action, would be handed down to the front-line bodies. There is a case for dealing with such disciplinary matters in a uniform manner, with a single disciplinary tribunal system. But the Chapter's overall conclusion is that the existing disciplinary system works reasonably well and should, subject to only a few changes, be left broadly as it is.

CHAPTER D – GOVERNANCE, ACCOUNTABILITY AND OTHER RELATED ISSUES

Introduction

1. This Chapter turns to detailed issues about the regulatory framework; and in particular deals with issues of governance and accountability of the Regulator.

2. The issues dealt with are those raised in the Consultation Paper:-

- Paragraphs 3 to 5 deal with whether the Regulator should be a board or an individual;
- Paragraphs 6 to 9 deal with board structure and composition of the Regulator;
- Paragraphs 10 to 17 deal with the appointment process;
- Paragraphs 18 to 20 raise issues about the independence and qualification of the Regulator;
- Paragraphs 21 to 25 examine the manner in which the Regulator should be held accountable;
- Paragraphs 26 to 30 deal with the Regulator's duty to consult;
- Paragraphs 31 to 33 comment on the process for appeal from decisions of the Regulator;
- Paragraphs 34 to 37 discuss funding issues;
- Paragraphs 38 to 41 examine the relationship between the Law Officers and the regulatory system; and
- Paragraph 42 sets out the broad conclusions.

The Regulator: board or individual

3. The Consultation Paper acknowledged that a regulator may be either an individual or a board. When the utility regulators were first set up in the 1980s, single regulators were common, but the trend now is towards a board.

4. There are good reasons for believing it would be better to vest the powers of the Regulator in a board, rather than in one individual. A board provides a source of expertise and opinion. It provides an opportunity to bring together individuals from different backgrounds, including both those who are suppliers and consumers of legal services. Importantly, it reduces the personalisation of issues, which could be a distraction.

5. The vast majority of respondents supported the idea that the regulator of legal services should be a board. The balance of this Chapter assumes that the regulator will be a board, the Legal Services Board, with the broad objectives and powers described in Chapters A and B.

Board structure and composition

6. The LSB will be an important policy making body and needs to be small enough to be effective. It might number between 12 and 16 members.

7. The Consultation Paper commented that the Board might be “*headed by a Chairman and, if thought appropriate, a Chief Executive...*”. The Chairman’s role, likely to be part-time, would be to run the Board, responsible for policy decisions; the Chief Executive’s role, almost certainly full-time, would be to run the operations of the Regulator and to implement policy. It would be possible to combine the two roles in one individual, but in general best practice would be for the two roles to be kept separate, and I would favour this.

8. The Chief Executive should be on the Board; and the Board might include a small number of other senior employees of the Regulator. But the majority of the Board should be non-executive. The non-executives should be drawn from a variety of backgrounds, including practitioners. To meet the Terms of Reference that the Regulator should have independence from those being regulated, it is proposed that the majority of the Board should be non-lawyers.

9. All non-executives should be appointed on merit, on the Board to assist the LSB to meet its objectives, not to represent any particular interest. To include representatives would cut across the principle, set out in Chapter B, of separation of regulatory from representative functions. Nevertheless, within the practitioner element of the Board, care should be taken to ensure that the mix of skills and expertise appointed reflected the diversity of activities carried out within the legal services sector.

Appointment process and tenure

10. The Consultation Paper made clear that there are a variety of different precedents for the appointment of directors to regulatory boards. This variety was reflected in the responses.

11. As regards the appointment of the Chairman and the Chief Executive, I judge the main choice to lie between appointment by the Secretary of State for Constitutional Affairs and appointment by the judiciary. There are conflicting pressures. On the one hand, the LSB will need to demonstrate that in the performance of its duties under statute the Board has been free from political influence; and this might suggest appointment other than by the Secretary of State. On the other hand, the Secretary of State will remain the Minister responsible to Parliament for the conduct of the legal services sector and will have a significant interest in the performance of the Regulator; so it is not obvious that he should be excluded from the process.

12. Given the need for independence, and the objective of the rule of law, it seems right that the judiciary should be involved in the appointment; but that it should be solely their appointment would imply that they had primary responsibility for the regulatory system and its performance.

13. The proposal of this Review is that the appointment of the Chairman and Chief Executive should be made by the Secretary of State in consultation with a senior member of the judiciary. Given his historic involvement in regulatory

matters within the legal sector I would propose the Master of the Rolls. The appointments would be made in accordance with 'Nolan'³⁰ principles and it would be expected that the Master of the Rolls himself, or a senior judge appointed by him, would sit on the selection panel.

14. All other appointments to the Board should be made by a Nominations Committee of the Board chaired by the Chairman, operating in accordance with 'Nolan' principles. If a Senior Independent Director is to be appointed, the appointment should be by the Board itself from among its lay members.

15. With regard to tenure, there is a balance to be struck between having directors in post long enough to understand the issues and make a full contribution, and not so long as to become a fixed part of the framework and to lose independence. The proposal is that non-executives should have a fixed appointment period, with the possibility of one renewal. The same principle should apply to the Chairman and Chief Executive. The precise period of tenure will be for the legislators to determine.

16. All respondents who touched on the issue commented on the importance of the directors being free of the fear of removal without cause. Nevertheless there will be exceptional circumstances in which, to maintain public confidence, a director should lose office. This power should be vested in the Board, not the Secretary of State. This power should be carefully circumscribed, but might include cases where the Board was satisfied that the director was incapable of performing his duties by reason of physical or mental health.

³⁰ In the case of ministerial appointments, detailed guidance is given in the Commissioner for Public Appointments Code of Practice for Ministerial Appointments to Public Bodies, December 2003, the principles of which are derived from the Committee on Standards in Public Life (the Nolan Committee)

17. The circumstances in which a director should automatically lose office could include conviction of a serious criminal offence, bankruptcy or disqualification as a company director or as a charity trustee.

Independence and qualification of the Chairman and Chief Executive

18. The Chairman and Chief Executive must have the skills, qualities and experience that such senior public appointments require. The difficult issue revolves around whether such appointments should be made solely from among those with direct experience of the legal profession, for example a judge, or whether such appointments should come from outside the profession.

19. There are coherent arguments in each direction. Some argue that knowledge of how the industry actually works requires that the Chairman and Chief Executive should come from within the profession. Others argue that the over-riding need to demonstrate independence requires that the candidates should come from without.

20. There are a number of lawyers with a high degree of objectivity about the strengths and weaknesses of the current system for providing legal services. There is, therefore, an argument that statute should not preclude these candidates. Such a degree of objectivity is not, however, a universal characteristic of lawyers. On balance I conclude that the arguments about independence require that the Chairman and Chief Executive should be non-lawyers. It is of note that the Bar Council also conclude that these posts should be filled by non-lawyers:-

“...we favour a requirement that a majority of the members of the Regulatory Board, including both the key positions of Chairman and the Chief Executive, must be non-lawyers.”

Accountability mechanisms

21. Under any transparent regulatory system Parliament, Ministers, public interest groups and the industry itself have the right to know how the LSB is discharging its functions, and be in a position to judge its performance.

22. Through the legislative process it will be for Parliament to determine finally the duties and objectives of the LSB; and the LSB would be accountable to Parliament. The appropriate Select Committee (currently the Constitutional Affairs Committee) could scrutinise the LSB's work and call upon members of the Board to be available for questioning and to account for its performance. It is clear that the LSB will need to publish an Annual Report; this might be laid in Parliament and publicly available.

23. The LSB should consult regularly with Ministers, but would need to retain its independence. The Secretary of State will share with the LSB the latter's concern for access to justice and proper rule of law. But there will be a number of issues on which there may not be an identity of interest; in particular the Government is a major purchaser of legal services and there may be occasions when resource considerations conflict with the requirements for regulatory decision making in the public interest.

24. The LSB should consider ways in which communication with consumers, and groups who represent them, may be increased. Plainly consultation (dealt with in the next section) on important policy matters will be important. As noted, the LSB will need to publish an Annual Report. It should consider, as other regulators have, an Annual Meeting open to the public and possibly a series of meetings around the country. As proposed in Chapter A, the LSB will have a duty in the area of 'promoting public understanding of the citizen's legal rights' and will need, therefore, to consider carefully how it communicates with its wider audience in this area. It would in any event make sense for the LSB to have a Consumer Panel, broadly similar to that which the Financial Services Authority (FSA) has.

25. The LSB will also need to maintain its relationships with those being regulated. As already noted, the Board is likely to contain a number of members drawn from the legal services sector, but their purpose on the Board is to contribute to all the activities of the Board, not to serve as a conduit for discussion with front-line bodies. As with other regulators (for example the FSA and its Practitioner Panel) the LSB will want to consider arrangements under which it maintains constant dialogue with those who represent the legal services sector.

The Regulator's duty to consult

26. Good practice indicates that a regulator should carry out appropriate consultation before exercising some or all of its powers. Under the current system there is a widespread duty to consult, and on occasions to obtain the concurrence of designated parties.

27. 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). There is also a requirement to consult the OFT and the Legal Services Consultative Panel in certain cases. Under section 28 of the Solicitors Act 1974 as amended the Master of the Rolls may make regulations concerning matters such as admission and practising certificates with the concurrence of the Secretary of State and the Lord Chief Justice. Under section 31 the Council of the Law Society may make rules in relation to professional practice, conduct and discipline of solicitors with the concurrence of the Master of the Rolls.

28. The duty on any regulator to publish proposals and consult during a minimum consultation period is, as noted, good practice, but it is recommended that for the Legal Services Board this requirement should be set out in statute.

29. Consultation with the senior judiciary would be important and the judges will want to consider how best they might deal with such matters efficiently.

30. In general the LSB will not be involved with matters of court practice and procedure, which are largely matters for the Rules Committee. But there will be certain issues which are directly related to the operation of the courts and which will be of special interest to the judiciary. In particular, as discussed in Chapter B, this would include the power to authorise bodies to grant rights of audience and rights to conduct litigation to their members. In such areas it would be difficult for changes to be made and to be effective unless they had the backing of the judiciary. It is for consideration, therefore, whether in those matters directly affecting the operation of the courts it would be right that the requirement on the LSB should move from consultation with the judiciary to concurrence.

Appeals process

31. The issue of appeals will need considerable attention once the broad outline of arrangements has been agreed. The precise nature of the appeal mechanism must depend upon the type of regulatory decision.

32. Where the decision by the LSB related to the exercise of its powers in regulatory areas such as practice rules then, in the ordinary way, such decisions would be subject to judicial review.

33. The regulatory model proposed involves the LSB in oversight functions of front-line recognised bodies, not the direct regulation of firms or individuals. To the extent that the LSB were to be involved in such matters, the overall procedure, including any appeal, would need to be ECHR compliant.

Funding issues

34. Chapter B set out an estimate of costs for the proposed regulatory system. The recognised bodies would, as at present, cover their own costs through a

levy upon their members. They would also have the right to levy fees upon legal practices (such as are described in Chapter F) which come under their regulatory auspices.

35. The issue arises as to how the LSB should be paid for. At present a substantial part of the oversight function is paid for by the State: judicial oversight falls to the taxpayer, as does the cost of the oversight function carried out by Government departments. The arguments in favour of the Government contributing to the cost of oversight functions, beyond the fact that it does already, are:-

- that the LSB, in pursuit of its objectives set out in Chapter A such as 'access to justice', has a wider role in the public interest than the oversight of practitioners in the legal sector; and
- that an element of payment by other than the bodies being regulated confirms that the regulator is independent of the regulatee.

36. There is an interesting precedent in the proposed funding of the Financial Reporting Council. Its funding is to be split, two thirds falling to the private sector and one third to Government. How the split should be made between the private sector and Government for the LSB would need to be covered in statute and would, therefore, be the subject of Parliamentary scrutiny.

37. There remains the issue of how the proportion to be raised from the recognised bodies should be split among them. There are various ways in which the levy could be calculated, including by size of front-line body (having regard to either numbers of members or turnover), or by regulatory resources required (having regard to the risks to regulatory objectives). It should be expected that, like the FSA, the LSB would consult on how it intended to raise the levy and have the power to change it over time.

Law Officers and the regulatory regime

38. 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, HM Crown Prosecution Service Inspectorate, Customs and Excise Prosecutions Office and the Legal Secretariat to the Law Officers.

39. The Attorney General and the Solicitor General are ex officio members of the Bar Council. They attend meetings of the Bar Council and the Attorney General usually chairs the Annual General Meeting.

40. The Government's own Scoping Study, which preceded this Review, named the Law Officers as one of the regulatory authorities. In fact it is not evident that the Law Officers have either regulatory duties or representative interests in respect of any professional body. But the fact that they are members of one such body could cause confusion. Whilst the Law Officers plainly need to be practising lawyers and closely in touch with many parts of the profession, it would be better if they had no formal link to any body with regulatory functions.

41. The Bar Council reaches a broadly similar conclusion in its response:-

"In any new regulatory structure there will be no need, in our view, for any formal relationship between the Law Officers, the Regulator and professional bodies with advocacy rights. The perceived independence of the Regulator and the professional bodies concerned would be enhanced by the absence of such a relationship."

Conclusion

42. This Chapter has examined governance options which might be suitable for the LSB. I conclude that the most appropriate arrangements would be for the LSB to be governed by a Board, led by a part-time Chairman and a full-time Chief Executive and consisting of between 12 and 16 members. For reasons of independence, I conclude that the Chairman and Chief Executive should be non-lawyers and that there should be a lay majority on the Board. The appointment of the Chairman and Chief Executive should be fixed term, on merit and made by the Secretary of State for Constitutional Affairs, in consultation with the judiciary, following a 'Nolan' type process. The LSB should be held accountable to Parliament and the public. It should consult widely before making major decisions; such decisions might be subject to appeal in defined circumstances. The LSB should be funded through a mix of Government and practitioner input. The Law Officers should not have a role in the regulatory framework.

CHAPTER E – REGULATORY GAPS

Introduction

1. Chapter E of the Consultation Paper raised issues of gaps and anomalies in regulated legal services. Currently, 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. The Consultation Paper raised questions about the mechanism and criteria for broadening or narrowing this definition. It asked 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 looked at how the need for a flexible framework fitted with the different proposed models.

2. The Scoping Study³¹ carried out for the Department for Constitutional Affairs described the landscape of regulation for legal services and drew attention to a number of gaps and overlaps. For example, some service providers are doubly regulated (such as solicitors providing non-incidental 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. 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. There are a number of services which most people would regard as legal services which are not reserved and can be provided by anyone who cares to do so. The consumer may, therefore, buy such services from providers who are regulated by virtue of their professional status, or from unregulated providers. The following table sets this out:-

³¹ op. cit.

Reserved

Probate

Immigration

Conveyancing

Notarial functions

Rights to litigate

Rights of audience

Unreserved

General legal advice

Will drafting

Employment advice

Claims assessment and management

3. The Consultation Paper did not set out to look at each service individually to determine whether or not it should be regulated; but it took as its starting point where the regulatory net currently falls. It took the view that it is for Government to decide which types of legal services should be regulated, as these are public policy decisions. The task set out in the Terms of Reference is to find the most suitable framework.

4. The Consultation Paper pointed to the inflexibility of the current framework, which does not allow services to move easily into or out of regulation. Currently, where it becomes apparent that a legal service needs to be regulated, primary legislation has to be introduced in order to cover the whole service area, since the service providers, who are not members of the designated or authorised professional bodies, have to be brought into the net. The Consultation Paper indicated that a future framework would have to be sufficiently flexible to be able both to bring in new services and to deregulate where necessary, with as little disruption as possible. It said that there was a need for a framework that could encompass new areas with a degree of consistency.

5. This Chapter takes the issues in the following order:-

- paragraphs 6 to 13 set out a definition of legal services (the 'outer circle');
- paragraphs 14 to 16 set out a definition of reserved legal services (the 'inner circle');

- paragraphs 17 and 18 refer to the not-for-profit sector;
- paragraphs 19 to 26 discuss the asymmetry of regulation and regulatory gaps;
- paragraphs 27 to 33 set out how changes to the inner circle might be determined;
- paragraphs 34 to 37 deal with the role of the Regulator; and
- paragraph 38 sets out conclusions.

Definition of legal services (the ‘outer circle’)

6. As the Consultation Paper made clear, it is difficult to prescribe the boundaries of any industry and, consequently, questions will always arise at the margins, particularly as new activities develop. However, in the context of this Review, a definition of legal services is desirable for two reasons. First, it will be important to the successful working of any new regulatory framework that the range of services for which the Regulator is statutorily responsible should be as clear as is possible - the Regulator should not be permitted to extend its powers beyond this, nor should Government require it to take responsibility for services outside the defined range. Secondly, the concept of the Legal Disciplinary Practice, discussed in Chapter F, would benefit from as clear a definition as is possible of what constitutes a legal service.

7. There have been many attempted definitions of legal services. Reporting in 1979, the Royal Commission on Legal Services chaired by Sir Henry Benson stated that:-

“A legal service may be described as any service which a lawyer performs for his client and for which professional responsibility rests on him...Services which are “legal”, in the sense that a lawyer would perform them in the ordinary course of practice, may also be performed by non-lawyers.”³²

³² The Royal Commission on Legal Services (the Benson Report) (Cmnd 7648), 1979

8. Crucially, however, this leaves open the interpretation of the “*ordinary course of practice*” which, for the purposes of enforcing the Solicitors’ Practice Rules, the Law Society determines on a case-by-case basis. It does not appear that there has ever been a comprehensive statement of what can be done properly within a solicitor’s practice, and the list of prohibited activities no longer appears in the Guide to Professional Conduct, in recognition of the fact that matters that may be considered unacceptable have changed over time.

9. Many have noted the difficulties in attempting to frame a precise definition of ‘legal services’. In 1988, the Marre Committee said:-

*“ ‘Legal services’ is not a phrase which is susceptible of a precise definition. Following the broad approach of the Benson Commission, (paragraph 2.2) we have taken it to include any service which might be available to help people to deal with legal problems regardless of whether payment is to be made from public or private funds. The phrase includes both criminal and civil legal services and also includes legal advice, legal assistance (for example in conveyancing and in the making of wills) and legal representation.”*³³

10. The Lord Chancellor’s Department agreed in its 1989 Green Paper:-

*“A comprehensive definition of what is meant by legal services is very difficult to frame, but, broadly speaking, legal services are concerned with the advice, assistance and representation required by a person in connection with his rights, duties and liabilities.”*³⁴

11. It is right to acknowledge that a precise definition is not possible; it needs some flexibility, given the need to accommodate the inevitable change which

³³ *A Time for Change* Report of the Committee on the Future of the Legal Profession (The Marre Committee), 1988

³⁴ *The Work and Organisation of the Legal Profession*, LCD Cm 570, 1989

occurs over time in the boundaries of what is considered to be 'legal'. For example, methods of alternative dispute resolution continue to grow in popularity and new areas of law develop through statute and case law. The LCD Green Paper recognised that legal services "*may of course change over the years with the prevailing values of society, the legislative will of Parliament and the decisions of the courts*".

12. Internationally, the World Trade Organisation and the United Nations advocate a broad definition of legal services which includes advisory and representation services as well as all the activities relating to the administration of justice.

13. One definition that commends itself to me and which captures a broad definition of legal services is:-

- '1. Advice and assistance in relation to the operation or exercise of legal rights and the performance of legal obligations; and
2. Advice and assistance in relation to all forms of resolution of legal disputes.'

This would include services funded publicly as well as privately, civil and criminal, contentious and non-contentious matters. This type of broad definition may be said to create an outer circle of legal services.

Definition of reserved legal services (the 'inner circle') and of regulated legal services

14. The definition of reserved legal services is relatively straightforward since those areas are contained in statute. The areas currently reserved to those who are appropriately qualified are set out in paragraph 2 above. These areas could be termed the inner circle of legal services. In order to provide such services, a practitioner must be certified by a regulatory body which has

itself been authorised so to do. A 'lawyer' could therefore be defined as any duly certified member of such a body.³⁵

15. The definition of regulated services is more complex. It includes all inner circle services, plus those in the wider, outer circle which a lawyer is allowed to undertake in a professional capacity.

16. There are also other services, such as financial, which a lawyer may be able to provide in the course of his business, either through direct regulation by another regulator, for example the FSA, or through an exemption regime.

The not-for-profit sector

17. In considering where the regulatory net should fall, there is a question of whether the legal services provided by the 'not-for-profit' sector would be included.

18. My intention is that those who are employed for the purposes of operating in this area should be liable to come within the regulatory net. Those who provide advice and assistance on a voluntary basis should either be brought within the net by dint of their pre-existing status as legal professionals; under supervision arrangements whereby a qualified person takes responsibility for the quality of the work done; or by dint of the regulation that surrounds the operational unit in which they work, for example through the Citizens Advice Bureaux network. Some have expressed concern about the burden of regulation in this sector - the Advice Services Alliance refer to "*the growing, and sometimes disproportionate, burden of regulation on small voluntary sector agencies.*" They point out that they are often highly regulated in other ways, for example by the Legal Services Commission and/or Charity Commission. Whilst it is to be hoped that the consistency that the new Regulator will seek to achieve may assist in the rationalisation of these

³⁵ This definition is wider than the definition of 'lawyer' in various EU Directives, e.g. the Mutual Recognition and Establishment Directive (98/5/EC) and Services Directive (77/249/EEC).

disparate arrangements, and that the regulatory touch will be light, to suggest that the not-for-profit area should not be covered by regulation would leave vulnerable those most likely to be disadvantaged by lack of knowledge of the law and legal services.

Asymmetry of regulation and regulatory gaps

19. There are two main strands of asymmetry of regulation. The first is that a provider, such as a solicitor, who is authorised to provide one or more of the reserved, or inner circle, services will also be regulated in the provision of the unreserved or outer circle services. However, these services can also be provided by an unauthorised individual, and in this case would not be subject to regulation at all. There can, therefore, be an asymmetry in the regulatory reach as regards individuals providing the same legal service.

20. The second asymmetry is that the rules set by front-line regulatory bodies may be different, even for the same reserved service, e.g. the rules pertaining to conveyancing are different as between Law Society members and members of the Council for Licensed Conveyancers.

21. These arrangements may create significant anomalies between lawyers regulated by different front-line bodies, and between lawyers and non-lawyers, in terms of both consumer protection and the regulatory burden. There have been calls for such discrepancies to be removed.

22. The first asymmetry, relating to regulatory reach, could be reduced by broadening the scope of the inner circle to bring a wider group of services within it, i.e. to widen the perimeter of the inner circle to bring it closer, if not aligned, to that of the outer circle. It may be considered that increasing the number of reserved services may be unjustified and anti-competitive, making the delivery of such services too burdensome for the practitioner and, therefore, restricting their availability to the consumer. As is mentioned at

paragraph 30 the inclusion of any further services within the reserved inner circle would require a detailed cost/benefit analysis.

23. A further way to limit the asymmetry of regulatory reach would be to limit the ambit of regulation purely to the reserved services. On this basis a solicitor would only be under a regulatory obligation when providing, for example, litigation services and not in providing will writing or general legal advice which are unreserved. But this would be to undermine one of the main principles on which the leading professional bodies operate – that all services provided by their members are done to the same high standard of care and concern for the client. In short, it would be a dilution of professionalism and of the brand, and would be likely to add to confusion for consumers.

24. The second type of asymmetry, that regulatory rules do not fall evenly on all lawyers, was referred to in Chapter B; and one possible solution requires the setting of a minimum consistent standard across the service type. However front-line regulatory bodies would be free to impose additional standards if they wished. This would permit competition between front-line regulatory bodies, whilst preventing erosion of important consumer protections.

25. Increased consumer education, leading to a heightened awareness from the consumers' perspective when using legal services, is a further way of reducing the effect of these asymmetries. Subject to the public interest consideration of securing probity in the legal system, where customers are well informed the availability of providers regulated in different ways expands consumer choice: buyers can choose a more expensive service with regulatory protection or a cheaper service with limited protection.

26. As regards the deregulation of services which were previously reserved, in the main there has only been the opening up of a reserved service to competition through the potential for delivery by other authorised providers;

and this may continue to be the pattern in the future. However, one consequence of such liberalisation could be to create uncertainty about regulatory reach. The initial proposals for the liberalisation of the delivery of certain probate services did create uncertainty. Issues raised included the regulatory responsibility for new providers and the jurisdiction of the complaints bodies. Such issues in themselves should not act as an inhibitor to change, but the Regulator will need to ensure that the regulatory framework provides the appropriate levels of consumer protection and avoids uncertainty of regulation.

Determining changes to the 'inner circle' of legal services

27. Some had hoped that the Review would look in detail at currently unreserved services. To look in the necessary detail at each area would not be possible within the time frame of this Review, nor would it be a complete solution, since new 'gaps' will emerge over time.

28. The Consultation Paper proposed that it is for Government to decide which types of legal services should be regulated. Almost all respondents agreed. Of those respondents who did not agree, some suggested that the power should lie with Parliament and some suggested that it should lie with the Regulator. In my view, it would be for Parliament to enact the primary legislation, setting out the broad framework, and for Government to propose the precise areas of reserved services through secondary legislation. To be too prescriptive about the areas of reserved services in primary legislation would reduce the flexibility of the model. These are public policy decisions for Government, albeit it must be expected that the Regulator would have a need and a right to make its views known. Government would have to assess the impact of any proposal, as it does today, and undertake a detailed analysis of costs and benefits in order to determine where the public interest lay. The risk to the individual consumer would need to be weighed against such wider public interest concerns as proportionate access to justice.

29. This type of analysis may involve considerable work, as it did for the Blackwell Committee.³⁶ This committee, commissioned by the Department for Constitutional Affairs and chaired by Brian Blackwell CBE, looked at some length in 1999/2000 at the activities of non-legally qualified claims assessors and employment advisers.

30. It is envisaged that, whenever Government identifies a new field in the legal services market that might be regulated or de-regulated, a process of consultation with stakeholders and the public would take place. A cost/benefit analysis is a way of ascertaining whether the risk is such that a change to the regulation of the legal service or provider is required. This approach has been endorsed by the Better Regulation Task Force which advocates a flexible, risk-based approach to regulation. It states:-

“The level of risk involved in any activity should determine the level of protection necessary.”³⁷

“Trade-offs between the costs and benefits of regulation need to be assessed, and citizens allowed, within reason, to make their own judgements about the risks in question.”³⁸

31. The Consultation Paper set out some of the points to be considered in weighing the advantages and disadvantages of whether a service should be reserved or unreserved:-

- provision of information: reserved 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

³⁶ The Report of the Lord Chancellor’s Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers, February 2000

³⁷ *Alternatives to State Regulation*, Better Regulation Task Force, July 2000

³⁸ *Principles of Good Regulation*, Better Regulation Task Force, October 2004

evenly on persons who provide the services, whether they are qualified or not;

- cost: in principle, regulation provides some protection for the consumer against failure – but regulation has 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; and
- a competitive market: regulation may be seen as an unnecessary restriction in the provision of services in the market place.

32. Further considerations have been suggested, including:-

- proportionality: the ease of extending regulation and the avoidance of regulatory duplication;
- the maintenance of trust and confidence: an appropriate level of consumer protection (including appropriate redress mechanisms) and certainty of outcome; and
- the cost and ability to apply appropriate standards of education, training and conduct.

33. Bodies outside of the regulatory net may perceive benefits of being able to say that they and their practitioner members are regulated, seeking to attract to themselves the status attached to a 'professional' body and the ability to provide clients with added levels of assurance about the quality of service. It might be argued that providers of such legal services should not be refused entry to the regulatory net, if they meet the minimum standards and pay the relevant costs. However, it is important to recognise that regulation does not

constitute a guarantee: it should be acknowledged that no framework can regulate against all risks. Equally, it should be recognised that the cost of regulation ultimately falls to the consumer and would divert regulatory resources. Regulation should be in place primarily to protect consumers of legal services, not to enhance the standing of providers. So a desire to be regulated on the part of practitioners should be met by the same careful cost/benefit analysis.

The Regulator's role

34. The Regulator will have a place in determining what services should be within or without the regulatory net. The Regulator should be enabled to advise the Government of areas where problems surface: for example, where complaints come to the Board about unreserved services or providers. The Regulator may come into contact with activities conducted on the fringes of regulation, with intermediaries who act as channels, and with 'rogue' operators. The Regulator's experience and expertise will be of value to the Government in reaching policy decisions about such activities.

35. For those who are deemed to be within the regulatory net, the Regulator would retain the right to carry out regulatory functions direct if necessary, although, as Chapter B makes clear, it is intended where possible that these functions should be delegated to a front-line body recognised for these purposes.

36. I see the Regulator as also having a role in looking beyond the regulated area to the boundaries of the legal services industry, viewing the extent of activity within the whole field to assess how it is working. It would be able to observe legal service activities in the field and detect problem points. In addition there are organisations which are not legal service providers but which do crucially impact on whether, when and how legal services are provided. Legal expense insurers are an obvious example. The Regulator's knowledge of the field would support any advice given to the Government

when it was considering regulating a new service type. The Regulator could be available for consultation by those in legal services areas who were unregulated but who might move towards regulated status. Further, it would have an educational role, for example in encouraging information supply to the consumer.

37. As well as supervisory powers over those regulated, the extent to which the Regulator should have powers, enabling it to pursue those who operate in regulated areas without the necessary licence, is for further discussion.

Conclusion

38. I conclude that, within the appropriate legislative framework, it is for Government to decide which legal services should be reserved, after appropriate consultation, in particular with the Regulator. Whereas there should not be a gap in regulation once it is determined that something is within the regulatory net, there are asymmetries in the regulatory system of which the Regulator should take note. Any changes to the regulatory net to deal with such matters should be subject to careful cost/benefit analysis. The Regulator's role will be to oversee those who are within the regulatory net, but it should also have a wider public interest role to look beyond the regulated area to the boundaries of the legal services industry and those non-legal bodies which interact with it.

CHAPTER F – ALTERNATIVE BUSINESS STRUCTURES

Introduction

1. In its report published in July 2003³⁹, the Government expressed its support for the principle of enabling legal services to be provided through alternative business structures. It said *“The Government supports in principle enabling legal services to be provided through alternative business structures. Such new structures would provide an opportunity for increased investment and therefore enhanced development and innovation, for improved efficiency and lower costs.... The Government accepts in principle that new business entities such as multi-disciplinary partnerships and corporate bodies should be allowed to provide legal services.”*

2. In its response to the Consultation Paper the Office of Fair Trading identified the most significant restrictions which affect the types of alternative business structures able to offer legal services. These restrictions are contained within the rules of the main professional bodies. They are:-

- (a) rules that prohibit partnership between barristers and between barristers and other professionals (both lawyers and non-lawyers); employed barristers may work for firms of solicitors, but may not without re-qualification become partners;
- (b) rules that prohibit solicitors from entering partnership with members of other professions (both lawyers and non-lawyers); and
- (c) rules that prevent, with a small number of exceptions, solicitors in the employment of businesses or organisations not owned by solicitors (e.g. banks or insurance companies) from providing services to third parties.

3. Although not the subject of this Review, it should be noted that self-employed barristers cannot in general deal direct with the public, but must do so through instructing solicitors.

³⁹ *Competition and regulation in the legal services market*, CP(R2) 07/02 DCA, July 2003

4. The product of the above rules is that there is little variation in the type of business structure that the consumer can access. As noted, he cannot (except in limited circumstances) access a barrister direct. The most easily recognisable organisational form which dominates the provision of legal services to consumers is the high street solicitors' firm, owned and managed by solicitors. (Throughout this Chapter we use the term 'Manager' to refer to a partner, principal or director of a firm.)

5. A key exception to the practice rules arises in the not-for-profit sector where, subject to certain conditions, solicitors (and those whom they supervise), barristers and other legally qualified (and unqualified) personnel employed by a Law Centre may work together and are permitted to deal directly with members of the public.

6. At the heart of this Review has been a distinction between Legal Disciplinary Practices (LDPs) and Multi-Disciplinary Practices (MDPs).

7. LDPs are law practices which permit lawyers from different professional bodies, for example solicitors and barristers, to work together 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. The concept seeks to sweep away most of the current restrictions on the business forms that lawyers may practise under.

8. 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. They do not solely provide legal services; indeed legal services might be a small part of their work.

9. 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.

10. Thus under the heading of 'Alternative Business Structures' there is a matrix of possibilities:-

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

11. In its response to the Consultation Paper the Law Society favours, subject to conditions, lifting the restriction on solicitors entering partnerships with other lawyers and non-lawyers (rule (b) in paragraph 2 above). It also proposes to remove the rule that prevents solicitors, in the employment of businesses or organisations not owned by solicitors, from providing services to third parties (rule (c) in paragraph 2). As regards rule (a) in paragraph 2, the Bar Council has indicated that it is prepared to permit barristers to enter partnership with other lawyers, subject to regulation by a recognised body other than itself; but continues to argue that it will not permit partnerships among barristers under its direct regulatory auspices.

12. Against this background the Chapter takes the issues in the following order:-

- paragraphs 13 to 22 look at the demand for LDPs;
- paragraphs 23 to 34 examine the issues for LDPs where management and ownership are in the same hands;
- paragraphs 35 to 61 examine the further issues which arise for LDPs where outside ownership is to be permitted;
- paragraphs 62 to 73 look at how and by which bodies LDPs would be regulated;

- paragraphs 74 to 83 look at the reasons given for the Bar Council's continuing ban on partnership under its regulatory auspices;
- paragraphs 84 to 86 look at the demand for MDPs;
- paragraphs 87 to 100 examine the particular regulatory issues which arise for MDPs; and
- paragraphs 101 to 104 set out broad conclusions.

Demand for LDPs

13. Demand for legal service provision through an LDP could come from two sources: the consumer and the provider. The absence of an articulated consumer demand, in the context of a market where restrictive practices operate as a barrier to innovative forms of service delivery, would not in itself be a persuasive argument that other forms of service delivery should not be permitted.

14. The private client, as distinct from the large corporate client, is unlikely to appreciate the differences in training, competencies and regulation between different categories of what they perceive to be 'lawyers'. This is not surprising given that the purchase of legal services by such consumers is infrequent and that the consumer's prime concern is usually about outcomes – e.g. a successful conveyancing transaction – rather than the means of its delivery. Nonetheless, customers generally are interested in low prices and an efficient service, and where the nature of the services is better understood, as in the conveyancing market, customers do 'shop around'. Providers react to competitive pressures by quoting competitively for the work.

15. Recent research provides some background to the concerns which consumers have about how traditional legal firms operate. Research carried out by MORI⁴⁰ shows that lawyers are not universally seen as customer focused, approachable or easy to comprehend. Other work⁴¹ shows that

⁴⁰ Research study conducted by MORI, commissioned by this Review

⁴¹ *Causes of Action: Civil Law and Social Justice*, Legal Services Research Centre, November 2003

inertia, through a feeling that ‘nothing can be done’, combined with a lack of knowledge about how civil law could help, act as barriers to people purchasing legal services. The Law Society’s submission to the Consultation Paper comments, based on research they have carried out, that whilst cost was important *“Consumers were, in fact, more concerned about the perceived unapproachability of solicitors and their apparent attitudes to their customers”*.

16. A survey carried out for the Consumers’ Association⁴² shows a perceived lack of client care by lawyers. The main reasons for dissatisfaction were, in descending order: excessive delays, not carrying out services with reasonable skill, making mistakes, failing to return phone calls or to reply to letters and unprofessional behaviour. While the Consumers’ Association themselves point out that their survey is not taken from a representative sample of the population (or lawyers’ clients), it does provide a useful snapshot of some important concerns consumers have. It is of note that these concerns relate as much to the quality of business service that is provided, as to the quality of the legal advice itself.

17. Moving to the supply side, there are various sources of potential provider interest.

18. Many firms of solicitors rely on people who are not qualified solicitors to take forward the business of providing legal services. People such as IT experts, HR specialists, and accountants play a key role in the success of the business, but solicitor practices cannot reward such key people with partnership and have instead to resort to ‘ways around’ the problem.

19. In addition, many Managers wish to work with legal professionals with complementary skills. It is hard to understand why someone who specialises

⁴² *Which?* July 2004

in advocacy, e.g. a lawyer who is a barrister, should not be permitted to work together as an equal principal with someone who is expert at conducting litigation, e.g. a lawyer who is a solicitor, both lawyers acting to provide an integrated service for the client.

20. Further, as the Law Society point out in their response, there are many in the legal profession who feel excluded from the partnership role in a traditional law practice. This may include people who are unable or unwilling to risk capital to put up their partnership stake; people from ethnic minorities who may feel they do not 'fit' into the partnership role within a traditional practice; and people who due to family or care commitments feel that they cannot undertake a traditional partnership role in terms of work commitments. Yet others, who are employed lawyers, may wish to play a more client facing role or just have a wider career structure. An LDP model with non-lawyer owners would broaden access to capital and lessen the need for practitioners to put in equity capital, and might enable varied work styles to suit a broader range of people wishing to work in the profession.

21. The flexibility afforded through having a range of legal skills available under one roof can be seen in the not-for-profit (NFP) sector. In the NFP sector, Citizens' Advice Bureaux and Law Centres have lawyers drawn from different branches of the legal profession working together under one roof to provide legal advice and services to their client base. The precise division of labour between the different professionals is a function of the expertise of the practitioners and the most efficient way of meeting the client need.

22. In the commercial sector too, firms such as the RAC have publicly articulated their wish to offer the general public an alternative way of accessing legal services. Unlike most high street solicitors, companies such as these have nationally known brand names to protect, which may be a powerful incentive to operate in a proper manner.

Issues which arise in LDPs where Managers and owners are the same

23. As noted, the basic principle of an LDP is that it is a law practice which brings together barristers, solicitors and other lawyers on an equal footing. Such new legal practices should provide advantages; and many respondents, both from the consumer and provider side, expressed themselves in favour in broad principle. It would widen the skills base that the legal firm could offer its clients by having under one roof, as equal principals, lawyers from a range of legal professional disciplines. It would provide greater choice for lawyers in the types of business structures they could work for. It would permit lawyers to invite into Manager status other professionals who were not lawyers. It ought also to provide a further business structure (alongside barristers' chambers and government service) where young barristers could get proper experience, both as regards pupillage and beyond, in order to become fully qualified.

24. The issues to be addressed in connection with such practices arise from:-

- (i) the proposal that lawyers with different professional qualifications should work together as equals;
- (ii) questions of how a regulator might expect LDPs to be managed; and
- (iii) the proposal that among the Managers of an LDP might be individuals who are not lawyers at all.

Each is considered in turn.

25. Arising from the proposal that lawyers with different professional qualifications should be permitted to work together as equals, the first and most important issue is to ensure that there is a high level of ethical standards within the legal practice. There should be a Code of Professional Practice for the LDP, agreed with the Regulator of LDPs, to which all lawyers in the practice would need to adhere. It is difficult to see why this should be a significant difficulty since, whilst each professional body frames the relevant provisions differently, the responsibilities of lawyers to outside parties is fairly uniform. All lawyers with rights of audience and rights to litigate have a duty

to the court which is over-riding. In general all lawyers have a duty to their client, and a duty to put the client's interests ahead of their own. A single entity-wide arrangement to cover matters such as legal professional privilege should also be obtainable through appropriate regulatory arrangements (set out later in paragraphs 62 to 73). Such ethical principles should be at the heart of an LDP.

26. One notable exception to the uniformity of lawyers in ethical matters is the position of notaries, since they have a particular duty to the validity of the transaction itself. However, many notaries presently manage individually to practise as both a notary and a solicitor, so there can be no suggestion that these two branches of the legal profession cannot co-exist.

27. A second set of issues relates to management responsibilities. In the management of an LDP, irrespective of its legal form, it must be expected that there would be some characteristics of a corporate structure. There would need to be a shift in emphasis towards regulation of the economic unit, beyond regulation of the individual practitioner. Thus it is proposed that there should be a 'Head of Legal Practice' (HOLP), nominated to the regulatory authorities and with overall responsibility for the conduct of the legal business in accordance with the regulatory rules. This person must be a qualified lawyer and able to satisfy the Regulator that he is competent to oversee all of the areas that the LDP will cover. The Regulator would look first to that nominated person to ensure that the standard of care in the legal practice conformed with the relevant rules. In particular, the responsibility for ensuring that legal services are provided only by those qualified to do so would rest with him. By 'competence' is not necessarily meant specialist expertise. The proposal is that the HOLP should be able to satisfy the Regulator that he has the necessary qualifications and experience to discharge the regulatory responsibilities required of him. In this context I would judge a solicitor to be properly qualified to act as the HOLP in respect of lawyers with higher court rights, even if he himself did not have such rights.

28. It is also proposed that an LDP must have a senior Manager acting as 'Head of Finance and Administration' (HOFA), nominated to the Regulator. The nominated person would be responsible both for the production of appropriate accounts for the legal practice and for the proper separation and management of client monies. This person might be a lawyer, but would not need to be. Many large and medium sized solicitors' practices are already organised in this fashion, and for others who chose LDP status I do not believe that the changes would be difficult to implement. In a small practice, there should be no reason why one person who was suitably qualified could not act as both HOLP and HOFA.

29. The nomination of one person to be primarily responsible for finance and administration, including client monies, would not obviate the responsibility of all Managers for such issues, any more than the presence of a finance director on the Board of a plc removes responsibility from other directors for the accounts of the company. But it does recognise the business reality that one person among the management team must lead in this important area.

30. A third set of issues arises through the presence among the Managers of an LDP of individuals who are not lawyers. The Bar Council argues in its submission that non-lawyers should not be permitted to become Managers, *"that it would be wrong in principle, and would give rise to risks to the public, if individuals were permitted to exercise a significant degree of control over the conduct of a legal practice who are not subject to the professional duties which should underpin the practice of law."* Most other respondents, however, took a different view, agreeing that some liberalisation in this area was sensible. As the definition of an LDP in paragraph 7 above makes clear, the role of the non-lawyer Manager is to enhance the services of the law practice, not to provide other professional services to the public. Non-lawyer Managers might, therefore, be expected to sign a Code of Practice agreed with the Regulator of LDPs, which would include a similar commitment to act in the best interest of clients to that which binds lawyer Managers. The

presence of non-lawyer Managers reflects the fact that, whilst legal skills should lie at the heart of a modern practice, they are not sufficient; to provide an effective service other skills are necessary and they include financial expertise, as discussed above, and also HR and IT expertise. As was noted in the Consultation Paper, in many legal practices professionals with these skills already sit on the Executive Committee of their firms, with significant control over the conduct of the practice. Similarly in Law Centres non-lawyers with other skills do exercise a significant degree of control over the practice to the benefit of the public. These examples suggest that different legal professionals are able to work together with non-lawyers, without compromising their professional standards.

31. As noted, the HOLP and HOFA would be nominated individuals and would need to satisfy the LDP Regulator that they had the necessary competence to fulfil these roles. All other Managers, lawyers and non-lawyers, would need to register with the LDP Regulator. It would be expected that the LDP Regulator would focus its regulatory attention upon the competence of the HOLP and HOFA and the management systems that they employed. It is of note that in New South Wales, where the framework permits Incorporated Legal Practices of a form similar to LDPs, the regulatory framework requires practices to be able to demonstrate compliance with 'appropriate management systems', and the regulatory authority has published a paper which includes a checklist of systems that a practice should have.

32. Whilst I conclude that non-lawyers should be permitted to be Managers of LDPs, the essence of an LDP is to be a legal practice. The proposal, therefore, is that there should be a limit on the level of non-lawyers among the Management group. The limit might be set by the Regulator but the recommendation in this Review is that 'lawyers should be in a majority by number in the management group'⁴³, signed up to certain regulatory

⁴³ It is of note that the equivalent of LDPs in New South Wales requires only that one member of the management team is a qualified lawyer.

standards by dint of their professional qualification. The hallmark of a legal practice lies not just in the fact that it provides legal services; it also lies in the ethos of the practice fostered by professionals sharing a common set of values. Having lawyers in a majority in the management group is a more certain way of ensuring that the fundamental attributes of the profession are maintained. It would be onerous for a single person such as the HOLP to define the culture of a firm or be expected to bear the entire weight of upholding the legal ethics of the practice.

33. It would be for the Regulator to determine the definition of a lawyer for the purposes of applying the principle in the above paragraph. My starting point would be lawyers authorised to carry out reserved services, as discussed in Chapter E.⁴⁴

34. It is recognised that the majority requirement may militate against sole practitioners turning themselves into an LDP in certain circumstances (e.g. taking one non-lawyer into partnership), but it would not be detrimental to their current position.

Issues which arise in LDPs where Managers and owners are different

35. There would be considerable benefit in permitting outside owners of legal practices. In general economic terms, new capital from outside the industry would be permitted which should increase capacity and exert a downward pressure on prices. In a business sense, new investors might bring not just new investment but also fresh ideas about how legal services might be provided in consumer friendly ways. Such new businesses might better address some of the consumer concerns referred to in paragraphs 15 and 16 above.

⁴⁴ The Regulator would need to determine which foreign lawyers it would permit to be included within the lawyer-majority for LDPs. For EU lawyers, it would need to have regard to the relevant EU directives.

36. There are, however, a number of issues that arise where management and ownership are split. They relate to:-

- (i) concerns about inappropriate owners;
- (ii) concerns that outside owners would bring unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties;
- (iii) concerns that new owners would cherry-pick the best business;
- (iv) as an extension of the argument about cherry picking, concerns that LDPs could jeopardise access to legal services in rural areas;
- (v) concerns that new owners would have conflicts of interest;
- (vi) issues about whether some restrictions might be placed on the nature and extent of the owners' interest in the LDP; and
- (vii) concerns that there is no precedent for such outside ownership.

Each issue is addressed in turn.

37. Opening up ownership brings the risk of inappropriate owners of a legal practice. A few have given short answers as to why only lawyers should be 'fit to own' a legal practice; this has been to refer to whoever they regard as the villain of the moment or, in default, 'Robert Maxwell Legal'. There is a point to be addressed on the issue of 'fit to own'. But the short answer is an insufficient one, just as the words 'South Sea Bubble' would not have been a sufficient reason for our forefathers to have prevented all new public share offers.

38. In judging these risks, it is important to remember that such risks already exist. As the RAC point out in their response to the Consultation Paper: *"This is attested to on a regular basis in the reports of the Solicitors Disciplinary Tribunal which list the names of those who have been struck from the Roll for malpractice and criminal behaviour."*

39. The consequences of widening the net of ownership do not all lead to greater risk. It is probable that many outside shareholders would bring

business practices which might provide higher standards than exist in some practitioner owned firms. They might insist on high levels of internal controls with checks and balances, for example in connection with clients' monies, that a small practitioner owned firm would find difficult to replicate. Many will already be familiar with the types of 'appropriate management systems' that the LDP Regulator is likely to insist upon.

40. Nevertheless the issue of ownership remains one that should be addressed, just as it does with any other business which has, as for example a bank does, an important fiduciary relationship with a client, including handling of his monies. It is, therefore, proposed that for prospective outside owners there should be a 'fit to own' test.⁴⁵ The precise provision would rest with the Regulator itself, but it might be expected to have regard to: (a) honesty, integrity and reputation; (b) competence and capability; and (c) financial soundness. The Regulator would be entitled to look at the business plan of the prospective owner and to understand what type of practice it wished to run and why. The Regulator would also have the right in a group context to look beyond the immediate shareholder, for example to the ultimate beneficial owner.

41. The second concern around permitting outside ownership is that outside owners, even if they were to pass the test of 'fit to own', might bring unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties. It is a point raised at length in the submission of the Solicitor Sole Practitioners Group. It is also a point made by the Bar Council who argue that there is:-

"...the conflict that would inevitably arise between the commercial interests of the owners and the ethical duties on which the practice of law is based. An owner of a law firm who was not a lawyer and

⁴⁵ As noted in paragraph 32 non-lawyer Managers may only be in a minority by number in the management group. If a non-lawyer Manager were to hold a disproportionate share of the economic interest in the LDP, the Regulator should have the power to treat him as an outside owner, in particular in respect of the 'fit to own' test.

therefore not subject to those duties would be perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession.”

42. It is not clear, however, that the Bar Council’s argument is correct. The LDP would have a number of characteristics which provide proper safeguards:-

- the Head of Legal Practice must be a qualified lawyer, competent to oversee the areas in which the LDP will practise;
- the Head of Finance and Administration must be competent in the areas which are central to practice management, particularly handling clients’ monies;
- both the HOLP and HOFA would be nominated individuals and subject to a competence test; they could not be removed without the consent of the Regulator;
- qualified lawyers would be in a majority by number in the management group in the legal practice;
- qualified lawyers would continue to have the same professional duty to their client and to the court as at present; all Managers must adhere to a Code of Practice agreed with the LDP Regulator;
- as discussed in paragraphs 53 and 54 below, the outside owner could have no adverse interest in the legal outcome of individual client matters dealt with by the firm, and would have no right to interfere in any client case, or have access to client files or information.

In short the LDP is a regulated entity, a number of protections would exist and the outside owner⁴⁶ would not be *“perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession.”*

⁴⁶ For the position of a non-lawyer Manager who has an economic interest in the business see previous footnote.

43. In order to ensure these safeguards are followed and clearly visible, it would be appropriate, as suggested by the Law Society in their submission, to require that the LDP, registered with the LDP Regulator, be a ring-fenced legal entity. It is also proposed that all owners should covenant with the Regulator to indemnify any loss of client monies incurred by clients of the practice.

44. It should be noted that the safeguards referred to above may change over time, in the light of experience. It would, therefore, be inappropriate for the safeguards to be enshrined in statute; rather the statute should propose that they are set out by the LSB, having regard to the need to protect the consumer interest and other objectives referred to in Chapter A.

45. A further argument made against permitting outside capital into LDPs is that such owners would seek to 'cherry-pick' the best pieces of business, to the detriment of the existing high street solicitor and possibly access to justice. The argument ignores the fact that it is the right of existing legal practices to determine which areas of the law they wish to practise in; and many have become specialist. It should be recognised, also, that 'cherries' generally grow where there are restrictions to free trade, either in terms of who may do a certain type of business or ease of access of capital. For many years the most typical piece of legal work, the 'cherry' for most high street lawyers, was conveyancing. The practice of minimum fixed fees was removed in 1973, and the Law Society monopoly was removed by the setting up of the Council for Licensed Conveyancers, under the Administration of Justice Act 1985. In general it should be expected that the admission of new capital will increase competition and reduce the cost of legal services, to the benefit of the objective of access to justice.

46. An extension of the cherry-picking argument arises in the context of rural practices. Some responses have expressed concerns that the advent of LDPs could jeopardise access to legal services in rural areas by further

reducing the numbers of generalist providers in such areas. In respect of the latter, it is felt that this would add to a trend of perceived rural deprivation of services generally as banks, shops, post offices and other service providers decide to withdraw from such areas.

47. The argument is that such small practices, many of which make only a modest profit, are only able to offer legal aid and other low margin work through the cross-subsidy received from general practice work such as conveyancing, probate, personal injury and small litigation. There is a social value in retaining such practices, because they offer a legal aid service to clients in rural areas who might otherwise have to travel long distances to obtain a similar service.

48. Against this are several arguments. The first is that, whilst services such as legal aid are important, their costs should be transparent. There is no clear reason why they should be subsidised by the users of other services.

49. The second is that concerns about new practices often ignore the benefits that new service providers could bring. These benefits are not only that they can bring about lower costs; it is also that through longer opening hours, sophisticated telephony and advanced customer care skills, they may be able to offer consumers better access to certain other types of legal services. As noted in Chapter A, the issue of access to justice is not just an issue of physical proximity; it is arguably even more an issue of cost. In general, measures which reduce cost are to be welcomed.

50. Moreover, a small solicitor practice with a good reputation and loyal following need not necessarily fear losing its customers to new entrants if the service they offer is superior. The research referred to in paragraphs 15 and 16 above, as well as feedback received in the course of the Review, shows that among the factors which put customers off include unapproachability and perceived aloofness.

51. Finally, unlike services such as banks, chemists and post offices, legal services are not ones which consumers use on a frequent basis; and some of the work may not need face to face meetings.

52. The balance of argument does not persuade me that new entrants willing to compete with existing providers on cost and service quality should be permitted, as they currently are, where the new capital is provided by lawyers, but prohibited where the capital might come from non-lawyers. If there is an issue about rural access, I believe:-

- it is independent of the issue of who provides the new capital; and
- it would be a matter for Government to address openly, in consultation with the Regulator and the legal services industry.

53. A further concern relates to possible conflicts of interest. A lawyer in an LDP must be in a position to assure his client that he approaches any instructions with an independent mind and no conflict of interest. He must approach any fresh instructions with 'clean hands'. The lawyer may well feel that he is able to do this, but where the owner has an interest in the issue there will be a suspicion (where the lawyer follows his professional duty it would be an unwarranted suspicion) that the lawyer may be influenced by this. It is, therefore, proposed that an LDP may not take instructions on a case where the owner has an adverse interest in the matter. Thus, if a bank were to own an LDP, that LDP could not act for a client on any matter in which the bank had an interest, for example advising a client on loan documentation to which the bank was a party. In this context, by 'interest' is meant a direct interest in the legal outcome of the matter being dealt with, rather than the economic one of an owner wishing to provide a satisfactory, rewarding service.

54. It should not be permissible for the owner, under the terms of the LDP's regulatory conditions, to interfere in any client case or to have access to any individual client files or client information. What the owner does have a right

to seek, from the money he invests in the business, is a proper profit. But then lawyers are not uninterested in such matters either. The notion that for lawyers, unlike businessmen, making money is merely a happy by-product of doing their professional duty has limited resonance with the public. Indeed a firm such as the RAC fairly argues that they have a client reputation to protect; and a failure of client care on their part, such as over-charging, would attract far more attention than one by a high street lawyer.

55. Even if it is accepted in broad principle that outside ownership is to be permitted, there remains the question of whether some restrictions should exist, either on the percentage of the capital which might be owned individually or in aggregate by outsiders, or in connection with conditions to be placed over capital rights.

56. With regard to percentage ownership there is a precedent within the accountancy profession. Under EU 8th Company Law Directive outside owners may not own in excess of 49 per cent of the capital of an audit practice. The Bar Council has proposed that outside ownership should be restricted to no more than 30 per cent of the capital. Both of these limits are restrictions on the aggregate level of shareholding to be held by outsiders.

57. One way to permit access of capital, but restrict control, would be a capital structure which permitted Managers to own voting shares, with outside providers of capital restricted to non-voting shares. In general I do not favour such capital arrangements, which place restrictions on free capital access. I do not believe that such restrictions are necessary given the safeguards already referred to in paragraph 42. If the Regulator considered that further safeguards should be introduced to provide assurances that a legal practice operated to a high ethical standard, with proper client care, it would be better to introduce additional checks on how the practice operated, rather than an artificial restriction on capital. As this Chapter makes clear, whilst there would be a 'fit to own' test for owners, the LDP would be a regulated ring-fenced

practice and the regulatory systems would concentrate primarily on who managed the practice and how they managed it.

58. The final issue to be addressed under the heading of LDPs having outside ownership is the suggestion that it should be resisted since such a step is without precedent. Even if correct it would be a poor argument; in fact it is incorrect and there are precedents. The Bar Council notes that it *“is not aware of any jurisdiction in which the ownership of legal practices by investors who are not lawyers is permitted”*. One jurisdiction in which it is permitted is New South Wales, and the introduction of model federal law provisions in April 2004 has enabled other states to follow suit. Incorporated Legal Practices may be owned by non-lawyers and a number are. The regulatory system concentrates, as already noted, on who manages the practice and the requirement for ‘appropriate management systems’.

59. It should be noted that a further jurisdiction in which outside ownership of certain legal practices is permitted is England and Wales. The Council for Licensed Conveyancers, whose members carry out probably the most common form of regulated legal service, does permit outside investors to own practices within its regulatory area. The practices are regulated by the Council and managed by legal practitioners who are qualified to do the work and who must be in a majority in the management group. Managers and owners must covenant with the Regulator to indemnify losses of client monies by the practice. I have seen no evidence that outside owners have interfered unreasonably. I have seen no evidence that the public has suffered. Indeed it is arguable that, while the market share of licensed conveyancers remains low, they have provided choice and played a useful role in keeping costs down in this important area of the legal services market.

60. The proposal in this Review is that liberalisation measures, similar to those which the Government introduced many years ago in respect of

conveyancing, should now be introduced for other areas of the legal services market, subject as noted to appropriate safeguards.

61. The key features of a Legal Disciplinary Practice are summarised in the following box:-

Legal Disciplinary Practices (LDPs)

- LDPs are law practices which permit lawyers from different professional bodies to be Managers in firms that provide legal services for third parties.
- Non-lawyers are permitted to be Managers of LDPs. Their role is to enhance the provision of legal services, not to provide other services to the public.
- Outside owners are permitted. They must be cleared by the regulatory authorities as 'fit to own'.
- Outside owners must provide an indemnity in respect of any loss of client monies.
- Lawyers must represent a majority by number of the Managers of the LDP.
- Among the Managers of the LDP must be a nominated lawyer (Head of Legal Practice), responsible for service standards in the provision of legal services; and a nominated appropriately experienced Manager responsible for finance and administration (Head of Finance and Administration).
- An LDP cannot take instructions on a case from a client where an outside owner has an adverse interest in the legal outcome.
- Outside owners cannot interfere in individual client cases or have access to client files or other information about individual cases.

The issues around what body should regulate LDPs

62. Chapter B looked at regulation by front-line recognised bodies in respect of their membership. It proposed a B+ model, with an oversight regulator, the Legal Services Board (LSB), delegating regulatory powers to recognised front-line bodies where the Board was satisfied as to the competence of the

underlying body and that appropriate governance arrangements were in place.

63. The issue raised in this section is how that system could be extended to regulation of LDPs, where Managers might come from more than one recognised body, or might not be members of the legal profession itself.

64. In discussing the regulatory body for LDPs it should be recognised that, for certain types of LDPs, the additional work required might not be significant. The Law Society fairly points out in its submission that it does already regulate large solicitor firms where a number of the key management team are not lawyers. In the case of the Council for Licensed Conveyancers (CLC), it does already regulate firms where a minority of Managers need not be lawyers and, as noted, outside ownership is permitted.

65. It is clear that, in the terms of this Review, the CLC is already a regulator of a type of LDP, one which is conveyancer oriented. Other types of LDPs with skills in different areas of the law could exist. Thus the recommendation of this Review is that regulation of LDPs should not be the preserve of any one body. It would be open to recognised front-line bodies to apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements the recognised body had in place. The authorisation of the recognised body as an LDP regulator would state in which legal service areas an LDP licensed by it could engage.

66. To take an example of the principle set out in the previous paragraph, it is not difficult to envisage that, under a B+ model, the CLC would be judged competent by the LSB to regulate a practice where three conveyancers and a barrister intended to work together in partnership to provide conveyancing services. But where it might be intended that the practice wished to engage

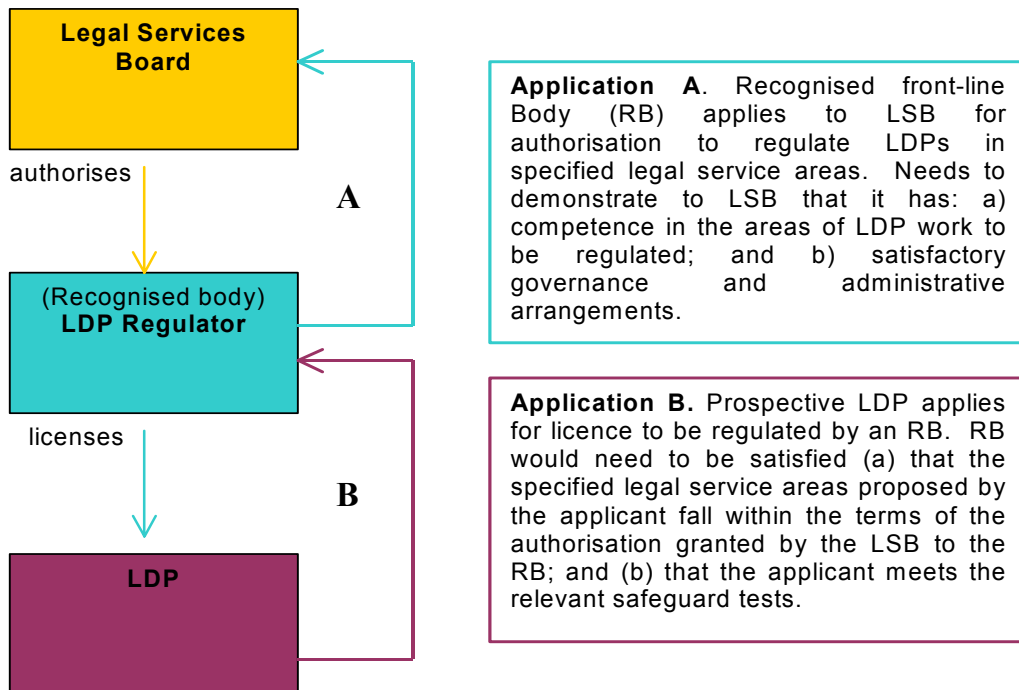
in designated legal services beyond conveyancing, it is less obvious that the CLC should be permitted to regulate such an LDP. If the CLC did wish to regulate such a practice (and in discussion with me the CLC has indicated that it believes it does have the infrastructure and skills to regulate practices beyond those involved purely in conveyancing) it would need in its application to the LSB to demonstrate its competence and that it had appropriate governance arrangements; and it would be for the LSB, after proper consultation, to determine the merit of the application.

67. It is clear that there is a distinction between the application by a front-line recognised body to the LSB for authorisation to regulate LDPs in specified areas ('application A') and the application by a prospective LDP to a recognised body for a licence to practise in nominated legal service areas ('application B').

68. Prospective LDPs may face a choice if they elect to practise in a particular area where more than one recognised body has been authorised by the LSB. Prospective LDPs are likely to make their choice of recognised body to act as LDP regulator based on regulatory cost, branding, and the potential to expand their business area.

69. Provided that the services to be offered by the prospective LDP fell within the competency of the recognised body acting as LDP regulator, there are as noted in this Chapter a number of conditions that the LDP would need to meet and they include: (i) satisfaction that the Head of Legal Practice is qualified to oversee the range of services offered by the LDP; and (ii) evidence that lawyers form the majority by number of Managers in the LDP. Condition (i) is competence based and designed to ensure that the key regulatory point of contact has the necessary competence to uphold the legal services standards of the firm; condition (ii) is designed to ensure that a majority are committed through qualification to the ethical standards to be expected of a law practice.

70. The following diagram illustrates the proposals.



71. It will be evident that the proposals in this Chapter shift the balance of regulation significantly towards regulation of the economic unit, beyond regulation of the individual practitioner. The proposed regulatory system focuses principally on who runs the practice and how. This is not intended to lessen the responsibility of each individual lawyer to meet the high standards to be expected of his profession. But it recognises the business reality that, in a practice of any size, the Regulator would be particularly interested in the competence of the senior Managers who ran the firm and the management systems they employed.

72. It follows that the prime focus of each recognised body, authorised to act as the front-line regulator of LDPs, would be upon the practice itself; and that it would be best if each lawyer Manager, irrespective of the branch of the legal profession he came from, were subject to the same recognised body as his lead Regulator. The lawyer Manager would remain a member of the front-

line body whose examinations he took; but would submit to lead regulation by reference to the economic unit he worked for. This principle of 'lead regulation by reference to economic unit, residual regulation by reference to professional qualification' is not a new one. A form of this principle exists in a number of areas: for example, many solicitors work for banks; their lead regulator is the FSA, but they remain members of the Law Society, subject to the general rules of ethical behaviour to be expected of members of that body.

73. The proposals above, outlining a framework for regulation of LDPs, are designed to be facilitative for lawyers wishing to practise in new ways. The issue arises, however, as to whether the principle of 'lead regulation by reference to economic unit, residual regulation by reference to professional qualification' could at some stage be available to lawyers practising in their current ways. If the new arrangements set out above were operating satisfactorily, this extension of the principle to existing structures could be contemplated. A number of solicitor advocates, operating as sole practitioners, have indicated that they might wish to have as their lead regulator the Bar Council. Adopting the same principle, it is possible that a set of chambers, wishing to operate outside the practice restrictions imposed by the Bar Council, for example in the matter of direct access, might wish to choose a different regulator competent in advocacy. There should be no objection in principle to these arrangements. Lawyers would have to submit to the practice rules of the lead regulator; the LSB would as indicated in Chapter B wish to ensure that minimum acceptable standards were adhered to so that there was no regulatory 'race to the bottom'; a single complaints system as set out in Chapter C would ensure that dissatisfied clients were not confused by the arrangements.

The Bar and the right to practise in partnership

74. Before proceeding from the issue of LDPs to that of MDPs, one further issue arises in connection with liberalisation of the way in which legal services are provided. The historic prohibition at the Bar, noted in paragraph 2, is that barristers may not enter partnerships with other barristers or with solicitors; they may work for firms of solicitors but may not without re-qualification become partners. As noted in paragraph 11, the Bar Council now proposes, in its response to the Consultation Paper, that barristers should be permitted to enter into partnership with other barristers and solicitors in LDPs outside its regulatory net; but it continues to argue that it is against the public interest that partnerships of barristers should be permitted under its regulatory auspices.

75. A consequence of the prohibition of partnership for those who join the Bar is that the first few years can be difficult. Giving evidence⁴⁷ before the House of Commons' Constitutional Affairs Committee in March 2004, the Chairman of the Bar Council described the position as follows: "*The trade-off of a career at the Bar is that you have rotten years at the beginning and maybe do not make it at all and leave. We have a big shakeout around the age of 30 because of competition. The trade-off is that you think that after that you have always historically had the prospect of a good income.....*"

76. The point at issue on partnerships concerns facilitative measures, not compulsion. The Chairman of the Bar Council, in an article he wrote earlier this year⁴⁸, set out arguments in favour of prohibition and concluded: "*That is why we oppose suggestions that we should be forced into partnerships.*" As far as I am aware, nobody has ever suggested that there should be an insistence on partnership; the issue is about the Bar's prohibition. I accept

⁴⁷ Minutes of Evidence taken before Constitutional Affairs Committee; Civil Legal Aid: Adequacy of Provision, HC 391-iii, 23 March 2004 [Question 185]

⁴⁸ *Legal Week*, 8th January 2004

that sole practitioner status, when combined with the chambers system in which most barristers operate, has merit as a way to provide advocacy services. The issue is about whether the Bar should refuse to permit other ways of providing such services under its regulatory net.

77. The Bar's justification of the restriction on partnership was set out in a report prepared by a committee chaired by Sir Sydney Kentridge QC, in response to the OFT's 'Competition in professions'⁴⁹ document. The report argued that the rule ensured the widest availability of barristers' services to the public in three ways: it served to minimise costs in the provision of barristers' services; it enabled the Bar to maintain the cab-rank principle; and it promoted competition and choice by maximising the number of competing undertakings.

78. The argument in connection with the minimisation of costs is that "*barristers providing services as individuals in general charge less for their services than do solicitors operating in partnerships*".⁵⁰ Presumably this arises for a number of reasons: solicitors carry out different duties, they need different back office systems to handle client papers; they need different premises to meet clients. It is not obvious that the higher cost arises because they have formed a partnership, which is the point at issue. In any event, even if correct, it is not a reason to ban partnership. That one type of economic unit had higher costs than another would not be a reason to prohibit it; it might be a reason why it would be less successful.

79. The argument in connection with the cab-rank rule is that it would be difficult to apply if barristers were in partnership. Some including the OFT have argued that a limited form of cab-rank rule could be applied to a partnership. But to judge the Bar's argument it is important to understand the manner in which the rule currently operates.

⁴⁹ op. cit.

⁵⁰ op. cit.

80. It should be recognised that the badge 'cab-rank rule' can mislead. The price of taking taxis is regulated; their availability or not is clearly shown. Neither of these conditions applies to barristers. For some years the fee rates in publicly funded areas such as crime and family law were 'deemed' as proper following negotiation between the Bar and those responsible for the legal aid services. This had the effect of requiring barristers to accept work at such fee rates. But recently the rate has become 'undeemed', leaving the issue of rates in those areas as well as others to the individual barrister. With regard to the availability of a barrister, as noted, this is often not clear. As was commented in a barrister's response, being busy is *"often a flexible concept and any reasonably successful barrister will be able credibly to assert that his current professional and private commitments preclude him or her taking on a case that is unattractive to him or her – until the next interesting case comes along which they would rather do."*⁵¹

81. Even if there were no issues about fee levels or availability, the rule does not ensure the right to representation often claimed. The barrister is required to accept a brief from a solicitor. In the restricted cases where the client can approach the barrister direct, the Kentridge Report states that the rule is not to apply. Thus for the public the rule would amount to: 'if you can hail a solicitor, you can hail a barrister'. The rule would be stronger if it were allied to wide direct access to barristers by clients.

82. The further argument against partnership in the Kentridge Report related to the importance of competition; and the claim by the Bar that permitting partnerships would restrict choice. It is not obvious that many barristers, operating as specialist referral advocates, would wish to form partnerships. In particular it seems unlikely that barristers in highly specialised areas (where the reduction in choice might be important) would form partnerships, given

⁵¹ Response submitted by David Wolfe of Matrix Chambers, June 2004

that conflict of interest issues would likely cut their work flow. The Office of Fair Trading comments:-

“The total ban fails to discriminate between partnerships that may increase competition and choice and those that may not. On the other hand, prohibiting partnerships restricts choice: the barrister’s choice to adapt his business structure in the way that best meets his needs and those of his client is restricted.”

In general competition and consumer choice is advanced by removing restraints on trade and by encouraging the maximum latitude in the types of economic units in which those with rights of audience can operate. As the OFT points out, competition rules exist to prevent concentration where it works against the public interest.

83. The burden of proof rests with those who seek to justify the restrictive practice. My conclusion is that the arguments made in the Kentridge Report have force, but rather less force than is claimed; and I am not convinced that they amount to a conclusive case for preventing under the Bar’s regulatory auspices other types of business structures. The issue set out in this section rests with the OFT and I encourage them to continue their review of this area, begun in their report ‘Competition in professions’⁵². In due course it would become an area of interest for the LSB, since its proposed objectives include promotion of competition. It is true that the development of Legal Disciplinary Practices can work its way round the refusal of the Bar Council to permit partnerships within its regulatory net. But, given the significance of the Bar, its continuing dominant position in High Court advocacy and its attitude to those barristers who pursue legal careers outside the self-employed Bar, a greater choice of business structures would be easier to achieve if the restrictive practice were removed.

⁵² op. cit.

Demand for MDPs

84. MDPs are practices which bring together lawyers and other professionals to provide legal and other services to third parties. Thus, for example, a lawyer and an accountant could be in practice together to provide legal and accounting services to their clients. Interest in MDPs could come from two sources: consumers and providers. The not-for-profit sector demonstrates that many consumers have a set of related legal and non-legal needs which require a holistic solution. Academic studies such as Professor Hazel Genn's 'Paths to Justice'⁵³ also support this. Some voluntary sector agencies combine legal and non-legal services for the benefit of their clients. For example the charity, Shelter, offers legal advice as well as advice on housing options and support services for people in housing need.⁵⁴ Others in the commercial sector have also pointed out that, for example, in the context of claims arising out of motor accidents, MDPs could offer an integrated service which dealt with all the related issues, such as property damage (to the car), mobility (courtesy car), health, rehabilitation and compensation. Affinity groups, such as trade unions, also provide a range of services to their members, of which legal advice is one, but one that is sometimes closely connected with other needs such as employment and welfare issues.

85. Unlike the case with LDPs, the consumer could reasonably be expected to make a distinction between different professionals such as, say, 'a lawyer' and 'an accountant'. Although, as discussed earlier at paragraph 13, consumer demand may not have been articulated, one can readily see, for example in the areas of consumer debt, inheritance planning or personal taxation, that a combination of both legal and accounting skills could be a valuable asset for the client. Research carried out by MORI⁵⁵ suggests that there is some consumer interest in the convenience and accessibility of 'one

⁵³ *Paths to Justice: What People Do and Think About Going to Law*, Hazel Genn, Oxford: Hart Publishing, 1999 – also referred to in *Geography of advice: An overview of the challenges facing the Community Legal Service, Citizens Advice*, February 2004

⁵⁴ Based on the response of the Advice Services Alliance

⁵⁵ MORI: op. cit.

stop shopping’, provided that appropriate regulatory safeguards are in place. As noted already, the issue is not about whether such combinations ought to be mandatory, merely why they should not be permitted.

86. Turning to providers, the fact that the aftermath of ‘Enron’ and ‘WorldCom’ has dampened corporate sentiment for large-scale MDPs, involving global networks of large accounting firms and linked legal practices, should not obscure the fact that small to medium sized professional service providers are well placed to cater to individuals, or small businesses, with a set of inter-related needs. Many such service providers (e.g. accountants, solicitors, estate agents) might benefit from sharing the overheads of high street premises and IT systems to make their business more viable.

Issues for MDPs

87. The Consultation Paper, and the responses to it, identified a number of issues with MDPs. These are:-

- (i) the issue of regulatory reach - how could a legal services regulator exercise power over people who were not lawyers, were offering clients a different professional service and who might have different codes of practice in areas such as client handling;
- (ii) the additional problem of regulatory reach where there were more than two professions involved and no obvious lead regulator; this would include the problems of using the HOLP model where non-legal professionals are involved;
- (iii) the issue of legal professional privilege; and
- (iv) the further complications of outside ownership by people who are not Managers.

Each is addressed in turn.

88. Of these issues the most fundamental is that of regulatory reach. This Review proposes a regulatory framework for legal services in England and Wales; and in Chapter B there are set out proposals for a Legal Services

Board. But such Board would have no jurisdiction over services provided outside the legal sector. The Regulator would, therefore, have to enter into collaborative arrangements with other regulators where this was deemed appropriate. Such arrangements might well include determining who was to have the 'lead' regulatory role and how the regulator of the 'minority' profession was to operate.

89. There would be an extra layer of complexity if there were two or more professions represented in an MDP, and none had a majority. There could still be the concept of a lead regulator, but it would have limited force if the direct control was over a minority of the business. There could of course be separate Heads of Practice (HOPs) for each service stream within an MDP, perhaps under an overarching HOP to ensure the integrity of the whole entity. But it should be recognised that there would be few individuals with the ability to demonstrate competence across a wide range of services. Furthermore, the influence of the HOLP is likely to be somewhat more diffuse in a multi-service business, such as an MDP, the more so if legal services were not the dominant business.

90. 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 adviser 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 lawyer-client relationship, to a degree that is greater than in comparable professions. As the recent *Three Rivers* case⁵⁶ highlighted, and as the money laundering regulations illustrate, the boundaries of privilege do get reviewed from time to time in the light of changed circumstances.

⁵⁶ *Three Rivers District Council v. The Bank of England* [2004] UKHL 48

91. 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 matters dealt with by 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. In certain areas they have an obligation to look for independent verification of representations made by their client. Such objectivity could be compromised were it to be fettered by considerations of having to treat information as privileged.

92. One way around these problems, suggested by the Law Society, would be to place a ring-fence around the legal practice, separating it from that part of the practice dealing with non-legal affairs. The easiest way to give effect to this ring-fence would be to place the legal services business into a separate legal entity. It will be recognised, however, that the effect of this is to return to the concept of an LDP, albeit one that might have common ownership with a non-legal practice.

93. This reasoning underlines the point, made by the Law Society, that it would be possible to get close to a de facto MDP through the existence of different practices (one of which could be an LDP) with common ownership and common branding.

94. It should be noted that a form of MDP already exists within the current framework for legal services. A number of legal practices currently offer financial services as part of an all-round service to their customers. Where such financial services form part of the mainstream work of the law firm, the firm must be authorised by the FSA, and anyone who performs controlled functions (such as investment advice) must be an approved person (on the FSA's register). Where these financial services are incidental or

supplemental to the main legal work these firms are not authorised by the FSA. Instead they follow rules set out by the appropriate professional body (called a Designated Professional Body), such as the Law Society.

95. These arrangements would need to be considered by the LSB and the FSA in the context of the proposals contained in this Review, but in general they appear to work in a satisfactory manner and should be 'passported' into the new regulatory regime.

96. As with LDPs, the opportunity for outside owners to participate in MDPs brings the opportunity of attracting capital investment as well as fresh business expertise. In connection with the 'fit to own' test, the criteria for financial soundness would need to take into account the activities to be undertaken by an MDP, and would be very different from that for a legal practice, if the MDP intended to engage in transactions across the service range as a principal.

97. It may be possible for some sort of criteria to be agreed by collaboration between the different professions. But this presupposes that each profession has a 'lead regulator' that can bind that profession in its entirety; and that the rules of the other professions would allow outside owners to invest in the MDP business – which may or may not be the case.

98. The overwhelming sentiment expressed to me, by those wishing to contemplate alternative business structures, was that it would be a good start to get lawyers working together in LDPs, and to assess the regulatory consequences of that, before proceeding with full-blooded MDPs. I concur with that sentiment but would encourage the efforts of the Law Society, who are doing further research to assess the demand for MDPs.

99. The Review, therefore, proposes that the necessary first step (which would facilitate the emergence of MDPs at a subsequent date) is the setting

up of an appropriate regulatory framework for LDPs, including a regulatory lead body for the legal services industry, such as that which would exist with the Legal Services Board. It would be for that Board to determine whether satisfactory arrangements could be worked out with other regulators as to how different practices with common ownership might operate between themselves (as outlined in paragraph 88 above), or indeed how they might be permitted to operate together within the same legal entity, in both cases in a manner which properly protected the interests of the consumers.

100. None of these concerns should be taken to mean that they are not capable of resolution or that MDPs are an unviable proposition. But for MDPs to be a reality there would have to be a real movement in co-operation between the different professions. As has been commented, the first steps must be to find a way in which lawyers from different front-line bodies can work together in one consistent regulatory framework. The Review has concentrated on that goal. It would represent an important step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.

Conclusion

101. Legal Disciplinary Practices are law practices which permit lawyers from different professional bodies to practice together as equals. I conclude that non-lawyers should be permitted to be Managers of such practices, subject to the principle that lawyers should be in a majority by number in the management group. The non-lawyers would be there to enhance the services of the law practice, not to provide other services to the public.

102. Outside ownership of LDPs should be permitted. Such ownership should be subject to a 'fit to own' test; but the main focus of the regulatory authorities should be upon the identity of the management team, in particular the Head of Legal Practice and the Head of Finance and Administration, and the management systems that they employ, in short on who manages the

practice and how. Within England and Wales outside ownership is already permitted in respect of certain types of legal practices which provide conveyancing services; it is proposed that, subject to proper safeguards to be set by the LSB, it should now be permitted in other areas of the legal services market.

103. In the regulation of LDPs it is proposed that the focus of the regulatory system should be upon the economic unit, rather than the individual lawyer. The principle to be applied is that of 'lead regulation by reference to economic unit, residual regulation by reference to professional qualification'. Recognised front-line bodies would apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements that the recognised body had in place.

104. Multi-Disciplinary Practices are practices which bring together lawyers and other professionals to provide legal and other services to third parties. Legal work might be only a minority of the work done by the practice. There are considerable issues around such practices, in particular that of regulatory reach; and the fact that a regulator, such as the Legal Services Board, would have no jurisdiction over activities outside the legal sector. The proposal of this Review is that attention should focus on the setting up of a new regulatory system for lawyers with the LSB at its centre, and the authorisation of LDPs. This would represent a major step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.