

RESPONSE BY THE FACULTY OF ADVOCATES TO THE CONSULTATION PAPER ON THE REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES

Executive Summary

1. The fundamental objective of a regulatory system for legal services should be to further the interests of justice. The independence of the legal profession is fundamental to the rule of law in a democratic society and any regulatory system should seek to support rather than undermine the independence of the legal profession.
2. The key values of the legal profession are independence, integrity, the duty to act in the best interests of the client, confidentiality and freedom from conflicts of interest.
3. The maintenance of professional values and standards in the provision of legal services is the best protection for the administration of justice and for clients. Any regulatory system should seek to promote professionalism in the provision of legal services.
4. Self-regulation of the legal profession is regarded throughout Europe as an important aspect of the independence of the profession. It fosters and promotes the key professional values of the legal profession and the constitutional role of the lawyer in society. In a system of self-regulation, experienced members of the profession devote time and energy, without charge, to matters of professional regulation. When leading members of the profession set standards and impose discipline, this carries a moral authority which could not be replicated by any external regulator. No external regulator could be as responsive, knowledgeable, authoritative, effective and good value as a system of self-regulation.

5. Any departure from self-regulation of the legal profession should be no more than is required by some compelling public interest and should not be such as would compromise the interests of justice. Combining the benefits of self-regulation with a degree of external oversight where this is required in order to secure some legitimate public interest (e.g. in order to check that professional rules which restrict competition may be justified in the public interest and to monitor complaints handling) strikes the right balance. In general, the appropriate body to exercise regulatory oversight over the legal profession is the Court. This general rule should be departed from only when the subject matter is inappropriate for decision by the Court.
6. Any regulatory system should be responsive to and should reflect differences between different types of legal practice. There are significant differences between the practice of advocacy on a self-employed referral basis and other forms of legal practice. These differences have regulatory implications which are reflected in the regulatory structures of the two branches of the legal profession.
7. The availability of the independent referral bar to clients throughout the country enhances access to justice, consumer choice and the quality of legal representation. It promotes expertise in advocacy and improves the flexibility, cost-effectiveness and international competitiveness of the legal profession as a whole.
8. There is no case for the introduction of LDPs in Scotland. Practitioners who choose to practise advocacy as self-employed referral practitioners may become Advocates while practitioners who wish to combine advocacy in the higher Courts with direct access to clients and/or partnership with other practitioners may do so as solicitor advocates.
9. Divorcing ownership and control of legal practice would present unacceptable regulatory risks.

10. The Scottish bar's rule that Advocates may not enter into partnership is fully justified. Advocacy lends itself to sole practice on a referral basis. Sole practice amongst Advocates in Scotland maximises choice, enhances access to justice and secures the highest quality of legal services for clients across Scotland as a whole. It enhances the flexibility and cost-effectiveness of the legal profession as a whole.
11. MDPs risk compromising the core values of the legal profession. There are serious difficulties in identifying a regulatory model for MDPs which would safeguard those values.

Introduction

1. The Faculty of Advocates is the professional body which regulates the profession of Advocate in Scotland¹. The bar in Scotland is essentially an independent referral bar: i.e. Advocates act on the instructions of appropriately qualified professionals who are the primary providers of legal services to lay clients. The work of Advocates, like the work of self-employed barristers in England, includes both advocacy and advisory work.
2. While there are similarities between the legal professions and the legal services market in Scotland on the one hand and in England and Wales on the other, there are also material differences. Each jurisdiction has its own regulatory structure for the legal profession. Apart from the regulatory structure, the following points of difference between the bars of the two jurisdictions should be noted:

2.1. The bar in Scotland is significantly smaller than the bar in England and Wales. There are about 450 Advocates in practice in Scotland at the present time.

¹ We use the term "Advocate" when we intend to refer to a member of the Faculty of Advocates, and the term "advocate" when we intend to refer to any legal practitioner appearing as an advocate before a Court or tribunal.

2.2. In Scotland, Advocates and solicitors typically follow a common education and training up until the point when the practitioner decides to become an Advocate. Most Advocates have qualified as solicitors and many will have practised for a number of years as solicitors before coming to the bar. The decision to come to the bar is for most entrants in effect a decision to practise as a sole practitioner offering advocacy and advisory services on a referral basis. The practitioner who wishes to offer services directly to clients and/or to practise in partnership with other lawyers may remain in practice as a solicitor. If a practitioner wishes to combine advocacy in the higher courts with direct access and/or partnership with other lawyers, he or she may do so as a solicitor advocate. An Advocate who decides that he or she wishes to practise in these ways may seek admission or re-admission as a solicitor.

2.3. The bar in Scotland is a library-based bar centred on the Advocates Library, which is widely recognised as one of the finest working law libraries in the United Kingdom. Any practitioner who completes devilling (pupillage) and fulfils the other entry requirements is entitled to practise and has full access to the Advocates Library. There is no requirement to obtain a tenancy in chambers. Moreover, any such practitioner is entitled (but not bound) to take advantage of clerking and other common services which are provided through a service company, Faculty Services Limited. The funding of those services (and of the Library) by members of the bar is related to fee income and the arrangement is accordingly advantageous: (a) to newly qualified practitioners; and (b) to practitioners who engage in areas of practice which are important in terms of access to justice but which are comparatively poorly remunerated.

2.4. The Faculty is directed by six Officebearers, headed by the Dean of Faculty, each of whom is a practising Advocate elected by a ballot of all members of Faculty, and by the Faculty Council, the members of which (most of whom are practising Advocates) are elected by specified constituencies. In accordance with the Guide to the Professional Conduct

of Advocates, any Advocate who is in doubt about the propriety of a particular course of conduct should consult the Dean or another Officebearer for guidance. The Officebearers are available to give such advice to Advocates, and do so on a regular basis.

2.5. Unlike the position as we understand it to be in England and Wales, there are very few employed Advocates in Scotland. This may be because of the common training, the relative ease with which an Advocate may be admitted as a solicitor if he or she wishes to practise in that form, and the absence of any restriction analogous to the requirement to obtain a tenancy in chambers. The overwhelming majority of non-practising members of Faculty have retired from practice, have become judges or pursue a non-legal career.

3. The regulation of the legal profession in Scotland is within devolved competence² and the Scottish Ministers have set up a Working Group for Research into the Legal Profession in Scotland. Given the differences between the legal professions in the two jurisdictions (including those to which we have referred), it cannot be assumed that any decision about the regulation of the legal profession in England and Wales would necessarily be appropriate to circumstances in Scotland. In particular, the context in which the question of legal disciplinary practices falls to be considered is quite different in the two jurisdictions. Nevertheless, the Consultation Paper recognises that regulatory change in England and Wales could have an impact on the other jurisdictions of the United Kingdom. The Faculty therefore welcomes the opportunity in light of this to comment on the general issues raised by the Consultation Paper.
4. Before addressing the specific questions asked in the Consultation Paper, there are some preliminary matters which we would suggest that any review of the regulatory framework for legal services should have in mind.

The constitutional context

² Scotland Act 1998, Schedule 5, Section C3.

5. The independence of the legal profession is fundamental to the rule of law in a democratic society. While this is true of the legal profession as a whole, the independence of that part of the legal profession which engages in advocacy is of particular constitutional importance in maintaining the independence and integrity of the judicial process – and accordingly to the maintenance of the rule of law. An Advocate is subject to what is known as “the cab-rank rule” which means that the Advocate is not at liberty to decline to act for any litigant who applies to him or her, however unpopular may be that litigant’s cause, other than in specified circumstances, such as the existence of a prior commitment for the same date or a conflict of interest. A solicitor is not subject to the cab-rank rule and may pick and choose his or her clients. The constitutional significance of the role of the advocate in our system of justice was recently emphasised by Lord Hobhouse of Woodborough in the following passage³:

“The constitutional aspect

The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client’s best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provides within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.

It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England, the professional rule is that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite, in a manner too often taken for granted, this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed, whether by the executive, the judiciary or by anyone else. Similarly, situations must be avoided where the advocate’s conduct of a case is

³ Medcalf v. Mardell [2003] 1 AC 120, paras. 51-54.

influenced not by his duty to his client but by concerns about his own self-interest.”

6. The function of the lawyer in society is set out in the preamble to the Code of Conduct for Lawyers in the European Union promulgated by the Council of the Bars and Law Societies of the European Union (“the CCBE”)⁴ in the following terms:

“1.1. The Function of the Lawyer in Society

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client’s cause but to be his adviser.

A lawyer’s function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client’s cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.”

7. Society as a whole has an interest in the maintenance of standards in the provision of legal services. As the preamble to the CCBE Code of Conduct indicates, the interests of the “consumer” of legal services (by which we take is meant the lay client), important though they are, do not exhaust the interests at stake. The proper and efficient conduct of litigation is essential to the administration of civil and criminal justice. The accused, victims and witnesses all have an interest in the proper conduct of a criminal prosecution. The maintenance of standards in conveyancing may have an impact on the security of property rights generally as well as on the demands made on Land Register staff. If a will or a trust is badly drawn, it is not necessarily the client who suffers but disappointed beneficiaries.

⁴ The CCBE is the officially recognised representative organisation for the legal profession in the European Union and the European Economic Area. The Code of Conduct was originally adopted at the CCBE Plenary Session held on 28th October 1988 and was subsequently amended during the CCBE Plenary Sessions on 28th November 1998 and 6th December 2002.

8. Society as a whole also has an interest in the maintenance of professionalism in the provision of legal services. Professional lawyers have a duty to act in the best interests of the client without regard to the impact on their own narrow economic interests. They have a duty to act with integrity and independence and to keep confidential their clients' affairs. In our view, the recognition and maintenance of these professional duties is important, not only for the protection of individual clients but also in the wider public interest in the proper administration of justice. We believe that the maintenance of professional standards and attitudes on the part of those providing legal services is the best protection for the client – and indeed that this protects the client in a way which no system of external regulation could achieve.

9. The fundamental values which we have mentioned have a corporate and institutional aspect. The attitudes and habits of mind which are essential if the Advocate is effectively to fulfil his constitutional role and which are required for the maintenance of professionalism in the provision of legal services cannot exist in a vacuum. The value in fostering those attitudes and habits of mind of a corporate professional environment committed to sustaining them should not be underestimated. In certain circumstances they require the institutional protection of a profession which is itself independent of the executive arm of the state and is committed to the constitutional and professional values which we have mentioned. In general, it is our belief that the legal professions in the various jurisdictions of the United Kingdom provide such an institutional professional environment. No reform which could compromise the independence and integrity of the legal profession could be justified. In particular, any reform granting responsibility for regulation of the legal profession to the executive arm of the state, or to any organ appointed by the executive, would be inimical to the public interest. Any reform of the legal profession should be clearly directed to maintaining and enhancing the key values served by lawyers in a democratic society.

The independence of the legal profession and self-regulation

10. Self-regulation is a feature of the legal profession throughout Europe. It is widely recognised to be a key aspect of the independence of the legal profession. We

understand that it is regarded as an important yardstick of the independence of bars in those countries in Eastern Europe which seek membership or observer status at the CCBE. It is readily apparent why this should be so: regulation of the profession by the executive arm of the state runs the risk of compromising the constitutional values which we have mentioned. While the state has an interest in ensuring that the public interest as a whole is served, any extension of state regulation of the legal profession requires to be carefully assessed in light of the considerations which we have mentioned.

11. We regard the commitment which, under the current system of self-regulation, members of the profession bring to the affairs of the profession as a precious heritage, which should not lightly be thrown away. In the Faculty of Advocates, for example, Advocates devote considerable time and energy, free of charge, to matters of professional regulation: the examination and training of intrants; the formulation of professional rules and standards; providing guidance to junior colleagues on proper professional practice; and involvement in complaints handling and the disciplinary process. The wealth of experience and insight which is thereby brought to bear upon the practical and professional issues which can arise in the practice of advocacy could not be achieved under any other system of regulation. When the leading members of the profession, elected and respected by their professional colleagues, set standards and impose discipline (as occurs in the Faculty of Advocates), this carries a moral authority within the profession which no external regulator could replicate. Moreover, self-regulation is capable of permitting desirable change to be effected quickly: for example, in recent times the Faculty has made a number of significant changes to the complaints and disciplinary systems quickly and efficiently. While these are examples from the Faculty's experience, we have no reason to believe that similar observations could not be made about the other legal professional bodies in the United Kingdom.

12. That is not to say that, in the context of a self-regulating profession, there is no place for external oversight of the profession's regulations. We fully accept the legitimacy of scrutiny of professional rules to check that they do not impose

restrictions which cannot be justified in the public interest⁵. A system which combines the benefits of self-regulation with some external oversight where this is required in order to safeguard some legitimate public interest strikes the right balance. As a general rule, it is constitutionally appropriate for oversight of the legal profession to be exercised by the Courts. In Scotland, important functions in that regard are exercised by the Court of Session or by the Lord President (the head of that Court): for example Advocates are admitted by the Court and, although the Court delegates responsibility for the examination of intrants to the Faculty of Advocates, changes to the requirements for admission as an Advocate require the approval of the Lord President; while rules made by the Law Society of Scotland on various subjects require the concurrence or approval of the Lord President⁶. General oversight of the profession's regulation of such matters by the Court accords with the commitment of the legal profession to the interests of justice and is, because the Court is itself independent of the executive, consistent with maintaining the independence of the legal profession. We would deprecate any shift of these existing responsibilities from the Court to the executive or to some agency appointed by or responsible to the executive. The general rule that any necessary oversight of the legal profession is a matter for the Court should be departed from only where the matter is one which is unsuitable for the Court: e.g. oversight of complaints handling.

The terms of reference

13. We note that 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. We do not minimise the potential benefits of competition and innovation. There is a public interest in an efficient and effective legal sector which the Faculty supports and seeks to advance. But it appears to us that the primary value which any system

⁵ That professional rules which could reasonably be regarded as promoting the core values of the legal profession (including rules designed to avoid the risk of the independence of the practitioner being compromised by conflict of interest) are justifiable in terms of European Community law even if they restrict competition was confirmed by the European Court of Justice in *Wouters v. Algemene Raad van de Nederlandse Ordre van Advocaten* [2002] ECR I-1577.

⁶ Solicitors (Scotland) Act 1980, s. 5(1) [training regulations], s. 25A(8) [rules in respect of rights of audience in the superior Courts], s. 34(3) [rules as to professional practice, conduct and discipline], s. 44(1) [rules as to indemnity].

of regulation of the legal profession should promote is the interest of justice. Efficiency and innovation are not antipathetic to the interests of justice, but any proposed reform requires to be tested, in the final analysis, by its impact on the administration of justice. Moreover, for the reasons which we have stated, the independence of the legal profession is a key value which should be promoted by any reform.

The role of the independent referral bar

14. The bar in Scotland is an independent referral bar. In other words, Advocates provide services (“referral services”) to other professionals (principally – though not exclusively - solicitors) who themselves provide services to their lay clients. While those services include both advocacy and advice, the work of Advocates in Scotland is typically heavily related to Court work: it would be very unusual for an Advocate to have a wholly chamber practice.
15. The demand for referral services is a feature of the legal services market in Scotland, and, we believe, in the United Kingdom as a whole. The reasons for this are various, but include the following. (1) The client’s affairs may require specialist input which the individual practitioner or his firm cannot provide. (2) There may be good practical and economic reasons why a solicitor (or other professional providing services directly to a lay client) should call on the services of a referral professional for particular types of work, notably advocacy and advice, rather than do the work in-house. (3) The circumstances may be such that a second opinion from a practitioner who is more detached from the client’s affairs or who can bring to bear a different perspective on the problem is of value.
16. That there should exist a pool of legal practitioners who offer to provide legal services, in particular advocacy and advice services, on a referral basis, is unsurprising. There are features of advocacy and advisory work which lend themselves to sole practitioners operating exclusively on a referral basis: see paragraphs 17 and 18 below. There are also wider issues which should be borne in mind when considering the role of the independent referral bar: see paragraph 19

below. In the comments we make, we are drawing particularly on our own experience of the position in Scotland but the points may be of general application.

17. *Advocacy*

17.1. The preparation for and presentation of a case to a Court or tribunal is a specialist activity, in which there is no substitute for specific training and experience. It is entirely appropriate that a practitioner who is not himself a specialist in advocacy should, when the interests of the client require it, instruct a practitioner who is.

17.2. Advocacy is an activity which is inherently individual. When the advocate is on his or her feet in Court, he or she must be master of the relevant factual and legal material and must be fully prepared for the examination of witnesses or the advancing of arguments to the Court. While that advocate will often require support of various kinds from solicitors or from other counsel, nobody else but that advocate can carry out the necessary preparation for the task – and the preparation will often be extremely time-consuming if the case is to be presented effectively.

17.3. The resources required for effective advocacy are: (a) legal knowledge and experience; (b) access to legal texts; (c) forensic ability; and (d) sufficient freedom from other demands to concentrate, when required, on the task in hand. An advocate does not need, in order to practise effectively, the office infrastructure which would be required in order to serve the demands of lay clients. It follows that advocacy services are capable of being provided relatively economically by a referral professional. The nature of the resources required is such that there is no obvious disadvantage in sole practice as compared with other business forms, particularly in the context of a library-based bar such as the Scottish bar, in which all practitioners have equal access to the legal resources needed in order to carry out their work.

17.4. The demands of office administration and serving lay clients may, indeed, for practical reasons, be quite difficult to combine with a commitment to

specialism in advocacy. At a basic practical level, a practitioner who spends a lot of time in Court is unavailable to deal with other demands of an office not only when he is in Court but also when he is preparing to appear in Court. During the running of a case, the advocate is likely to have to spend a lot of time when he is not in Court continuing with the preparation of the case. In short, advocacy, especially in the Courts or tribunals where Advocates most often appear, is a full-time activity.

18. *Advisory work*

Fully researching a difficult legal problem and formulating sound advice in light of that research may be time-consuming. It requires not an office infrastructure, but legal training, forensic ability, access to legal resources and time to concentrate on the problem in hand. It may be both practical and economic for a solicitor to instruct another professional to do this work rather than to do the work in-house – quite apart from those situations where it is desirable in the interests of the client to obtain an opinion from a practitioner with greater specialist knowledge or who can bring to bear a different perspective on the question in issue.

19. *Wider issues*

19.1. There are some more general points which might be made about the role of the independent referral bar in Scotland.

Access to justice and consumer choice

19.2. The availability of the independent referral bar enhances the choice and potential quality of legal representation available to clients throughout the country. In principle, each Advocate is available to be instructed by any solicitor and to appear in any Court or tribunal in Scotland, and is accordingly available to any client in any part of the country. Clients throughout the country are able to obtain access to the highest level of expertise which the bar can provide, while small firms (wherever situated) may, through their access to the bar, be able to provide a greater range and quality of service to their clients than would otherwise be the case. The availability of the independent referral bar permits the solicitor to call on the assistance of another lawyer without the fear of losing the client. These

considerations are significant in terms of access to justice throughout the country, in particular in rural areas and for the clients of smaller solicitors' firms. Because Advocates are sole practitioners, it is unlikely that the Advocate of choice will have to decline instructions because of a conflict of interest. The introduction of partnerships in the context of a small bar such as the Scottish bar would diminish consumer choice.

Flexibility

19.3. The solicitor may instruct an Advocate or team of Advocates appropriate to the task in hand and may accordingly be able to provide a more flexible, responsive and economic service to clients than might be the case if the work had to be carried out in-house. No solicitors' firm could maintain in-house the range of experience and expertise in advocacy which is available to all consumers in Scotland through the independent referral bar. If any tried to, or were forced to do so, there would be a very substantial increase in the overall cost of legal services. The demands of litigation may fluctuate considerably and the availability of the independent referral bar provides the flexibility to allow firms to carry a fluctuating caseload economically. The flexibility which the independent referral bar provides allows the Court system to operate more efficiently and more economically than would otherwise be the case.

The cab-rank rule

19.4. The cab-rank rule, which is observed by members of the independent referral bar, has, as Lord Hobhouse observed, a constitutional importance. It is not merely a rule which may be invoked in extreme cases, but is by its very existence conducive to maintaining the professional values which we mentioned above. It is difficult to see how this rule could be applied to practitioners who are not in sole practice. For the avoidance of doubt, we do not argue that every court lawyer must be subject to the cab-rank rule. But it is important that there should be a sufficiently large and identifiable body of practitioners across the full range of expertise and experience who cannot pick and choose their clients. The independent referral bar provides such a body of practitioners.

The role of the instructing solicitor as an informed intermediary

19.5. Advocacy services are credence services. Most clients require advocacy services very occasionally (if ever) and, when a client requires an Advocate, the litigation will usually be a matter of considerable significance (e.g. it may determine a criminal charge against the client, it may decide the fate of the client's children, it may be important to the future of a business, it may involve substantial sums of money). This is all the more so in relation to advocacy in the higher Courts, where Advocates typically specialise. Most clients accordingly have no basis in experience for assessing the relative merits of different Advocates for the task in hand. Nor is there any objective criterion which could be applied: the effectiveness of an Advocate's performance cannot, for example, be determined by reference to success or failure in previous cases, which will have been determined by many other considerations, not least the merits of the case. Even after a case has been concluded, it is not necessarily possible for a lay client to assess how effective the advocate has been. Against this background, a significant benefit of the fact that Advocates practice on a referral basis is that the client's choice of Advocate will be made on the advice of an informed intermediary – normally a solicitor who has a greater knowledge than the lay client of the law, of the characteristics and qualities in an Advocate which may be particularly relevant for the case in hand, and of the working of the legal system generally. In this regard, it may be regarded as being in the public interest that Advocates should practice on a referral basis.

Regulatory implications

19.6. The distinction between the provision of services directly to lay clients and referral services has regulatory implications. In particular, regulatory issues which arise for a lawyer who is providing services directly to lay clients do not arise for a lawyer who is providing referral services. Inasmuch as a lawyer who is providing referral services does not handle clients' funds, it is unnecessary for him to be subject to the structure of regulation and control which necessarily applies to lawyers who do. Moreover, the nature and incidence of complaints in relation to the independent referral bar differ from complaints about other legal services. In her most recent annual report (for 2002-3), the Scottish Legal Services Ombudsman noted that, during the year, the Faculty of Advocates had received 35

complaints in total about the conduct of advocates⁷. To impose on lawyers practising on a referral basis a regulatory framework appropriate to lawyers who provide services directly to lay clients would be inappropriate and disproportionately burdensome.

20. In light of these considerations, it may be seen that the institutional separation between the two branches of the legal profession is not merely an accident of history. It reflects practical differences between practice as a professional providing services directly to lay clients and practice as a referral professional, specialising in advocacy. The characteristics of advocacy just described apply to the practice of advocacy and are not shared by any other profession, including solicitors who are not practising advocacy. This means that there is a fundamental justification for treating regulatory issues in relation to advocacy services differently from the services of other professionals, including solicitors who are not practising advocacy. Moreover, as described, regulatory issues applicable to practitioners to whom lay clients have direct access differ from those which apply to referral professionals. The institutional separation between the two branches of the legal profession readily allows the regulatory regime applied to two different types of legal practice to reflect, proportionately and appropriately, those differences. In responding below to the particular questions which are raised, we have done so from the point of view of the Faculty of Advocates and the situation of the legal profession in Scotland, and in an effort to provide information and comments which may be of assistance to those engaged in considering the regulation of the profession in England and Wales.

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

21. The fundamental objective of a regulatory system for legal services should be to further the interests of justice in the broadest sense. For reasons already explained, it follows that the approach to regulation should maintain and support the independence and integrity of the legal profession – not as an end

⁷ Scottish Legal Services Ombudsman, Annual Report 2002-3, p. 5. In 2001 the Faculty received 23

in itself but in the interests of the rule of law in a democracy. The furthering of the interests of justice can be seen as the maintenance and improvement of the quality and integrity of legal services provided to clients and to the Court. The objective of provision of a quality service to clients is clear. No less important an objective, however, is the provision of fully prepared and properly presented and argued cases to the Court. In the form of procedure practised in Scotland and, we believe, in England and Wales also, the Courts are highly dependent on the proper conduct and quality of presentation and argument of the lawyers who appear before them. The Courts are not in a position, in the great majority of cases, to make up for any deficiencies in the representation of litigants before them. The efficient operation of the Courts, and the reaching of decisions which are just and fair and in accordance with the law, depends to a large extent on maintaining a high standard of advocacy.

22. In the interests of maintaining the independence of the legal profession and for reasons to which we have already alluded, we believe that any departure from a system of self-regulation should be no more than is required by some compelling public interest and should not be such as would compromise the interests of justice. Maintaining the integrity of the legal profession requires that there be appropriate standards in respect of qualification, training and education and appropriate rules of professional conduct. It also requires that there be in place a system: (a) to deal with breaches of professional discipline; and (b) to deal with complaints of inadequate professional services. It is only insofar as regulation fulfilling these objectives cannot be provided by the profession itself that there would be justification for giving the power to an external body. If self-regulation with some form of external oversight would adequately protect the public interest (as we believe it does), then this should be preferred to any more intrusive change. If and to the extent that oversight can be appropriately exercised by the Court, then this should be preferred to oversight by the executive or any agency appointed by or accountable to the executive.

23. It is important that any regulatory system should be responsive to and reflect differences between different parts of the legal services market. It would be a mistake to believe that a “one size fits all” approach would necessarily be the best. As we have explained above, there are features of work as an Advocate in the independent referral bar which justify differences between the regulatory regime applicable to its members and that applicable to solicitors who are the primary providers of legal services to lay clients. Put shortly, the areas of regulatory risk are quite different in relation to the two branches of the legal profession. The current regulatory system, based as it is on the institutional separation between the Law Society and the bar, reflects these differences.

24. The interests of justice include access to justice. Members of the independent referral bar are subject to the cab-rank rule which plainly furthers access to justice. There would be difficulties in applying that rule effectively to practitioners who are not in sole practice. Certainly, solicitors are not currently subject to such a professional rule. A rule which in effect requires practitioners to accept instructions whether they wish to do so or not is acceptable as an aspect of the self-regulation of a profession dedicated to the interests of justice. However, it would be difficult in a free society to accept state direction in relation to the acceptance of instructions.

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

25. The fundamental principles applicable to the legal profession are those set out in the Consultation Paper: independence, integrity, the duty to act in the best interests of the client, and confidentiality. These principles are further elaborated in the existing professional Codes of Conduct. We would add to the principles mentioned in the Consultation Paper (although it might be said to be an aspect of acting in the best interests of the client) the avoidance of conflicts of interest.

26. There are, in addition, particular rules and principles which apply to the practice of advocacy and which are essentially irrelevant to other aspects of legal practice. In particular, the advocate faces issues arising from his duty to the court which are not faced by the chamber practitioner. Moreover, it is a feature of advocacy that the advocate may require to make irrevocable decisions about the difficult issues of professional conduct which may arise at any time in the course of the conduct of a case without much time for reflection: e.g. whether it is proper (or indeed necessary) to withdraw from acting; whether instructions from the client can properly be acted on; whether a particular submission or line of questioning may properly be advanced.

27. Three consequences follow from these considerations:

- a. Any system of regulation of the legal profession should accommodate different rules and principles applicable to different types of legal practice. These considerations reinforce the proposition that a “one size fits all” approach to regulation would be inappropriate.
- b. It is necessary to maintain a professional environment which cultivates in advocates those attitudes and habits of mind which will enable the advocate to identify the professional issues which arise and to take effective and appropriate decisions about those issues. An environment in which members of the profession are directly engaged in the regulation of the profession and where the leaders of the profession place their moral authority within the profession behind the formulation and maintenance of standards has been shown by experience to be conducive to this.
- c. It is highly desirable to have in place an effective system whereby advocates can immediately obtain authoritative guidance as to proper conduct in cases of difficulty. Advocates seek such guidance not simply in order to obtain “regulatory clearance” to avoid disciplinary action in the future but to ensure that they do the right thing in the interests of justice. Such advice can only be given by experienced

practitioners who have an intimate knowledge and experience of the range of issues which can arise in practice. It is vital that such guidance can be obtained on the spot. Any delay would be intolerable. In Scotland, Advocates may seek guidance at any time from the Dean of Faculty or other office-bearers of the Faculty of Advocates – in effect from the leaders of the profession, who are immediately available to give such guidance and advice when it is required. Moreover, it is essential that the advice can be regarded as authoritative - that the advocate can be confident not only that if such advice is followed the advocate cannot thereafter be the subject of legitimate criticism but also that the advocate will be doing the right thing. This is best achieved through a system of self-regulation.

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

28. We understand this question to ask whether regulatory powers and resources should be used to address those areas where there is greatest risk of the regulatory objectives being compromised. Taken in that general sense, we do not take issue with the proposition. Plainly it would be appropriate to concentrate resources where they are most needed. There would be no point in putting in place an expensive new regulatory framework to address matters which can be adequately addressed within the existing system or by modifying it. Likewise, it would be pointless to subject members of the independent referral bar to a regime which is designed to address the regulatory risks related to the handling of clients' money or other regulatory risks which arise for direct access professionals.

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

29. We consider that Model B is to be preferred to Model A.

- a. Model A is open to fundamental objections on the grounds: (a) that, as compared with Model B, it would tend to weaken rather than strengthen the independence of the legal profession; (b) that it would undermine rather than strengthen those professional values to which we referred above; and (c) that it would be a disproportionate response to the issues raised by the Consultation Paper.

- b. We have mentioned above some of the advantages of self-regulation. We believe that there are constitutional objections to a departure from self-regulation as the fundamental basis of regulation of the legal profession. Moreover, we do not believe that any external regulator could command the same moral authority within the profession which its leading members have. We doubt whether any external regulator could bring to bear an understanding and expertise concerning the issues of proper professional practice equal to that which is currently provided by experienced practitioners from within the profession itself. We are concerned that, if members of the profession cease to have a direct involvement in the formulation and application of principles of good professional conduct, those principles will come to be seen merely as regulatory rules to be worked within or avoided, rather than as being intrinsic to good professional practice. In effect, we believe that a system of external regulation would tend to undermine, rather than to support, those professional attitudes which are, in our view, the best protection for the public interest in the administration of justice and for the client.

- c. We consider that there is considerable force in the proposition that, in general, keeping regulation close to those who provide the services is likely to be cheaper. At present, experienced and senior members of the profession devote time and energy free of charge to the regulation of the profession and make themselves available to provide guidance on professional issues to other members of the profession. An external regulator would need to pay for staff and premises. The expense of

creating a new external regulator would be disproportionately great in a small jurisdiction such as Scotland.

- d. An external regulator would need to employ lawyers. It is extremely unlikely that it would be able to employ lawyers of the seniority, experience and expertise of those who are currently engaged in regulating the professions. It is hard to see how an external regulator could bring to bear the same insight into the practical application of principles of good professional practice to the work of the advocate which is inherent in a system in which senior and experienced members of the profession apply themselves to these issues. It is difficult to envisage its staff having the same moral authority which the leaders of the profession enjoy. An external regulator would not be able to provide the same speedy, informed and authoritative guidance about proper practice which, certainly in the Faculty, members may obtain from the leaders of the profession. At present, such guidance is sought and provided on a daily basis, often in the middle of a trial or hearing.

30. A strength of combining regulatory and representative functions within a professional organisation dedicated to the interests of justice is that, at root, it is in the interests of each member of the profession as well as of the profession as a whole to maintain standards. One would expect that those who have to represent the profession to the outside world would also wish to secure that the highest standards are maintained.

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

31. We consider that model A would not meet the requirement that any regulatory framework should be no more restrictive or burdensome than is clearly justified. It is likely to be less flexible than the current arrangements in reflecting practical differences between different sectors of the legal profession. We do not consider that it would promote the independence of the legal profession. We believe that it would undermine rather than support the

professional values at the heart of good legal practice. We accept that it is valuable to have lay involvement in and external assessment of complaints handling. However this exists at the moment.

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

32. Insofar as this is directed to the legal professions in England and Wales, it is a matter for them on which it would be inappropriate for us to comment.

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

33. We consider that Government powers to intervene in the regulation of the legal profession should, in the interests of maintaining the independence of the legal profession, be the minimum necessary and should exist only to the extent that such powers are necessary to promote some compelling public interest, and then only where: (a) the power of Government to intervene does not compromise the administration of justice and; (b) the public interest in question cannot be secured by some less intrusive method. We can see merit in the view that the default position should be for any relevant powers to be held by a body independent of Government: the retention of any powers by the Government should require to be justified.

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

34. Since one of the aims of the regulatory system should be to maintain and support the independence of the legal profession, we consider that Government should not have power to instruct any regulator of the legal profession.

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

35. We welcome the recognition that any decisions in relation to England and Wales should be taken in consciousness that they could have implications for Scotland and Northern Ireland.
36. Any regulatory arrangement should take account of and be consistent with the Code of Conduct for Lawyers in the European Union promulgated by the CCBE⁸.
37. Any regulatory arrangement should not be inconsistent with European Union law or with the European Convention on Human Rights. As *Wouters*⁹ illustrates, European law is not antipathetic to the maintenance of professional rules and practices which are directed to the public interest in the administration of justice and the protection of clients. Disciplinary procedures may require to be assessed for compatibility with the Convention.

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

38. We see no good reason for making such an operational split. Often, a service complaint may raise a question of good professional practice, or even professional discipline. To take a crude example, a complaint that the advocate did not fulfil the client's instruction to lie to the Court in order to gain some advantage for the client would plainly fall to be rejected. Equally, a complaint may have both service and disciplinary aspects: e.g. inordinate delay in fulfilling instructions could be regarded as raising both service and disciplinary issues. Any system requires to provide for these links between service complaints and disciplinary matters and a system which accommodates both within a system of self-regulation can readily do so. The Faculty's procedures encompass both types of complaint in one system in a way which is flexible and convenient. This has given rise to no difficulties in operation and a breach of the Disciplinary Rules may be established in either respect in the case of any particular complaint.

⁸ See above.

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

39. The principal advantages of each body remaining responsible for its own complaints are: (a) that members of the professions have a collective interest in ensuring that complaints are properly handled; (b) that they bring to bear a practical working knowledge of professional practice; (c) that the differences in practice between different parts of the legal profession which are reflected in the institutional division between advocates and solicitors are reflected in the approach to complaints handling; (d) that insofar as any disciplinary issues arise in the context of a service complaint, that issue can readily be addressed within the same system; (e) that the burden of regulation is more likely to be appropriate to the nature and type of complaints which may arise in relation to the different branches of the profession; and (f) that the system is likely to be more effective, authoritative and better value, because leading members of the professions are prepared to give their time to dealing with such matters.

40. The possible advantage of a uniform complaints organisation external to the professions might be simplicity from the point of view of the complainer and the possibility of administering complaints involving members of both branches of the profession together. We question whether the creation of a uniform complaints organisation would be a proportionate response to this aim. In Scotland, complaints are handled by the professional bodies, subject to oversight by the Scottish Legal Services Ombudsman, who scrutinises not the merits but the handling of complaints. We believe that this system effectively combines the advantages of self-regulation with a measure of external oversight. In addition, the Faculty is (in response to a recommendation of the

⁹ See above.

Scottish Legal Services Ombudsman) in the course of agreeing a protocol with the Law Society of Scotland dealing with co-operation and exchange of information between the two professional bodies if and when a complaint is made which involves both a solicitor and a member of Faculty.

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

41. Oversight of complaints handling should be in the hands of a person or body who is institutionally independent both of the professions and of the executive. The Scottish Legal Services Ombudsman provides an appropriate form of oversight of complaints handling.

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

42. We do not consider that it is necessary or appropriate to have a single uniform disciplinary body for all lawyers. Fundamentally, there are two branches of the profession with different roles and responsibilities which have real practical implications for regulation. There are particular disciplinary issues which arise in the context of the practice of advocacy and, further, particular issues which may arise when acting in a referral capacity. Moreover, the many disciplinary issues which may arise in the context of acting directly for lay clients and handling clients' money are irrelevant to members of the bar. These differences justify discipline being addressed through the separate professional bodies.
43. We consider that there are clear advantages in the different professional bodies dealing with disciplinary matters. In such a system practitioners, who are experienced and knowledgeable in the practice and proper conduct of the profession and who have an interest in maintaining the integrity of the profession and professional standards, give their time to dealing with disciplinary complaints.

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

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

44. We deal with Questions C5 and C6 together. At present, insofar as complaints and discipline are handled by the professional bodies, they are funded by the professions. Insofar as external oversight of complaints handling has been established in the wider public interest, that is funded from public funds. The distinction appears to us to be a principled one.

45. It would be disproportionately burdensome to require members of the referral bar to fund a system which would have to deal with the complaints and disciplinary issues which arise in the context of solicitors' practice. The current institutional arrangements reflect the differences between the two branches of the profession, and permit the application of appropriate regulation tailored to the differing regulatory requirements applicable to different sorts of professional practice.

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

46. It does not appear to us that this question or the other questions in this section of the Consultation Paper can be answered without first determining: (a) whether the creation of a new external regulator can be justified; and (b) the scope of any regulator's functions. Further, we recognise that in relation to the questions posed in this section of the Consultation Paper there may be relevant and different considerations arising north and south of the border and therefore we make only a few general comments from a Scottish perspective on some of the issues raised. For the reasons which we have explained, we do not believe

that the creation of a new external regulator would be justified. We believe that a system based on self-regulation of the professions is in the public interest and that, where appropriate, external regulation of the legal profession, and in particular of those parts of the legal profession which are engaged in litigation and advocacy, should be in the hands of the Courts.

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

47. We make no comment on this question: see paragraph 46 above.

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

48. The only general comment which we would make on this question is that appointments bearing on the legal profession would appropriately be in the hands of a senior judge.

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

49. We make no comment on this question: see paragraph 46 above.

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

50. We make no comment on this question: see paragraph 46 above.

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

51. The only general comment which we would make on this question is that any body regulating the legal profession should be accountable to the Courts.

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

52. We make no comment on this question: see paragraph 46 above.

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

53. We make two general comments on this question. As at present, it would be necessary to have appropriate rights of appeal in relation to disciplinary matters. So far as service complaints are concerned, it might well be necessary to have an ombudsman with a role similar to that of the Scottish Legal Services Ombudsman to supervise complaints handling by any regulator.

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

54. We make the following general comment on this question. At present, the system of self-regulation is, in effect, funded by the professions. Because the institutional split between the two professional bodies reflects the different risks involved in referral practice as an Advocate and practice as a solicitor, the costs of regulation to practitioners reflect the nature and extent of the risks involved in these different sorts of practice.

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

55. Insofar as this question addresses an issue particular to England and Wales it would be inappropriate for us to comment.

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

56. We do not agree that it is for Government to decide which types of legal services should be regulated. As a matter of principle, it seems to us that the scope of the regulatory framework should be a matter for the legislature.

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

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

57. We address Question E2 and Question E3 together. The main purposes of the regulation of legal services should be to promote the interests of justice, to protect the public against the dishonest and the incompetent and to ensure that any rules restrictive of competition have a public interest justification. There are many providers of legal services (in a broad sense) whose activities are completely unregulated, notwithstanding that they can do real harm. Examples are commercial claims managers/assessors and unqualified persons who offer to represent clients in tribunals. The proliferation of conditional fee agreements has created a real risk of the exploitation of clients by uninsured, unqualified and unregulated persons. There is, in our view, a clear public interest in regulating the activities of such persons. At the very least the public should be given clear information about the disadvantages and risks of dealing with them.

58. There would, in our view, be much to be said, from the point of view of the protection of the public, for reserving the provision of legal services to those who are properly qualified to provide such services and whose activities are subject to appropriate professional regulation and safeguards (such as

indemnity insurance and the solicitors' guarantee fund) which are designed to protect clients.

59. Short of that, we recognise a need for firm regulation of the provision of legal services (which would need to be defined) by persons who are not qualified solicitors or Advocates (or their equivalents in other jurisdictions). For the reasons which we have advanced, however, we consider that there are strong reasons against any change which substantially affects the current self-regulation of the professions.

Question F1. Is there potential demand from users and providers for Legal Disciplinary Practices?

60. We are not conscious of any demand for the proposed model of Legal Disciplinary Practice from those who practice as members of the Faculty of Advocates. As noted above, there are very few non-practising Advocates who are employed in a legal capacity. Insofar as there might be a demand from users and providers for practices which combine advocacy work with direct access to clients and/or the other services which a solicitor may provide, that demand can in Scotland be met within the present framework. A practitioner who wishes to practice as an advocate in partnership with others can do so, as a solicitor-advocate. Insofar as there might be a demand for practices which combine advocacy in the higher Courts, direct access to lay clients and the various services which a solicitor can offer, that demand can be met in the same way. Likewise, solicitors may re-qualify as Advocates if they wish to practice as independent referral professionals within the framework of the bar. In practice, transfer between the two branches of the profession is not particularly uncommon.

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

61. We propose to address this issue in three parts: (1) the advantages and disadvantages of LDPs where the managers and the owners are the same; (2)

the advantages and disadvantages of LDPs where the managers and owners are different; and (3) the rule which precludes practising Advocates in Scotland from operating in partnership with others.

Advantages and disadvantages of LDPs where the managers and owners are the same

62. There are a number of disadvantages in combining advocacy at a high level with direct access to lay clients and other aspects of a solicitor's practice.

- a. As we have sought to stress above, advocacy is inherently an independent activity which lends itself to sole practice. The principal resource, beyond his own skill and experience, which an advocate needs is access to legal materials. This can be funded on a collective basis without the need for any alternative business structure. In Scotland, for example, one of the finest working law libraries in the country, the Advocates Library, is readily available to all Advocates (who are in turn available to be instructed on behalf of any client in Scotland or abroad). No form of alternative business structure would be likely to be able to fund a comparable resource. This is particularly important in relation to constitutionally important but relatively low-paying work such as criminal and public law.
- b. Proper preparation of a case for Court demands a sustained commitment of time. Moreover, while the advocate is in Court he or she is necessarily unavailable to clients. The demands of presenting a case severely restrict an advocate's ability to do other than concentrate on the case in hand while the case is ongoing. These features of advocacy at a high level mean that quality advocacy can be difficult to combine effectively or satisfactorily with: (i) management of an office; or (ii) the legitimate demands of clients.
- c. Practice of advocacy in combination with other lawyers would also compromise access to justice interests in that it would be difficult to apply the cab-rank rule to a practitioner who is not in sole practice.

63. Insofar as practice which combines advocacy in the higher Courts with direct access to lay clients and other aspects of a solicitor's practice might provide advantages to practitioners or clients, there is no barrier to such practices being established or developing within the current framework.
64. If an Advocate were to be permitted to enter into partnership with solicitors providing direct access to clients, it would be necessary to address the application to the Advocate-partner of the regulatory regime necessary where direct access is being provided to clients (and in particular where clients' money is being handled by the firm). In Scotland, there seems to us to be no obvious reason why it should be regarded as inappropriate to require an Advocate who wishes to practise in partnership providing direct access to clients to be admitted (or, as would for many be the case, re-admitted) as a solicitor. It would, it seems to us, be unnecessary (and, in a small jurisdiction, extremely onerous) for the Faculty to be required to duplicate the regulatory functions of the Law Society. If there were to be such duplication, it would in any event be necessary to resolve which professional body would have oversight of the firm as a whole. In effect, as we have already suggested, the rules of the two professional bodies reflect the differences between direct access and self-employed referral practice. The best approach is to require each professional to be a member of the regulatory body appropriate to the type of practice in which he or she chooses to engage.

Advantages and disadvantages of LDPs where the managers and owners are different

65. While south of the border there might be particular conditions of which we are unaware, it seems to us that divorcing ownership and management of legal practice presents unacceptable regulatory risks. Where ownership and control are separated (as in public limited companies), the fundamental duty of the managers of the business is to the shareholders or owners of the business. By contrast, the fundamental duties of any lawyer are to the interests of justice and to his client. It would be unacceptable for there to be any risk that those

duties might be compromised by a duty to shareholders or other owners of the business in which the lawyer works.

The rule against partnerships

66. Like the bar in England and Wales, the Faculty of Advocates has a rule which prohibits practising Advocates from practising in partnership with one another or with other lawyers. Our view is that this rule is fully justified in the context of the legal services market in Scotland.
67. As a matter of principle, it is of fundamental importance that an Advocate be independent of any influence which might divert him or her from his duties to the Court and to his client. Sole practice supports that principle.
68. Sole practice, in the context of a referral bar, maximises choice. The solicitor instructs counsel suitable for the particular task in hand. All counsel are available to be instructed on behalf of any client. Sole practice, in the context of a referral bar, minimises the risk that the Advocate of choice cannot act because of a conflict of interest. This is of particular value in a small jurisdiction such as Scotland.
69. Sole practice, in the context of a referral bar, enhances access to justice for all consumers. The cab-rank rule would be difficult to apply to practitioners who were not in sole practice.
70. Sole practice, in the context of a referral bar, enhances access to justice across the country as a whole. All counsel are available to be instructed by solicitors from any part of the country. This enables smaller firms (and in particular rural firms) to offer a fuller and more effective service to their clients.
71. Sole practice, in the context of a referral bar, enhances the flexibility and cost-effectiveness of the profession as a whole. Solicitors do not need to carry as a fixed overhead the resources to service every demand which might be made upon them. They can instruct counsel, as required, for advice in cases of difficulty and for advocacy, both of these activities being demanding of time.

Because Advocates do not require to carry the office overheads which would be required if they were to offer services directly to clients, they can provide a flexible and cost effective alternative to in-house provision of these services.

72. Sole practice, in the context of a referral bar, secures the highest quality of legal service for the client. The Advocate, unlike a solicitor in partnership, can devote his time and energy to the case free of any competing pressures through having to be accountable to and for fellow firm members or staff. He does not have to take care of client's money. Practice as an Advocate on a referral basis allows the practitioner to concentrate on and to build up an expertise in advocacy and related services which could not be replicated if the practitioner were also servicing clients directly. He does not require to administer an office nor run a partnership. Importantly, the Advocate has no responsibility for the conduct and administration of litigation (e.g. dealing directly with the client, witnesses, Court offices, solicitors for other parties or the Legal Aid Board). This is a well-established and sensible division of labour.
73. Sole practice, in the context of the referral bar in Scotland, maximises the number of independent counsel available to clients. If the rule against partnerships were to be removed there would be a risk, particularly in a relatively small jurisdiction such as Scotland, that a small number of LDPs would come to dominate the market, with anti-competitive effects detrimental both to consumer choice and to the interests of justice.
74. Advocacy lends itself to sole practice on a referral basis. In Scotland, the principal external resource required for effective practice as an Advocate is available through the Advocates Library. Insofar as there might be any advantages in combining advocacy, direct access to lay clients and the other services which a solicitor provides, this can be accommodated within the current framework (which permits solicitors to qualify as solicitor-advocates with full rights of audience in the higher courts). There is accordingly no practical need for the rule to be modified.

Question F3. What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any, would you wish to see imposed on LDPs in the area of ownership?

75. The primary focus of regulation of the legal profession should remain on the individual practitioner. It is that practitioner who must be appropriately qualified, must follow the rules of professional conduct and fulfil professional duties to the Court and to the client – although no doubt there are some rules which essentially apply at a management level, in relation to matters such as complaints handling and care of clients' funds.

76. If it were to be permissible for Advocates to practise in partnership with solicitors, the possibility of mismatch between the regulatory regime applying to the professionals might arise. It appears to us that the simple solution is to require Advocates who wish to practise in partnership or to provide services directly to clients, to become solicitors (and, if they wish to continue to practise advocacy in the higher courts, solicitor advocates). They would then be subject to a regulatory regime appropriate to that form of practice.

77. For reasons which we have explained we consider that there are fundamental objections of principle to a division between ownership and management of legal practices.

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

78. This is a difficult question to answer since much may depend on the particular type of free service which is being provided. However, in general, if an Advocate accepts professional instructions but on a pro bono basis, the normal duties arising from the office which the Advocate holds still apply.

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

79. We consider that there is merit in the present system, whereby qualified lawyers who wish to provide services direct to lay clients in effect require to be solicitors and are accordingly subject to the body of rules promulgated or administered by the Law Society which are appropriate to practice of that sort. It is an argument against permitting partnerships between Advocates and solicitors that issues of regulatory oversight would arise.

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

80. We are not aware of any demand on the part of Advocates to participate in MDPs.

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

81. In our view, the reasons why MDPs have hitherto been prohibited remain valid. In any situation where the ownership and control of the business is not in the hands of lawyers who are subject to common ethical and professional rules, there is a risk that the fundamental duties of the lawyer to the interests of justice and to his client could be compromised by his duties to those of his colleagues who would not be subject to the same duties and rules of conduct. There could well be difficulties in maintaining client confidentiality and in the operation of legal professional privilege: it should be appreciated that these doctrines exist ultimately in order to serve the ends of justice in an adversarial system as well as the interests of the individual client. There are serious difficulties in identifying a regulatory model for MDPs which would safeguard the fundamental principles of professional legal practice.

Question F8. What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership?

82. For the reasons which we have expressed above, we are not in favour of MDPs.

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

83. For the reasons which we have expressed above, we are not in favour of MDPs.

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

84. The flexibility, experience and expertise of the independent referral bars in the United Kingdom are, we believe, an asset to the international competitiveness of the legal professions of the United Kingdom as a whole. It seems to us that reforms which would damage the independent bars would damage the international competitiveness of the United Kingdom legal profession as a whole.

