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FACULTY OF ADVOCATES

RESPONSE

by

THE FACULTY OF ADVOCATES

to

SUPER-COMPLAINT

by

The Consumers Association (trading as “WHICH?”)

entitled

**“Restriction on Business Structures and Direct Access in the
Scottish Legal Profession”**

INTRODUCTION

1. The Faculty of Advocates provides the following response to the super-complaint which has been made by the Consumers Association to the Office of Fair Trading (“OFT”) in accordance with Section 11 of the Enterprise Act 2002 (“the Enterprise Act”).
2. It is submitted that the OFT should take no action as a result of the super-complaint for the following reasons:
 - (a) The super-complaint does not demonstrate any feature, or combination of features, of the market for legal services in Scotland which is significantly harming the interests of consumers.
 - (b) The features of the legal services market to which the super-complaint refers are to a significant extent the subject of substantive law which the Faculty of Advocates (and the Law Society of Scotland) cannot alter. Such alteration would require primary legislation which would require to be promoted in the Scottish Parliament.
 - (c) Insofar as the super-complaint is seeking the creation of a new regulatory system for the legal profession in Scotland that is not justified by any reference to

significant harm to the interests of consumers in Scotland and would require primary legislation in the Scottish Parliament. It is essentially a political argument which ought not to be pursued by means of a super-complaint nor by any investigation initiated by the OFT.

- (d) The continued existence and preservation of the legal services market in Scotland is not anti-competitive and is in the interests of consumers in Scotland and in the public interest. In one respect, namely the rule that an advocate cannot enter into partnership, it has been considered by the Director General of Fair Trading and has been found not to be anti-competitive.
- (e) Any change to the legal services market in Scotland should have regard to the position of members of the legal profession, and of advocates in particular, in the administration of justice. Advocates are officers of the Court and are ultimately regulated by the Court of Session in the public interest and are not simply suppliers of consumer services.
- (f) The market for legal services in Scotland is distinct and should not be altered or regulated simply by reference to circumstances in England and Wales.
- (g) The super-complaint does not comply with the Guidance issued by the OFT in respect of super-complaints.

3. This Response comprises the submissions of the Faculty of Advocates in reply to the elements of the super-complaint which are relied upon by the Consumers Association together with Appendices which provide detailed reference to the factual and legal elements of the legal services market upon which the Faculty relies. These Appendices are as follows:

Appendix 1: The legal and constitutional background

Appendix 2: The Faculty of Advocates

Appendix 3: The market for legal services in Scotland

Appendix 4: Advice given by the Director General of Fair Trading in terms of section 40(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

Appendix 5: Report of the Legal Services Review Group in Northern Ireland (2006)

Appendix 6: CCBE Economic Submission to Commission – Progress Report on Competition in Professional Services

THE BASIS OF THE SUPER-COMPLAINT

4. The super-complaint has alleged in Part 2 that in respect of advocates there are three elements in the current regulation of the legal profession which in some respects are said to result “in significant consumer detriment”. Part 2 of the super-complaint also refers to restrictions on third party entry to the Scottish legal services market which the Faculty considers applies most directly to the regulation of solicitors upon the assumption that the rule against advocates entering into partnership with solicitors is maintained.

5. In Part 5 of the super-complaint at paragraph (85), the Consumers Association submit that the “regulatory inhibitions on solicitors and advocates working with each other are all to be found in the rules promulgated by the Society and the Faculty.” This is not correct. As discussed below, almost all of the features relied upon by the Consumers Association in terms of section 11 of the Enterprise Act are matters of substantive law which could be altered only by primary legislation in the Scottish Parliament.
6. In paragraph (89), the Consumers Association submit that a new regulatory structure should be provided “which would address the substance of our complaint.” This is not justified by any reference to significant harm to consumers arising from the present regulatory structure. In paragraph (96), the super-complaint suggests the creation of an “independent Scottish Legal Services Board” based directly upon proposals for England and Wales.¹ In paragraph (103), it is stated that the super-complaint offers “the opportunity for Scottish Consumers to be put on an equal footing with consumers [in] England and Wales.” This is essentially a political submission which if successful would require primary legislation and it is not properly a part of a super-complaint which has been made in accordance with section 11 of the Enterprise Act. The OFT has no power to amend primary legislation which exists in relation to the provision of legal services in Scotland nor to create a new regulatory body for Scotland and given that these are the aims of the super-complaint, the OFT should not take any action in response to it.
7. In paragraph (97) of the super-complaint, the Consumers Association state:
- “Further, we are of the view that the provision of legal services in Scotland must be conducted in accordance with the long-established principles of professional legal practice and that practitioners and owners of legal services must:*
- (a) *act with independence and integrity;*
 - (b) *maintain proper standards of work;*
 - (c) *act in the best interests of their clients;*
 - (d) *ensure client affairs are confidential;*
 - (e) *those practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, should comply with their duty to the court to act with independence in the interests of justice.”*
8. These are important principles which the Faculty and its members recognise and the Consumers Association do not suggest that they are not being fulfilled and will not continue to be fulfilled by the regulation of the Faculty of Advocates which is currently provided. Given that the Faculty and its members are and have always been regulated by the Court of Session, any suggestion that these principles were not being fulfilled would amount to a challenge to the Court. That would be a most serious matter but in any event it is not properly the subject of a super-complaint.

¹ See footnote 70 of the super-complaint.

9. In paragraph (98), the Consumers Association assert that the super-complaint “firmly establishes that the current regulatory restrictions on lawyers’ business structures and consumers’ direct access to advocates in the Scottish legal services market are features of that market which are causing significant harm to the interests of consumers.” The Faculty does not agree that the super-complaint has provided any substantial basis for such an assertion and it fails to meet the criteria in the OFT’s document *Super-complaints: Guidance for designated consumer bodies*. The Faculty refers in particular to paragraph 2.11 of, and the Annex to, that document. It is submitted that the Consumers Association have failed to identify a feature of the market which “is or appears to be significantly harming the interests of consumers”. They have identified no specific and concrete detriment which is currently suffered by consumers in Scotland as a result of any of the features of the market which they address. Far less have they sought to quantify the impact of any such detriment. The document proceeds on the basis of assertion and the proposals are in the main founded upon mere possibilities which the Consumers Association believe would occur were the current position to be changed. In any event, the Consumers Association have advanced no evidence which would support a finding that any of the features of the market which they have referred to are “significantly harming” the interests of consumers in Scotland.
10. The Faculty submits that these elements of the super-complaint demonstrate that it is not truly seeking alterations to the practices of the legal profession in the interests of consumers but rather a fundamental restructuring of the regulation of the legal profession for reasons related to regulatory consistency with England and Wales. The OFT should not initiate any action upon such a basis. Any alteration to the regulatory regime of the legal profession in Scotland would require to be properly justified, would require to be the subject of primary legislation in the Scottish Parliament, and would require to respect the role of the Court of Session in the regulation of the Faculty of Advocates² and the provisions of the Act of Union.³

THE FEATURES REFERRED TO IN PART 2 OF THE SUPER-COMPLAINT

Section 2.1: Restriction on Advocates’ Business Structure

11. In paragraph (29) of the super-complaint it is asserted that the Consumers Association “believes that consumers are disadvantaged” as a result of advocates being compelled to operate as sole traders. Whatever may be the justification for this assertion, the rule against partnerships is not said to have the result of “significantly harming the interests of consumers” which is the standard required by Section 11(1) of the Enterprise Act. Indeed, that could not be the case because in paragraph (32) the Consumers Association accept that advocates should not be prohibited from remaining in sole practice. It is therefore logical to conclude that advocates in sole practice, whether required to do so by current rules or choosing to do so if unregulated,

² See Appendix 2, section 1.

³ See Appendix 1.

cannot be harming the interests of consumers. This topic therefore does not in its own terms attempt to suggest that this is a feature which may properly be the subject of a super-complaint.

12. In any event the rule against partnerships which is referred to is properly justified and in the interests of consumers in the circumstances which exist in Scotland because:
 - (a) It was approved by the Lord President of the Court of Session and the Secretary of State as required by section 31(1) of the Law Reform (Miscellaneous Provisions (Scotland) Act 1990 following advice received from the Director General of Fair Trading. That advice specifically considered the effect of the rule on the interests of consumers and found that it should not be prohibited.⁴
 - (b) The nature of the legal profession in Scotland permits any practitioner who wishes to provide advocacy services in the supreme courts to choose to do so as an advocate in sole practice or as a solicitor-advocate⁵ in partnership or in employment. Given that the Consumers Association do not propose the prohibition of advocates practising as sole traders, the existing structure of the legal profession already provides the opportunity to practitioners which the Consumers Association propose.
 - (c) The existence of a body of members of the legal profession who bind themselves to practice only as sole traders exists in other equivalent jurisdictions.

13. It is also to be noted that the super-complaint discusses only what it perceives to be the adverse impacts of the rule against partnerships. It does not address the potential impact on the competitive structure of the market or on its operation, if advocates were to be permitted to practice as partnerships. The Consumers Association do not suggest that the market, as it currently operates, is uncompetitive; nor does it offer any concrete example of a consumer need which is not met under the current arrangements.

14. Permitting partnerships amongst those who currently practise individually would by definition result in fewer business units and would be liable to reduce consumer choice and to decrease competition. Advocates with particular specialisms could group together in a way which would create a local monopoly, enabling them to raise prices and engage in price discrimination. In the context of a dispute, a client on one side would find his choice of representation limited to the extent that the advocate on the other side was in partnership with other advocates. The economic advice to the Scottish Executive Research Working Group (“SERWG”) was that “Lower costs associated with economies of scale, economies of scope and the benefits of risk sharing in the multi-lawyer firm were likely to lead to multi-lawyer firms dominating where they were permitted and there was unimpeded competition between organisational forms”.⁶ It is

⁴ See Appendix 4.

⁵ Solicitors with extended rights of audience in accordance with section 25A of the Solicitors (Scotland) Act 1980.

⁶ Paragraph 8.14. The advice, however, went on to note that a full analysis would require to take account of the economies of scale which advocates in fact enjoy through the Advocates Library and other cost-sharing arrangements. It concluded that the arguments on both sides were speculative without empirical research, but reached the ultimate conclusion that, in a context where the benefits of practice in a

an odd proposition that a rule which maintains a highly competitive market amongst advocates should be altered in circumstances where there is a real risk that anti-competitive consequences could arise. Such a possibility would also have implications for the administration of justice in Scotland and to access to justice for consumers.

15. The Faculty's rule against forming professional relationships with another advocate or other person for the purpose of offering professional services was the subject of advice by the Director General of Fair Trading referred to above and in Appendix 4. The only relevant change in circumstances since that advice is the advent and growth of solicitor-advocates. The economic advice to the SERWG was that the rule against partnerships would not be anti-competitive provided there were no impediments to competition between advocates and solicitors (including solicitor-advocates).⁷ In 2006, the unanimous conclusion of the Legal Services Review Group in Northern Ireland, in relation to a jurisdiction which is closely analogous to that of Scotland, was that "consumers have more to gain than to lose from retaining the prohibition on barristers forming partnerships".⁸ This conclusion also demonstrates that an equivalent rule against partnerships in respect of barristers or advocates exists in Northern Ireland and it also exists in Ireland. It existed in England and Wales as a matter of common law.⁹ The Faculty considers that the rule against partnerships is an important element in access to justice and in providing for the availability of a body of independent individual advocacy practitioners. Any alteration to it would require the approval of the Court of Session as the ultimate regulator of the public office of advocate.

16. In paragraph (29), it is submitted that consumers are disadvantaged as a result of consumers being compelled to operate as sole traders and that is because of lack of availability of capital and an inability to share risk. The paragraph also refers to "the potential tax efficiencies of incorporation" but this implies that advocates might become directors of a company providing advocacy services whereas otherwise the feature being complained about is the rule against partnerships. This random reference to incorporation suggests a confusion and lack of proper understanding on the part of the Consumers Association. In any event, given that as stated in paragraph (32), they do not propose that advocates will be prohibited from remaining in sole practice, the supposed disadvantages to consumers relied upon by the Consumers Association would presumably remain even if the rule were to be abolished. The position of the Consumers Association on this issue is illogical.

17. It is submitted that by virtue of what is said in this section of the super-complaint, the Consumers Association demonstrate a lack of proper understanding of the inherently individual nature of the tasks which advocates undertake and which lend themselves to practice as a sole

partnership format could be obtained by individual practitioners as solicitor-advocates, the rule against partnerships was not anti-competitive provided there are no impediments to competition between advocates and solicitors (including solicitor-advocates).

⁷ Paragraph 8.22.

⁸ See Appendix 5.

⁹ See the advice of the Judicial Committee of the Privy Council in the case of *Parry Husbands v Warefact Limited* which is referred to in Appendix 2, section 4.

trader on a referral basis.¹⁰ Equally, the Consumers Association do not recognise the extent to which a library-based bar may achieve economies of scale without compromising the individual nature of practice as an advocate. Advocates are free to organise their practices as they consider appropriate, provided they do not enter into partnership with one another. They may accordingly pool costs, though they may not share profits. They may, and do, act collectively for the purposes of advertising, marketing and engaging administrative support. There is no evidence that any constraint on the availability of capital affects the ability of advocates individually or collectively to meet the requirements for their services or to practise efficiently and cost-effectively. The Consumers Association overstate the risks of practice as an independent advocate. The costs of entry to the profession are low. The overheads of practice are also low. In our view, alteration of the current arrangements would probably be reflected in increased costs to the consumers of legal services. If there are risks in sole practice, those are risks which the practitioner will have decided to run in choosing to practise at the bar rather than in a firm as a solicitor-advocate.

18. The core services which advocates provide are advocacy in courts and tribunals, and specialist legal advice. It has not been demonstrated that the efficiency or effectiveness of the delivery of those services would be improved by departure from the sole practitioner model. Advocates do not enjoy a monopoly in the provision of those services, and as far as service development is concerned, as referral practitioners, advocates require to be responsive to the needs and demands of those immediately instructing them. If individual advocates are not responsive, there are others available who are likely to be, and if advocates collectively are not responsive, there are other practitioners who compete in the provision of advocacy services.

19. In paragraph (31), the Consumers Association state that “firms comprised of solicitors, advocates and non-lawyer third parties, would be able to provide seamless litigation services”. There is no description of what this so-called “seamless” approach actually means in practical terms and it is no more than jargon. No evidence has been put forward that the so-called “seamless” approach (whatever that expression may mean) produces better advice or service than the current flexible arrangements and the Faculty emphasises that the Consumers Association have provided no evidence that any benefit to consumers would ensue. The evidence from the former associations which were established between two large firms of Scottish solicitors and two firms of accountants and consultants is not supportive of the view that it would.¹¹ The fact that both were unwound within a very few years suggests that the hoped-for synergies arising from multi-disciplinary firms exists more easily in the realm of theory than that of practice. Further, insofar as there are such benefits, then they may already be achieved in the context of a solicitors’ firm which may include partners who are both solicitors and solicitor-advocates.

¹⁰ See Appendix 2, section 5.

¹¹ The firm of Dundas & Wilson was a part of the now-defunct Andersen organisation between 1997 and 2002 and the firm of McGrigor Donald was associated with KPMG between 2002 and 2003.

20. While the Faculty Rule prohibiting advocates from entering into partnership could be revoked by the Faculty, and for the reasons explained elsewhere the Faculty would consider that that could be done only with the approval of the Lord President, the regulatory complexities which would arise if advocates were to enter into partnership with solicitors should not be underestimated. The advocate partner would, presumably, be jointly and severally liable for the obligations of the firm in accordance with ordinary rules of partnership law. Consideration would have to be given to the liability of the advocate partner under the Accounts Rules and in relation to the Guarantee Fund. It seems likely either that the Faculty would have to duplicate the regulatory structures of the Law Society (which would radically increase the regulatory burden undertaken by the Faculty) with a view to co-regulation of such firms, or the advocate would have to submit to the rules of the Law Society (in which case, the simple solution would be for him simply to become a member of the Law Society and practise as a solicitor which can be done at present).
21. In addition, the formation of partnerships between advocates and solicitors would require not only the abolition of the Faculty rule against partnerships but the alteration to the relevant rules made by the Law Society and approved by the Lord President in accordance with section 34 of the Solicitors (Scotland) Act 1980.¹²
22. In paragraph (30) of the super-complaint, the Consumers Association state a belief “that the imposition of the sole trader structure upon an advocate ... prevents new services being developed.” The basis of this belief is not stated. The Consumers Association offer no example, even by way of illustration, of what new service an advocate might offer and which would be materially different from the core functions of advocates which exist and are provided at present. If such a service were to be compatible with sole practice, then there would be no bar to an advocate offering it. If it were to be a service which could only effectively be provided by legal practitioners acting in partnership (and none is identified), and if an individual legal practitioner wished to offer that service, there would be no bar to the practitioner becoming a solicitor (if necessary, with extended rights of audience) and offering that service. As a matter of experience, the present rules have not prevented advocates from providing their services in new ways. By way of example, practice at the bar has changed substantially with the advent of electronic methods of communication which are routinely used both by those instructing counsel and by counsel themselves.
23. Also in paragraph (30) of the super-complaint, the Consumers Association state a belief “that the imposition of the sole trader structure ... prevents effective marketing being undertaken.” The basis for this belief is once again not stated. Advocates are free to organise their business affairs as they consider appropriate, provided they do not enter into partnerships. They may share costs though not profits and if a stable of advocates should choose to engage in marketing

¹² Rule 4 of the Solicitors (Scotland) Practice Rules 1991; Rule 4 of the Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991.

activity there is no reason why they should not do so. Indeed, recent changes to the stables to which most advocates belong are already resulting in greater activity of that sort.

24. In the same paragraph, the Consumers Association state a belief “that the imposition of the sole trader structure upon an advocate ... may prevent entry to the market ...”. As before, the basis of this belief is not stated. It is offered by the Consumers Association simply as a possibility but it does not reflect practical experience. The costs of entry to the market as an advocate are extremely low compared with the costs of embarking on other professional careers. The profession organises itself in a way which facilitates new entry by providing on a collective basis the Advocates Library and other facilities required by all advocates. There has, in recent years, been no shortage of recruits to the bar. Many are solicitors with significant prior experience who choose to practise advocacy as sole traders at the bar.

25. Lastly in paragraph (30) of the super-complaint, the Consumers Association state a view “that sole traders are impeded from scaling up their services and achieve the efficiencies that this may bring.” The basis for this view – other than as a generalisation unrelated to the actual practice of advocacy – is not stated. The services which advocates provide are inherently individual.¹³ It is not explained how those services could be “scaled up”, nor how the services as they are provided at present are “significantly harming” the interests of consumers.

26. In relation to what is said in paragraph (31) of the super-complaint, it is accepted that a sole trader has limited resources and time. As explained in Appendix 2, the provision of advocacy services is inherently individual and a particular advocate who is in demand cannot be in two courts at once. Equally, he cannot transfer his personal skills and experience to another advocate. Since an advocate may be instructed by any solicitor to assist in relation to any matter which the solicitor considers appropriate, there is great flexibility for packages of legal services to be put together, tailored to the individual client’s needs. It is difficult to see what “broader range of legal services” might be provided by advocates operating in partnerships. The Consumers Association certainly offer no example. All they say is that “It is *possible* that advocates legal firms *may be able* to offer specialised services to meet particular market needs”. This is not a basis for a finding of significant harm to consumer interests.

27. The Faculty submits that in respect of this section of the super-complaint, the Consumers Association have not provided any proper basis upon which the OFT should take any action.

Section 2.2: Restriction on Direct Access to Advocates

28. In paragraph (33) of the super-complaint, the Consumers Association assert “that the prohibition on consumers seeking direct access to an advocate is difficult to justify on a number of grounds”. It is to be noted that once again this does not submit that the restriction is “significantly harming the interests of the consumers” which is required by section 11(1). In no situation which exists in Scotland is any client obliged to consult or instruct an advocate,

¹³ See Appendix 2, section XX.

whether for advice or for litigation, and it is reasonable that given the nature of advocacy services in particular in the supreme courts, it is in the interests of consumers that such instructions should be given only when properly justified.

29. What is said in the super-complaint betrays a lack of understanding on the part of the Consumers Association about the function of an advocate and the function of a solicitor.¹⁴ It is the solicitor who engages in litigation and an advocate does not have the practical resources or ability to carry out functions such as the service of a summons or petition which functions are the responsibility of a solicitor. The suggestion that is made in paragraph (34) of the super-complaint that the receipt by a consumer of a writ or summons may immediately alert him to the need to instruct counsel is not correct because the need to instruct counsel will emerge only if legal advice or representation in court is necessary to defend the proceedings. In the first instance, the need to respond to a court document by way of defences or answers is something done in practical terms by a solicitor with the practical resources which are available to a solicitor, and the input of an advocate will be necessary only if the merits of the particular litigation justify it. What the Consumers Association have said, therefore, is a precise example of why it would not be appropriate for direct access to be available to counsel in such a situation because an advocate could not do what the consumer required, at least without the services of a solicitor. That is the existing situation and it is in the interests of consumers.
30. It is submitted that this section of the super-complaint displays a confusion of thought about what it is an advocate actually does in the conduct of a litigation. It is necessary in the course of any litigation to carry out a (potentially large) range of tasks, and that range of tasks is determined by the nature of the litigation process not by the identity of the lawyer. If the argument is that advocates should be able to do all of the tasks, then each advocate would be able to undertake fewer cases, since he or she would have to carry out all of the tasks required. It is no answer to that to say the advocate could retain others to do some of those tasks because that would simply be the obverse of what happens at present where solicitors carry out some tasks and instruct advocates to carry out others.
31. For the reasons which are set out in Appendix 2, the conduct of litigation is most efficiently done by a solicitor, and a structure which placed this upon the advocate would be likely to produce a poorer service to the client. That is simply because an advocate, or any other lawyer, cannot concentrate on advocacy tasks and case investigation tasks simultaneously, and a solicitor's practice will be organised with a view to dealing with clients and case investigation, with counsel being instructed only as and when the circumstances justify it.
32. Consumers have available to them various sources of primary legal advice, in particular from solicitors. The Consumers Association do not suggest that the market is uncompetitive in that regard. The Consumer Association's position seems to be that advocates should be compelled to offer primary legal advice rather than act on a referral basis. But a practitioner who has

¹⁴ See Appendix 2, section YY.

chosen to practise as an advocate has, by doing so, chosen to act as a referral practitioner who does not offer his services directly to the consumer. The Consumers Association do not suggest that an advocate should be prohibited from deciding to practise only on a referral basis and the practical effect of the change which is proposed would be minimal.

33. Having said that, it is accepted that there may be situations in which a more “sophisticated” consumer such as referred to in paragraph (34) is better able to judge for himself or itself the need to instruct counsel. That is why the Faculty in 1991 initiated the Direct Professional Access Rules and more recently the Direct Access Rules 2006.¹⁵ These initiatives have already provided an appropriate level of direct access to advocates and the restriction referred to by the Consumers Association must be considered in that light. No further alteration to the restriction is necessary or would be justified in current circumstances.
34. The restriction on direct access operates in the public interest. Experience shows that there is demand for a body of practitioners who choose to act on a referral basis. By operating in this way, these practitioners are enabled to devote themselves to the tasks which they are instructed to do, and to provide a service which is efficient and cost-effective.
35. The rule to which the Consumers Association refer in paragraph (33) of the super-complaint (but slightly mis-state) arises in the context of the cab-rank rule which is imposed upon advocates as a matter of common law.¹⁶ Notwithstanding the cab-rank rule, if counsel considers that he or she does not have the appropriate expertise or experience to fulfil a particular instruction, he or she should inform the solicitor, who may then choose to instruct someone else. But it is not understood how the cab-rank rule could apply in the context of direct access instructions (and it does not apply to instructions under the Direct Access Rules 2006). It is not clear to us what significance is attached to the rule in question in the present context.
36. The Consumers Association do not address the impact on advocates’ practices of routinely having to deal with instructions directly from lay clients. It is not to be assumed that every client who seeks to instruct counsel directly will in fact have a problem which justifies the involvement of counsel. In such a case, counsel will have to read the papers only to refer the client back to a solicitor – and will presumably be entitled to charge a fee for doing so. In other cases, the information will be incomplete or require further investigations because the lay client (unlike a solicitor) does not have the expertise necessary to identify what material will be relevant to the issue being placed before the advocate and what material will not be relevant. Again, and advocate having read the papers might have to instruct further investigations to be carried out – presumably by a solicitor. In our view, it makes practical good sense that lay clients should first consult a solicitor who can marshal the material and assist the client to make an informed choice of the advocate best fitted to deal with the particular problem which exists. The same benefits exist where the lay client is being represented by a professional who is

¹⁵ See Appendix 2, section 6.

entitled to exercise direct access to advocates. That professional will have the expertise within his own field which is necessary to identify and set out for the advocate the appropriate information which is relevant to the problem.

37. If direct access instructions were to be tendered routinely to an advocate, and if he or she were not simply to decline to accept such instructions (and it is not clear whether the Consumers Association accept that counsel would be free to decline such instructions), the advocate would probably need to engage support staff greatly in excess of those currently required. He or she would, in effect, become a solicitor, with all the demands of dealing with office administration and client handling. The value of an independent referral bar would be undermined.

38. The Faculty does not accept that the current rules involve “duplication, increased cost and waste” as suggested in paragraph (35) of the super-complaint. The Consumers Association provide no evidence for this assertion and it may be based upon their misunderstanding of what is done by a solicitor and what is done by an advocate. For the reasons explained above and by reference to Appendix 2, the current arrangements reflect a rational and efficient division of work. Counsel is only instructed where the solicitor (or other instructing professional) considers that it would be in the client’s interests to do so – and in such a case it is likely that there is work to be done which cannot efficiently or effectively be done by the solicitor himself. The Consumers Association have referred to no demand from consumers for the change which they propose and in contrast the continuing distinction between those who choose to practise as solicitors and those who choose to practise as advocates is a rational demonstration of why the consumer is well served by the two branches of the legal profession each with their different and complementary roles.

39. The Faculty submits that in respect of this section of the super-complaint, the Consumers Association have not provided any proper basis upon which the OFT should take any action.

Section 2.3: Restriction on Solicitors and Advocates Providing Services Jointly

40. The restrictions being referred to in this section of the super-complaint in effect relate back to the rule against an advocate entering into partnership which has been addressed in relation to section 2.1. The Faculty refers to what is said above with particular reference to the status of an advocate as an officer of the court and the basis of the rules which prohibit a solicitor from entering into partnership with someone who is not a solicitor.

41. In paragraph (36) of the super-complaint, the Consumers Association assert that “There is little doubt that this restriction is unjustified and has no rational basis and causes significant consumer harm”. In this instance only do the Consumers’ Association actually allege that the restriction being referred to “causes significant consumer harm” but they do not identify what that harm is but merely suggest possible benefits which they say might emerge from its

¹⁶ See the decision of the Inner House of the Court of Session in the case of *Batchelor v Pattison and Mackersy* which is referred to in Appendix 2, section 4.

removal. The existence of speculative and hypothetical benefits, which in any event the Faculty would not accept, is not the same as stating that there already exists significant harm to consumers. Reference is made again to the contrary conclusions of the Director General of Fair Trading and the Legal Services Review Group for Northern Ireland.¹⁷

42. The statement that the rule “causes significant consumer harm” is not supported by any evidence. The basis for the assertion is a statement of belief by the Consumers Association that the removal of the rule would have certain consequences. These are stated at the most abstract level of generality and do not bear close scrutiny. The Consumers Association singularly fail to identify any concrete detriment which consumers suffer as a result of the current structure of the legal profession, which accommodates the presence of practices offering both litigation and advocacy services and an independent bar of practitioners who offer only advocacy services.
43. In any event, the basis of the benefits which are suggested are not justified. There is no evidence nor even explanation as to why solicitors and advocates being in partnership with one another (but presumably each continuing to provide the services which they provide at the moment) would result in the provision of advocacy services at lower cost. It is quite likely that the opposite would be the result because at present an advocate in sole practice has significantly lower administrative and overhead costs than a solicitor in partnership. If an advocate were to become part of such a partnership logic would suggest that the costs of practice of the advocate would increase thereby increasing overall the costs of the legal services provided.
44. The super-complaint suggests that the advocate would be able to choose “alternative business structures to increase efficiency”. There is no explanation in practical terms of what this actually means and it is simple assertion without evidence. From the point of view of those who understand and regulate advocacy services, the Faculty does not understand what might be achieved. In any event, and as already noted, any legal practitioner who wishes to be in partnership and practise in the supreme courts may do so under present conditions by becoming a solicitor-advocate.
45. The other aspects of this restriction which are alleged by the Consumers’ Association relate principally to the provision of solicitor’s services, and in particular conveyancing and estate agency services. The Faculty makes no comment on these but whatever their merits they do not justify the inclusion of advocates in any partnership of solicitors. In any event, removal of this restriction would not result in consumers enjoying “easier access to specialised legal services”. The result would be the opposite because if one assumes that a specialised advocate were to join a partnership with solicitors, then the services of that advocate would be available only to the clients of the partnership unless one firm of legal practitioners chose to instruct another firm of legal practitioners. This is a situation which does not occur to any significant extent in reality because of the anxiety that the client will be lost by the firm instructing to the firm instructed.

¹⁷ Appendices 4 and 5 respectively.

46. The situation in the case of a specialised advocate who is practising as a sole practitioner is precisely the opposite. Such an advocate is available to be instructed by every firm of solicitors in Scotland and is thereby available to the client of every such firm. The advocate is instructed on a case by case basis and may be instructed by different firms for different clients at the same time in different cases. The nature of a body of individual specialised advocacy practitioners available to all in Scotland is fundamentally competitive and in the interests of consumers and the loss of that body or any members of it by advocates entering into partnership with solicitors would be to the detriment of competition, consumers and consumer choice.

47. In paragraph (36) of the super-complaint, the Consumers Association state that were the restriction to be removed, they “believe that consumers would enjoy significant benefits”. The suggested benefits as they are set out in this paragraph are addressed as follows:

(a) *“New legal services firms would emerge.”*

The emergence of new firms as such does not demonstrate any benefit nor current detriment. The Consumers Association state that “The new firms *might* be able to provide legal services, including access to advocates at lower cost, as the existing restrictions on advocates taking instructions only via a solicitor would be removed.” This is correctly stated as no more than a possibility. It has already been observed that in cases which justify the instruction of counsel there is no duplication of work. It is presently possible for a client to consult a solicitor-advocate, who can both conduct the litigation and perform the advocacy role. In a more complex case, the solicitor-advocate is likely to require another solicitor to fulfil the role of the instructing solicitor in conducting the litigation while he fulfils the advocacy role.

(b) *“Advocates would be able, should they choose, to adopt alternative business structures to increase efficiency. Any efficiencies could be shared with consumers.”*

Again, this is stated as no more than a possibility. In any event, a practitioner may currently choose to “adopt alternative business structures” by becoming a solicitor-advocate if he or she considers that a more effective or efficient model for practice. The Consumers Association do not explain what different efficiencies might be secured by a partnership which included a solicitor and an advocate.

(c) *“Consumers would enjoy easier access to specialised legal services.”*

Having regard to the text, it appears that the complaint here is about lack of information about the correct service provider for the job. It is not at all clear why the introduction of partnerships between solicitors and advocates should improve the position in this regard. Indeed, one of the benefits of the present system is that the client of a solicitor has the benefit of the solicitor’s advice and assistance in deciding whether or not counsel is required, and in identifying an appropriate counsel.

- (d) *“Asymmetry would be reduced by increased competitive forces and improved marketing – thus improving consumer awareness and choice.”*

The assumption is that the result would be “increased competitive forces”. This assumption is nowhere justified. It is just as likely – as the Director General of Fair Trading recognised in 1992 – that the introduction of partnerships between solicitors and advocates would result in a reduction of competition. It is unlikely that small firms – those most likely to be consulted by consumers – would be able to justify entering into partnership with an advocate. If partnerships between solicitors and advocates were to be permitted, the more likely result, if there were to be any change at all, would be that a body of the most sought after advocates would become tied to the larger commercial firms. It is difficult to see how this would increase consumer choice or be in the wider public interest in equal access to justice.

- (e) *“Innovative new legal services would be developed improving access to justice and reducing cost to the consumer.”*

Again, the Consumers Association nowhere identifies what “new legal services” could be developed in a partnership between solicitors and advocates which could not already develop in a solicitor’s firm which included solicitor-advocates. The example discussed seems to relate to the issue of multi-disciplinary practices, rather than specifically to the question of advocates and solicitors providing services jointly.

- (f) *“The opportunity to commoditise certain areas of the law would be easier to realise. This would likely lead to lower costs and efficiencies to the benefit of consumers.”*

The work done by advocates simply does not lend itself to “commoditisation”. It is by its nature not routine, and in relation to advocacy services, involves appearance in Court which simply cannot be “commoditised”. The examples of commoditisation given by the Consumers Association are remote from the work of advocates. In any event, they do not offer encouragement to consumers. The Scottish Parliament has felt compelled to re-organise the regulation of diligence and the professions of Messenger-at-Arms and Sheriff Officer.¹⁸ In light of perceived market failures and abuses, the UK Parliament has been compelled to regulate claims management companies.¹⁹

48. The Faculty would also observe that the cab-rank rule would be difficult to maintain in the context of partnerships between solicitors and advocates. It is not clear how an advocate who was a partner of a firm could be forced to accept instructions to act against a client of the firm of which he was a partner. For example, some banks presently make it a condition of a solicitors’ firm being a member of their advisory panel that the firm will not act in any litigation against that bank. In other jurisdictions, firms which typically act for one “side” (e.g. employers, personal injury claimants, insurers) will not be instructed from the other “side”.

¹⁸ See particularly Part 3, Bankruptcy and Diligence etc., (Scotland) Act 2007

¹⁹ See Part 2, Compensation Act 2006

49. In substance, it may be said that what this section of the super-complaint is truly advocating is a fusion of the legal profession with solicitors and advocates becoming members of a single profession with the same admission arrangements and the same regulatory structure. If that is what the Consumers Association are seeking then it would be preferable if they were to state it openly and it could be addressed directly. The Faculty would certainly not accept that fusion would be of any benefit to the consumer nor be in the public interest nor be in the interests of justice whether it was achieved *de jure* or *de facto*. The possibility of fusion would of course be a significant matter which the Faculty does not need to address in response to this super-complaint.
50. The Faculty submits that in respect of this section of the super-complaint, the Consumers Association have not provided any proper basis upon which the OFT should take any action.

Section 2.4: Restrictions on Third Party Entry

51. This section of the super-complaint appears to adopt the position that both the market analysis and the proposals for structural change made by the Clementi review in England and Wales can be read across to Scotland without qualification or further consideration. That position is supported by de-contextualised extracts from two academic papers. No evidence from Scotland nor any analysis of the Scottish market is produced.
52. The Faculty refers to the distinctive features of the legal services market which exist in Scotland²⁰ and to the fact that the Court of Session and the College of Justice (of which the Faculty of Advocates is a part) are secured in terms of Article XIX of the Act of Union. There are therefore both practical consumer reasons and legal and constitutional reasons why the direct application of regulatory arrangements for England and Wales should not and cannot be imported directly into Scotland.
53. In any event, the Faculty does not accept the proposition that third party entry into the legal services market in Scotland would be in the public interest. The proposition that the external ownership of legal firms would be economically advantageous is a matter of controversy. The Faculty refers to the conclusions of the CCBE based upon the work carried out for the Danish Bar which are set out in Appendix 6. “The CCBE came to the conclusion that non-lawyer owned firms bring in their train severe problems arising out of the potential conflict with the core principles of the legal profession, i.e. independence, confidentiality and the avoidance of conflicts of interest ...”²¹ In addition, the Legal Services Review Group for Northern Ireland unanimously recommended that the prohibition preventing the external ownership of a law firm should remain, noting that Northern Ireland had already had instances of paramilitary involvement in legal practices, even when external ownership was not permitted. There are

²⁰ Appendix 3.

²¹ CCBE Economic Submission to Commission – Progress Report on Competition in Professional Services, page 6.

similar concerns that ownership or financial control of firms of solicitors could fall into the hands of criminal elements in Scotland.

54. There are therefore good reasons why the external ownership of law firms would be undesirable and they are not just economic ones. They concern the integrity and independence of the legal profession and access to justice throughout Scotland. These are matters related to the administration of justice which in Scotland are subject to ultimate regulation by the Court of Session and in any event, as acknowledged in paragraph (83), such a change would require primary legislation. The question of whether the public interest in Scotland justifies the promotion of any such legislation is a matter for the Scottish Executive, and the question of whether the public interest in Scotland justifies the enactment of such legislation is a matter for the Scottish Parliament. No evidence to justify such legislation has been advanced in this super-complaint and section 11 of the Enterprise Act does not provide that a super-complaint is an appropriate mechanism for promoting primary legislation.
55. The Faculty is concerned about access to justice across Scotland. External ownership involving the provision of legal services by corporate bodies with non-legal ownership (what has been called “Tesco law”) could present a serious threat to small “full service” law firms many of which exist in smaller towns throughout Scotland. Externally owned practices would be likely to be interested principally in the relatively straightforward transaction which can be “commoditised”. They would be unlikely to be interested in the intractable and difficult cases, which professional firms currently handle – the family law dispute, the difficult criminal prosecution. They would, in particular, be unlikely to be interested in such matters in relatively remote or sparsely populated parts of the country. Who would represent the battered wife in Wick who needs an urgent interdict now? Or the man in Kirkcudbright who wants access to his children? Or the youth in Ardrossan who has been picked up by the police and is facing a serious criminal charge? These are the sorts of real examples of where access to economic and independent legal services is essential but nowhere in the super-complaint is there any reference to or description of such realities. In the view of the Faculty, the real consumer interest is that such individuals should have professional, well-qualified representation close at hand. So far as the Faculty is aware, it is yet to be shown that the proposal for external ownership of legal firms will promote this consumer interest. On the contrary, what is proposed presents a potential threat to access to justice across Scotland.
56. The Faculty submits that in respect of this section of the super-complaint, the Consumers Association have not provided any proper basis upon which the OFT should take any action.

ADDITIONAL MATTERS REFERRED TO IN THE SUPER-COMPLAINT

Paragraph (68)

57. The Faculty does not dispute the findings of the analysis referred to in this paragraph. The Consumers Association note that “advocates continue to dominate appearance work in those courts” (i.e. the higher civil courts). It is not clear what inference the Consumers Association

seek to draw from that finding. During the period in question (2005, 2006 and early 2007) there were more than 100 solicitors with rights of audience in the Court of Session. They could choose to appear in final and determinative hearings in their own right, and their solicitor colleagues (whether in the same firm or from other firms) were free to instruct them for such hearings. There was and is no barrier to them doing so. Indeed, one might have expected some internal pressures to keep the work in-house. Yet it is plain that they and their solicitor colleagues have, at least for the final and determinative (by definition, the most difficult and significant) stage of a case, chosen to instruct counsel. They have presumably done so because they have considered it to be in their client's interests to instruct advocates, perhaps:

- (a) because of the expertise of the advocate;
- (b) because the advocate can provide the service more cheaply than the solicitor-advocate (who must carry his office overheads); or
- (c) because the solicitor recognises the benefits which accrue from the instruction of an independent practitioner who, operating on a referral basis, can focus exclusively on the preparation and presentation of the case.

58. The Consumer Association's analysis accordingly supports the Faculty's analysis of the inherent benefits which accrue from the current structure of the profession.

Paragraph (70)

59. It does not follow from the analysis that solicitor-advocates "have largely failed to enter this market". The following factors should also be taken into account:

- (a) The analysis is concerned only with the "final and determinative stage" of a case – by definition, the most complex and demanding. It does not include routine interlocutory appearances, far less pleading. It is the impression of the Faculty that solicitor-advocates are more likely to draft pleadings and to appear at relatively routine hearings than to conduct the more difficult stages of a case. To this extent at least in relation to civil practice, there has been a diversion of work from the bar to solicitor-advocates.
- (b) The analysis does not deal with criminal cases at all. It is our impression that quite different findings would be reached if an analysis of High Court trials were to be carried out. There are solicitor-advocates who regularly exercise rights of audience in criminal trials the High Court of Justiciary. Interestingly, it is the impression of the Faculty that some of them, in effect, practise in the same way as do advocates, operating as sole practitioners, and receiving instructions from solicitors in other firms.
- (c) Even if solicitor-advocates should be choosing not to exercise their extended rights of audience, the very fact that they may do so exerts competitive pressure on advocates.

60. There may be an implication in the Consumer Association's observation that solicitor-advocates "have largely failed to enter this market" that somehow they have been prevented

from doing so. If so, the Faculty would not accept that implication. In particular, the Faculty does not accept the suggestion in the footnote to this paragraph that the mixed doubles rules may explain the figures. It is far more likely that the figures reflect conscious decisions by solicitors and their clients that the right choice of representative for these critical stages of a case is an advocate.

61. It is incorrect that solicitor-advocates are the only potential alternative service providers in the market for appearance work in the civil Supreme Courts. Section 25 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 has been brought into force recently, and we understand that a number of service providers are seeking approval in terms of the scheme provided for by that section..
62. The Faculty would also express surprise that that the Consumers Association should place such emphasis on proceedings in the supreme courts, when the bulk of consumer litigation takes place in the sheriff court. Of course, counsel is often instructed in the more complex litigations in the sheriff court – which again goes to support the Faculty’s general analysis.

Paragraph (82)

63. The Faculty notes the assertion that “third party involvement in the Scottish legal services market lies at the very heart of this super-complaint”. The Consumers Association have identified no harm which the absence of such involvement causes to consumers in Scotland. In this paragraph, the Consumers Association suggest that if third party involvement was permitted this “may” reduce investment costs leading lower prices. This is an insubstantial basis for a proposal which, as the Consumers Association acknowledge, cannot be implemented without wholesale change in the regulation of the profession in Scotland.

CONCLUSION

64. The Faculty submits to the OFT in respect of the super-complaint by the Consumers Association:
 - (a) That it does not fulfil the requirements for a super-complaint made under section 11 of the Enterprise Act;
 - (b) That it does not provide any evidence of significant harm to consumers in respect of the legal services market in Scotland;
 - (c) That it contains material inaccuracies of fact and law;
 - (d) That the features of the legal services market upon which it relies are in certain respects the result of primary legislation which the Faculty of Advocates could not by itself alter;
 - (e) That it seeks alteration to the regulation of the Faculty of Advocates which is a matter for the Court of Session;
 - (f) That in proposing a new regulatory system for the legal profession in Scotland it is advocating political change rather than any matter related directly to the interests of consumers;

- (g) That the proposal for a regulatory regime based upon that for England and Wales would not be in the interests of consumers in Scotland, would not promote access to justice in Scotland, and would not be in the interests of the administration of justice in Scotland.

65. The Faculty submits that the OFT should take no action in response to the super-complaint by the Consumers Association, and that in the circumstances it would not be lawful for them to do so given that the super-complaint does not fulfil the requirements of a super-complaint made in accordance with section 11 of the Enterprise Act.

Appendix 1

THE LEGAL AND CONSTITUTIONAL BACKGROUND

Enterprise Act 2002 (“the Enterprise Act”)

Section 11 of the Enterprise Act insofar as relevant provides as follows:-

- “(1) *This section applies where a designated consumer body makes a complaint to the OFT that any feature, or combination of features, of a market in the United Kingdom for goods and services is or appears to be significantly harming the interests of consumers.*
- (2) *The OFT must, within 90 days after the day of which it receives the complaint, publish a response stating how it proposes to deal with the complaint, and in particular -*
 - (a) *Whether it has decided to take any action, or to take no action, in response to the complaint, and*
 - (b) *If it has decided to take action, what action it proposes to take”*
- (3) *The response must state the OFT’s reasons for its proposals”.*

These provisions permit the OFT to take action, or to take no action, in response to a super-complaint such as that submitted by the Consumers’ Association. In terms of sub-section (1), such a super-complaint properly constituted must demonstrate a feature or combination of features of a market for goods and services which appear to be significantly harming the interests of consumers. In the event that a document purporting to be a super-complaint did not demonstrate such features in respect of which there was significant harm to consumers in a particular case then it would not constitute a super-complaint for the purposes of section 11. In that event, the OFT would not be entitled to take action in terms of sub-section (2) because it would not have received a document which fulfilled the requirements of a super-complaint.

In the present case, it is submitted that the Consumers Association have not demonstrated in the super-complaint any significant harm which is the result of the structure of the legal profession in Scotland. In that event, it is submitted that it would not be lawful for the OFT to take any action in terms of section 11 of the Enterprise Act.

Scotland Act 1998 (“the Scotland Act”)

Section 30 of the Scotland Act provides for matters which are reserved to the United Kingdom Parliament (“reserved matters”) and which are defined in Schedule 5. Paragraph 1 of Schedule 5 which is contained in Part II provides that “The matters to which any of the Sections in this Part apply are reserved matters for the purposes of this Act”. Section C3 entitled “Competition” provides:

“Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers.

“Exception

“Regulation of particular practices in the legal profession for the purpose of regulating that profession or the provision of legal services.

“Interpretation

“‘The legal profession’ means advocates, solicitors and qualified conveyancers and executry practitioners within the meaning of Part II of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”

The effect of the exception to the reserved matter defined in Section C3 of Schedule 5 to the Scotland Act is that regulation of the legal profession is devolved to the Scottish Parliament and is therefore the responsibility of the Scottish Executive. In respect of any legislative steps which would be required in the event that any aspect of the super-complaint was accepted and an alteration to the regulation of the legal profession in Scotland was properly justified, such legislation would require to be promoted in and passed by the Scottish Parliament.

Act of Union 1707 (“the Act of Union”)

Article XIX of the Act of Union between Scotland and England provides for present purposes that:-

“That the Court of Session or colledge [sic] of justice do after the union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the laws of that kingdom and with the same authority and privileges as before the union subject nevertheless to such regulation for the better administration of justice as shall be made by the Parliament of Great Britain... And that the Court of Justiciary do also after the union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the laws of that kingdom and with the same authority and privileges as before the union subject nevertheless to such regulations as shall be made by the Parliament of Great Britain and without prejudice of other rights of justiciary... And that no causes in Scotland be cogniscible by the courts of Chancery Queen’s Bench Common Pleas or any other court in Westminster Hall and that the said courts or any other of the like nature after the union shall have no power to cognosce review or alter the acts or sentences of the judicatures within Scotland or stop the execution of the same...”

The Act of Union sets out the constitutional arrangements between Scotland and England which have existed within the United Kingdom for 300 years. The fact that the regulation of the legal profession is devolved to the Scottish Parliament by virtue of the exception in Section C3 of Schedule 5 to the Scotland Act is consistent with the protection for the courts of Scotland and the authority and privilege of the College of justice which is provided by Article XIX of the Act of Union. In the case of the Faculty of Advocates, the fact that any legislation which may be necessary in order to regulate the Faculty is devolved to the Scottish Parliament is also appropriate given that the Faculty is a part of the College of Justice and that advocates are officers of the Court of Session and regulated ultimately by the Court of Session which is also a part of the College of Justice.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

Section 31(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides:

“Any rule, whether made before or after the coming into force of this section, whereby an advocate is prohibited from forming a legal relationship with another advocate or with any

other person for the purpose of their jointly offering professional services to the public shall have no effect unless it is approved by the Lord President and the Secretary of State; and before approving any such rule the Secretary of State shall consult the Director [General of Fair Trading] in accordance with section 40 of this Act.”

Subsection (1) of section 40 provides for the approval of rules by the Director General of Fair Trading (“the Director General”) including rules such as are mentioned in section 31(1). Subsection (2) provides:

“The Director [General] shall consider whether any such rules... as are mentioned in subsection (1) above would have, or would be likely to have, the effect of restricting, distorting or preventing competition to any significant extent.”

Subsection (3) provides that the Director General shall give to the Secretary of State such advice as he thinks fit.

The rule against partnerships which is referred to in the super-complaint was approved by the Lord President and the Secretary of State in accordance with the advice given by the Director General which is referred to in Appendix 4 of this Response. The fact that such approval was required to be given by the Lord President as well as the Secretary of State is consistent with the role of the Lord President and of the Court of Session in the regulation of advocates as referred to in section 1 of Appendix 2 of this Response.

Appendix 2

THE FACULTY OF ADVOCATES

1. The office of advocate

The Faculty of Advocates is part of the College of Justice in Scotland which was established in 1532 and is referred to in Article XIX of the Act of Union. An advocate is the holder of a public office and is admitted to that office by the Court of Session which is also a part of the College of Justice.

The Faculty's position as the professional body which regulates advocates derives from its recognition as such by the Court.²² Advocates are admitted to the public office of advocate by the Court of Session and may be deprived of office only by the Court. The Court admits as advocates only persons whom the Faculty had examined and found to be fit.²³ The admission of an advocate takes place in open court. The declaration of allegiance is administered by a judge of the Court of Session and sworn by the person being admitted and upon admission the advocate signs a roll maintained by the Court. In matters of discipline, the Court retains a role because in practice the Court has for over 150 years acted in questions of suspension and deprivation of office on the petition of the Dean of Faculty.

The role of the Court of Session as the ultimate regulator of the public office of advocate means that any significant change in the status of that office would require (at the least) to take into account the views of the Court. The Court is a distinct element in the governance of Scotland and is independent of the government (the Scottish Executive) and of the legislature (the Scottish Parliament). The super-complaint does not to any extent refer to the role of the Court in the regulation of advocates. In the third paragraph of the Executive Summary of the Super-complaint it is stated that the Faculty is "self-regulating". This statement must be qualified by the fact that the public office of advocate is ultimately subject to the regulation of the Court of Session. Furthermore, in their conduct of cases in Court advocates are subject to direct supervision and control by the Court itself.

The Faculty of Advocates is the professional body to which all advocates in Scotland belong. Advocates, like other members of the legal profession, are subject to regulation in the public interest. They must satisfy entrance requirements designed to ensure that only persons who are suitably qualified enter practice as advocates. Those requirements are subject to the approval of the Lord President, acting on behalf of the Court. The Faculty runs a skills training course for intrants²⁴ which is equivalent to those in other parts of the United Kingdom and in common law jurisdictions abroad. Advocates are subject to well-recognised duties to the Court as well as to their clients. They must adhere to a code of professional conduct, breach of which may give rise to disciplinary sanction.²⁵

²² See Chapter 57 of the Rules of the Court of Session.

²³ The matter is recorded in the Books of Sederunt (the record of the Court) on 13 December 1664; the history is summarised in the *Stair Memorial Encyclopaedia of the Laws of Scotland*, Volume 13, paragraph 1240ff.

²⁴ A prospective advocate is known as an intrant.

²⁵ The Faculty's code of conduct is contained in the *Guide to the Professional Conduct of Advocates* <http://www.advocates.org.uk/downloads/codeofconduct.pdf>. There is significant lay involvement in the Faculty disciplinary procedures.

At present, all complaints made against an advocate are dealt with by the Faculty under the Faculty of Advocates Disciplinary Rules 2005. They provide that all complaints are determined either by a Complaints Committee or a Disciplinary Tribunal, each of which is comprised of an equal number of members of Faculty and lay members. The complaints-handling procedures of the Faculty are subject to scrutiny by the Scottish Legal Services Ombudsman.

Recent legislation has created the new Scottish Legal Complaints Commission²⁶ which will receive all complaints against advocates (as well as solicitors) and will itself determine complaints of inadequate professional service and remit complaints of misconduct to the Faculty for determination. It will also have a role in monitoring the Faculty's handling of conduct complaints. This current alteration to the regulation of the legal profession is not referred to in the super-complaint.

2. The Advocates Library.

The Faculty is responsible for the Advocates Library which is the national law library for Scotland. Members of the public may obtain access to all legal and historical texts kept in the Advocates Library through arrangements made with the National Library of Scotland which is situated adjacent to the Advocates Library. The Advocates Library has charitable status but otherwise is maintained at the expense of members of Faculty and at no cost to the public purse. The super-complaint does not refer to the public interest which is served by the Faculty in its maintenance of the Advocates Library, both in the sense that its maintenance as a public institution is in the public interest and its contents are maintained and available to all consumers.

From the point of view of consumers of legal services, the availability of the Advocates Library to all advocates equally, irrespective of their seniority or the size of their practices, is of material advantage to those members of the public of Scotland who may require to take advantage of the services of an advocate.

The existence and nature of the Advocates Library, and the fact that advocates practise from and have equal access to that Library, are characteristics materially different from those under which advocacy services are delivered in England and Wales.

3. Advocates

There are approximately 470 practising advocates in Scotland. Each advocate is an independent, self-employed professional, available to receive instructions on behalf of any client and to appear in any court or tribunal in Scotland. Advocates specialise in two things: advocacy – the presentation of cases before Courts and tribunals throughout Scotland - and the giving of specialist legal advice. Advocates are independent referral practitioners: in other words, they act only on the instructions of a solicitor or other person who may instruct counsel.

²⁶ The Scottish Legal Complaints Commission has been established by the Legal Profession and Legal Aid (Scotland) Act 2007.

The existence of a strong bar of independent advocates is in the public interest. The duty of an advocate to advance the interests of the people upon whose behalf he or she is instructed, while fulfilling the advocate's obligations to the Court, plays an important role in maintaining the rule of law in a democratic society. This has been consistently recognised by the House of Lords²⁷.

Further, any solicitor and any other person who may instruct counsel may call on the services of any advocate to act on behalf of any client, wherever situated. Thus the individual client of every small firm of solicitors wherever situated in Scotland has the same access to the most experienced members of the bar as the corporate client of the largest firms in Glasgow and Edinburgh. The availability of independent referral advocates to accept instructions on behalf of any client promotes equal access to justice throughout Scotland and the ability of solicitor's firms to meet the needs of their clients. This is an example of where the current structure of the legal profession operates to the advantage of consumers in all locations throughout Scotland. The potential loss of access to independent advocates throughout Scotland would result from what is proposed in the super-complaint would act to the detriment of consumers rather than the existing structure of the profession.

These benefits are a direct consequence of the rules which the Consumers Association attacks in the super-complaint. It is because each advocate is an independent sole practitioner that any client may instruct any counsel. If advocates were to enter into partnership with one another, conflicts of interest would inevitably and routinely arise. Equally, because an advocate is not "tied" to any solicitor's firm, he or she is free to accept instructions from any client of any firm in Scotland.

It is to be emphasised that the existence of the Faculty as a body of individual independent practitioners is the result of each practitioner deciding for himself or herself to offer legal services in a particular way. In Scotland, the system of legal education is common to both branches of the profession and it is relatively straightforward for a solicitor to become an advocate (and *vice versa*). Many advocates are admitted after having qualified and practised as solicitors, but also many solicitors choose to remain as such or to obtain extended rights of audience as solicitor-advocates. These characteristics are the result of each practitioner deciding for himself or herself how to practise and indicate that the structure of the legal profession is not restricted artificially.

4. Instruction of an advocate

As the holder of a public office, an advocate does not enter into any contractual relationship with the solicitor or other person who instructs him or with his client. In *Batchelor v Pattison & Mackersy*,²⁸ the Lord President (Inglis) said:

"An advocate in undertaking the conduct of a cause in this Court enters into no contract with his client but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes

²⁷ See, for example, *Medcalf v. Mardell* [2003] 1 AC 120, at paragraphs 51-55 per Lord Hobhouse of Woodborough.

into Court to take the retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives honoraria in consideration of these services.”

This passage is authority for the propositions at common law (i) that an advocate does not enter into a contract with his client, (ii) that an advocate cannot decline to act for any litigant in relation to court proceedings except on special circumstances (referred to as “the cab rank rule”), and (iii) that an advocate cannot sue for his fees.

The authority of *Batchelor v Pattison & Mackersy* has been accepted and acted upon by both the courts and the legal profession and it is consistent with the similar position of barristers in other equivalent jurisdictions. It was referred to recently as an accurate statement of the law in *Wright v Paton Farrell*,²⁹ a decision of the Inner House of the Court of Session which considered the scope of the duties of counsel. In *Parry Husbands v Warefact Limited*³⁰, the advice delivered by Lord Bingham of Cornhill stated that “the legal rule that barristers and advocates in the United Kingdom have no contractual relationship with their lay clients and may not sue for their fees is of very long standing and has in the past been justified on grounds of high public policy”.

In paragraph (73) of the super-complaint, the Consumers Association suggest that this passage may no longer be regarded as authoritative because it may be described as “obiter”. They do not provide any legal authority for this view and it is inconsistent with the fact that what was stated by the Lord President has long been accepted and applied as authoritative and it is also consistent with the common law position in other equivalent jurisdictions. What the Consumers Association have stated is clearly incorrect as a matter of law. As a result, the super-complaint misrepresents the position of an advocate and the nature of his relationship with those whom he represents and the submissions of the Consumers Association should be disregarded to the extent that they rely upon this misrepresentation.

The effect of Section 2A of the Late Payment of Commercial Debts (Interest) Act 1998 is also not represented correctly by the Consumers Association. This section states that “the provisions of this Act apply to a transaction in respect of which fees are paid for professional services to a member of the Faculty of Advocates as they apply to a contract for the supply of services for the purpose of this Act.” This provision was enacted as it was precisely because an advocate does not enter into a contract for the supply of services. It does not have the effect that advocates’ fees are regarded as being due as a result of a contract; rather it treats them for the purposes of the application of interest under the Act as if they were contractual precisely because they are not contractual.

In section 61(1) of the Courts and Legal Services Act 1990, which applies only in England and Wales, a specific statutory provision was enacted which permitted barristers in that jurisdiction to enter into contracts and this was referred to by Lord Bingham in *Parry Husbands v Warefact Limited*. No equivalent statutory provision has been passed in Scotland.

²⁸ (1876) 3R 914, at page 918.

²⁹ 2006 SC 404.

The result is that as a matter of substantive law an advocate who is the holder of a public office may not enter into a contract either with his client or with a solicitor. That situation could be changed only by primary legislation passed by the Scottish Parliament.

5. The work of an advocate

The work which an advocate undertakes is inherently individual. That is why it is individuals and not firms which are accorded rights of audience. The advocate who is on his feet in Court must himself or herself be in complete command of the relevant facts and law. It is that advocate who must have devoted himself to the preparation of the case. While that advocate may well have the support of a team (which may include junior counsel and solicitors), there is a limit to the extent to which tasks can be delegated. While the case is ongoing, the advocate is not available to deal with other matters. Advocacy accordingly lends itself to practice on an independent referral basis where the practitioner is free from the immediate demands of clients and office administration. These characteristics of the practice of advocacy are in the interests of the client who is being represented and thus in the interests of the consumer of legal services which include advocacy services. They are also in the interests of the Court.

All advocates practise as sole practitioners. The rule of the Faculty to that effect in its current form was approved by the Secretary of State and the Lord President, after consultation with the Director General of Fair Trading. The relevant advice is referred to in Appendix 4. Those advocates who act as prosecutors in the High Court of Justiciary do so either as *ad hoc* Advocates Depute, instructed for particular cases, or as full-time Advocates Depute. In either case, they are not employees of the Crown but hold a commission to act on behalf of the Lord Advocate. They remain independent practitioners.

Advocates do not undertake responsibility for the administration of a litigation. That is the responsibility of the solicitor, who is the client's agent and owes professional duties to the client. The solicitor will "run" the litigation, engage in all necessary correspondence, carry out any necessary investigations, lodge and intimate Court documents and so on. There is no duplication. Both the task of presenting the case in Court (with all the preparation which that entails) and the ancillary administrative tasks require to be done by someone. When a solicitor represents his client in the sheriff court, he must do both. In a complex or significant case, the division of responsibilities between advocate and solicitor is an effective and efficient one. It allows the advocate to concentrate on the task of preparing and presenting the case in the most effective manner.

The division of responsibility between solicitors and advocates is practical and sensible, having regard to the nature of the work which advocates do. When an advocate is in court, or preparing for a court appearance, he or she cannot be available to meet the day-to-day demands of clients or of running an office. A solicitor, who is subject to such pressures, may be less able than an advocate would be, simply to devote himself or herself to the demands of a lengthy court hearing. Equally, giving sound legal advice on a difficult question requires the freedom from other demands fully to research the law and to consider its application to the facts. Advocates, by their training, and by virtue of the way the legal

³⁰ Unreported, Privy Council Appeal No 74 of 2001, at paragraph 20.

profession is organised, are able to do this. The arrangement also facilitates the development of expertise in advocacy.

Because of the nature of the work which they do, advocates do not need to – and, in practice, do not – maintain an office with support staff. Unlike barristers in England and Wales, they do not work from buildings provided by themselves known as “chambers”. They work from the Advocates’ Library, where they have available to them the legal resources necessary to fulfil the tasks entrusted to them. Advocates are thereby freed from the demands of office administration and are able to devote themselves to fulfilling the particular tasks entrusted to them. They are free to organise their professional practices as they consider appropriate and, in practice, most advocates are members of “stables” for the purposes of clerking and other support services, as well as for such matters as marketing and advertising.³¹ Such limited administrative support as they require is available to them from clerks employed by Faculty Services Limited or by the advocate directly. These arrangements secure the benefits of a bar of independent sole practitioners while achieving economies of scale in relation to the provision of the services necessary to enable them to conduct their professional affairs in an efficient and cost-effective manner. Furthermore, advocates are freed from the demands of office administration, and are able to devote themselves to fulfilling the particular tasks entrusted to them.

The current arrangements build considerable flexibility into the system. No solicitors’ firm could maintain the fixed cost of a team of advocates which could deal with every type of case. The current system – in which advocates act as sole practitioners, not “tied” to any firm – enables the solicitor to instruct counsel as and when required. So, in the course of a single litigation, a specialist advocate may be instructed to advise at the outset, a junior advocate may be instructed to appear in relatively straightforward interlocutory matters, a team of senior and junior counsel may be instructed for a proof, and, indeed, a different advocate for an appeal. It is hard to see this as anything other than a benefit to consumers in Scotland.

The differences between practice as an advocate and other forms of legal practice have regulatory implications which are reflected generally in the regulatory arrangements for the two branches of the legal profession. For example, since advocates do not handle clients’ money, they do not require to have Accounts Rules or a Guarantee Fund.

6. Direct access to advocates

Although the majority of those who instruct advocates are solicitors in Scotland, it has always been possible for others in specified categories to do so. Since before 1988, local authorities, patent agents, parliamentary agents and foreign lawyers have been able to instruct advocates. In 1991, the Faculty introduced a Direct Professional Access scheme which permitted instructions to be given by members of recognised professional bodies for work other than court work. In terms of the Direct Access Rules 2006, the scope of those who might instruct advocates directly was widened to include categories of other professional bodies, public authorities, voluntary organisations and charities, public limited

³¹ Groups of advocates served by the same clerk are normally referred to a “stables” although some stables have recently adopted individual names.

companies, trade unions, and regulatory bodies. many bodies including public limited companies, voluntary organisations and others.³²

For work which involves court proceedings, a Scottish solicitor must be instructed. This is a matter of statute law not of rules of professional practice.³³ For the reasons given above, there are also sound practical reasons which are of benefit to consumers of legal services, for the functional distinction between the work done by advocates and the work done by solicitors in the course of a litigation.

³² The full list is set out in the Faculty's Direct Access Rules 2006, which are available for download at: <http://www.advocates.org.uk/downloads/directaccessrules.pdf>

³³ See section 32 of the Solicitors (Scotland) Act 1980.

Appendix 3

THE MARKET FOR LEGAL SERVICES

The Consumers Association effectively proposes that the provisions of the Legal Services Bill, currently in progress in England and Wales, should be “read across” to Scotland without any regard to the particular circumstances of the market in Scotland. Whatever might be said about the merits of those reforms for England and Wales, it is far from self-evident that they are appropriate for the smaller jurisdictions of the United Kingdom. We note in this regard that the Legal Services Review Group in Northern Ireland, in its 2006 Report, unanimously concluded that “the current model of the independent referral Bar Library is one that works well in Northern Ireland and offers consumers access to a wide choice of high quality, independent legal representation and advice” and that “consumers have more to gain than to lose from retaining the prohibition on barristers forming partnerships”.³⁴ The same is true of Scotland.

In this regard, we draw attention to the following features of the legal services market in Scotland:-

General

- (a) The population of Scotland is one tenth that of England and Wales. The legal services market is also small compared with the market in England and Wales. There are some 9,500 solicitors with practising certificates issued by the Law Society of Scotland³⁵ and some 470 practising advocates in Scotland. So far as the bar is concerned, this contrasts with the position in England and Wales, where there are some 11,000 barristers in independent practice and some 3,000 employed barristers.
- (b) The Faculty accepts that the provision of legal services in Scotland is “in the main” delivered by solicitors and advocates but it is to be noted that only certain specific types of legal service are reserved to solicitors or advocates. It is a criminal offence for an unqualified person to draw or prepare: (i) any writ relating to heritable or moveable estate; (ii) any writ relating to any action or proceedings in any court; or (iii) any papers on which to found or oppose an application for a grant of confirmation in favour of executors.³⁶ Further, only qualified persons have rights of audience in the sheriff court and Court of Session. These restrictions are conceived as necessary to protect consumers from unqualified practitioners and to secure the proper and efficient administration of justice.³⁷
- (c) Other legal services (and, in particular, legal advice) may be offered by anyone. In relation to such services, solicitors and advocates are in competition, not only with other members of the legal profession, but other actual and potential entrants to the market. For example, financial

³⁴ Paragraph 6.43.

³⁵ Annual Report of the Law Society of Scotland, 2005.

³⁶ Section 32(1) of the Solicitors (Scotland) Act 1980.

³⁷ See the comments of the Lord Ordinary (Lady Smith) in *Tods Murray WS v Arakin Ltd*, Unreported, 31st October 2003, at paragraphs [55] to [62].

and tax advice may be provided by accountants. Quantity surveyors provide advice about construction law matters. Claims management companies operate in the market in relation to personal injury claims. The Faculty has reservations as to whether it is in the public or consumer interest that legal services should be provided by persons who are not qualified in law, but the point, for present purposes, is that the market is a porous one.

- (d) Even in relation to the reserved matters, there are other potential providers of the services in question. Conveyancing and executry practitioners may offer conveyancing and executry services under the provisions of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990. Sections 25 to 29 of that Act provide a mechanism whereby members of bodies other than the Law Society or the Faculty may acquire rights to conduct litigation and rights of audience. Those provisions have, with the support of the Faculty, been brought into force and may increase the competitive pressures which apply in relation to those services. Consumers who are individuals may also be represented by authorised lay representatives in proceedings under the Debtors (Scotland) Act 1987 and in small claim³⁸ and summary cause actions.³⁹ There is a growing market in the provision of alternative dispute resolution services, which may divert disputes from the mainstream court structure.
- (e) The Consumers Association does not seek to quantify the number of providers in the market nor seek to analyse the structure of the market. It perhaps suffices that it is not suggested that the market, as it is currently organised, is uncompetitive.

Advocates

- (a) The size of the bar has implications for the matters addressed by the Consumers Association. In relation to some areas of practice, the number of practitioners is quite small. If advocates were to be permitted to – and were to choose to – operate in partnership, the limitations on consumer choice would be real. Likewise, if a relatively small number of advocates were to be “tied” to particular solicitors’ firms, there could be a disproportionate impact on the current access of consumers to all members of the bar in Scotland. The practical reality is that the most successful practitioners would be the ones who would be most sought after by the large commercial solicitors’ firms – and who would then become out of reach of the ordinary consumer.
- (b) Outwith the conurbations of the Central Belt, Scotland has a relatively dispersed population. The issue of access to legal services in rural areas is one of particular salience in Scotland. The local “full service” legal firm is, in our view, critical in securing access to justice across the range of legal services. The existence of advocates who are all available to all of these firms on an equal basis has a particular role in enabling small firms to offer a quality service to their clients.

³⁸ See rule 2.1 of the Act of Sederunt (Small Claim Rules) 2002 [SSI 2002/133].

³⁹ See rule 2.1 of the Act of Sederunt (Summary Cause Rules) 2002 [SSI 2002/132].

- (c) So far as the bar is concerned, a practitioner who qualifies as an advocate is, thereafter, fully entitled to practise as an independent advocate at the Scottish bar. There is no equivalent to the need, which we believe pertains in England and Wales, for counsel to obtain a tenancy in chambers. The barriers to entry to practice as an advocate are low.
- (d) All advocates have equal access to the Advocates Library (which is funded by advocates by a percentage levy on fee income). This secures equal access to justice – for example, an advocate who is representing an impecunious consumer on legal aid or on a *pro bono* basis has access to the same legal resources as an advocate representing a major corporation or a public authority.
- (e) Most advocates have qualified as solicitors (and many will have practised for a period as solicitors) before choosing to come to the bar. By making that choice, a practitioner is choosing to practice as an independent practitioner on a referral basis. As the Consumers Association note, there is a tradition of transfer between the two branches of the profession in Scotland. It is our understanding that in England and Wales relatively few barristers will have qualified as solicitors before going to the bar.
- (f) Unlike the position in England and Wales, the number of advocates who practice in an employed capacity in Scotland is insignificant.
- (g) The Court structure and litigation funding arrangements in Scotland are different from those in England and Wales.

Appendix 4

ADVICE GIVEN BY THE DIRECTOR GENERAL OF FAIR TRADING IN TERMS OF SECTION 40(3) OF THE LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) ACT 1990

In 1992, the Director General reached the following conclusions on the proposed Faculty rule prohibiting advocates from forming legal relationships. In the Conclusions and Recommendations, the Director General stated as follows:

“6.4 As recorded in paragraphs 4.12, 5.21 and 5.25, in none of the three cases do I think that a significant anti-competitive effect has been established. This has been a judgement easier to form in some cases than in others. For example I see very little scope for, or demand for the services of, advocate [multi-disciplinary partnerships] for the reasons given in paragraphs 5.22 to 5.25. There are rather clearer theoretical grounds, set out in paragraph 4.1 to 4.5 for thinking that clients might benefit if a system of advocate/advocate partnerships were able to operate in competition with advocates practising independently. The evidence that clients would benefit from such competition is, however, very thin, and has to be set against the likely reduction in the number of independent advocates available to them. As recorded in paragraph 4.12, I do not think that a significant anti-competitive effect has been demonstrated in this case.

“6.5 The most difficult judgment is on the question of advocate/solicitor partnerships. The expected advantages of firms which can provide a combined litigation and advocacy service are by no means simply theoretical, since it is clear that solicitors offering such a combination of services in the lower courts are able to prosper. Of course, we cannot say for sure that these same advantages will apply to the handling of work in the higher courts. Moreover, these considerations have to be set against the likely reduction in the number of independent advocates available to clients. Accordingly ... I have concluded that in this case also a significant effect on competition has not been established.

“6.6 In submitting these conclusions ... I am conscious that section 40(3) [of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990] provides that I should give such advice as I think fit, and that it would be possible to recommend withholding approval of the rule if the analysis of the competition effects, even though falling short of a significance finding, made this appropriate. ... I do not think that would be appropriate in this case. I am confirmed in that conclusion by another potential development which I have deliberately excluded from the consideration of the actual or potential competitive effects of the Faculty’s proposed rule. This is the proposal ... that Scottish solicitors should be granted rights of audience in the Court of Session and the other higher courts. ... it is clear that if extended rights were granted they would provide a means by which combined advocacy and litigation services could be provided in the higher courts, and indeed would allow clients to benefit from any advantages there might be in persons offering advocacy services combining in ways which are not permitted for members of Faculty. Taking into account both this possibility and the absence of any finding of a significant restriction or distortion of competition, I do not believe that there are grounds for withholding approval of the Faculty’s proposed rule.”

Since the Director General reached these conclusions, the grant of extended rights of audience to solicitors has become a reality. Accordingly, practices offering combined advocacy and litigation services in the higher courts now exist in the market in Scotland and clients may take advantage of such services, if they consider that there are advantages in doing so. Members of the legal profession who wish to practise advocacy in the higher courts as part of a firm may qualify as solicitor-advocates and practise in partnership or in employment.

Appendix 5

REPORT OF THE LEGAL SERVICES REVIEW GROUP IN NORTHERN IRELAND

In 2006, the Legal Services Review Group in Northern Ireland unanimously recommended that the prohibition preventing the creation of Legal Disciplinary Partnerships in that part of the United Kingdom should remain. The members of the Review Group included a representative of the General Consumer Council for Northern Ireland.

The Review Group made the following observations:-

“6.45 We accept that there are some potential benefits from allowing solicitors and barristers to form partnerships. For example, we see the advantage of a consumer being able to avail of all legal services within a single practice. There may also be some opportunities for more risk-averse individuals who wish to become barristers to enter the profession in the potentially safer environment of a Legal Disciplinary Practice, where they would be guaranteed an income in their early years. ...

“6.46 One of the advantages of the existing system is that consumers in Northern Ireland, even from the most remote part of the province, are able to secure the best legal representation by engaging with their local solicitor. If LDPs were established, small solicitors firms would have difficulty in competing with them. In addition, since most of the LDPs would probably be formed in the larger cities ... the advantage of being able to find a solicitor within a reasonable travelling distance would be lost. Instead of solicitors’ firms in seventy-four locations, they would be replaced by fewer LDPs in fewer locations. Hence both geographical convenience and consumer choice would be reduced. In addition, since LDPs would have their own in-house counsel, consumer choice would be even further reduced. Instead of having 560 barristers to choose from, consumers would probably find that their solicitors expected them to choose from the in-house barristers so that business remained within the practice. And these barristers might not have the same level of skill and experience, at least in the particular area of law required, as those in another LDP.

“6.47 We consider that access to justice and competition are essential in a jurisdiction such as Northern Ireland and that anything that has the potential to hinder the achievement of these twin goals should be avoided. We consider that Legal Disciplinary Practices have that potential. Hence we believe that the current prohibition on LDPs being established here should remain.”

The same considerations apply equally in Scotland.

Appendix 6

CCBE ECONOMIC SUBMISSION TO COMMISSION – PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES

The CCBE (the Council of the Bars of Europe) has noted work carried out by Copenhagen Economics for the Danish Bar,⁴⁰ which concluded that from a purely economic perspective, non-lawyer owners can probably not operate a law firm significantly more efficiently than lawyers, and that there are a number of clear economic advantages from lawyers owning the firm themselves. The CCBE summarised the advantages as follows:

- (i) There is no conflict between owners and lawyers. This ensures efficient management, including effective decision-making, whilst avoiding conflicts regarding strategy and management.
- (ii) There is better control of the firm. Economic literature indicates the legal profession as a business where it is optimal to have the workers (lawyers) owning the firm, since non-lawyer owners would have difficulties in assessing and controlling the work of the lawyers.
- (iii) Ownership motivates the lawyers, who are the most important asset of the firm.
- (iv) Law firms are not capital intensive firms. Many lawyers have leadership experience and ability. firms are free to employ expertise as they require.

⁴⁰ The report is available at http://www.copenhageneconomics.com/publications/The_legal_profession.pdf.