Response

by

the Faculty of Advocates

to

Independent Review of the Regulation of Legal Services –

Call for Evidence

Executive Summary

The Faculty of Advocates is largely content with the current regulatory regime applicable to the provision of legal services by its members, subject to certain important exceptions in respect of which proposals for reform are suggested.

The key points arising from the Faculty's consideration of the current regulatory regime, as set out in detail in the following paper, may be summarised as follows:

(i) **Existence of the independent referral bar:** The independent referral bar, operating under the "cab rank rule", remains a critical feature of the legal profession in Scotland, which remains fundamentally incompatible with the employment or partnership of Advocates within alternative business structures (paras 52 and 66);

(ii) **Direct access:** The introduction of a general rule permitting the direct instruction of Advocates by members of the public, thereby extending the current "direct access" rules, is neither necessary nor desirable in the interests of justice (para 59);

(iii) **Incorporation of counsel:** Subject to compatibility with the fundamental principles underlying the independent referral bar, it may be desirable for Advocates to be permitted to practice on a limited liability basis: otherwise, the ability of solicitors and others to do so may amount to an unfair competitive advantage (paras 72 and 79);

(iv) **Discipline and complaints handling:** The existing disciplinary jurisdiction of the Faculty ought to be extended to include the handling of all complaints

(including services complaints) against Advocates (paras 61); consequently, the jurisdiction of the SLCC (or any new regulator of legal services) ought to be excluded so far as Advocates are concerned (paras 82, 90 and 91);

(v) **Choice of counsel:** Consideration should be given to reinforcing existing provisions ensuring access by litigants or prospective litigants to legal advisers best suited to their needs, and avoiding conflict of interest inherent in the internal instruction of solicitors with extended rights of audience (paras 95-101);

(vi) **Third party complaints:** Any regulatory regime permitting of "third party complaints" ought to include legislative provision clarifying that such complaints are subject to legal professional privilege and may be made only by complainers with "sufficient interest" to do so (paras 102, 106 and 111).

Introduction

1. The Faculty of Advocates welcomes the opportunity to respond to the 'Independent Review of the Regulation of Legal Services – Call for Evidence', and seeks to do so in order to assist and inform the panel's understanding of the Faculty's unique position within the legal profession in Scotland today.

2. At the outset, however, we would wish to draw attention to the work done by the Faculty in response to the Scottish Government's previous consideration of the regulation of legal services in Scotland, leading to the introduction of the Legal Services (Scotland) Act 2010.[1] The panel is encouraged to have regard to the considerable material produced by the Faculty for that purpose, including the Office of Fair Trading Report on prohibiting Advocates from forming legal relationships[2], and the independent report commissioned from the Institute for Law, Economy and Global Governance, University of Manchester, in respect of the economic organisation of the Faculty[3], insofar as that material remains relevant by way of context to certain of the matters presently under review. Accordingly, the substantive comments that follow should be read against that background. [4]

[1] '*Access to Justice: a Scottish perspective: a Scottish solution*' – A response by the Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession dated 13 May 2008; see, also, Justice Committee Legal Services (Scotland) Bill – Written submission from the Faculty of Advocates dated 1 December 2009: http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/LegalServices/Submissions/LS2.FacultyofAdvocates.pdf

[2] '*Access to Justice: a Scottish perspective: a Scottish solution*' (*supra*), Appendix 1.

[3] '*Access to Justice: a Scottish perspective: a Scottish solution*' (*supra*), Appendix 2.

[4] For ease of reference, the documents referred to are produced as appendices to this paper.

3. Before turning to the questions posed, it may be helpful to set out the background to the Faculty of Advocates, and the role it plays in the administration of justice in Scotland in 2018.

4. The Faculty of Advocates is the professional body to which Advocates[5] in Scotland belong. By statute, the Faculty has regulatory responsibilities in relation to the profession. In order to understand the Faculty's nature and role, it is necessary to appreciate: (a) the nature of the public office of Advocate in Scotland; and (b) the nature of advocacy as a specialist professional activity.

5. No picture of the Faculty would be complete without an appreciation of the role which it has played in the maintenance and development of Scotland's distinctive legal system and, more broadly, in the life of the nation. The Faculty has been one of the key institutions responsible for maintaining Scotland's national identity, in particular since 1707.

6. The [then] Lord President observed recently[6] that: "[T]he public interest lies in the survival of a vigorous, independent referral bar". He has described the essential qualities to which the Faculty of Advocates is dedicated in the following terms: "a commitment to excellence, a commitment to scholarship and learning, a commitment

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[5] often referred to as "Counsel", and to be distinguished from "Solicitor Advocates", a term commonly used to describe Solicitors with Extended Rights of Audience

[6] Speech to the Commonwealth Law Conference – Independence of the judiciary and the legal profession (13 April 2015) available at: http://www.scotland-judiciary.org.uk/26/1422/Lord-President's-speech-to-the-Commonwealth-Law-Conference-2015.

to the noblest ideals of professional conduct and, above all, a commitment to justice for all in our society" [7].

7. When the Court of Session was established in 1532 as a College of Justice, legislation required the Court to admit individuals to plead as Advocates before the Court. Initially, the Court itself exercised discipline directly over Advocates, but by the end of the seventeenth century the Court had delegated to the Faculty: (i) the examination of intrants (i.e. persons who wished to become Advocates); and (ii) the exercise of professional discipline over Advocates. The Court retained responsibility for admitting Advocates and removing Advocates from office.

8. This regulatory structure was broadly replicated in the Legal Services (Scotland) Act 2010[8]. By virtue of that Act, the Court of Session is responsible for: (i) admitting persons to (and removing persons from) the office of Advocate; (ii) prescribing the criteria and procedure for admission to (and removal from) the office of Advocate, and (iii) regulating the professional practice, conduct and discipline of Advocates.

9. The Court may not delegate its responsibility to admit persons to and remove them from the office of Advocate. However, the Court's other responsibilities are exercisable, in accordance with such provision as the Court may make, by the Lord President or by the Faculty. The Court has, by Act of Sederunt[9], delegated those functions to the Faculty. Amendments to the rules which the Faculty may make in relation to the matters delegated to it require to be approved by the Lord President.

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[7] Remarks on the introduction of the new Dean of Faculty, 5 February 2014
[8] ss. 119-122
[9] Act of Sederunt (Regulation of Advocates) 2011

10. The 2010 Act correctly refers to "the office of Advocate". In Scotland, Advocates hold a public office to which they are admitted by the Court. This reflects the independence with which Advocates are required to approach their functions, the responsibilities which are incumbent on Advocates and the public nature and importance of those responsibilities.

11. An Advocate is required to fulfil his or her responsibilities independently of any other person. An Advocate is instructed on behalf of a litigant[10], but in fulfilling those instructions the Advocate must exercise his or her independent judgment. For example, an Advocate representing a person accused of crime must advance the accused's defence, but it is for the Advocate to decide how that should be done – the client has no right, for example, to insist that the Advocate lead a particular witness or examine a witness in a particular way. Likewise, in giving advice on the law, an Advocate must give objective and candid advice, independently of any other consideration.

12. As the [then] Lord President has recently observed[11]:

"The public nature of the office [of Advocate] is reflected in the duty of counsel to appear on behalf of any litigant who requests his services and tenders a reasonable fee. It is reflected in the power of the Dean of Faculty to require counsel, in exercise of the Faculty's tradition, to withdraw from a case if counsel should be required to defend

[10] An Advocate does not enter into a contract with solicitor or client: *Batchelor v. Pattison and Mackersy* (1876) 3R 914.

[11] *Taylor Clark Leisure plc v. HMRC* 2015 SC 595, para. 22

an accused person who for any reason is without proper representation. It is also reflected in the rules of priority that require counsel, when instructed for the Appeal Court or the Inner House, to return conflicting instructions for any lower court… This complex of rights and public duties holds the College of Justice together and maintains standards of conduct in the justice system."

13. The rule that an Advocate may not, without good reason, refuse to accept instructions in any case where the Advocate is offered a reasonable fee is known as "the cab-rank rule". It was contained in the 1532 legislation establishing the Court of Session and is still in force[12]. The rule ensures that every member of the Scottish bar is available to any litigant who requires the services of an Advocate. An unattractive or unpopular litigant or accused person has, by reason of the cab rank rule, the same right to have his or her case professionally presented to the Court as anyone else. The rule also secures the independence of the Advocate: accepting the instruction is a matter of professional obligation, not choice. The constitutional importance of the cab rank rule in underpinning access to justice and the rule of law has been affirmed by many eminent judges.[13] Although it is rarely formally invoked, it is part of the culture of practice at the referral bar. Solicitors (including solicitors with extended rights of audience: "solicitor-advocates") are not bound by the cab rank rule.

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[12] The rule is regarded by all the independent referral bars as a core professional principle; it was first articulated in Scotland in the 1532 legislation as an incident of the public office of Advocate.

[13] See eg *Rondel v. Worsley* [1969] 1 AC 191, 227 per Lord Reid ("it is essential that the duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise"), 274-275 per Lord Pearce; *Arthur Hall v. Simons* [2002] 1 AC 615, 686 per Lord Hoffmann ("a valuable professional ethic"), 730 per Lord Hutton (of "fundamental importance"), 739-40 per Lord Hobhouse ("a fundamental and essential part of a liberal legal system"; *Medcalf v. Mardell* [2002] UKHL 27, para. 52 per Lord Hobhouse of Woodborough.

14. Advocacy is inherently an individual activity. The individual who is standing up in Court has to master the material which he or she needs in order to carry out the task. Although the Advocate may be supported by a team, if that individual has not done the necessary preparation the case cannot be properly conducted, no matter the other resources which may have been applied to it. If advocacy is to be done well, it demands a high level of professional skill and focused application to the case in hand. It demands: (a) a deep understanding of the law relevant to the case; (b) mastery of the factual position and of the evidence which is available; and (c) forensic skills, whether in the examination and cross-examination of witnesses, or in presenting persuasive argument to judges. One of the keys to effective advocacy, assuming the necessary levels of skill, is preparation - and the time to prepare properly. The individual nature of advocacy explains why it is individuals and not entities which have rights of audience and why advocacy may be effectively practised as a sole practitioner in the context of the independent referral bar.

15. The distinction between the role of the Advocate and of the solicitor in a system such as ours reflects, as a South African judge has observed[14], in terms which are equally applicable in Scotland,

"the reality of two distinct professions engaged in different fields of legal expertise. People choose to become attorneys [solicitors] or Advocates … because of the different challenges which they offer: one, the attorney mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where

[14] *Rosemann v. General Council of the Bar of South Africa* 2004 (1) SA 568, para. 26 per Heher JA

administrative skills are often important, the other, the Advocate, court-based, requiring forensic skills, at arm's length from the public, individualistic, concentrating on referred problems and usually little concerned with administration."

16. The same judge went on to identify[15] the following benefits for the client in the role of the Advocate:

"(1) the encouragement of independence of thought and action, and candour and objectivity in advice; (2) the avoidance of emotional involvement or friction with the client, both of which… can seriously undermine proper professional service; attorneys by contrast often have ongoing business or professional relationships with their clients; (3) a clear division of responsibility allowing the Advocate to serve the client expertly without the likelihood of conflict or compromise with his instructing attorney; (4) avoidance of financial involvement with the client and the likelihood of dispute about fees or their recovery; (5) the receipt of instructions which have been filtered through the attorney for relevance and importance and directed by the attorney to an Advocate known by the attorney to be skilled in the particular field in which his client requires assistance; (6) in a good working relationship between Advocate and attorney, an effective, efficient and complementary pooling of skills and knowledge in which the client benefits by more than the mere sum of the parts".

17. Other advantages include the following: (1) Because an Advocate does not have a burden of office administration or the responsibility for client care, the Advocate is free to organise his or her time so that he can undertake the preparation which is

[15] *Ibid*, para. 30

required for the forensic task in hand – indeed to devote time which a solicitor, with heavier overheads, might well find uneconomic; (2) This applies both to the preparation for court work and appearance in court, and also to advisory work: good quality legal advice demands the application of time and skill to research and consider the question; (3) An Advocate who is well instructed is able to develop a high level of skill and expertise in the particular forensic tasks which are undertaken by Advocates, as well as experience of the techniques of advocacy which may be appropriate in different forensic settings and before different tribunals; (4) The ethical training of Advocates is focused on the issues which arise in the context of forensic advocacy – and, in Scotland, the ethical and institutional framework within which Advocates' work is focused on and adapted to the practice of advocacy at a referral bar.

18. All Advocates are members of the Faculty of Advocates. The membership of the Faculty includes: (i) practising members; (ii) non-practising members; (iii) retired judicial members; and (iv) honorary members. Only practising members may exercise rights of audience as Advocates. The non-practising membership includes members of Faculty who are not in practice at the referral bar but are employed in other capacities, and retired Advocates. It includes judges and sheriffs who are members of Faculty, academic lawyers and others. The practising membership currently numbers 436.

19. The Faculty is led by elected office-bearers and an elected Council. The office-bearers of the Faculty are the Dean of Faculty, the Vice-dean, the Treasurer, the Clerk, and the Keeper of the Library. The Faculty also elects the Chair of Faculty Services Limited, a service company established to provide administrative and other support services to

Advocates, and has recently appointed a (lay, non-Advocate) Chief Executive Officer with responsibility for both the Faculty and Faculty Services Limited. The Faculty Council comprises members elected for constituencies organised by seniority, and a non-practising constituency. Much of the Faculty's work is undertaken by committees established for particular purposes. The office-bearers and Council members remain in practice and receive no remuneration for the work they undertake for the profession.

20. The Faculty has a small secretariat, which supports the office-bearers and committees in the work of the Faculty. The regulatory work of the Faculty is adapted to, and proportionate to, the particular requirements of practice at an independent referral bar. For example, because Advocates do not handle clients' money, the Faculty does not require to replicate the Law Society of Scotland's regulation of that aspect of solicitors' practice.

21. The process of admission as an Advocate takes place within the context of a Petition to the Court for admission. The Faculty prescribes criteria before a Petition may be presented. Once the Petition has been presented, the Court remits the matter to the Faculty. The Faculty prescribes the academic and practical requirements which an intrant must satisfy. The academic requirements comprise examinations in specified substantive legal subjects, and the Faculty's examination in Evidence, Practice and Procedure ("EPP"). In practice, most intrants are exempted from most or all exams, apart from EPP, by reason of having passed exams in the equivalent subjects during a Scottish law degree. The practical requirements comprise a period of training in a solicitor's office, followed by a period of pupillage with the Faculty. During pupillage,

the intrant is required to complete successfully the Scheme for Assessment of Devils, which requires the intrant to demonstrate competence in advocacy in: (a) examination of a witness; (b) legal submissions; (c) drafting a writ; and (d) drafting an opinion. There are special rules for European lawyers and barristers from England & Wales and Northern Ireland. Flexibility is secured by provisions for exemption.[16]

22. The period of pupillage, known as "devilling", comprises a course of training which lasts up to nine months, but may be less, and which is provided to intrants free of charge. During that period, the intrant will undertake nine weeks of classwork. The classwork includes both advocacy skills training and taught elements. The skills training is delivered by Advocates who have been specifically trained in advocacy training. The Faculty's skills training programme was first developed over twenty years ago on the basis of the best international thinking in advocacy training and has been kept under review by successive Directors of Training. All the teaching is delivered by experienced Advocates, among them some of the leaders of the profession. During the remainder of devilling, the intrant shadows one or more experienced Advocates ("devilmasters"), undertakes drafting and opinion work on which the devilmaster will comment, and observes proceedings in court, consultations with clients and other meetings, with the opportunity to discuss matters with the devilmaster.

23. Once the Faculty's requirements have been satisfied, the intrant is admitted as a member of Faculty, and by the Court to the public office of Advocate. The Faculty is

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[16] See, generally, 'Becoming an Advocate – General Admissions Information', available at: http://www.advocates.org.uk/about-advocates/becoming-an-advocate/general-information.

currently undertaking a review of the Regulations as to Intrants[17], any changes to which will require the approval of the Lord President.

24. The Faculty promulgates: (a) a Guide to Professional Conduct and other guidance on matters of professional practice; and (b) a Complaints and Disciplinary Procedure.

25. The Guide to Professional Conduct[18] sets out the principles and rules of professional conduct applicable to Advocates in Scotland. It reflects and adopts the Code of Conduct for European Lawyers promulgated by the CCBE (the Council of European Bars and Law Societies)[19], amplified and adapted to the circumstances of the independent referral bar in Scotland. The Dean of Faculty may also, subject to the Lord President's approval, issue Dean's Rulings on particular matters of professional practice arising from time to time. The Faculty has also promulgated guidance on other matters – for example, the Faculty's Anti-Money Laundering Committee recently issued updated Anti-Money Laundering guidance.

26. The Faculty is also proactive in promoting the continuing improvement of the professional standards of its practising members. From November 2016, the Faculty has taken the significant step of introducing a Quality Assurance ("QA") programme, which is designed to ensure a minimum standard of performance in core advocacy skills by way of five-yearly individual, peer-review assessments of all, including the most senior, practising Advocates. Advocates are also subject to enhanced continuing

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[17] Regulations as to Intrants (July 2009 edition) available at: www.advocates.org.uk/about-advocates/becoming-an-advocate/admission-regulations

[18] Guide to the Professional Conduct of Advocates (5th edn, October 2008) available at: www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf

[19] The umbrella organisation for European Bars and Law Societies.

professional development ("CPD") requirements, including completion of minimum requirements in respect of specialist advocacy training with a particular focus on the skills of oral and written advocacy in different court or tribunal settings.

27. Advocates are enjoined by the Guide to Conduct to seek advice in cases of difficulty or uncertainty, ultimately from the Dean of Faculty or the Vice-dean – and Advocates are obliged to follow the instructions of the Dean or Vice-dean in relation to matters of professional conduct. This culture of seeking and giving advice is an important mechanism for supporting Advocates and making sure that they exercise their professional responsibilities at all times in accordance with the highest ethical standards.

28. As things stand, any complaint against an Advocate must be lodged, by statute, with the Scottish Legal Complaints Commission ("SLCC"). If the SLCC considers that the complaint is a conduct complaint, the complaint will be remitted to the Faculty for disposal in terms of the Faculty of Advocates Disciplinary Rules 2015.[20] The Faculty has worked with the SLCC to produce guidance on good practice in complaints handling, which was launched in January 2015.[21]

29. Under the current regulatory regime, a service complaint will be dealt with by the SLCC. A conduct complaint will be remitted to the Faculty, and will ordinarily be dealt with, at least in the first instance, by a Complaints Committee, comprising an

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[20] Faculty of Advocates Disciplinary Rules 2015, available at: http://www.advocates.org.uk/media/1916/disciplinaryrules2015.pdf

[21] The Practical Guide for Complaining Parties ("Complainers") and Counsel is available at: www.advocates.org.uk/making-a-complaint/how-to-make-a-complaint

equal number of Advocates and lay members. The Faculty Disciplinary Tribunal, which is chaired by a retired judge and has Advocate and lay members, hears appeals against decisions of the Complaints Committee and disposes of cases remitted to it by the Complaints Committee for sentence where the powers of the Complaints Committee are inadequate.

30. The Dean of Faculty historically exercised a very significant disciplinary role. While that role has diminished with the creation of the SLCC, it has not disappeared. If a matter which calls for inquiry is drawn to, or comes to, the Dean's attention, the Dean may require the Advocate in question to explain the circumstances. He may himself initiate a complaint against an Advocate (which would, like any other complaint, be made to the SLCC). If, pending disciplinary proceedings or as a result of a determination by the Faculty Disciplinary Tribunal, an Advocate is to be suspended or removed from practice, the Dean petitions the Court, which alone may remove an Advocate from office.

31. Current practice as an Advocate is characterised by two features: (i) every Advocate is a sole practitioner; and (ii) Advocates practise as referral professionals.

32. The independence with which holders of the public office of Advocate are obliged to exercise their functions is underpinned by the fact that Advocates practice as sole practitioners. Under the Faculty's Guide to Professional Conduct, Advocates are prohibited from entering into partnership or any other business relationship with

another Advocate or any other person for the purpose of jointly offering professional services to the public.[22]

33. The "no partnership" rule maximises choice, by ensuring that the whole bar is available to every client. If Advocates were to operate in partnerships or other legal forms along with others, conflicts of interest would become endemic. In a small jurisdiction such as Scotland, there is, in any particular field of law, typically a small number of specialists: the "no partnership" rule makes sure that all are available to any client (unless already instructed on behalf of another client in relation to the same matter). Moreover, when a solicitor is putting together a team of counsel to deal with a particular case, he is not confined to Advocates who operate within a single partnership or firm – he can choose the separate members of the team from the whole bar.

34. The collegiate nature of the Faculty creates a professional environment in which, although Advocates are sole practitioners, good practice and experience may be shared amongst practitioners, albeit that they are in competition with one another. The environment also fosters relationships of trust between practitioners – something which is valuable in maintaining professional integrity and in securing the effective administration of justice. The professional obligation on Advocates to seek advice on issues of professional conduct – ultimately from the Dean or the Vice-dean – and to follow instructions given by the Dean or the Vice-dean, underpins the Faculty's commitment to high standards of professional conduct.

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[22] *Guide to Professional Conduct*, para. 16.1 (see *infra*)

35. The collegiate nature of the Faculty also enables economies of scale to be secured in relation to the facilities which an Advocate requires in order to be able to conduct his or her practice. Advocates collectively fund the Advocates' Library, so that all Advocates – however junior and whether engaged in relatively poorly remunerated (or *pro bono*) but socially important work – have equal access to the best legal resources. In the 1970s, the Faculty established its service company, Faculty Services Limited, to provide clerking, administrative and fee collection services to Advocates who subscribe for those services (as most Advocates do). Advocates who subscribe to Faculty Services Limited are organised in stables, each of which is served by a clerking team employed by the company. Stables have significant autonomy – engaging, for example, in marketing and promotional activities – but benefit from collective services, such as HR, IT, and an electronic fee-rendering system.

36. Section 122 of the Legal Services (Scotland) Act 2010, reflecting earlier legislation, provides that any rule under which an Advocate is prohibited from forming a legal relationship with another Advocate or any other person for the purpose of jointly offering professional services to the public is of no effect, unless it has been approved by Scottish Ministers after consulting the Competition and Markets Authority. The Faculty's rule was approved under the predecessor legislation following a report from the Director General of Fair Trading.[23]

37. Advocates practice on a referral basis – i.e. they do not offer their services directly to the public at large, but act on the instruction of an appropriately qualified professional,

[23] See fn 2, *supra*

usually a solicitor. This secures a number of the advantages mentioned above. There is a similar recognised bar of specialist Advocates who practice on a referral basis in England & Wales[24]; Hong Kong; Ireland; Lesotho; the Australian jurisdictions; New Zealand; Namibia; Northern Ireland; and South Africa.

38. The law distinguishes between the right to conduct litigation and rights of audience in court. Ensuring that those who conduct litigation before the Courts on behalf of clients, and those who appear to represent clients in the Courts, are appropriately qualified protects the interests of clients and, at the same time, promotes the effective and sound administration of justice. A professional who conducts litigation takes responsibility for the management of the case, the lodging of documents, the arrangement of witnesses, and the like. A professional exercising rights of audience has the right to appear in Court on behalf of a client.

39. Solicitors have the right to conduct litigation in all courts in Scotland. Members of the Association of Commercial Attorneys may also qualify to conduct litigation in the lower (sheriff) courts.

40. Advocates have rights of audience in all courts in Scotland. Solicitors have rights of audience in the sheriff courts; and may qualify for higher court rights of audience in either the criminal courts, or the civil courts, or both.

41. Advocates do not, however, have the right to conduct litigation, and may accordingly appear in court only on the instruction of a professional who does have the right to

[24] Although the English bar now has arrangements permitting direct public access, many barristers still practice on a referral basis.

conduct litigation in that court. The distinction reflects the specialisation of function between Advocate and solicitor outlined above.

42. Advocates may appear in tribunals, arbitrations and other non-court *fora*, and may give advice, on the instruction of solicitors or anyone who has direct access rights under the Faculty's direct access rules. The Direct Access Rules[25] list members of other recognised professions, as well as a range of other bodies, who may instruct counsel direct in contexts which do not require instruction by a professional with the right to conduct litigation.

43. The existence of a bar of independent Advocates, available to represent or advise clients in any court or tribunal in Scotland (or elsewhere on matters of Scots law) – as well as in the United Kingdom Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union – promotes access to justice, and the quality of legal services, across Scotland. Every solicitor has access, on behalf of all the solicitor's clients, to the wide range of expertise and skill at the bar. Small firms across Scotland, including firms in rural Scotland, can, in this way, enhance the service which they provide to their clients and compete more effectively.

44. No firm of solicitors can replicate the range of experience and expertise at the independent referral bar. Advocacy is a time-intensive activity – both in terms of preparation, and by reason of the requirement to be present in court throughout the

[25] Faculty of Advocates Direct Access Rules (October 2006), available at: www.advocates.org.uk/media/2708/new-direct-access-rules.pdf

case. Solicitors' firms which have substantial litigation practices can, by using the bar, resource the peaks and troughs of litigation work economically.

45. Likewise, in the course of a litigation, the solicitor may use the range of experience and expertise at the bar to provide an economical service to the client: an opinion may be taken from a QC with specialist expertise before the action is launched; the summons may then be drafted by a relatively newly qualified Advocate; a more experienced Advocate may be instructed for a contentious motion in the course of the litigation; and the QC may be brought back in to conduct a debate or a proof, perhaps assisted by the junior who drafted the summons. Or the solicitor may choose to have continuity and instruct the same team of counsel throughout.

46. The cab-rank rule underpins the commitment of the Faculty to access to justice for all. Many Advocates are, in addition, willing to accept instructions to undertake civil work – particularly personal injury claims on behalf of pursuers – on a speculative basis (i.e. no win, no fee) – an approach to funding which secures high quality representation for ordinary men and women (usually against insurers or large employers) at no cost.

47. Moreover, the Faculty of Advocates Free Legal Services Unit secures *pro bono* advice and representation for cases which have been referred to it by recognised advice agencies, which could not reasonably be funded in other ways. The Free Legal Services Unit also provides a *pro bono* service to individuals seeking to appeal to the Employment Appeal Tribunal whose appeals have been struck out and who wish to have a hearing under rule 3(10) of the Employment Appeal Tribunal Rules 1993.

48. The Faculty's great contribution to Scotland's national culture is the role which Advocates have played, since the establishment of the Court of Session, in the maintenance and development of Scots law. In the sixteenth and seventeenth centuries (and to a lesser extent in subsequent centuries), many Advocates studied on the Continent, usually in the Netherlands. The profession was steeped in the legal learning of Continental Europe. It was at this time that the foundations of Scots law, as a system based on principle with its roots firmly in the Civilian tradition of Continental Europe, were established.

49. Advocates play an essential role, not only in the defence of the rights of litigants, but also, through their work in court, in the development of the law. As Sir George Mackenzie, Dean of Faculty in the late seventeenth century, wrote: "our College of Justice is but one body, in which the Senators are the judicative faculty, and the Advocates the inventive". Judges, in our system, depend on the lawyers who appear before them to present fully researched arguments and to bring forward the relevant legal materials to enable the judge to determine legal questions which arise.[26] It is through this process that the law, in Scotland, has been developed and refined. It is critical to this process that Advocates are in a position, by training and mode of

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[26] In other systems, judges undertake much more of their own research, and may, indeed, have staff who are employed to support them in that regard. Our judicial system is not resourced in a way which would enable judges to do this: only the two most senior judges, the Lord President and the Lord Justice Clerk, have the benefit of dedicated assistance in view of the importance of the cases chaired by them, and the significant additional administrative and extra-judicial functions entailed in their roles. In effect, in our system, the job of legal research required to inform the Court properly is privatised. In any event, the issue is not simply one of research: it is the value to the Court, and to the development of the law, which is derived from the competing arguments of counsel, each of whom is engaged to advance his or her client's case vigorously.

practice, to fully research the law, and work within a culture which encourages legal rigour and legal creativity.

50. Outside the courtroom, the Faculty actively engages in law reform work through its Law Reform Committee. It responds regularly to consultation papers issued by Scottish Government and others. The Dean and other members of Faculty, as required, give evidence before Parliamentary Committees, both at Holyrood and Westminster. When invited to do so, the Faculty provides comment, both in writing and in discussion with civil servants engaged in legal policy work, and to Bill teams.

51. With that background, we turn to the questions posed in the call for evidence.

Question 1: What should a regulatory system for 21st century legal services in Scotland look like?

52. It is of primary importance to emphasise that the continued existence of an independent referral bar, subject to appropriate regulation, is a vital component of 21st century legal services in Scotland. That is so for all of the reasons outlined above as to the working context of the Faculty of Advocates within the wider Scottish legal system. First and foremost, however, the Faculty considers that the independent referral bar is the only viable method by which to ensure access to justice for all members of the community, in the public interest, in Scotland. Moreover, the Faculty considers that it remains the most efficient and cost-effective method by which to deliver high quality, specialist legal professional advocacy services, in the interests of consumers and legal service providers alike, in Scotland.

53. In summary, the Faculty considers that the current regulatory landscape ought to be maintained in respect of entry to, and the qualifications of, Advocates; the activities permitted to be undertaken by Advocates; the setting of standards applicable to practice as Advocates; and the monitoring of compliance with those standards. Significant change would be welcome, however, in respect of the current regulatory regime applicable to complaints handling, in relation to Advocates, by the SLCC. Separately, the Faculty also considers that the current rules in respect of the organisational structure of legal service providers in Scotland, insofar as relevant to Advocates, may merit further investigation. These various points are considered below.

***Entry and qualifications*.**

54. The regulatory regime applicable to entry to the Advocate profession, and practising as an Advocate thereafter, is set out in a handful of relatively short and easily comprehensible documents, which are made freely accessible to the public and kept under regular review by the Faculty. The regime has been explained in some detail above, and is not repeated here.

55. For present purposes, however, it may be relevant to note that the current iteration of the regulations on entry to the profession strikes a fair balance between the necessary requirements of academic excellence, and knowledge of and familiarity with Scots law and legal practice on the one hand, and the Faculty's commitment to facilitating ease of access to the profession on the other. In particular, the regulations provide significant flexibility, where appropriate, to allow entry to the profession by those who may have followed alternative career paths to law. The regulations also enable ease of transfer between the Advocate and solicitor branches of the profession, thereby facilitating choice on the part of legal service providers as to their preferred business model (i.e. whether to exercise rights of audience in the higher courts as a self-employed Advocate, or as a solicitor-advocate in employment or partnership with others). Equally, the regulations allow for ease of transfer between jurisdictions, such that barristers may follow a relatively straightforward route to practice at the Scots Bar.

56. For the avoidance of doubt, however, the Faculty maintains that the provision of greater mutual recognition of qualifications (for example, by conferring on barristers

in England and Wales automatic rights of audience in the Scottish courts) would be incompatible not only with maintenance of the necessary high standards outlined above, but also the preservation and promotion of our distinct Scottish legal system and profession.[27]

***Activities undertaken*.**

57. So far as the ability to practise in the higher courts is concerned, there is now substantial open competition between Advocates and solicitor-advocates who may exercise rights of audience in all civil and criminal courts in Scotland, particularly following removal of the rule against "mixed doubles".[28] Moreover, it may be observed that all solicitors have substantially greater opportunity to exercise rights of audience, if they so wish, in the lower courts following the increase in the exclusive jurisdiction of the sheriff courts recently effected by the Courts Reform (Scotland) Act 2014.[29]

58. The Faculty has also been proactive in taking steps to promote awareness and understanding of the rules enabling "direct access" to Advocates, by suitably qualified professionals and other public bodies, without the need for an instructing solicitor. Subject to such continuing efforts, the Faculty considers that the scope of the existing direct access rules, as outlined above, is adequate to allow the direct instruction of Advocates in appropriate cases, where the acceptance of such instructions is unlikely

[27] See, generally, *Taylor Clark Leisure plc v. HMRC (supra)*

[28] From 23 September 2008, a member of Faculty has been able to appear in any court, whether in a criminal or civil cause, with a solicitor who has a right of audience in that court.

[29] 2014 Act, section 39 (Exclusive competence)

to impose significant administrative or other burdens upon the Advocate in addition to, or inconsistent with, his or her existing professional duties and responsibilities.

59. For the avoidance of doubt, therefore, the Faculty does not consider that its members (or, indeed, consumers) are disadvantaged by the current lack of direct access to Advocates by members of the public more generally. For all of the reasons outlined above, the independent referral model is a fundamental and necessary characteristic of practice as an Advocate, which recognises, amongst other things, the distinct roles undertaken by Advocates and solicitors on behalf of their clients respectively. Accordingly, the Faculty does not consider that it would be advantageous or appropriate for direct access to be extended to the public at large.

60. In any event, it is significant to note that the current regulatory regime permits Advocates to accept instructions, at their sole discretion, to appear in court without an instructing solicitor being present. This is a significant and relatively recent development, which is intended to promote the efficient and cost-effective delivery of specialist advocacy services, in a proportionate and appropriate manner, according to the Advocate's professional judgment in the circumstances of the particular case. There again, the Faculty considers that there would be no substantial advantage to be gained from any extension of the direct access rules to members of the public, where the current regulatory regime permits a large measure of flexibility in the conduct of matters, as between Advocates and the solicitors instructing them on behalf of clients.

Monitoring compliance, making complaints and obtaining redress.

61. The current regulatory regime in respect of the handling of service and conduct complaints made against Advocates has been explained in detail above. In particular, however, the Faculty would emphasise that the operation of the current Faculty Disciplinary Rules in connection with conduct complaints is desirable, and consistent with the overriding character of the regulatory regime applicable to Advocates as a whole. As described earlier in this paper, Advocates, as holders of public office, are (historically and presently) subject to direct oversight by the independent senior judiciary in Scotland. That, of itself, demonstrates the Faculty's commitment to, and compliance with, the highest standards of independent scrutiny and professional conduct. The Faculty considers that such a regime remains appropriate and proportionate today, as it has done for centuries, and it would be anomalous and highly undesirable for the discipline of Advocates to be removed from the jurisdiction of the courts and otherwise regulated to any extent.

62. The operation of the current Faculty Disciplinary Rules is, in any event, subject to the further safeguards of transparency and publicity in the conduct of disciplinary proceedings against Advocates. Any hearings of the Disciplinary Tribunal must be held in public, unless it would be inappropriate to do so[30], and decisions are published and made available for inspection in respect of any complaint that is upheld, or upon the request of the Advocate concerned where the complaint is dismissed[31]. Additional publicity may be given to the complaint where the circumstances justify it.[32]

[30] Disciplinary Rules 2015, rule 55
[31] Disciplinary Rules 2015, rule 71
[32] Disciplinary Rules 2015, rule 73

63. The primary focus of any conduct complaint is the comparison of the conduct complained of, and the standards to be expected of responsible or reputable Advocates. Nevertheless, the Faculty Disciplinary Rules recognise that, in some cases, it may be appropriate not only to impose a financial penalty where a conduct complaint is upheld against an Advocate, but also to provide monetary redress to the complainer. Currently, therefore, the Rules provide for the imposition of fines and/or compensation up to £15,000 in respect of findings of "unsatisfactory professional conduct" or "professional misconduct".[33] Any award of compensation by the Tribunal would, of course, be without prejudice to the ability of the complainer to seek further redress by way of a claim for damages.

64. The Faculty considers, therefore, that the current regulatory regime operated by the Faculty itself in respect of professional disciplinary matters embodies the highest possible standards of quality, proportionality and fairness, and ought to be maintained. Moreover, Faculty respectfully suggests that serious consideration ought to be given as to whether the existing SLCC model is efficient, from the point of view of complaints (re services and conduct) made against Advocates. As discussed under reference to Question 4 below, Faculty suggests that all such complaints should be dealt with by Faculty as the regulator of Advocates.

<u>Rules on organisational structure of providers</u>.

[33] Disciplinary Rules 2015, rules 25 and 26 (Imposition of penalties by the Complaints Committee) and rule 63 (Imposition of penalties by Disciplinary Tribunal)

65. Having regard to the size of the practising membership of the Faculty, currently numbering some 436 individuals, as outlined above, the requirement that "an Advocate should not, when available to accept instructions, refuse to accept instructions to act for any litigant before Scottish Courts which are accompanied by payment of a reasonable fee or the obligation of a Scottish solicitor to pay such a fee"[34] – the so-called "cab rank rule" – is of crucial importance to ensure access to justice.[35] The rule operates as a duty upon Advocates to be generally available for instruction, rather than a duty upon solicitors or clients to accept the services that may be offered by any particular Advocate. The rule ensures that any litigant in Scotland may secure the services of any Advocate in respect of a particular matter within his or her professional expertise, without the restraint of conflict of interest rules or other contractual duties, which may otherwise arise between Advocates in practice with others, and which may otherwise prevent Advocates from being generally available for instruction.

66. In short, therefore, it remains the position of the Faculty that the engagement of Advocates in employment or partnership with others would be fundamentally incompatible with maintenance of the independent referral bar: the "cab rank rule" simply cannot be applied in an employment or partnership context. This has been the

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[34] *Guide to Professional Conduct,* para 8.3.1

[35] See, also, *Guide to Professional Conduct*, para 8.3.5: "An Advocate would normally be expected to be available to accept instructions to appear before Scottish Courts at times when the Court of Session is not in recess or vacation. It is however accepted that there may be circumstances such as maternity, paternity, vacation, illness or other personal circumstances which mean that an Advocate may not be available to accept any or some instructions."

Faculty's consistent position with regard to any suggestion that Advocates ought to engage, or be permitted to engage, in alternative business models.[36]

67. Whilst a practising Advocate may (rarely) be "seconded" on a short-term, self-employed basis to carry out work *qua* Advocate for a particular solicitors' firm or other client with direct access privileges, special permission of the Dean would be required should any Advocate wish to remain a practising member of Faculty and yet exempt from the usual requirements of the "cab rank rule".[37] Similarly, a practising Advocate may (again, exceptionally) take up employment in a related role, which does not involve undertaking any work *qua* Advocate[38], subject to special permission of the Dean on a case-by-case basis where to do so would otherwise interfere with the necessary requirement to be generally available for instruction.[39] Members of Faculty therefore enjoy significant flexibility in the provision of professional services under the current regulatory regime, whilst substantially maintaining the existence, availability and critical mass of the independent referral bar at all times.

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[36] See, generally, '*Access to Justice: a Scottish perspective: a Scottish solution*' (*supra*).

[37] Faculty of Advocates, *Equality & Diversity Code* (January 2011), para [D2]: "The Dean of Faculty, on receipt of an application from an Advocate for absence for maternity, paternity, adoption, parental, compassionate, and other personal circumstances, as to such matters as the place or time in which s/he is available to accept instructions (hereinafter referred to as an 'exempted absence'), may grant an exemption, or partial exemption, in terms of the said paragraph 8.3.5 of the Guide to Professional Conduct of Advocates…" The Code is available at: http://www.advocates.org.uk/about-advocates/professional-standards/equality-and-diversity.

[38] See, eg, *Guide to Professional Conduct*, para 16: "There are no fixed rules prescribing the activities in which a practising Advocate may or may not engage outside his practice as an Advocate, except that he cannot be a solicitor or be in partnership with or employed by a solicitor or other professional person entitled to instruct Counsel directly on behalf of clients in Scotland or elsewhere."

[39] See, also, *Guide to Professional Conduct*, para 16.3: "The Dean may, at any time, require an Advocate to cease to engage in a particular activity which in his opinion is incompatible with the rights or duties of an Advocate or, alternatively, to cease to hold himself out as a practising Advocate."

68. There is, however, a particular question as to whether alternative business structures might, on a strictly limited basis, be adopted in order to enhance the services provided by Advocates. This is, however, more conveniently dealt with below in response to Question 4.

Question 2: Do you have any comments about the consumer, provider or public interest in the current regulatory framework?

69. The Faculty has no further comments to make in response to this question, as comments made elsewhere encapsulate its response.

Question 3: Do you have any comments about transparency and accountability in the current regulatory framework?

70. The Faculty has no further comments to make in response to this question, as comments made elsewhere encapsulate its response.

Question 4: Do you have any comments about flexibility and proportionality in the current regulatory framework?

<u>Flexibility.</u>

71. Reference has already been made to the flexibility inherent in the current regulatory regime, particularly with regard to entry to, and transfers between the Advocate branch of the legal profession and others. As against those positive aspects, however, an issue arises as to whether Advocates ought to be permitted the flexibility of choice to incorporate: that is, to continue to operate as sole traders, yet benefiting from limited liability by way of the provision of legal services via a corporate vehicle.

72. A limited liability partnership model would be unworkable for the reasons already given anent the incompatibility of a partnership model with the " cab rank rule" : the independent referral bar is inimical to any question of partnership. However, the possibility of Advocates providing legal services by way of a private limited company vehicle may merit further investigation. Subject to the requirement to be constituted as a single member/director entity, thereby avoiding undue prejudice to the independence of advice and representation to be provided by the Advocate, it is arguable that the solicitor branch of the profession enjoys an unfair competitive advantage over the Advocate branch, which is not justified by the fundamental principles underlying the independent referral bar. This is because all solicitors operating in Scotland – including those with extended rights of audience who are thus direct competitors with Advocates – are able to practise under corporate structures – either limited liability partnerships or limited companies – which provide the protection of limited liability. As things stand, the protection of limited liability is

denied to all Advocates, a situation that does not require to be tolerated by any other professional working in modern Scotland.

73. In the event of an Advocate constituting such an entity, as envisaged above, the legal service provider would remain the individual who is admitted to the public office of Advocate, but the Advocate would nonetheless be able to benefit from the limited liability business model. Whilst such an "incorporated counsel" would necessarily remain subject to the same disciplinary and regulatory standards as "traditional counsel", it is not inconceivable that such an Advocate could be the subject of complaint on the basis of alleged breach of applicable companies legislation. With that possibility in mind, further consideration may have to be given to whether such matters would be dealt with as professional disciplinary issues or otherwise. Similar incidental issues may arise, for example, regarding the possibility (and desirability) of an "incorporated counsel", who may be disqualified from holding office as a company director, resuming practice as "traditional counsel". It is thought, however, that the existing disciplinary regime would be capable of addressing such matters: it is perhaps difficult to envisage disqualification from company directorship without, at the same time, committing professional misconduct. The current disciplinary rules could be amended in order to provide that such disqualification would amount automatically to professional misconduct.

74. In the event of this option being explored further, consideration might also require to be given to the traditional lack of a contractual relationship between Advocates and

those instructing them.[40] Again, however, this is not thought likely to present insurmountable difficulties.

75. It must be stressed, however, that the foregoing suggestion is strictly limited to the possibility that a corporate vehicle may be used for the provision of professional services *qua* Advocate on a limited liability sole trader basis only (e.g. the currently available single member/director private limited company model).

76. Whilst it is understood that barristers may be permitted to participate in other incorporated entities in England and Wales[41], such arrangements must be understood in the context of the Bar of England and Wales comprising some 16,000 practising barristers. No meaningful conclusions can be drawn in respect of necessary or desirable reform (if any) of the Scots Bar from the mere fact of the introduction of similar or more extensive reforms elsewhere. It is highly significant that the Scots Bar, numbering less than 500 practising members, amounts to a mere fraction of that size. Ultimately, any prospect of erosion of the "cab rank rule" as a result of the adoption of alternative business structures poses a real risk to the ultimate survival of the independent referral bar in Scotland. As a small body of independent experts, practising first and foremost in the interests of ensuring critical levels of access to justice in a small jurisdiction, participation in such entities would present a far greater existential risk to the Scots Bar than similar proposed reforms may present to larger

[40] *Batchelor v Pattison and Mackersy (supra)*

[41] See, eg, Bar Standards Board 'About BSB entities': https://www.barstandardsboard.org.uk/regulatory-requirements/entities,-including-alternative-business-structures/about-bsb-entities/

referral bars operating in larger jurisdictions. Accordingly, the Faculty does not consider that any wider proposals for alternative business structures involving Advocates would be feasible or desirable in the wider interests of justice in Scotland.

77. The primary attraction of a proposal in respect of the incorporation of Advocates is, of course, the general benefits that may be derived from limited liability. For centuries, Advocates were immune from suit, and thus did not need to concern themselves with the protection of limited liability. The last 30 years have, however, seen the erosion of such concepts, to the point where counsel is as vulnerable to claims as any other professional[42]. The question that might usefully be addressed at this point, accordingly, is whether there remains a cogent basis for denying to Advocates the protection of limited liability that is available to all other professionals, including solicitors and solicitor-advocates.

78. The advantages of permitting such arrangements would not just enure to the benefit of Advocates. Operating under the auspices of a corporate vehicle would be likely to create savings, which would in turn allow a more cost-efficient provision of advocacy and advisory services by counsel, to the benefit of the Scottish people as a whole. Such provision would also avoid the potential pitfalls of the current situation, which is demonstrably anti-competitive in allowing solicitors with extended rights of audience the protection of limited liability which is denied to Advocates as their primary competitors.

[42] The history of the immunity and its erosion can be traced via *Rondel v Worsley* [1969] 1 A.C. 191; *Arthur JS Hall & Co v Simons* [2002] 1 A.C. 615; and *Wright v Paton Farrell* 2006 S.C. 404

79. It is accordingly suggested that consideration ought to be given to whether, notwithstanding that the ban on partnership and equivalent or comparable arrangements must endure, and that individual counsel must remain answerable for their actions as holders of public office, Advocates should be allowed to provide their services with the opportunity to take advantage of limited liability.

Proportionality.

80. Separately, the Faculty has considered carefully the submission prepared on behalf of the SLCC, and would make the following further observations in light of the SLCC's stated policy position.

81. The Faculty acknowledges at the outset that it agrees with certain of the observations made by the SLCC. In particular:

    (i) The Faculty agrees that the existing complaints regime is not working satisfactorily. At present, it may take up to 23 weeks for the SLCC to classify a complaint, before it can even be referred for investigation by the Faculty or otherwise. That, in the Faculty's view, is unacceptable. The decisions of the SLCC have been the subject of appeal on dozens of occasions over the decade or so of its existence. A very substantial number of those appeals have been successful, either by concession or by decision of the Court of Session. A real question arises as to why this is so: there is no similar history of difficulties arising from decisions made either by the Faculty's Discipline Tribunal or

indeed the Scottish Solicitors Discipline Tribunal[43]. Moreover, in the Faculty's experience, and having regard to the published decisions of the courts in professional regulatory matters, there has been no equivalent surge in appeals from comparable regulatory bodies dealing with professions other than the law.

(ii) The Faculty agrees that complaints arise disproportionately from certain areas of practice. This is plainly borne out by the SLCC's most recent report[44], which indicates that for 2016-17, 1,145 complaints were made against solicitors, whilst only 10 were made against Advocates. On the basis of an understood 11,000 solicitors and 436 Advocates practising in Scotland, that means that the rate of complaints against Advocates (approx. 2%) is one fifth of the rate applicable to solicitors (approx. 10%). Certainly, the experience of those members of Faculty who practise in the field of professional regulation and discipline is that complaints arise overwhelmingly from what might be termed consumer facing "High Street" legal services. Those services primarily include residential conveyancing (but not, it is thought, commercial conveyancing), child and family law, and wills and executries.

(iii) The Faculty also agrees that regulatory scrutiny and resources ought to be focused on areas which give rise to significant numbers of complaints.

[43] There is no recorded instance of a judicial challenge to a decision of the Faculty's Discipline Tribunal. Whilst there have been several appeals over the years regarding decisions of the Scottish Solicitors Discipline Tribunal, the vast majority of these have failed.

[44] https://www.scottishlegalcomplaints.org.uk/media/75360/slcc-annual-report-2016-17.pdf

82. None of the above, however, supports the conclusion of the SLCC that there ought to be a single new regulator for ***all*** legal services. Indeed, there is no basis upon which to suppose that any such regulatory body could do the job better, more quickly or at less expense, at least so far as complaints against Advocates are concerned. On the contrary, there is every reason to suspect the opposite.

83. The Faculty suggests that the SLCC's observations call for an evidence-based analysis of the areas where unnecessary bureaucracy and expense might be removed from the current regulatory regime.

84. The SLCC has published its complaints statistics to a limited and varying extent to date.[45] Between 2008/09 and 2010-11, 7 conduct complaints against Advocates were remitted by the SLCC to the Faculty for investigation under the new statutory regime. In 2011-12, one handling complaint was made against the Faculty itself. The number of service complaints against Advocates, which were accepted as eligible for investigation by the SLCC during these periods, is unknown but thought to be low. Between 2012-13 and 2016-17, a total of 14 conduct and service complaints against Advocates were accepted as eligible for investigation by the SLCC.

85. The reasons for such a modest number of complaints are obvious:

    (i) Advocates do not carry out any transactional conveyancing or administrative executry work, which is the source of a large number of complaints;

[45] See, generally, the SLCC Annual Reports 2008-09 to 2016-17 available at: https://www.scottishlegalcomplaints.org.uk/resources/annual-report-accounts.aspx.

(ii) Advocates tend to have responsibility only for certain aspects of any particular client matter or case – they may have a one-off involvement in a preliminary or advisory capacity, or they may be involved only in particular stages of court or similar proceedings, by comparison with the transactional solicitor who may be viewed as responsible for the conclusion of matters as a whole;

(iii) Advocates do not handle client money;

(iv) Many Advocates practice in fields, such as commercial law, where complaints are comparatively rare; others work predominantly on behalf of large institutional clients, such as public authorities, banks or insurance companies, who rarely use the complaints system;

(v) Crucially, the Faculty has a long-established collegiate culture, and a system of rules and customs whereby advice from senior practitioners (and, in particular, from the Faculty's office bearers) is always available to any member with a professional or ethical difficulty. The ready availability of such advice, and the clear professional duty to seek (and follow) advice in cases of doubt, have a significant effect in preventing complaints from arising.

86. Of the complaints made in the relevant period, the vast majority have been deemed unsound: either by being deemed ineligible at the very outset, or by being rejected on investigation. One service complaint against an Advocate was initially upheld by the SLCC but subsequently overturned by the Court, in terms which included trenchant

criticism of the SLCC's analysis and decision-making process.[46] This history is such as to call into question the utility of the SLCC's involvement so far as complaints against Advocates are concerned, for reasons discussed below.

87. All conduct complaints have been, or are currently being, investigated and dealt with by the Faculty itself, according to the disciplinary rules outlined above. The Faculty observes that to remove the SLCC as the "gatekeeper" of that process would have no negative impact on the handling of those complaints: they would continue to be investigated and dealt with as they are at present. Moreover, the removal of the current requirement for the SLCC to "classify" complaints against Advocates as either conduct or service complaints, and to refer them for investigation by disparate bodies accordingly, could be expected to have a significant positive impact on the efficiency with which all complaints against Advocates may be resolved. As has been noted, this need for classification already causes significant delays, which are in the interests of no one – least of all the complainer. On the other hand, the Faculty's disciplinary processes are thought to be significantly quicker than, for example, the Law Society of Scotland's comparable processes. That is, at least, a function of the comparatively low volume of complaints made against Advocates, and the high quality of resources made available by the Faculty to deal with them.

88. The Faculty maintains a panel of eminent counsel who prosecute cases before the Disciplinary Tribunal. In addition, the Faculty brokers professional indemnity

[46] *Bartos v Scottish Legal Complaints Commission* 2015 SC 690

insurance on behalf of all practising Advocates, which entitles them to high quality specialist representation in the event of disciplinary proceedings being prosecuted against them. Together these features produce an extremely high quality and efficient process for the resolution of complaints. The Faculty would be eminently capable of extending its existing facilities and expertise to cater for the small number of complaints overall, including both conduct and service complaints, that may be made against Advocates from time to time.

89. In the Faculty's view, and with the benefit of its knowledge of the SLCC's experience to date, there is simply no realistic prospect that anything approaching the quality of the disciplinary procedures adopted by the Faculty could be recreated by a new statutory regulator. Such regulation would necessarily be "one size fits all", to a greater or lesser extent, and at least in the composition and experience of any regulatory tribunal that may be appointed[47]. It would, inevitably, reduce the quality of decision-making in respect of those complaints currently (or to be) dealt with by the Faculty under its demonstrably successful self-regulatory model.

90. In the event of the removal of SLCC functions in respect of all complaints against Advocates, which the Faculty supports, the Faculty anticipates that a significant positive impact would be observed. There would be a single point of contact for consumers in respect of all and any aspects of criticism or complaint that may be raised against Advocates. Prior to the inception of the SLCC, the Faculty found no need to

[47] Cf the concerns raised by the Inner House in *Bartos,* cited earlier, at [90]

"sift" complaints. The volume of complaints was (and may be expected to remain) such that the Faculty was (and is) able to investigate them all to the full extent necessary to enable a fair and principled decision to be made. The bureaucracy and additional complication of the SLCC's "sifting" jurisdiction was (and would be) avoided, leading to a streamlined and transparent process. Most obviously, there would be no need for complainers to wait several months for a preliminary classification decision to be reached by the SLCC: all complaints would proceed to investigation immediately, and the process would speed up dramatically overall.

91. The Faculty suggests, therefore, that the evidence strongly supports the conclusion that there is no significant problem as regards complaints of any nature against Advocates. There is, therefore, no justification whatsoever for the imposition of additional layers of regulatory complexity, at disproportionate and unjustifiable expense in terms of the associated operating costs levied against Advocates, despite the low level of complaints against them. The better course, in the Faculty's view, would be simply to return jurisdiction to the Faculty over all complaints against Advocates, under an efficient and proportionate self-funded and self-regulatory system. As the Faculty has sought to demonstrate in the course of this paper, to do so would provide quicker, cheaper and higher-quality decision making than exists under the present hybrid system operating as between the Faculty and the SLCC, or could reasonably be anticipated to exist under any newly established external statutory regulator.

92. The SLCC and others would doubtless oppose such a move, pointing to the need for independent regulation. But such a stance would ignore three truisms. First, it has for centuries, and even since the inception of the SLCC, been accepted that the regulation of conduct complaints – which are generally considered to amount to more serious allegations than services complaints – is appropriately left to the Faculty as the professional regulator. "Independent" regulation cannot sensibly be more important for services complaints than for conduct complaints. Secondly, in those centuries there has never been any concern raised about a lack of proper independent scrutiny of complaints made against Advocates. On the contrary, the importance to the Faculty of the reputation of the Office of Advocate means that the complaints process is robust and fair. And finally, the process is, and can properly be seen to be, independent. Whilst members of Faculty sit on both the Complaints Committee and the Disciplinary Tribunal, (a) those members are themselves, as with all Advocates, fiercely independent; and (b) those members do not constitute a majority in either forum: the Disciplinary Tribunal, for example, will have three lay persons; two members of Faculty; and a retired judge (whose independence is, as a former Senator, beyond question) as Chairman. There is thus a clear majority, with the Chairman carrying the casting vote, made up of persons who are not practising members of Faculty.

93. There is thus a very easy solution, which comes at no cost, indeed a saving, to the public purse: return all complaints made against Advocates to the Faculty as the appropriate regulator, under the delegated authority of the Court.

94. If necessary, consideration may be given to retention of the SLCC's oversight role regarding the way complaints are handled by the Faculty as a regulatory body ("handling complaints"), subject to the continuing need to avoid unnecessary or unduly complex sifting procedures. For the avoidance of doubt, the Faculty does not consider that such a function would be necessary, having regard to the existing direct oversight of the Faculty by the Court. But if it were thought necessary, from the point of view of public confidence, to have the further protection of such oversight by the SLCC, then Faculty would of course cooperate fully: the central point is that the existing complaints process does not work, and can be replaced (so far as Advocates are concerned) with ease, with confidence, and with a substantial saving, for the reasons given.

Question 5: What have been your experiences of coming into contact with legal services in Scotland? How could the experience be improved? (It would be useful to understand what the nature of the contact was, what type of legal service you benefitted from, and broadly what the subject area of the problem was.)

95. The Faculty notes that the United Kingdom Supreme Court has recently (*Maguire, Re Application for Judicial Review (Northern Ireland)* [2018] UKSC 17) cited with approval the concerns raised by the High Court of Justiciary in *Addison v HM Advocate* 2015 JC 105 and *Woodside v HM Advocate* 2009 SCCR 350. In particular, the Supreme Court wished "to reinforce the message given by the High Court of Justiciary in *Addison* that it is the professional obligation of solicitors to give clear advice to accused persons of the options available to them when a [legal aid] certificate for two counsel has been granted".

96. In the words of the current Lord President and Lord Justice General, in each of the cases cited by the Supreme Court (and, indeed, in a third: *Yazdanparast v HM Advocate* 2015 SCCR 374):

> "the High Court voiced concern that the accused had not been given sufficient information to make an informed choice about his representation. That is to say, he had not been given adequate information about the pros and the cons of representation by a solicitor advocate as opposed to counsel, and in a charge of murder, his right to be represented by a QC, whether counsel or solicitor advocate.

> The other concern of the court was the instruction of in-house solicitor advocates, which the court in that case considered to involve a potential conflict of interest.
>
> The conflict arises from the simple fact that, if an instruction was retained in-house, the firm would benefit financially." [48]

97. Since those comments, an Act of Adjournal[49] has been introduced requiring a solicitor to identify a selection of counsel (or, in cases of murder, senior counsel) available to represent the accused. Nevertheless, this only applies in criminal cases, despite the fact that the same concerns identified by the Lord President were acknowledged by him, in the same speech quoted from above, probably to apply in civil cases as well.[50] Certainly, the Faculty would endorse this view: the same conflict of interest may arise in criminal and civil cases alike. Moreover, even in criminal cases where the Act of Adjournal does apply, the Faculty understands from members versed in such matters that the requirements thereof are often treated as a mere "box ticking exercise", and rarely if ever mentioned at preliminary hearings.

98. This issue raises fundamental questions of both access to justice and fairness of competition. Whether in criminal or in civil matters, the simple fact of the matter is that in the vast majority of cases (direct access to counsel has no applicability in criminal matters, and is responsible for a very small proportion of civil work

[48] See Lord President Carloway's speech to the World Bar Conference, 14 April 2016, p 7 (footnotes omitted): http://www.advocates.org.uk/media/2088/worldbarconfcarlospeech.pdf

[49] Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No. 3) (Instruction of Representation in the High Court) 2016/201

[50] p 8

undertaken by Members of Faculty) the solicitor acts as "gatekeeper" to all litigious matter in Scotland. Without instruction from a solicitor, work does not come to the Bar. The introduction of the concept of "solicitor advocates" (i.e. solicitors with extended rights of audience) was designed to enhance competition. However, as things stand there is a real risk of competition being stultified, to the detriment of litigants in general.

99. The point is capable of short illustration. Imagine a substantial company, A Ltd, facing a large claim for damages raised in the Court of Session. It instructs Solicitor B of Firm C & Co to represent its interests. One of B's partners, D, is a solicitor with extended rights of audience, entitling him to plead in the Court of Session. B has a choice: he can instruct any member of the independent referral bar, or he can instruct D. If he chooses the former, his client has access to the unparalleled expertise and litigation skills offered by the Bar as a whole. If he instructs D, the whole fees of conducting the litigation and representing the client in court enure to the benefit of C & Co and, hence, to B as a partner therein. This puts him in a clear and irresolvable conflict of interest.

100. This is not a merely theoretical issue. As the criminal cases (in particular, *Woodside*) show, there have been multiple examples of legal representatives attempting to extend their reach in circumstances where their expertise or experience makes the attempt unwise or even risky for their clients. This does not benefit litigants. Moreover, the situation which presently obtains – in which solicitors are able to dictate what work does, and what does not, percolate to the Bar – is one in which the risk of unfair competition is apparent, indeed clamant.

101. In these circumstances, the Faculty suggests that consideration ought to be given to ameliorating the present situation by the enactment of primary legislation. Doubtless the precise solution would require to turn on the views and evidence from across the legal sector, but in the first instance the Faculty suggests that one easy step might be taken: namely, forbidding the internal instruction which creates the "in-house conflict" and which has been adverted to in the cases discussed above and in the Lord President's speech. In such circumstances, any solicitor looking to instruct representation of his or her client in the higher courts would have access to all counsel and solicitor-advocates in Scotland (thus enhancing competition), save those in the same firm as him or her (thereby avoiding the pernicious and unfair effects of the evident conflict of interest discussed above).

Question 6: Are there any regulation issues you wish to comment about in relation to specific types of justiciable problem e.g. employment, consumer or family disputes?

102. If the SLCC is to remain in existence, as currently constituted, the Faculty considers that two aspects of the Legal Profession and Legal Aid (Scotland) Act 2007 could usefully be improved. Both concern what have come to be referred to as "third party" complaints, that is to say, complaints by persons who have never been represented by the Advocate (or other practitioner) against whom the complaint is directed.

103. The first issue relates to legal professional privilege. In the case of complaints made by clients, there is no difficulty in this regard: by initiating the complaint, the complainer is taken to have waived the legal professional privilege which would otherwise require the Advocate in question to keep the relevant information confidential. But, in the case of a third party complaint, the privilege is not the complainer's to waive: it belongs to the client.

104. In the Faculty's view, it is clear that, on a proper interpretation, the 2007 Act does not override legal professional privilege.[51] Both the Faculty of Advocates and the Law Society of Scotland have taken that view, and advised their members accordingly, for a number of years. It appears that the SLCC has also come to accept the correctness of that view, at least tacitly, insofar as it has declined to test the point by applying to the Court for an order requiring disclosure of privileged material in respect of any of the

[51] See, eg, *B & others v Auckland District Law Society* [2003] 3 WLR 859, a decision of the Judicial Committee of the Privy Council, which the Faculty considers would be followed in Scotland.

substantial number of complaints in which the issue has arisen, in the Faculty's experience, to date.

105. Nevertheless, the Faculty's experience (borne not from complaints against Advocates, which as has been noted are few in number, but rather from Advocates representing solicitors who have been the subject of complaints) is that issues of legal professional privilege arise regularly in the context of complaints handling. The SLCC routinely asks practitioners to respond to complaints by third parties, in situations where they cannot do so without breaching privilege. This produces the following undesirable consequences:

(i) The practitioner may be induced by such requests to respond to third party complaints in a manner which results in breach of the duties of privilege owed to the practitioner's client;

(ii) The third party complainer, having made a complaint in ignorance of the existence of the privilege, may have to be told that no information will be provided in response to the complaint, which tends to be productive of resentment and suspicion towards the practitioner, who may be accused of "hiding behind" the privilege, even though the practitioner has no choice but to do so;

(iii) The requirement to consider issues of privilege may also place the practitioner in an awkward position of conflict with the client to whom the privilege belongs. In many cases, it will be in the practitioner's interest to disclose the

relevant material in full. Often the complaint will be misconceived, and there may be a complete answer to it, if only it could properly be revealed upon a waiver of privilege. The practitioner should not have to request his or her client to give up a fundamental right in order to allow the practitioner to be vindicated from an unjustified complaint by a third party.

(iv) In cases where such issues of privilege arise, considerable delay and expense may be occasioned. Where the practitioner's interest favours disclosure of the privileged material, the resulting conflict may require the client to be told to seek independent legal advice.

106. In the Faculty's view, therefore, the better course would be to introduce an express legislative provision to the effect that a third party complaint does not override the effects of legal professional privilege. In that event, all prospective third party complainers would be aware of that fact from the outset of the complaints process.

107. The second, and related, issue concerns the proper scope of third party service complaints. Section 2(2)(a) of the 2007 Act provides that "any person" may make a conduct complaint: the Faculty does not suggest any change to that provision. In the Faculty's view, there is a clear public interest in the investigation and resolution of complaints about professional conduct, and it would not be appropriate for there to be any limit on the categories of person who may be entitled to bring such a complaint. The existing legislation incorporates sufficient protection, in particular, against

frivolous or vexatious complaints. The position is different, however, in respect of service complaints.

108. Section 2(2)(b) of the 2007 Act provides a list of the categories of persons or bodies who may make a service complaint. The Faculty's concern arises from the terms of sub-paragraph (i) of that provision, which permits complaints to be made by "any person who appears to the Commission to have been directly affected by the suggested inadequate professional services". In practice, the SLCC interprets this provision as requiring a two-stage test: (i) that there should have been an identifiable deficiency in the service provided to the practitioner's own client, and (ii) that the complainer should have been directly affected by that deficiency. In the Faculty's view, the requirement that the complainer should have been "directly affected" is a necessary, but not a sufficient, threshold.

109. Third party service complaints raise a number of particular difficulties:

(i) The person to whom the service is provided (and who is generally paying for it) is generally a better judge than a third party complainer as to whether it has been satisfactory. It is self-evident that service and communication must be tailored to the requirements of the individual client and his or her instructions. Service, which is adequate in one context, may be inadequate in another context. It is anomalous, therefore, that service with which the practitioner's own client is perfectly happy may be complained about by a "non-client" third party.

(ii) Where the complainer is the opponent in litigation of the practitioner's own client, it is commonplace for lay complainers to attribute decisions taken by their opponents in litigation to their opponents' lawyers. Typical examples include complaints made by one party to family proceedings that the lawyer for the other party is "dragging things out" or "being unreasonable" in the conduct of negotiations. It is unrealistic, however, for practitioners operating in an adversarial context to be expected to please both their own client and their client's opponent. The present threshold test does not exclude busybodies. Nor does it exclude complaints that may be made for tactical mischief-making purposes by opponents in litigation.

(iii) Such complaints cut across fundamental principles of the underlying law. The UK Supreme Court has recently reaffirmed the long standing rule that solicitors do not generally owe any duty of care to parties to transactions for whom they are not acting.[52] According to the current legislative regime, however, as applied in practice by the SLCC to date, the lender who pursued that case would have been entitled to complain about the service rendered by the defender solicitor to her own client, even though the pursuer would not have been entitled to bring a damages claim because the defender owed no duty to look out for the lender's interests. The Faculty readily acknowledges that a regulatory system should not be expected to mirror completely the principles

[52] *Steel & another v NRAM plc* [2018] UKSC 13

applicable to damages claims, but nor should it run completely counter to those principles without good reason.

(iv) Almost invariably, in practice, such complaints cannot be responded to because to do so would breach privilege. Professional services are not provided in a vacuum: the advice given, and the work done, will depend upon the instructions and information provided by the client, and may also depend on the client's ability or willingness to fund the work. That is not information which can be disclosed by the practitioner.

110. All that being said, it is obvious that some third parties should be entitled to make certain categories of service complaints. The obvious example is the beneficiaries to an executry estate. Typically, the practitioner's client will be the executor, but the beneficiaries will not themselves be clients. Nonetheless, it is obvious that they have a legitimate interest to complain about any defective or inadequate service which affects the orderly winding up of the estate. Another example may be third party funders of litigation, such as legal expenses insurers. Typically, such funders will not themselves be clients, but they will be meeting the cost of the litigation and indemnifying the client against liability for the expenses of the client's opponent. That, too, may confer an obvious interest to complain.

111. The Faculty therefore proposes that eligibility to make a third party service complaint under the current regulatory regime should depend, not only upon the complainer

having been "directly affected" by the alleged inadequate professional services, but also on the complainer being able to demonstrate a "sufficient interest" to complain.

112. The requirement to demonstrate an interest was previously a precondition of making a complaint of inadequate professional service against an Advocate or solicitor under the preceding legislative regime[53], which test appeared to the Faculty to work satisfactorily in practice.

[53] See section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, as it stood prior to repeal.

Question 7: What innovations or barriers to innovation within legal services or their regulation would you wish to highlight?

113. The current regulatory framework permits Advocates to enjoy significant freedom to innovate and engage in the creative delivery of specialist advocacy services in Scotland. By way of example, two Advocates have this year established a new 'stable' (chambers), which is intended to operate without the need for traditional Advocates' clerking services, with an emphasis on direct communications by solicitors and bodies with direct access privileges.[54]

114. Over and above the existing situation, however, the primary potential innovation that the Faculty would suggest might be explored is that discussed at Question 4 above: namely, the potential to allow counsel to operate as sole traders via limited liability corporate vehicles.

[54] Benchmark Advocates was established by two members of Faculty in January 2018: ('*Thomas Ross QC and Edith Forrest launch Benchmark Advocates*', Scottish Legal News, 26 January 2018: http://www.scottishlegal.com/2018/01/26/thomas-ross-qc-edith-forrest-launch-benchmark-advocates/))

Question 8: Given the significant pace of change in our economy, how would you envisage the regulation of legal services facilitating innovation and imaginative service delivery supporting the growth of the economy?

115. It is noted that the Taylor Review of Expenses and Funding of Civil Litigation in Scotland reported some time ago, and yet the recommendations thereof have not yet been implemented in full. It is respectfully suggested that such recommendations, including the introduction of damages-based agreements, might usefully now be taken forward.

Question 9: Are there any immediate steps that should be taken in the short term to enable legal service providers in Scotland to compete better with providers in other competing jurisdictions?

116. The Faculty would encourage the promotion and adoption of Scots law as the governing law, and the prorogation of the exclusive jurisdiction of the Scottish courts, in both public and private sector procurement and other contractual contexts.

117. The Faculty has nothing further to add at this stage.

Faculty of Advocates
30 March 2018

Appendices

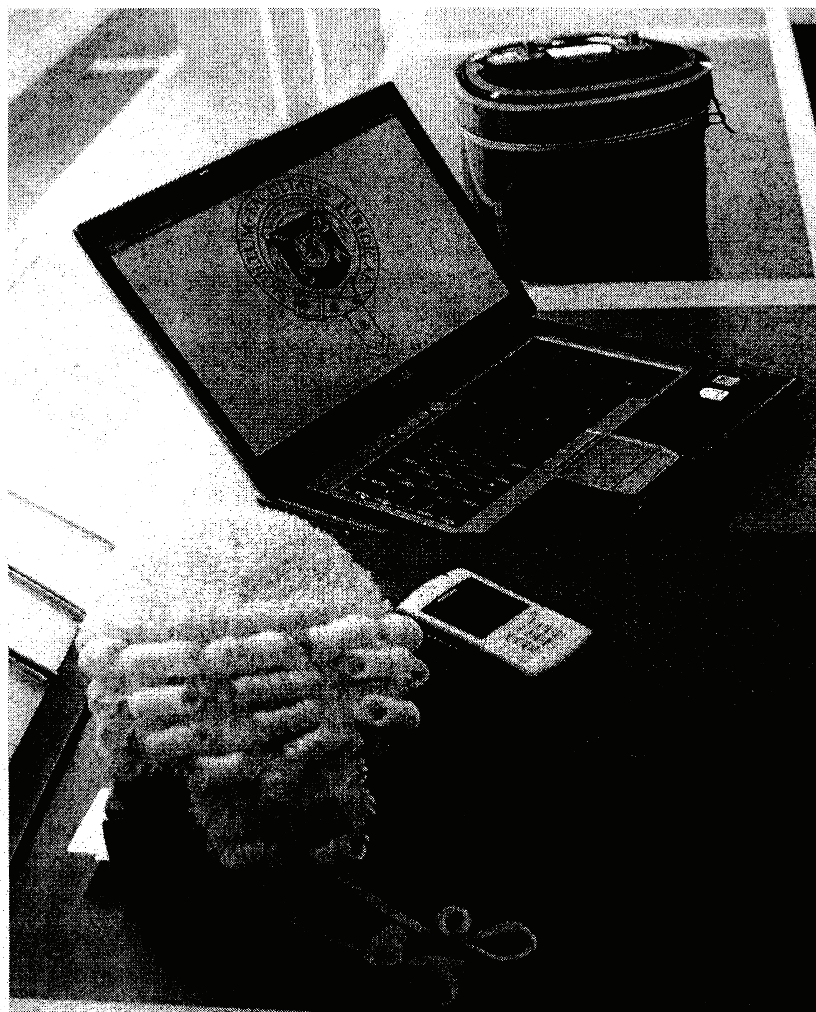
1. '*Access to Justice: a Scottish perspective: a Scottish solution*' – A response by the Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession dated 13 May 2008

2. Justice Committee Legal Services (Scotland) Bill – Written submission from the Faculty of Advocates dated 1 December 2009 (also available at: http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/LegalServices/Submissions/LS2.FacultyofAdvocates.pdf)

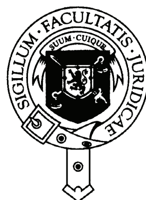
ACCESS TO JUSTICE

A SCOTTISH PERSPECTIVE

A SCOTTISH SOLUTION



A RESPONSE BY THE FACULTY OF ADVOCATES TO THE SCOTTISH GOVERNMENT POLICY STATEMENT ON REGULATION AND BUSINESS STRUCTURES IN THE SCOTTISH LEGAL PROFESSION.



FACULTY OF ADVOCATES

13 May 2008

Kenny MacAskill, Esq., MSP,
Cabinet Secretary for Justice,
The Scottish Government,
St Andrews House,
Regent Road,
Edinburgh, EH1 3DG

Dear Cabinet Secretary,

This paper has been prepared by the Faculty of Advocates in response to the Scottish Government's Policy Statement on Regulation and Business Structures in the Scottish Legal Profession. That policy statement was of course prepared in light of the views expressed by the Office of Fair Trading (OFT) on 31 July 2007 in respect of (1) regulatory arrangements for legal services in Scotland and (2) business structures in the Scottish legal profession. These observations were accompanied by a recommendation that the Faculty of Advocates, as well as the Law Society of Scotland, should carry out a review of their rules insofar as they might impose unnecessary restrictions on business practice and business structures.

The Faculty considers that it should address these issues from a wider perspective than just its own rules of professional conduct. The Faculty also considers that the requirements for regulation should be determined by reference to the structure and particular needs of a distinctive Scottish legal profession. A properly informed view as to regulation can only be arrived at once there is a properly informed view as to the appropriate structure of the Scottish legal profession.

As the Scottish Government acknowledged in its policy statement, a distinct legal system and independent legal profession has been one of the enduring characteristics of the Scottish nation since the Union of 1707. The Faculty

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believes that this will and indeed must remain a distinctive characteristic of the Scottish nation. The Faculty of Advocates is an ancient and venerable institution, which traces its roots to at least 1532 when James V founded the College of Justice. This however says nothing about its present performance and guarantees nothing with respect to its future. The Faculty recognises the need to critically analyse the relevance of what it does and how it can best optimise the services which it delivers to Scottish institutions and to the Scottish public.

The term "legal services" may be open to materially different interpretations, depending upon the perspective from which it is examined. It is widely acknowledged that many of those who operate within the solicitor branch of the profession are men of business or commerce as much as lawyers in the strict sense. It is noteworthy that much of what we now identify as the financial services industry in Scotland was developed by and from the solicitor branch of the profession in Scotland. Even if one was to narrow the scope of work carried out by solicitors to what might be more definitively termed "legal work" one would find much of the work of this branch of the legal profession in Scotland is quite distinct from the form of legal services provided by members of the Faculty of Advocates. That is not of course to say that solicitors may not in some instances carry out the sort of legal services in which members of the Faculty of Advocates specialise. Nowadays solicitors are able to exercise a right of audience in every court or tribunal in Scotland including the Supreme Court, if they choose to acquire the appropriate qualification. Indeed for any person or institution needing legal assistance, solicitors are normally the first port of call, and quite often the only port of call.

The great majority of non-contentious legal work, including work relating to companies, property, contracts, trusts, and wills, is handled by solicitors. Solicitors give advice on a myriad of legal subjects; conduct correspondence on behalf of clients and attempt to resolve problems and disputes without recourse to litigation.

Where proceedings are brought, solicitors conduct litigation on behalf of clients and provide services needed for that purpose. These services include the preparation and service of proceedings; interviewing and taking instructions from the client and keeping the client informed of the progress of the proceedings; corresponding with other parties; collecting evidence including finding and interviewing witnesses; reviewing, collating and disclosing documents; inspecting documents disclosed by the parties; instructing experts; preparing documents for use in court; and all the incidental requirements of modern court procedure. The performance of these

activities requires not only training and expertise but also systems for maintaining case and correspondence files; a high level of administrative support; and a regulatory structure which governs amongst other things the handling of clients' money.

In contrast to the foregoing members of the Faculty of Advocates specialise in the provision of advocacy and legal advice. The advocate's view of what constitutes "legal services" is therefore rather narrower than that of the solicitor branch of the profession. Advocates and of course those solicitors who choose to specialise in advocacy, are more immediately concerned with the maintenance of the rule of law; and access to justice. The advocate must take account of the duties owed to the court and the legal system in general, just as much as the duties owed to individual clients. It is not simply an historic accident that the advocate is an officer of the court.

In view of the foregoing it may be appreciated why the Faculty views the delivery of what it sees as legal services as being more than a commodity. Respect for the rule of law; defence of the rule of law; and effective access to justice are fundamental and essential requirements for any functioning democratic society. That is not to infer that these fundamental requirements can be used to justify inappropriate market practices or artificial restrictions on professional practice. The Faculty recognises the need to be outward looking, accessible and economically effective. It is in this spirit that it has addressed the review of its present rules of conduct and procedure.

The Faculty of Advocates constitutes an independent referral bar. It is important in the first instance to understand what that actually means. It is a body of lawyers, each of them independent, available for instruction and bound to accept instruction by any party or person in Scotland, or beyond, where they are qualified and available to accept such instruction.

One of the core values of such an independent referral bar is what is sometimes termed the "cab-rank" rule. This rule expresses more than a duty to clients; it expresses a duty to the public at large and to the administration of justice. The rule is worth restating. It requires a member of the Faculty of Advocates (the rule is not binding on solicitors or solicitor-advocates) to accept instructions in any field in which he or she professes to practice, including instructions to appear in any court where he or she is admitted to practice, on being offered a reasonable fee. This duty exists whatever the advocate's views of the client, or of the client's case.

The cab-rank rule serves two vital purposes. It preserves the advocate's independence from his client, which is essential to the proper performance of

an advocate's professional duties. It is a fundamental principle of advocacy that an advocate, when he makes submissions to the court, is putting forward his client's case and not his own opinion or belief. It is this principle which makes the representation of unattractive and even reprehensible clients morally acceptable. The fact that an advocate is obliged to act for any client means that acceptance of instructions cannot be taken to connote any personal approval or endorsement of the client or the client's opinions or conduct.

The second purpose of the rule is to facilitate access to justice. It is a fundamental principle that a person should not be placed at a disadvantage in obtaining legal representation because he or she is unpopular or holds unpopular beliefs. As Lord Pearson, a former Lord of Appeal in Ordinary once observed,

> **"It is easier, pleasanter and more advantageous professionally for (advocates) to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisors for the latter."**

In a legal system which cannot always avoid reflecting the inequalities in society, it is of the highest importance that citizens, however unpopular they or their causes may be, are able to obtain the services of advocates of high quality.

In another more recent case in the House of Lords, Lord Hobhouse observed with respect to the cab-rank rule,

> **"It is in fact a fundamental and essential part of a liberal legal system."**

In addition to the foregoing it is also necessary to recognise the importance of an independent referral bar, dependent upon a cab-rank principle, to a jurisdiction such as Scotland. It means that there is an independent source of expert advocacy and legal advice to persons throughout Scotland.

The Faculty of Advocates guide to the Professional Conduct of Advocates provides at paragraph 1.2.5 that,

> **"In order to preserve a Bar of independent Advocates it is necessary that an Advocate cannot enter into partnership with another Advocate or with any other person, or any employment or similar relationship, in connection with his practice as an Advocate."**

That provision is apparently seen by some as merely a restrictive practice. It is no such thing. It reflects one of the fundamental core values of an independent referral bar, namely the availability of each independent advocate under the cab-rank rule. An advocate who is in partnership with another advocate or with other professionals whether they be solicitors or otherwise, becomes bound by his duties to the firm of which he is a member. He can no longer be subject to the cab-rank rule. He cannot be bound in law to accept an instruction which would conflict with the interests of his fellow partners.

The Faculty believes that the rule must remain if Scotland wishes to maintain an independent referral bar. That is not to suggest that all those who practice in the Supreme Courts in Scotland should have to be bound by such a rule. The Faculty acknowledges that solicitors cannot be bound by such a rule. The Faculty also acknowledges that individual practitioners should be free to adopt alternative business models if they so wish. Consequently provision should be made to ensure that any member of the Faculty who wishes to abandon the obligations of the cab-rank rule should be able to do so and move, without difficulty, into practice as a solicitor-advocate. This objective could be achieved very simply by introducing into Scotland a statutory provision equivalent to Section 31C of the Courts and Legal Services Act 1990 as amended by Section 39 of the Access to Justice Act 1999, in England & Wales. The foregoing provides that a barrister becoming a solicitor automatically retains his or her previous rights of audience.

It should be noted that there is no real practical hurdle to a member of the Faculty of Advocates becoming a solicitor in Scotland. Not only is the training of solicitors and advocates in Scotland substantially in common form, but in fact more than 85% of those admitted to the Faculty have already been on the roll of solicitors. (Of the remainder a high proportion are barristers from England & Wales.) A statutory provision of the kind referred to would obviate the need for a member of Faculty transferring to the solicitor branch of the profession to "requalify" as a solicitor-advocate. As a solicitor he would simply enjoy the rights of audience he had already qualified for as a member of the Faculty of Advocates.

In their recent paper "Delivering Scottish Legal Services" the Law Society, while acknowledging the "distinctive nature of the Faculty of Advocates as an

independent referral bar" proposed that members of the solicitor branch of the profession should be able to enter into partnership with members of the Faculty of Advocates. It is noteworthy that nowhere in this paper did the Law Society address the cab-rank rule and its implications for the provision of legal services. It is perhaps worth commenting upon the "advantages" which the Law Society felt could follow from the introduction of such business arrangements even absent reference to the cab-rank rule.

The relevant bullet points in the Law Society's paper were as follows:

- **"It would permit direct access by clients to advocates and so avoid the need for clients to have to instruct a solicitor and an advocate separately. This could reduce cost to the client and make legal services in Scotland more competitive."**

  It should be noted that for a number of years now the Faculty of Advocates has had provision for direct access. The relevant rules and provisions are annexed to this paper. The limitations on direct access are due to functionality more than anything else. As indicated earlier members of Faculty do not carry out the functions of solicitors in litigation and it would be neither cost effective nor appropriate for them to do so. It should however be noted that the Faculty is in the process of reviewing its provisions on direct access.

- **"It would offer more choice to solicitors and advocates about how to deliver their services most effectively and how to share profits between them."**

  In the view of the Faculty the relevant perspective should be that of choice to the consumer of legal services rather than the provider. For reasons set out in the Appendices to this paper it is quite clear that the introduction of partnership would be wholly inconsistent with the maintenance of an independent referral bar and would result in a reduction rather than an increase in consumer choice. Further, it is not clear how the consumer of legal services is going to benefit from the manner in which solicitors and advocates choose to share profits between themselves.

- **"It would allow members of the different legal professions to share overhead costs which could result in lower legal costs for clients."**

It is understandable why this expression of opinion should be so tentative. Recent estimates put overheads for the average firm of solicitors at between 66% and 76%. This contrasts with overheads in respect of a member of Faculty of about 15%. This discrepancy can be explained in part by the distinct functions of the advocate and the solicitor. The former will never handle clients funds and therefore does not have to be engaged in the overheads consequent upon a guarantee fund and a master policy. It is also partly explained by the manner in which the two branches of the profession carry on practice. The Faculty is based upon a library system which produces a significant reduction in overheads.

- **"It may enhance the quality of service by facilitating transfer of skills and knowledge between solicitors and advocates."**

  It is appropriate to note that the principal skills of the advocate are extremely personal and individual and not readily amenable to transfer. Insofar as such skills can be transferred this already happens by virtue of training and education schemes.

- **"The core values of the branches of the legal profession are virtually identical and would not be put at risk by permitting LDP."**

  The Faculty would fundamentally disagree with this observation. The core value of an independent referral bar is acknowledgement of the cab-rank rule.

In fairness, the Law Society's policy paper does go on to acknowledge that a requirement for partnership with members of Faculty may hardly be necessary in circumstances where there is a provision for solicitor-advocates with rights of audience in the Supreme Courts in Scotland. This raises two matters which the Faculty should address along with the solicitor branch of the profession. First, the need for clients to have unhindered access to solicitor-advocates and advocates of their choice. This involves the Faculty addressing the present prohibition on what is termed "mixed-doubles" namely, the instruction of an advocate and a solicitor-advocate in the same case. This is addressed later in this paper. Second there is a need to ensure that there are no unnecessary or artificial obstacles to professionals wishing to move between the Faculty and the solicitor branch of the profession in order to exercise their rights as

advocates. Reference is made above to what the Faculty considers to be the simplest and most effective means of achieving this objective.

In addition to the prohibition on mixed doubles, there are further areas where the Faculty requires to address the need for change or reform. First, there is the requirement that an advocate cannot appear in a court or tribunal on behalf of a client without an instructing solicitor. In the first instance it is appropriate to note the basis for this requirement. An advocate acts as such in performance of an office and has no contractual relationship with his client. It follows that he cannot perform any act which must, in law, be performed by the client or by someone empowered to act as an agent on his behalf. The acts of an advocate are acts done upon his own responsibility and performance of an office and he does not, and cannot, in any sense, act as the agent of his client; that is the function of a solicitor or other professional. Where the law requires the client should be present in court or be "represented", the presence of an advocate is not sufficient. It is the function of an agent to "represent" a client before the court. The status and functions of an advocate are accordingly different in law to those of the agent or solicitor.

The time may have come when the relationship between advocate and client is put on a more formal contractual basis. This may have wide ranging implications. Nevertheless it would enable the advocate to appear in a court or tribunal without the instructing solicitor or agent being present. That may not always be appropriate. However in circumstances where it was deemed appropriate there could be a considerable saving in cost for the consumer or client. This issue requires to be addressed. Changes in the fundamental relationship between advocate and client may of course require primary legislation.

The second matter is connected to the first matter referred to above. If an advocate is to be able to appear without the presence of an instructing solicitor or agent then he will require to have the ability to speak to witnesses in a cause. Under the present guide to professional conduct there are material limitations on an advocate being able to speak to a witness. These limitations need to be reconsidered.

It is the view of the Faculty that the changes mooted above (and elaborated upon in this paper) will not require major regulatory changes.

The Faculty would note that where required, regulation should be as simple as is effectively possible. The cost of regulation is an overhead which ultimately rests with the consumer. In circumstances where members of Faculty and solicitor-advocates appear together in litigation there is no reason why the individual professionals should not be regulated by their respective professional bodies. There is of course a need to ensure that the systems of regulation are compatible and comply with standards acceptable to the courts and to clients. However just as there is no case for saying that advocates as distinct from solicitor-advocates should enter into partnership with solicitors so there is no case for suggesting that such "firms" should be regulated by one professional body while the individual partners thereof are regulated by distinct professional bodies.

It is my wish as Dean of Faculty to seek approval and implementation of the changes considered in this paper during the course of 2008. There are potential hurdles to dealing with the issue of mixed doubles but these are far from insurmountable. I believe that there is a willingness and an ability to embrace change and improvement in both branches of the legal profession in Scotland. Ultimately what we must have in mind is the maintenance of an effective system of justice which respects the rule of law; and access to such a system of justice for the entire Scottish community.

Yours sincerely,

Richard Keen, Q.C.

AN INDEPENDENT REFERRAL BAR FOR SCOTLAND

The Faculty of Advocates is a self governing body consisting of those admitted to the office of Advocate in the Court of Session, the Supreme Civil Court in Scotland. Advocates who are admitted have right of audience in the Court of Session and the High Court of Judiciary (Supreme Criminal Court). An Advocate owes his status to the fact that he has been admitted to the office of Advocate by the Court. He can be deprived of his office only by the Court. However by long tradition, the court has left it to the Faculty of Advocates to lay down the rules of professional conduct for Advocates.

There is a clear and legitimate public interest in maintaining rules of professional conduct which guarantee the independence and integrity of a legal profession which is involved in the administration of justice and the interests of those who require access to our justice system.

The existence of an independent referral bar is not a manifestation of some restrictive practice, but rather an indication of the way in which the legal profession has adapted itself to the most efficient method of making legal services available while at the same time respecting the necessary integrity of the justice system.

Some rules of professional practice may be necessary in order to ensure the proper practise of the legal profession and in particular the independent referral bar, in Scotland. It is however, incumbent upon the Faculty of Advocates to ensure and indeed to demonstrate that such rules form a coherent structure necessary for proper practice and operation of an independent referral bar. If the status and rules of an independent referral bar are to be defended on economic and competition grounds, it is important that the Faculty be very clear in its own collective mind as to what features and rules are essential to its status. The Faculty must be prepared to identify traditional practices which may be unduly restrictive and dispensable.

This may not be the place to rehearse the origins and development of the independent referral bar in Scotland. It may be an ancient institution but that tells us little about whether the present structure and organisation fully and properly addresses the interests of those who require access to the justice system.

It is generally acknowledged that an independent referral bar has an important role to play in the delivery of legal services in Scotland. As the Council of the Law Society of Scotland recently observed:

> **"The Council recognises the distinctive nature of the Faculty of Advocates as an independent referral bar. Faculty members provide high quality advocacy services to the Scottish public and uphold the standards which the public office of advocate demands."**

Inherent in the last part of this remark is an apparent recognition of one particular requirement of the public

office of advocate – namely that he should be available for instruction and should not allow his interests to conflict him accepting instructions, from any person or party in Scotland who might require his services. This is what is sometimes referred to as the "cab rank rule". This is not a rule which applies to solicitors or to solicitor advocates. It is not a rule which can be applied to someone other than an independent advocate. In particular it cannot be applied to a legal practitioner who is in employment or in partnership with others.

The maintenance of an independent referral bar bound by the cab rank rule is of particular importance in a jurisdiction such as Scotland. There are about 10,000 solicitors in practice in Scotland divided across approximately 1,200 firms of solicitors. Many of these firms, particularly in our major urban areas, are both large and specialised. They are able to provide a wide spectrum of services to clients including advocacy. These large law firms disproportionately represent corporate clients and tend to be beyond the reach of all

but the very privileged individual client. That is certainly not a criticism but merely an acknowledgement of the economic reality.

A large proportion of solicitors operate upon a small scale in what might be termed general practice. This is particularly the case in small towns and rural areas throughout Scotland. These firms and their clients have unhindered access to an independent referral bar capable of providing both advocacy services and independent legal advice. That is important not only in providing choice to the consumers of legal services but in actually providing access to legal services and to justice for many who do not have a realistic means of access to the large specialist firms of solicitors concentrated within our major city centres.

The maintenance of an independent referral bar will become all the more important if or when the solicitor branch of the profession embrace multi-disciplinary practice. Such practice will bring with it potential problems of conflict of interest and independence.

Such problems may not be an insurmountable obstacle to multi-disciplinary practice. Indeed the existence of an independent referral bar comprised of sole practitioners would offer to such firms the possibility of avoiding conflicts of interest and would offer to the clients of such firms a guarantee of choice in independent representation and advice.

PROHIBITION ON PARTNERSHP

The Faculty of Advocates "Guide to the Professional Conduct of Advocates" provides at paragraph 1.2.5 that:

> **"In order to preserve a Bar of Independent Advocates it is necessary that an Advocate cannot enter into partnership with another Advocate or with any other person, or any employment or similar relationship, in connection with his practice as an Advocate."**

The question which arises is whether such a prohibition is reasonably required for the maintenance and proper practice of an independent referral bar. Is there a legitimate public interest in maintaining such a rule with its apparently restrictive effect on practice because of the public interest value of an independent referral bar?

It should be noted that the prohibition on partnership in respect of Advocates, has already been the subject of consideration by the Office of Fair Trading. Section 31 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provided that any rule 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 by the Secretary of State and that before approving any such rule the Secretary of State must consult the Director General of Fair Trading. Under the provisions of Section 40 of the 1990 Act the then Secretary of State for Scotland did submit the Faculty rule prohibiting partnership for consideration by the Director General of Fair Trading. In terms of Section 40 (2) of the 1990 Act the Director General was required to consider whether the rule would have, or be likely to have, the effect of restricting, distorting or preventing competition to any significant extent. He concluded that it would not do so and that accordingly there were

not grounds for withholding approval of the relevant prohibition. A copy of the Director General's Report is annexed to this paper.

The Faculty is of the view that the prohibition on partnership remains essential to the future of the Scottish Bar as an independent referral bar and that accordingly it remains lawful judged from a competition perspective.

On one view the maintenance of the prohibition may be thought to be an impediment to competition because it is a restriction on the business model that advocates can adopt. However, the alternative (that advocates are free to form and in fact do form partnerships) also has competition effects by reducing access to choice for the public. Where one advocate member of a firm acted for one party in a dispute any of his colleagues would be prohibited by reason of conflict of interest from acting for any other party to the dispute.

There is no inherent objection in competition law terms to maintaining a prohibition against partnerships. This is a point made by the European Court of Justice in the Wouters case[1]. In that case the ECJ upheld the validity of a rule of the council of the Netherlands Bar prohibiting partnership between members of that bar and non lawyers. The ECJ concluded that the relevant prohibition did not infringe competition law since:

> **"the Dutch Bar could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession as organised in the Member State concerned."**

What the ECJ is therefore indicating is that the objective and economic consequences of such a prohibition have to be identified and the question then asked whether the prohibition is required to obtain the objective.

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[1] Case – 309/99[2002] ECR 1-1577

As to the relevant objective it is one supported both by the Scottish Government and by the Law Society of Scotland namely, the maintenance of an independent referral bar in Scotland.

The cab rank rule to which advocates (but not solicitors or solicitor advocates) are subject is the cornerstone of the independence of the bar. An advocate is duty bound to accept instructions irrespective of personal preference and that ensures that the widest possible number of advocates are available to meet consumer needs. The cab rank rule cannot be operated when lawyers are grouped together in partnership because it clashes with the most significant consequence of joint association in a firm which is that all the members of a firm are judged as a single entity for the purposes of conflict of interest. The acceptance by one partner of instructions necessarily restricts the freedom of consumers to instruct any of his partners.

Some commentators have pointed to proposals to England and Wales to lift the prohibition on partnerships between barristers and solicitors.

It appears to the Faculty that the position in England and Wales provides little if any realistic guidance to the situation of Scotland with its distinct political, social and legal order.

There are about 17,000 barristers in England and Wales and the lifting of the prohibition on partnership may have little practical effect on reducing the availability of a range of qualified barristers to meet the needs of consumers.

In Scotland there are about 460 advocates practising at the independent referral bar. It might well be commercially advantageous for at least some of these advocates to group together into partnership. Advocates in some areas of practice could virtually monopolise expertise in some areas of work. The

result would be a significant reduction in consumer choice.

The prohibition on partnership is beneficial to consumers because it supports the cab rank rule and provides maximum availability of a range of advocates to meet client needs. Moreover, it has to be remembered that partnership brings with it administrative burdens and financial burdens. In the case of solicitors that often means that experienced practitioners are removed from active practice in order to operate a firm. It also means that overheads are increased and these ultimately are passed on to the consumer of legal services. The benefit of the Faculty's more widely based structure is that it places a much reduced burden on individual advocates to divert themselves from the practice of law and hence expands the choice critically of senior and more experienced practitioners able to tackle more demanding work. It is significant that experienced solicitors often choose to become advocates to free themselves from the

responsibilities of business management and to return to the practice of law.

It is sometimes thought that the prohibition of partnership has adverse cost implications for the consumer. The principal advantage of partnership is that it enables the partners to reduce costs by economies of scale, the benefits of which can in theory be passed on to the consumer. In fact, the Faculty's arrangements secure that advantage without restricting consumer choice. The advocate's principal tool of trade is access to a law library, which the Faculty provides on a communal basis with the total cost shared between all the members and met through a levy based on a percentage of income received. Beyond that there are certain core needs in relation to administrative support and accommodation that the Faculty provides on a communal, shared cost basis, again subject to a charge which is based on a percentage of income received. Advocates overheads tend to be in the range of 13-15%. That compares very

favourably with overheads generally estimated at 66% to 76% for solicitors.

The Faculty would note that the scale and manner of delivery of legal services in Scotland may admit of some comparison with the position in Northern Ireland. In Northern Ireland the legal profession is again divided between an independent referral bar based upon a library system and the solicitor branch of the profession. The Legal Services Review Group under the chairmanship of Sir George Bain recently addressed the matter of whether the prohibition on partnership between solicitors and barristers (Legal Disciplinary Practice) should be maintained. In Northern Ireland the conclusion of the Bain report was that:

> **"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 LDP's being established here should remain."**

It is interesting to note some of the reasoning which preceded that conclusion.

The Bain report observed:

> **"Barristers in the Northern Ireland Bar library operate as sole traders selling a single product (advocacy services) in the market for legal services. On the supply side membership of the Bar Library is available to all those who qualify as barristers. On the demand side, advocacy services are demanded by a large number of solicitors, many of whom are sole practitioners. Hence the market for advocacy services in Northern Ireland is "competitive" in the economists sense of that term: a large number of sellers**

(barristers) offer without any collusion between them a relatively homogenous product (advocacy services) to a large number of buyers (solicitors).”

“Allowing barristers to form associations would, by bringing them together in larger units, be a move away from the competitive model described above. Barristers specialising in certain aspects of law, in which there are a limited number of suppliers in Northern Ireland, could group together to form a local monopoly. By doing so, they would be able to raise prices, engage in price discrimination, or even deny supply to certain customers. Hence we conclude that the current prohibition on association between barristers in Northern Ireland should be viewed as a pro rather than an anti competitive restriction…

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 a local solicitor.”

ECONOMIC ORGANISATION OF THE FACULTY

The Faculty has commissioned its own independent report on the economic organisation of the Faculty of Advocates. The report was prepared by Professor Frank Stephen and Dr. Angela Melville of the Institute for Law Economy and Global Government in the School of Law at the University of Manchester. The report is appended to this paper.

The Faculty would note that this report was carried out entirely independently and upon the basis that its conclusions would be published irrespective of what they might be.

With respect to the matter of cost sharing and saving the authors observed:

> **"This analysis of cost sharing across members of the Faculty suggests that the OFT's**

contention that permitting partnerships between advocates would enable economies of scale which are not available to independent practitioners to be captured is mistaken. Members of the Faculty already benefit from economies of scale through participation in FSL (Faculty Services Limited) and access to the shared facilities of the Faculty."

With regard to the implications of the Faculty rule on partnership for competition the authors observed:

"The discussion in the *Report of the Research Working Group on the Legal Services Market in Scotland* of the rule against partnership contained in (paragraph 1.2.5) of *The Guide to Professional Conduct of an Advocate* suggests that a priori multi-lawyer practices might be expected to operate at lower costs than sole practice. However, the more detailed explanation of these factors presented above suggests that a proper understanding of

advocates practice and the cost sharing arrangements of members of the Faculty weakens this argument. The behaviour of members of the Faculty who have moved from practice as a solicitor to practice at the Bar further undermines the previously presumed advantages of group practice. The vast majority of intrants to the Bar in Scotland in recent years have previously practiced as solicitors in Scotland. This suggests that intrants view the increased risk associated with independent practice at the Bar to be compensated by benefits (such as increased specialisation and autonomy). Prior practice as a solicitor allows a prospective advocate to build up expertise and reputation in particular areas of law which mitigates the risks associated with sole practice."

"Lawyers" with a preference for advocacy who wish to combine this with the income and

cost sharing associated with group practice have the opportunity to practice as solicitor-advocates. The educational requirements for acceptance as a "devil" are almost identical to those for a traineeship as a solicitor. This reduces the costs of transfer between the two branches of the legal profession in Scotland as compared to transfer between the two branches in England and Wales. Transfer in either direction is thus possible at a relatively low cost.

In principle the choice between practicing as a solicitor or a solicitor-advocate or as an advocate resolves to the individuals preferred trade off between specialisation in court, advocacy, litigation management, financial risk and personal autonomy."

The authors of the report concluded with an important and significant point:

> **"In practice, however, the Faculty prohibition on mixed doubles gives advocates a competitive advantage over solicitor advocates. Thus there remains an impediment to competition between the separate branches of the profession when it comes to advocacy."**

The Faculty of Advocates has taken notice of this point and addresses the matter of the prohibition on "mixed doubles" in the next part of this paper. Subject to what is said there with regard to the prohibition, it should be noted that advocates no longer have a monopoly on the provision of advocacy services in any court or tribunal in Scotland. In lower courts solicitors have rights of audience. In higher courts advocates share rights of audience with solicitor advocates.

The division of the profession does not itself impede the ability of individual members to practice law in the business model of their choice. Those who wish to provide litigation services in a partnership setting can

do so as a solicitor advocate. Individuals do move back and forward between the two branches of the profession and doubtless both the Faculty of Advocates and the Law Society of Scotland could facilitate that process by agreeing simpler arrangements for transfer. In this connection it should be noted that whilst a solicitor who becomes a member of the Faculty of Advocates thereby secures rights of audience in all courts, that is not automatically the position where a member of the Faculty of Advocates transfers to the other branch of the profession and becomes a member of the Law Society of Scotland. More than 85% of intrants to the Faculty of Advocates have previously been on the roll of solicitors in Scotland. It should therefore be a very straight forward matter for members of Faculty to continue to enjoy advocacy rights in the higher courts in Scotland upon transfer to the solicitor branch of the profession.

The present anomaly is that an experienced advocate who is qualified and trained in advocacy in order to appear before the higher courts as a member of Faculty

cannot continue to do so simply by transferring to the solicitor branch of the profession. This was never intended to be the case and the position could be cured by introducing a simple statutory provision such as that which exists in England & Wales. Section 31C of the Courts and Legal Services Act 1990 as amended by Section 39 of the Access to Justice Act 1999 provides that where a barrister becomes a solicitor he automatically retains his or her previous rights of audience. That is a perfectly sensible and logical provision and one which can be easily adopted and indeed incorporated in the present Judiciary Bill.

The Faculty would commend such a provision in as much as it would clearly simplify the process of transfer between the independent referral bar and the solicitor branch of the profession for individuals who wanted to choose a particular business model in order to carry on the provision of advocacy services. The practical effect would be that any individual who wanted to choose between carrying on practice as an independent advocate, (subject to the cab-rank rule)

and carrying on the provision of the same services in partnership, (without being bound by the cab-rank rule), could simply choose between membership of the Faculty of Advocates and membership of the Law Society of Scotland.

MIXED DOUBLES

There exists a Dean's Ruling prohibiting members of the Faculty of Advocates from accepting instructions to appear in any court or proceedings with a solicitor-advocate. As a consequence of this ruling a senior member of the Faculty of Advocates, namely a Queen's Counsel, may not appear with a solicitor-advocate as his junior; and a senior solicitor-advocate, namely a Queen's Counsel, may not appear with a member of the Faculty of Advocates as his junior.

As noted earlier, Professor Frank Steven and Dr. Angela Melville concluded that this rule prohibiting mixed doubles gave advocates a competitive advantage over solicitor-advocates, and created an impediment to competition between the two separate branches of the profession when it came to the provision of advocacy services.

The Faculty has come to the view that such an impediment to competition can no longer be justified. The rule is not required in order to maintain the cab-rank rule and consequently the integrity of an independent referral bar in Scotland. Although a number of incidental issues may require to be addressed, the Faculty has concluded that the prohibition on mixed doubles requires to be revoked.

It has been mooted that if solicitor-advocates are to be entitled to appear with members of the Faculty in the provision of advocacy services then they should be subject to the cab-rank rule. In the view of the Faculty this is wholly unrealistic. Solicitor-advocates generally engage in the provision of advocacy as partners in a firm. Current developments suggest that this will include partnership within a multi-disciplined practice. A solicitor-advocate owing his primary duty to his firm and fellow partners cannot be expected to be subject to a cab-rank rule. Accordingly this should not be a requirement for removal of the prohibition on mixed doubles.

The matter of regulation and disciplinary functions will have to be addressed in the context of members of Faculty and solicitor-advocates appearing together. The courts would no doubt prefer a situation in which both members of Faculty and solicitor-advocates were regulated by the same body and subject to the same code of discipline. That however is not practical. Of course each professional body's code of practice will require to be reviewed in order to ensure that any differences in the obligations placed on an advocate and a solicitor-advocate, while carrying on the same function, are rationally based and necessarily imposed. Mechanisms will have to be in place to resolve any conflict that may arise when the two are acting together in a mixed double.

FURTHER CHANGES IN RESPECT OF PROFESSIONAL CONDUCT

There are two further matters that the Faculty would wish to address with respect to its own code of practice, upon removal of the prohibition on mixed doubles. First, there is the matter of witnesses. Neither a member of Faculty nor a solicitor-advocate may speak to a witness once he has begun his evidence. However prior to the commencement of evidence a solicitor-advocate is free to speak to any witness; while a member of Faculty is prohibited from speaking to witnesses other than a client or expert witness. It is of course critical to the proper administration of justice that witnesses should give their evidence freely and without undue influence from third parties. However consistently with this objective, the Faculty considers that it should adjust its own code of conduct so as to enable members of Faculty to speak to witnesses upon the same terms as solicitor-advocates.

Second, it is possible for a solicitor-advocate to appear before a court or tribunal without another solicitor being present – in more complex cases this may not be desirable. A member of Faculty is not able to appear before a court or tribunal on behalf of a client without a solicitor or agent being present. The Faculty would intend to address this aspect of practice in order that a member of Faculty may be able to determine that in appropriate circumstances he should appear without a solicitor or agent being present.

A third incidental matter concerns a point on legal aid regulation. Under the present scheme for legal aid there is provision whereby solicitor-advocates, (but not a member of the Faculty of Advocates), may certify themselves as a senior for the purposes of a case. This enables them to assume the position of leader in the case and to be paid an enhanced fee. The original justification for this provision appears to have been that following the introduction of solicitor-advocates there were none yet qualified for appointment as

Queen's Counsel (senior counsel). Accordingly otherwise experienced solicitor-advocates would be prevented from securing an appropriate fee for leading in a legal aid case. There may have been some justification for such an introductory rule 15 years ago. It no longer appears to have any justification. There are many solicitor-advocates who are sufficiently qualified and experienced to apply for and be appointed Queen's Counsel. This has happened in a number of instances.

It would be anomalous if by virtue of the legal aid regulations a solicitor-advocate instructed to appear with a member of the Faculty of Advocates could, irrespective of qualification and experience, certify himself as leader for legal aid purposes and be paid accordingly. The Faculty does not suggest that this facility should be extended to members of Faculty. Rather it is anomalous that it is available at all. The Faculty had understood that the Scottish Legal Aid Board was going to address this issue some time ago. More recently it was advised that the matter would be

attended to by about June of 2008. It now appears that the Society of Solicitor-Advocates of the Law Society of Scotland wishes to extend this facility. A recent announcement from the Law Society of Scotland has indicated that the matter will be the subject of a three month review. The Faculty does not consider that there is a great deal to review and would prefer to see this matter dealt with sooner rather than later.

CONCLUSION

1. There is a clear and compelling case for maintaining an independent referral bar in Scotland.

2. An independent referral bar must operate subject to the cab-rank rule. If individual advocates are to be subject to the cab-rank rule then they must operate as independent advocates. There is accordingly a clear case for maintaining the prohibition on partnership between advocates and between advocates and other professionals.

3. Legal professionals in Scotland should be free to provide advocacy services and legal advice either as advocates within an independent referral bar; or as solicitors who are not subject to the cab-rank rule or any prohibition on business practice. Solicitors who become members of the Faculty of Advocates should, as

now, automatically qualify for rights of audience in all courts in Scotland. Advocates who become members of the Law Society of Scotland should automatically retain their rights of audience in the higher courts. This can be achieved by a relatively simple and straightforward legislative change.

4. The present prohibition on mixed doubles, namely the appearance of advocates and solicitor-advocates instructed for the same party in the same case should be removed.

5. The Faculty should review its present Code of Professional Conduct in order to allow members of the Faculty to speak to witnesses upon the same terms as a solicitor-advocate; and in order to allow members of Faculty to appear in appropriate cases without a solicitor or agent being present.

6. Members of the Faculty of Advocates and solicitor-advocates should continue to be regulated by their respective professional bodies even in cases where they are appearing together before a court for the same party. Each professional body must however review its code of conduct in order to ensure that they are compatible and that any difference in the obligations placed on an advocate and a solicitor-advocate while carrying on the same function is rationally based and necessarily imposed.

APPENDICES

Appendix 1

Office of Fair Trading Report:

Faculty of Advocates: proposed rule prohibiting advocates from forming legal partnerships

Appendix 2

Report by Professor Frank H. Stephen and Dr. Angela L. Melville:

The Economic Organisation of the Faculty of Advocates

Appendix 3

Appendix D of Faculty of Advocates Guide to the Professional Conduct of Advocates re Direct Access with May 2007 Addendum

APPENDIX 1

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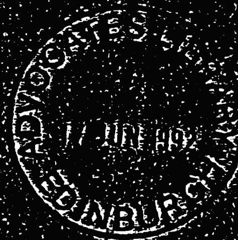
Office of Fair Trading

Faculty of Advocates: proposed rule prohibiting advocates from forming legal relationships

Advice from the Director General of Fair Trading to the Secretary of State for Scotland under Section 40(3) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990



June 1992

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1 INTRODUCTION

1.1 Section 31 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ("The Act") provides that any rule 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 by the Secretary of State; and that before approving any such rule the Secretary of State must consult the Director General of Fair Trading.

1.2 Pursuant to this provision, and to section 40 of the Act, the Secretary of State for Scotland has sent me a copy of a proposed rule of the Faculty of Advocates ("the Faculty"). Section 40 provides that I must consider whether this rule "would have, or would be likely to have, the effect of restricting, distorting or preventing competition to any significant extent"; that when I have completed my consideration I am to give such advice to the Secretary of State as I think fit; and that I may publish my advice.

The Faculty's proposed rule and its effects

1.3 The rule in question states:

> "No advocate whose practice is in Scotland may form a legal relationship with another advocate or with any other person for the purpose of their jointly offering professional services to the public."

1.4 There are two points to note about this formulation. First, it prohibits not only partnerships but also participation in bodies corporate. But since most of those who have commented have concentrated on the possibility of advocates forming partnerships, I shall for convenience refer to partnerships throughout this advice. It does not appear that from the point of view of the competition analysis there is a significant distinction to be drawn between the various forms of legal relationship prohibited by the rule.

1.5 The second point is that the prohibition applies not only to practices being formed with persons other than advocates - what is usually referred to as a multi-disciplinary practice ("MDP") - but also to partnerships between advocates. In fact for the purposes of this report it will be convenient to distinguish between three cases, namely:

- partnerships between advocates; these will be referred to as "advocate/advocate partnerships"

- partnerships between advocates and solicitors; these will be referred to as "advocate/solicitor partnerships"

- partnerships between advocates and non-lawyers (with or without solicitors); these will be referred to as "advocate MDPs".

Background to my consideration

1.6 In February this year my Office sent a consultation letter to 250 recipients covering the rule proposed by the Faculty of Advocates, and also rules of the Law Society of Scotland ("LSS") relating to MDPs, on which I am reporting separately. At the same time a press notice was issued inviting anyone else interested to comment. Those consulted consisted of government and representative bodies (including consumer interests); a number of large professional firms; and financial, commercial and industrial companies. We received 70 substantive replies.

1.7 In addition, the Faculty of Advocates sent the Office's consultation letter to all practising advocates, about 300, and the LSS to all solicitors' practices, about 1,100. We received a further 32 replies from solicitors and 4 from advocates.

1.8 A further three pieces of work were commissioned. The first was an account of the distinctive features of the Scottish legal system and of the market for legal services in Scotland, and services most likely to be offered alongside them. The second was a survey of attitudes among a statistically representative sample of members of the professions thought most likely to be affected by the introduction of MDPs containing solicitors or advocates, that is solicitors, accountants, and surveyors. Some advocates were also interviewed (paragraph 2.8). Both these blocks of work were undertaken by the University of Strathclyde. The third piece of work was a report on how the provision of legal services is organised in a number of European countries.

1.9 I wish to express my thanks to all of those who contributed to these exercises. I am particularly grateful to Professors Stephen, Miller and Paterson of the University of Strathclyde and to Mrs D M Donald-Little, WS, who provided the report on the experience of MDPs overseas.

2 MARKET ANALYSIS

2.1 Normally when I examine the effect of a restriction on competition, I do so by reference to an established market. The particular restriction on the activities of advocates has the effect of prohibiting partnerships, not only with other professions, but also within their own profession. In the present case the restriction is such that no advocate partnerships and no advocate-based MDPs exist. Potentially the range of markets affected by this restriction is very wide; in practice its size will be determined by the commercial advantage of offering advocates' services alongside those of other professions, the demand for such joint provision, and the nature of the relevant practice rules. The approach I have followed here is to consider both the existing market for the services of advocates in Scotland and whether competition would be increased or reduced if those services were to be provided in combination with others.

Advocates

2.2 At present there are around 300 practising members in the Faculty of Advocates in Edinburgh, of whom about 70 are QCs. Each advocate is in effect a sole trader. I understand that some 80% of a junior advocate's time is spent in court work, the remainder being on opinions. Senior counsel spend more of their time on opinion work. For the most part advocates are generalists, though specialisms have emerged in recent years, notably in criminal work and to a lesser extent in areas such as tax, planning and agricultural law. Advocates have the right to appear in any court or tribunal in Scotland and at the present time have exclusive rights in the Court of Session, High Court of Justiciary, House of Lords and Judicial Committee of the Privy Council. They have concurrent rights with solicitors in lower courts.

2.3 I am informed that training as an advocate is open to all who fulfil the entry requirements. Admission to the Faculty is then open to all who have passed through the necessary academic and practical training. Unlike the situation in England and Wales, no qualified advocate is prevented from practising by being unable to find a place in chambers. All admitted to the Faculty enjoy the services of the Library and of Faculty Services Ltd which provides the services of a clerk, renders accounts and provides secretarial services. Use of these services is paid for by means of a percentage levied on fees earned.

2.4 I understand that there is little competition between members of the Scottish Bar in the matter of fees. Generally the fees payable to an advocate are set after the work has been completed and are based on a "going rate" for the type of work and the experience of the particular advocate. Accounts are then rendered by a clerk employed by Faculty Services Ltd to instructing solicitors (or others having direct access, such as patent agents).

Other professions

2.5 In comparison with advocates the members of other professions which might be involved in MDPs are much more numerous.

Solicitors		7,300
of whom in private practice	5,800	
Chartered accountants		12,700
of whom in private practice	7,400	
Surveyors		2,000

Around half of both solicitors and accountants practise in Edinburgh and Glasgow. The Faculty is effectively Edinburgh based.

Possible general impact of MDPs

2.7 Unlike solicitors, advocates are at present barred from entering into a legal relationship with any other profession to offer services on their behalf. Nor is there any indication from the survey that advocates are already part of informal network arrangements with other professions.

2.8 Only a small number of advocates were covered by the survey interviews conducted by the University of Strathclyde[1]. More is revealed by the attitude of solicitors to potential partnerships with advocates. Not surprisingly, solicitors saw the profession of advocate as highly compatible with their own. In the survey of solicitors, 60% of those surveyed mentioned the business of advocates as being compatible with their own, well ahead of those who mentioned accountants, surveyors and estate agents. However, when it came to a choice of partners in an MDP, solicitors surveyed by Strathclyde University said the most likely partners would be accountants rather than advocates. 43% of those surveyed considered that if MDPs were permitted it might be in their commercial interest to seek out accountants as partners, as opposed to 20% who mentioned advocates. One explanation for this choice may be that only around one quarter of solicitors' fee income relates to court work, so that only the larger solicitors' firms would have sufficient work to justify taking an advocate into partnership, always assuming that other advantages justified such a move.

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[1] A statistical appendix is available on request from Office of Fair Trading, Room 726, Chancery House, 53/64 Chancery Lane, London WC2A 1SP.

3 COMPETITION ASSESSMENT: THE GENERAL APPROACH

3.1 As observed in my separate report on the Law Society of Scotland's MDP rules, one way of approaching prohibitions such as these is to regard them as interference with the way the relevant markets operate which it is for the proponents of the restriction to justify. Section 40(2) of the Act requires me to take a different approach. I must consider whether the rule, by prohibiting any of the types of partnerships described in paragraph 1.5, has the effect of restricting, distorting or preventing competition to any significant extent. In other words, the question I must address is whether permitting partnerships would improve competition in the markets involved.

3.2 In addressing this question, I have followed broadly the same approach as that adopted towards the LSS rules. That is, I have considered first what reasons there are on grounds of general principle for supposing that partnerships involving advocates could offer a type of service, or a mix of services, not currently available and for which there is a significant demand, or offer services at a price or a quality which would represent an increase in the current level of competition. Second, I have looked at what evidence there appears to be of demand for services provided by partnerships involving advocates. Finally, I have considered whether there is anything in the objections to such partnerships which should be taken into account in the competition assessment.

3.3 In following this procedure it has been apparent to me that the arguments for and against partnerships for advocates, and the markets in which the competition effects should be assessed, differ somewhat according to which of the partnership types listed in paragraph 1.5 are being considered. I therefore cover each type in turn.

4 ADVOCATE/ADVOCATE PARTNERSHIPS

4.1 The relevant market here is the supply of advocates' services, more precisely advocacy in the courts below the Court of Session, advocacy in the higher courts, drafting of pleadings and opinion work. It seems to me that if there are advantages in advocates forming partnerships of this kind, they would fall into one of four categories:

- economies of scale, as a result of advocates sharing facilities such as clerks, support staff and accommodation, which may produce cost savings while maintaining current levels of service or better levels of service;

- better arrangements for transferring work in the event of one advocate's unavailability;

- improved market entry, through a career structure providing financial security, particularly for new entrants to the Bar;

- enhanced price competition between partnerships.

4.2 As regards **economies of scale**, the Faculty's argument is that advocates already enjoy a wide range of common services provided by the Advocates' Library and by the service company Faculty Services Ltd - such as library facilities, accommodation, clerking services and so on - that are less costly than equivalent arrangements made by individual advocates or groups of advocates outside this system would be. It is not clear why a monopoly supplier of office services such as these should necessarily be more efficient than competing service providers, and without experience of providing the services in other ways the cost advantages or disadvantages of the present system are difficult to establish. The Dean of the Faculty has, however, emphasised to me that the proposed rule does <u>not</u> stop groups of advocates making arrangements to share clerking and support facilities outside the central system and that advocates are free not to subscribe to Faculty Services Ltd. In effect they could set up arrangements similar to a set of chambers at the Bar in England and Wales. Certainly it is striking that although such arrangements already seem possible there is little evidence of their being established. This may well support the argument that the present system is more cost effective than a partnership could manage. On the other hand, there may be cultural and social reasons why advocates operating within the present close community are reluctant to make alternative arrangements.

4.3 It could be argued that partnerships would make it easier for **transfer of briefs**. This should be set against the fact that the present system, with a relatively small number of clerks (10) each looking after a "stable" of advocates but in contact with one another, is able to arrange for the efficient transfer of briefs. True, a partnership may be particularly keen to ensure that the brief stays within the partnership. Indeed it is possible to envisage a

partnership attempting to organise itself, and to market itself, on the basis that it would ensure an advocate of appropriate standing was available, perhaps charging higher fees for what might be regarded as a more reliable service. Common clerking arrangements for groups of advocates outside the existing system, as mentioned in paragraph 4.2, could go some way to achieving this, but in a partnership the participating advocates would have a greater commitment to delivering the promised service. But such a strategy would require a partnership to have a number of advocates with roughly the same expertise and experience. As is discussed below, there are likely to be other problems with partnerships composed along these lines. More generally, the case for partnerships under this heading rests on the assumption that the present system of clerks provided by Faculty Services Ltd is not delivering the service clients would wish. Bearing in mind that the present clerking system is effectively a monopoly, this is certainly a danger one has to be aware of. Nevertheless, it must be said the Office's consultations found very little evidence of dissatisfaction among clients.

4.4 The argument that partnerships would make **market entry** easier for newly qualified staff also requires close scrutiny. The Faculty says that entry into the profession is very open. Anyone passing the necessary exams, and observing the specified period of pupillage, is not only permitted to practise but has open access to the clerking facilities which facilitate this. A system which required a new entrant to be accepted by a practice might well be more restrictive of entry, although of course this is not an objection to partnerships and the existing arrangements operating side by side. Nor does there seem to be a shortage of work for advocates which would make it difficult for the newly qualified to become established. There remains the problem of the new entrant finding the necessary finance until the fees start coming in, and partnerships might be a way of meeting that difficulty, although this would only be true of partnerships which set out to recruit new entrants. In fact the Faculty believe that, if permitted, partnerships would tend to attract advocates of similar seniority and specialism. On the other hand it is possible that some partnerships would wish to establish a reputation in a particular field and that this would involve the recruitment of newly qualified advocates to develop the practice. All things being equal one would expect entry to the Scottish Bar to be even easier, especially for individuals of limited means, if would-be advocates were able to choose between the current system and a partnership system. It is not possible to say how much easier entry would be when there is no experience of partnership arrangements operating at the Scottish Bar.

4.5 As regards **price competition**, I understand that when an advocate accepts a brief, Faculty Services Ltd arranges for an account to be sent to the instructing solicitor. I am told that the amount of that fee is fixed in relation to a rate for the job, taking into consideration the nature of the work and the experience of the advocate concerned. There thus appears to be no scope for competition between advocates in the matter of fees. In effect Faculty Services Ltd not only recommends the fees to be charged but, by means of its control over the sending of accounts, ensures that its recommendations are adhered to. Consideration of the competition

implications of this system is outside the scope of this report. Certainly competing partnerships would be likely to facilitate greater price competition. On the other hand, the same would be true of the separate arrangements mentioned in paragraph 4.2, which are already permitted.

4.6 The views of clients and suppliers, as gathered both in the Office's consultation exercise and the Strathclyde surveys, tend to reinforce the above observations, although they have to be seen against the background that advocates, solicitors and many clients were in favour of advocates remaining independent. The fundamental fear was that choice and competition would decrease if partnerships were permitted. That said, some financial advantages were seen in advocate/advocate partnerships for the advocates themselves. It was recognised that partnerships could ease the path of new advocates (the bulk of whose early cash income may be delayed, perhaps to the end of their second year) and that there should be a saving on interest and perhaps a tax saving in the partnership tiding newcomers over as against their borrowing money to live on. In addition partnerships were thought to provide some protection against illness and changes in the type of work available. Some clients thought that they would benefit from partnerships specialising, and from being able to discuss problems within the partnership, drawing on shared experience. It was noted, however, that partnerships would need to be small to avoid restricting choice. All the advocates stressed the lower overheads they enjoyed compared to solicitors.

4.7 I turn now to consider whether there are competition aspects to the arguments which have been advanced against advocate/advocate partnerships. There are essentially two major objections.

4.8 The first is that such partnerships would lead to a significant reduction in the choice of advocate available to clients, because advocates in partnership with one another could not be briefed by opposite parties to a case. Accordingly, if one party chose an advocate working in a partnership, the choice available to the opposing party would be reduced by the number of advocates in that partnership. I recognise that this will be the effect - it could not be acceptable for advocates in partnership with one another to appear on opposite sides. On the face of it, this would reduce competition as well as choice. If this is so, then permitting advocate/advocate partnerships could itself be anti-competitive. Whether it will result in a significant reduction in competition will depend, however, on a number of factors, including the size of the partnerships formed; the number of parties to a case whose interests were in conflict; the extent to which partnerships concentrated advocates of particular specialisms, expertise or seniority; and the extent to which advocates are already locked out of the market by general retainers.

4.9 I have doubts about how far the creation of advocate/advocate partnerships can be regarded as anti-competitive. No-one can know at this stage, of course, what size and composition of partnerships would emerge if they were permitted. However, even if one assumes quite large partnerships, say a partnership of 30 (which would represent some 10% of the existing Bar), the first party to an action

to brief an advocate would have a choice of some 300 advocates, and the opposing party a choice of 270. Bearing in mind that most advocates regard themselves as generalists, it seems to me that there would still be a good deal of choice, and thus effective competition, for parties in even the larger multi-party cases. Of much more concern would be the situation if partnerships attracted concentrations of advocates who specialised in certain fields or who were of equivalent seniority. It is clear that some specialists can be identified among Scottish advocates - criminal work is the obvious one, but I understand there are a small number of senior advocates who specialise in cases such as planning or tax. The Faculty has argued that such specialists will gather together in a few partnerships, and it must be recognised that one of the theoretical advantages of advocate/advocate partnerships is based on the premise that they will do this (see paragraph 4.3) The Dean has argued that the most experienced and highest-earning advocates will tend to form partnerships together because the current system of financing Faculty Services Ltd, being based on a percentage of earnings, bears most heavily on them. I have doubts about whether this is the form of partnership most likely to be formed - advocates entering such partnerships would have to turn away business because a partner is appearing for another party and this would at best limit the size of the partnerships - but I recognise the risk.

4.10 The second objection to advocate/advocate partnerships is that partnerships formed by advocates would adversely affect the operation of the Advocates' Library. I understand that the building is owned by the Faculty and that the Library is a charitable trust. The Advocates' Library is given some 8,500 legal books and publications a year under the Copyright Acts and is the national repository. Advocates use the library as their place of work, and may use its books in or out of the library. The books given under the Copyright Acts are also available to the public in the National Library of Scotland for research and reference. Solicitors, even if they obtain extended rights of audience, will not be able to use the Advocates' Library, if only because of shortage of space. Instead they may choose to use either the Signet Library or the Solicitors to the Supreme Court Library.

4.11 It is necessary to distinguish the issue of the Library itself from the question of the clerking and support services provided by Faculty Services Ltd. As already seen, the proposed rule does not prevent advocates opting out of the services provided by Faculty Services Ltd, and the question of the financing of the Library itself does not seem to be connected with the partnership issue - I do not see why advocates in partnership should not continue to be expected to pay, as individual members of the Faculty, subscriptions designed to maintain the Library and indeed the Faculty. In any event, in the past the Faculty has supported its Library with far fewer members than at present.

4.12 In order to form a view on the competition effects of the proposed rule, the question to be addressed is what the consequences would be if the existing prohibition on advocates forming legal relationships were repealed, as envisaged by the Act, and the proposed rule were not introduced. In applying that test to the

question of advocate/advocate partnerships I have put to one side the current fee fixing arrangements (see paragraph 4.5), which may merit separate consideration under general competition law. This apart, my view is that it cannot be ruled out that some advocates would wish to form such relationships. To that extent, it would be right to regard the rule as likely, in principle, to represent some restriction on the manner in which advocates may compete in the markets in which they operate. Whether it is a significant restriction, however, depends on a judgment about how far clients are disadvantaged by the restriction. Here the evidence is part conjecture and part based on survey evidence. There may well be improvements in convenience to clients, possibly improvements in quality of service, and conceivably, but by no means certainly, reductions in cost. To set against this, there is the concern of most clients that there should continue to be a pool of independent advocates freely available and that to some extent the choice of advocate would be reduced by the creation of partnerships, particularly partnerships of specialist advocates. It does not seem to me that there is sufficient evidence that the rule amounts to a significant restriction or distortion of competition.

5 PARTNERSHIPS BETWEEN ADVOCATES AND OTHERS

5.1 There are a number of theoretical advantages where services associated with different professions or disciplines are provided by a single firm. These benefits may arise both where advocates and solicitors practise together in advocate/solicitor partnerships and where advocates (with or without solicitors) practise with persons from other disciplines in advocate MDPs.

5.2 **Economies of scope** These are cost savings arising from the joint provision of two separate services or products, which would not be realised if they were provided independently. Advocates' activities may overlap with other professional services, most notably those of solicitors, but other cost savings, arising chiefly from support service savings, may also occur with other professionals.

5.3 **Greater convenience** There are many situations where the services of more than one profession are required. Where several professional services are provided, not just under one roof but as part of the same firm, this is likely to save time for the consumer of those services, in addition to any economies of scope mentioned in paragraph 5.2. All things being equal it should be for the market to decide between the greater convenience in an advocate/solicitor partnership and the present arrangement where the solicitor instructs an advocate.

5.4 **Innovation** Closer contact between different professions is usually regarded as leading to a greater appreciation of the needs of the client and hence to the provision of new and innovative products. Moreover, partnerships and MDPs involve the principals sharing the risks of the business and having joint incentives to improve it. Generally speaking, co-ownership provides a stimulus to innovation which goes beyond synergy.

5.5 **Specialisation** As already noted, advocates are for the most part generalists. The formation of partnerships could result in an increase in specialisation. Indeed advocate/solicitor partnerships or advocate MDPs could be a means of achieving such specialisation without reducing the number of advocates able to be briefed in any one case.

5.6 **Enhanced quality** In addition to possible cost and price savings arising from cost reduction and enhanced competition, the quality of service may benefit from partnerships. The joining of different specialist professionals can widen the approach of all and make the organisation more customer focused and sensitive. The standard of advice will clearly depend on the quality of the professionals themselves, but allied to the risk sharing and incentive properties of partnerships should be a concern for service quality in all its aspects.

5.7 **Choice** Mixing services can both increase and reduce choice. To the extent that structures such as MDPs innovate and provide one-stop services then consumer choice will be widened. In so far as they result in a reduction in the numbers of separate firms or sole

traders offering legal services in Scotland, however, then choice will be reduced.

5.8 The relative importance of these advantages is likely to vary between advocate/solicitor partnerships and advocate MDPs.

Advocate/solicitor partnerships

5.9 In the case of advocate/solicitor partnerships, the principal advantage is likely to be greater convenience, with perhaps some economies of scope and enhanced quality arising from a sharing of facilities. The scope for innovation in partnerships containing only advocates and solicitors is likely to be more limited, as are any advantages of specialisation which could not be obtained separately by firms of solicitors and individual advocates.

5.10 Arguments that it may be more convenient for the client to deal with only one firm for the full litigation service, including advocacy, are not to be dismissed lightly. Clients in Scotland already have the ability to obtain litigation and advocacy services from a single firm in cases which do not go to the Court of Session or beyond. It is possible to see the same advantages in the combined conduct of litigation and advocacy for cases which go to the higher courts. The costs of co-ordination could be reduced, and the ease and speed of communication improved, if all work were conducted within a single firm. It could also be more convenient for the client to deal with a single firm, and clearer as to where the responsibility at various stages lay. If the advocate within a firm were involved at an earlier stage there would be less chance of an advocate unfamiliar with the subject taking on the case at a relatively late stage. If advantages on these lines produce cost savings, then one would expect that to be reflected in the total fee which clients pay.

5.11 On the other hand, none of the advantages is indisputable. There would be a balance to be struck between the extra initial cost of involving the advocate earlier and the later savings in cost which might flow from this. Moreover, tying up an advocate's time in the early stages of a case may restrict the flexibility with which his services can be deployed. Alternatively, if advocates within advocate/solicitor partnerships continued to be briefed by solicitor colleagues within the firm in the same way as now then the apparent cost savings may prove illusory. Even the arguments concerning the convenience for clients may be less important than they seem at first sight. It is doubtful, after all, whether any firm of solicitors other than the large practices in the major urban areas would be able to attract established advocates into partnership. One further element of the cost argument has to be considered. As has been noted, advocates practising within solicitors' firms may actually prove more expensive overall, suggesting that they would have to provide a better service to flourish. On the other hand, I do not consider it realistic to assume that overheads attributable to advocates in solicitors' firms would necessarily rise to those of their solicitor partners. Management consultants, for example, keep their costs down by economising on accommodation for staff who spend

much time out of the office and can conveniently take home work such as writing reports.

5.12 As regards the empirical evidence of demand for the combined conduct of litigation and advocacy, there are two pointers which should be taken into account.

5.13 First, the "one-stop" service is already available in the lower courts. Sometimes it is used, as when solicitors appear in court, and other times it is not, as when advocates are briefed. This suggests that there is likely to be some demand from clients for choice regarding higher court work. The move to allow the combined service to be extended to the higher courts through extended rights of audience for solicitors is a further pointer in this direction.

5.14 The second pointer lies in the views expressed during the consultation exercise, and in the results of the Strathclyde survey. A quarter of the solicitors interviewed thought they were likely to become partners with advocates (if permitted), half thought it unlikely, and the majority of the balance said they would wait and see. Most of the advantages identified in advocate/advocate partnerships (see paragraphs 4.1 to 4.6) would also apply to advocate/solicitor partnerships. In addition, clients and some solicitors said they would look to combined conduct of litigation and advocacy for improved service in several respects: ease of communication and briefing, greater certainty and continuity of representation, cases prepared better, and less manpower required. These factors were seen as helping to reduce costs. With scarcely an exception, advocates did not foresee that their services could be offered more cost-effectively through partnerships with solicitors, but more than half the advocates interviewed feared that independent advocates would lose business to advocates in partnership with solicitors, suggesting that they thought clients would see other benefits in such relationships.

5.15 The objections to advocate/solicitor partnerships bear some similarities to the objections to advocate/advocate partnerships. In so far as an advocate/solicitor partnership might gather together several advocates, the objection noted in paragraphs 4.8 and 4.9 will apply. Even if only one or two advocates were in partnership with a firm of solicitors, however, there may be certain drawbacks which have competition implications. There are three problems which need to be addressed.

5.16 The first is a variant of the **tying-in** problem which is often a matter of concern when a mix of services is offered. In this case the worry is that a firm of solicitors with an in-house advocate will brief that advocate even though another advocate (independent or in another firm of solicitors) would be better qualified for the task. This is a particularly difficult sort of tying-in problem, however, since the client will rarely be in a position to judge which advocate is the most appropriate - he would normally rely on the solicitor's judgment. This is not a new difficulty - the same sort of problem could arise now when a firm of solicitors must choose between handling advocacy in the lower courts itself or briefing an advocate. The issue is arguably of a different order when advocacy in the

higher courts is called for, but it seems likely that the problem could be regulated by appropriate rules of conduct adopted by the LSS, the Faculty or indeed both. Moreover, clients would still also have the choice between firms of solicitors without advocates and those with in-house advocates. Any remaining concern by clients that they would not receive the best service if they used advocate/solicitor partnerships is bound, however, to diminish the demand for services provided by such partnerships.

5.17 The second problem is similar to the one referred to as the **conflicts of interest** issue in my report on the LSS rules. The danger is that preferred advocates may not be available to be briefed because their partnerships are acting, or have acted in the past, for another party to the case. How much of a problem this is would depend on the size of any advocate/solicitor partnerships which arise and how far they concentrate work requiring particular specialisms or experience. I believe that this would not be a serious problem, since a solicitor/advocate partnership which grew so large and built up a such a dominant position in a particular field or fields that business had to be turned away would find itself losing not only clients but also partners. It would send clear signals that there was unmet demand in the relevant markets.

5.18 The third problem concerns the **availability** of advocates to be briefed by solicitors. If the pool of advocates who are independent or at least freely obtainable on a referral basis were to shrink substantially, that could be a matter of considerable concern. Any such shrinkage would represent a reduction in competition and in the choice of advocate open to clients.

5.19 There are ways in which this threat can be mitigated. All things being equal, if there is a strong demand for advocates outside solicitors' firms then one would expect a certain number to remain available. Moreover, if it became apparent that this was at risk, there are ways in which such concerns could be addressed by regulation. For instance, it would be consistent with the philosophy of a tying-in rule that advocates in an advocate/solicitor partnership should be available to be briefed by other firms of solicitors, subject to there being no conflict of interest. Nonetheless, I would expect there to remain substantial worries on the part of solicitors and their clients even if such a rule were introduced. There would still be a possibility, for instance, that clients opting for the full service of litigation and advocacy within the advocate/solicitor partnership would have first call on the advocate's time. Also, it is likely that solicitors briefing such advocates would be reluctant to risk losing the client to the firm they approached. These problems are not necessarily insuperable objections to advocate/solicitor partnerships. Partnerships which established a reputation for not poaching or discriminating against other firm's clients would be more likely to attract briefs than those which did not, and advocates would still have the option of practising independently. They do, however, suggest that the growth of advocate/solicitor partnerships is likely to lead to some reduction in competition and this effect will counterbalance the pro-competitive effect described earlier.

5.20 The responses to our consultation exercise and the Strathclyde surveys show that advocates, solicitors and many clients were strongly in favour of advocates remaining independent. They feared that choice and competition would decrease if partnerships were allowed, because partners could not act in cases where another partner was engaged and because of fears that advocates would join expensive firms of solicitors.

5.21 Taking all these factors into account, my view on the competition effects of prohibiting advocate/solicitor partnerships is that they involve a restriction and distortion in competition, in that as matters stand they prevent clients obtaining a combined conduct of litigation and advocacy service. On the other hand, the growth of advocate/solicitor partnerships is likely to lead to a reduction in competition and in the choice of advocates open to clients through the shrinkage of the pool of independent advocates currently available. Certainly there is insufficient evidence for me to conclude that the prohibition of advocate/solicitor partnerships amounts to a significant restriction or distortion in competition.

Advocate MDPs

5.22 The arguments for and against advocates being able to practise in partnership with persons other than advocates or solicitors are in many respects the same as those relating to solicitors forming MDPs. For instance, one would expect advantages of innovation and specialisation (see paragraphs 5.4 and 5.5) in such MDPs, as well as benefits of economies of scope and greater convenience. To the extent that advocate MDPs include other advocates or include solicitors, the considerations discussed in Chapters 4 and paragraphs 5.9 to 5.14 will also be relevant.

5.23 I do not believe it will be necessary to consider these arguments in detail, however, since I see no strong advantage to most clients in the services of an advocate being offered alongside any of the non-legal services which have been mentioned in the context of MDPs. Advocacy in the higher courts is something which most clients will need on a case by case basis and very infrequently. All of the arguments for MDPs rest on the assumption that there is some form of synergy between the various services the MDP will offer. Frankly, I do not see much synergy between the work of advocates and the various services which have been mentioned as attractive to MDPs.

5.24 The responses from the consultation exercise and the work undertaken by Strathclyde bear this out. Although 20% of accountants and 34% of surveyors interviewed said that they considered their business compatible with that of advocates (compared with 60% of solicitors), there was no discernible interest, either on the part of clients or service suppliers, in advocates forming partnerships which extended beyond other advocates or solicitors. Nor do any of the advantages which some saw in advocate/advocate partnerships and advocate/solicitor partnerships seem to be relevant to activities other than those of litigation or advocacy.

5.25 Accordingly, while in principle I think it has to be accepted that the effect of the proposed rule in prohibiting the formation of MDPs including advocates represents a restriction in competition, I do not believe it can be said that the effect is significant, since there is no reason to suppose that competition in the supply of advocacy services or any other services would be significantly enhanced if MDPs were permitted. In any case there is likely to be a counterbalancing reduction in competition through shrinkage of the pool of independent advocates currently available.

6 CONCLUSIONS AND RECOMMENDATIONS

6.1 In Chapters 4 and 5 I have considered the competition arguments for and against advocates forming legal relationships with other advocates, or with persons other than advocates, taking the three separate cases of legal relationships between advocates (advocate/advocate partnerships), legal relationships between advocates and solicitors (advocate/solicitor partnerships), and legal relationships between advocates and persons who are neither advocates nor solicitors (advocate MDPs).

6.2 In all three cases, the rule proposed by the Faculty will have the effect of restricting the way in which advocates can offer their services in the relevant markets. Therefore, the rule is, in principle, likely to represent a restriction in competition in those markets and the markets in which potential partners of advocates might operate. However, that effect is likely to be counterbalanced to some extent by a reduction in competition and in the choice of advocate currently available.

6.3 Section 40(2) requires me to consider whether the rule would have, or be likely to have, the effect of restricting, distorting or preventing competition to any significant extent.

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 judgment easier to form in some cases than in others. For example I see very little scope for, or demand for the services of, advocate MDPs 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 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, as recorded in paragraph 5.21, I have concluded that in this case also a significant effect on competition has not been established.

6.6 In submitting these conclusions, however, I am conscious that section 40(3) 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 findings, made this appropriate. This is the course I have followed in my separate report on the LSS rules. 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, currently being considered by the Lord President, that Scottish solicitors should be granted rights of audience in the Court of Session and the other higher courts. That proposal has yet to be submitted in its final form for competition scrutiny and it would not be right to discuss it at this stage. However, 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 the 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.

APPENDIX 2

MANCHESTER
1824

The University
of Manchester

Institute for Law,
Economy
and
Global Governance
School of Law

The Economic Organisation of the Faculty of Advocates

Professor Frank H Stephen

and

Dr Angela L Melville

February 2008

Introduction

This Report summarises the results of an independent research project on the economic position of the Faculty of Advocates commissioned from the School of Law, The University of Manchester. The research was commissioned by the Dean and Faculty Officers to assist the Faculty in evaluating any proposed legislation on the organisation and regulation of legal services in Scotland following on from the *Report of the Research Working Group on the Legal Services Market in Scotland* (RWG) and in the light of the significant changes in the regulation and organisation of legal services in England & Wales contained in the Legal Services Bill then before the UK Parliament.

The research was carried out by Professor Frank H Stephen, Professor of Regulation, and Dr Angela L Melville, Lecturer, School of Law, University of Manchester. The analysis and conclusions reached are those of the research team. They have been arrived at independently of the Faculty and its Officers who are not bound by them. Under the contract for this research the researchers will be free to publish the research in due course.

The researchers are grateful to the Faculty Officers for providing the funding for this research and to the Officers and members of the Faculty and Advocates' Clerks and staff of Faculty Services who agreed to be interviewed on a confidential basis.

Purpose of the Research

This research is designed to provide an economic analysis of the position of the Faculty in the market for legal services in Scotland and, in particular, whether the Faculty's rule against partnerships has an anti-competitive effect in that it restricts the business structures through which legal services may be provided. This restriction, along with others, was the subject of a 'super complaint' by *Which?* to the Office of Fair Trading under Section 11 of the Enterprise Act 2002. It was also subject to analysis by the Research Working Group on the Legal Service Market in Scotland (RWG, 2006, paragraphs 8.1 – 8.24). A preliminary economic analysis by one of the present authors (Frank H Stephen) is contained within the RWG's Report. This emphasised the importance of economies of scale, economies of scope, economies of specialisation and the benefits of risk spreading in evaluating the choice of business structure in which a legal professional might choose to practise were that choice not restricted by professional rules. In considering the putative choices open to an advocate in such circumstances it was argued that account had to be taken of the benefits in these respects which arose from the Faculty Library and from the operation of Faculty Services Ltd. The potential benefits from risk spreading and economies of scope arising from partnership would then have to be considered as would the benefits of specialisation (both in advocacy and in area of law) which might be available to a sole practitioner advocate. It was concluded that the magnitude of this trade-off was purely speculative in the absence of empirical evidence. It was further suggested that this might be an area where empirical research was needed (para. 8.18). The present project undertakes such research.

It was not envisaged that the present project would be able to identify precise quantitative magnitudes for each of the effects mentioned above, given the resources and time available for this project. It has been possible, however, to indicate the extent to which factors such as specialisation apply to the work of individual advocates of different levels of seniority. It has also been possible to explore the factors which led individuals to choose the bar as a career rather than qualifying as a solicitor. Of particular significance in this respect are the motivations of those advocates who have practised as solicitors prior to being called to the bar. These individuals are also in a position to indicate the costs which they incurred in

making this change. In addition financial information was provided by Faculty Services Ltd on the costs to advocates of providing the services of advocates' clerks etc.

The collation of this information, including the experiences of members of the Faculty, provides a firmer basis than has been available to independent researchers for evaluating the relative magnitude of the factors outlined above which would impact on the optimal choice of practise organisation for advocates.

Research Method

The primary means of gathering the information has been by interview. Most of these were carried out at Parliament House. However, it was necessary to conduct some interviews by telephone. In total 28 interviews were carried out. These were not a random sample but structured in order to get an appropriate mix of Seniors, recent intrants, gender and age mixes and an appropriate number of advocates who had practised as solicitors before being called to the bar. The selection of interviewees was made by the research team and appointments arranged through the appropriate clerk. The sample of interviewees included 8 silks and 20 Juniors (including 8 who had been called since 2000). Nine interviewees were females and 19 male. Fourteen had previously practised as solicitors. In addition one Faculty Office Bearer was formally interviewed while others had brief discussions with one of the research team[1]. The Chief Executive of Faculty Services Ltd and 7 clerks were interviewed. One of the researchers also observed clerks carrying out their work as well as members of the Faculty in consultation with each other in Parliament House and the Library.

Members of the Faculty were informed by the Dean that the research was being carried out at the request of the Faculty Office Bearers. The interviews were semi-structured in format with the interviewer using topic guides (one for advocates and one for Clerks). The topic guides are included in Appendix I. With the interviewee's consent, each interview was recorded for later transcription.

[1] It proved difficult to arrange more extensive interviews with more office bearers at the time the field work was being conducted.

Summary of Main Findings

Growth of Size of Faculty

- Membership of the Faculty of Advocates has grown significantly over the last 35 years. In 2006 it was 3.8 times that of 1973. The number of solicitors in Scotland holding practising certificates in 2006 was 2.8 times that in 1973.

- The ratio of solicitors in Scotland to advocates has fallen over this period from 30:1 to 21.5:1

- The relative increase in the number of advocates since 1973 was higher than that of the Bars of England & Wales and Ireland until 2003. However, by 2006 the relative growth of the Bar in Ireland significantly exceeded that in Scotland and in England & Wales.

Determinants of Practice Organisation

- A legal practitioner's free choice of practice organisation will be influenced by economies of scale, economies of specialisation, risk spreading and economies of scope

Specialisation

- Advocates may benefit from economies of specialisation in court room advocacy and in area of law

- Areas of special interest indicated by advocates on their stable web pages suggest that about one-third of advocates have no area of specialisation. This is likely to be an underestimate of the degree of specialisation.

- Those indicating areas of special interest often indicate multiple areas. More than one-third of those indicating specialist areas identify five or more such areas.

- The most frequently cited areas of specialisation are criminal trials, commercial, professional negligence and personal injury. Each was named by just over 20% of advocates

- Those indicating criminal trials as a special interest indicate a smaller number of areas than those indicating commercial matters as a special interest

- Interviews with advocates suggest that whilst some have specialised practices there is a fear of being pigeon-holed

- A number of interviewees suggested that the size of the jurisdiction did not permit a high degree of specialisation

Risk Spreading

- Advocates spread risks by avoiding being pigeon-holed and maintaining a reputation for reliability

- Vast majority of Intrants are now coming from the ranks of solicitors and thus are voluntarily giving up the risk sharing benefits of partnership

Economies of Scale

- Many of the benefits of cost sharing and economies of scale of partnership are available to advocates through Faculty Services Ltd and through the other collective facilities of the Faculty

Redistributional Effects of Income-based Subscriptions

- The method of paying for the clerking and billing services of FSL provides a small element of risk sharing as it is based on a percentage of income rather than the actual costs of clerking and billing. Thus those advocates working in areas with lower fee generating prospects bear a lower share of costs and those with lower amounts of work bear lower costs

- Data on the distribution of fee income across the whole Faculty suggests that this effect may be quite important

- Comparison of the average fee income and number of fee notes across stables also suggests a small degree of net income smoothing

Effect on Costs of Advocates' Partnerships

- A significant number of small partnerships between advocates outside FSL could have the effect of increasing the costs of those who remain even if they increased the net incomes of those who formed the partnerships. This would depend on the minimum efficient scale of FSL (i.e. the number of transactions necessary to reach the minimum average cost).

Transfer between Branches of the Legal Profession in Scotland

- The vast majority of Intrants to the bar in Scotland in recent years have previously practised as Solicitors in Scotland. This suggests that Intrants view the increased risks associated with independent practise at the bar to be compensated by benefits (such as increased specialisation and autonomy).
- The educational requirements for acceptance as a 'devil' are almost identical to those for a traineeship as a solicitor. This reduces the cost of transfer between the two branches of the legal profession in Scotland as compared to transfer between the two branches in England & Wales.
- The Faculty's prohibition on 'mixed doubles' acts as a barrier to the choice between practise as an advocate and practise as a solicitor-advocate being based solely on individual preferences on the balance between risk, specialisation and autonomy. Were this prohibition to be removed the prohibition on partnership would not be a significant impediment to competition between the branches of the legal profession in Scotland.

Economic Organisation of Advocates

Advocates in Scotland provide court-based advocacy in the higher courts and opinions on complex legal matters outside the courts. These services are provided by advocates as self-employed sole practitioners. They are precluded from forming partnerships with each other or with any other person in respect of their professional practice as an advocate by paragraph 1.2.4 of *The Guide to Professional Conduct of an Advocate.* The Office of Fair Trading[2] (OFT) and others[3] have argued that this prohibition on partnerships is detrimental to competition in legal services and to the public interest. It is seen to restrict an advocate's choice over the organisational form under which these services are provided. Before turning to the analysis of this restriction on the business organisation of advocates we first describe some trends in the number of advocates over the last thirty or so years in order to place the subsequent analysis in context.

Number and growth of advocates

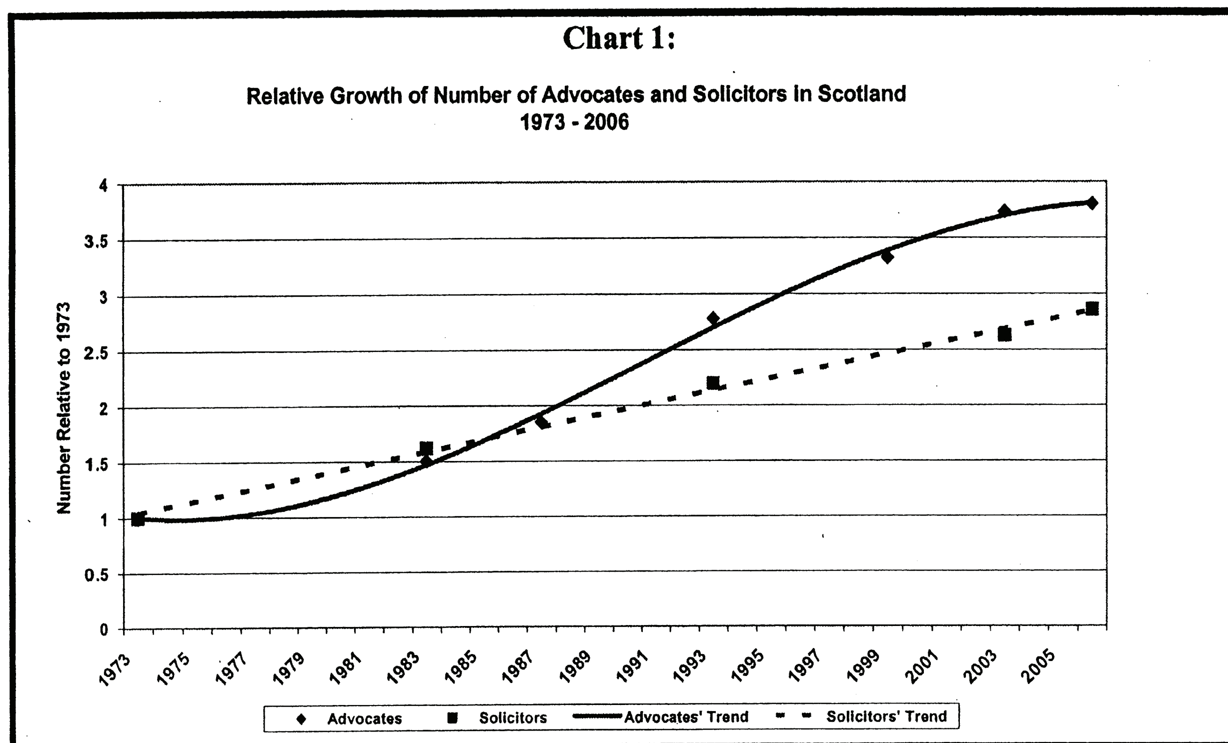
There were some 460 practising member of the Faculty of Advocates in 2006. This compares with almost 10,000 solicitors in Scotland holding practising certificates. Table 1 shows the number of practitioners in the two professions at various times over the last thirty years. The number of advocates has grown from 121 in 1973 while the number of solicitors

Table 1:
Number of Advocates and Solicitors in Practice in Scotland

	1973	1983	1993	2003	2006
Advocates	121	182	336	452	460
Solicitors	3472	5620	7629	9120	9919

has grown from 3,472. Chart 1 illustrates the relative growth of the two branches of the legal profession in Scotland over the three intervening decades relative to the number in 1973. As the chart shows the number of advocates has grown more rapidly than the number of solicitors from the 1980's. The number of advocates in 2006 was 3.8 times that in 1973 while the number of solicitors in Scotland had only risen by just over 2.8 fold.

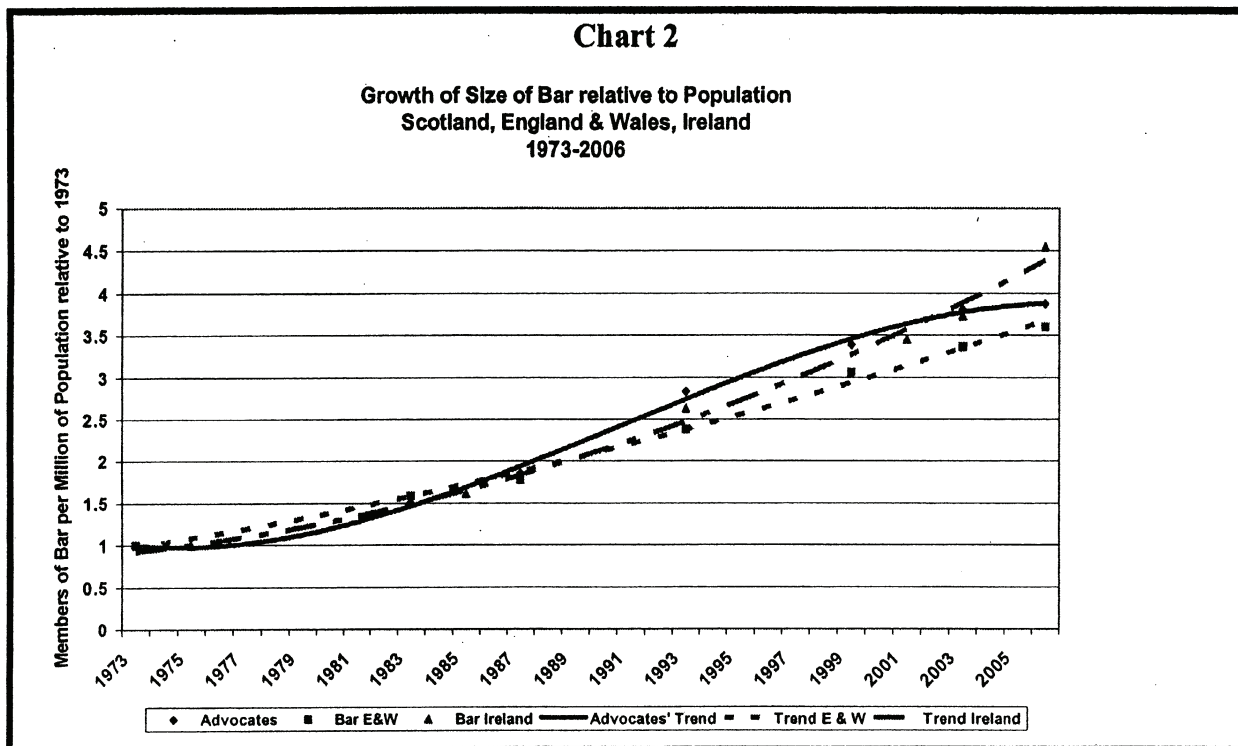
[2] Report of Research Working Group on Legal Services in Scotland (2006), p. 88
[3] e.g. *Which?* in its 'super complaint'.



The trend growth in the number of solicitors has been a steady 5.8% of the number in 1973 per annum. The trend growth in the number of advocates has been less smooth as shown by the non-linear trend line in Chart 1. The relative growth in the number of advocates was much greater between 1983 and 2003 (at over 11% of the number in 1973) than that for solicitors. Growth in the number of advocates has slowed down since 2003.

The growth in the number of advocates between 1973 and 2006 is compared to that of the Bar in England & Wales and in Ireland in Chart 2[4]. Given the differences in the populations of the three jurisdictions what is compared here is the size of the bar relative to population (i.e. members of the bar per million of population). As the chart illustrates over the period the relative growth of the Scottish Bar has been greater than that of England & Wales (8.7% of the 1973 figure per annum as compared to 7.9%). However, the growth of the bar in the Republic of Ireland was greater (11.5%), once adjustment is made for changes in population. The Scottish Bar's relative growth to 2003 was in fact greater than that for Ireland (9.4% of the 1973 figure per annum as compared to 8.8%). However, the Irish Bar's growth has been increasing over the period studied. The absolute size of the Irish Bar rose between 2003 and 2006 by 22%. The comparable increase for Scotland was 1.8% and for England & Wales 7%.

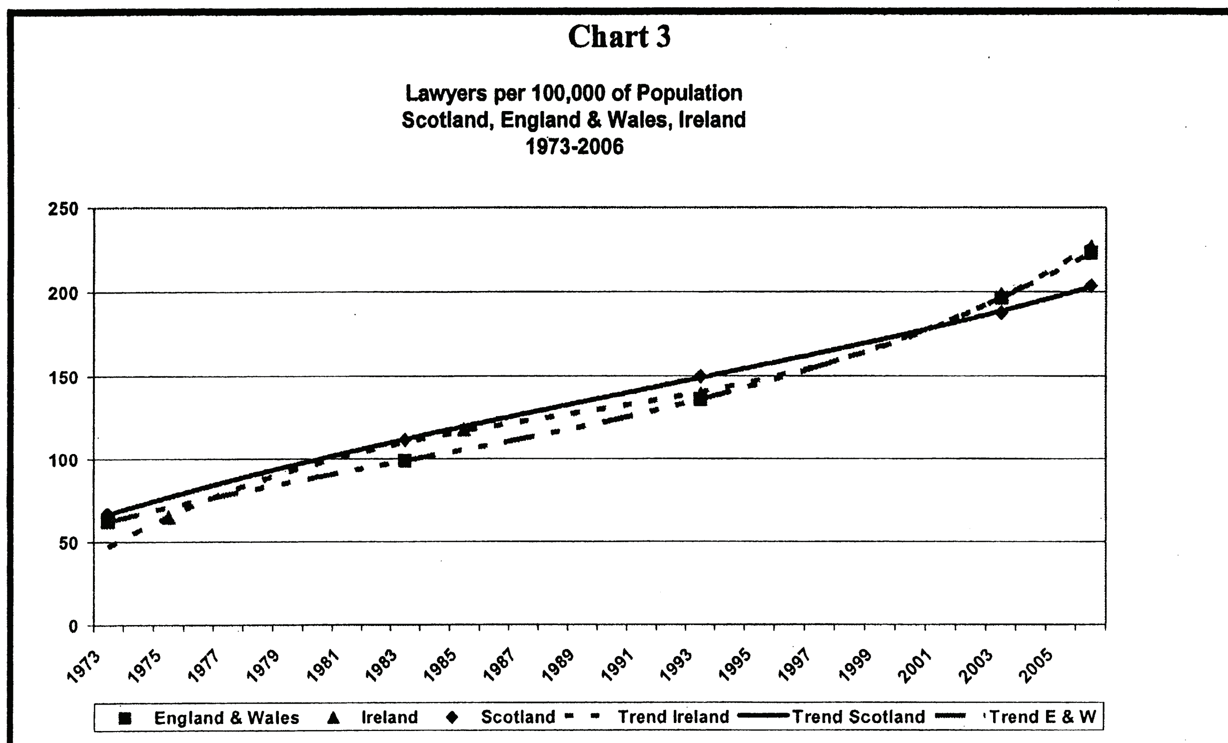
[4] The relevant populations are taken as at the preceding census i.e. 1971, 1981, 1991 and 2001. The number of barristers in Ireland for the earlier years was extracted from INDECON, *INDECON's Assessment of Restrictions in the Supply of Professional Services*, Report prepared for the Competition Authority, Dublin, 2003 whilst for more recent years the data was supplied by Bar Council of Ireland. The base year for Ireland is 1975 rather than 1973. The figure for barristers in England & Wales has been obtained from the General Council of the Bar. Scottish figures have been supplied by the Faculty.



It should be noted that the number of barristers relative to population in England & Wales and in the Republic of Ireland is higher than the number of advocates relative to population in Scotland. This may in part be attributable to historic differences in the rights of audience of the different branches of the legal profession in the different jurisdictions. Solicitors in Scotland have traditionally had more extensive rights of audience in the courts than their counterparts in England & Wales. On the other hand, solicitors in Ireland have formally had the same rights of audience as barristers since 1971 but the ratio of barristers to solicitors has been about 1:4.5 over this period. However, the INDECON (2003) report for the Irish Competition Authority states (at paragraph 5.6) that few solicitors plead in the High Court or the Supreme Court.

The ratio of barristers to solicitors in England & Wales has fluctuated around 1:8 over the last 30 years. In 2006 it was almost exactly the same as in 1973 (8.7) having risen since 1993 (7.9). The ratio of advocates to solicitors in Scotland over the same period has fallen from around 1:30 in 1983 to 1:21.5 in 2006. That in Ireland has fallen from 1:5.1 to 1:4.3 between 1973 and 2006.

Notwithstanding the differences across the three jurisdictions in the sizes of the two branches of the legal profession, the number of lawyers (solicitors and barristers/advocates) in practice relative to population was broadly the same in all three jurisdictions in 2003 as illustrated in Chart 3. From 1973 to 2003 the number of lawyers relative to population had been higher in Scotland than in England & Wales and for most of the period had been higher than in Ireland. The number of lawyers in Scotland per 100,000 of population had risen to just over 200 by 2006, whilst that in England & Wales had continued to rise to 223 and that in Ireland to 226.



The rise in the legal profession in Scotland has been much smoother than that in either England & Wales or in Ireland. Thus although the numbers in the other two jurisdictions have grown more rapidly over the last three years than in Scotland, past experience suggests that there is likely to be a slow down in future in the other two jurisdictions. The growth of the number of lawyers in Scotland is, of course, dominated by the growth in the number of solicitors since the bar is less than 5% of the number of lawyers. As Table 1 and Chart 1 illustrate, the solicitors' profession has grown more slowly than the bar since 1983.

The rise in the number of advocates has been accompanied by a rise in the fee income generated by members of the Faculty. Data supplied to the researchers by FSL shows the growth in the Fees collected over the last decade. This is summarised in Table 2.

Table 2

YEAR	NO. OF SUBSCRIBERS	FSL COMMISSION	FEES COLLECTED*	FEES COLLECTED PER SUBSCRIBER
1996/97	376	8.00%	£34,378,847	£91,433
1997/98	380	8.00%	£36,978,667	£97,312
2004/05	461	7.50%	£56,130,102	£121,757
2005/06	460	7.50%	£55,921,979	£117,570
2006/07	460	7.50%	£56,800,000	£123,478

Note: * In 2006 prices

Not only has the real value of fees collected by FSL increased between the mid 1990s and recent years but the average value of fees per subscriber has risen. The commission charged by FSL has fallen between the two decades.

Factors influencing choice of business organisation

The literature of economics has analysed the factors which influence the structure of business and other organisations when their owners are free from restrictions on their choice. The insights from this literature are used in this research to identify those factors which would be likely to influence the choice of organisation which advocates would make were they not restricted by the Faculty through *The Guide to Professional Conduct of an Advocate*. An outline of such an analysis was provided to the Research Working Group on the Legal Service Market in Scotland by Professor Frank H Stephen and incorporated in the Report of the Group. In the present context the issue crystallises as to the choice between sole practise and practise in a multi-lawyer organisation such as a partnership. The factors which would be likely to influence this choice include whether economies of scale, economies of scope and economies of specialisation may be captured by a multi-lawyer form of organisation together with a capacity to spread risks.

In his submission to the RSWG on this matter Frank Stephen argued that:

> Every introductory textbook in economics lists sources of *economies of scale*. Principal among these are those emanating from the more efficient use of capital and specialisation of labour. The former of these is doubtful in the case of legal services, at least where it is physical capital that is involved. The physical capital requirements of legal services are quite small and are likely to involve limited economies of scale. Access to appropriate reference works and case reports may be the exception here. Legal services are essentially human (rather than physical) capital intensive.
>
> Provision of legal services through a group practice organisational form allows *specialisation* of lawyers in particular areas of law, with the consequence of lowering the cost of providing services. Multi-lawyer firms will also benefit from economies of scale in the use of non-lawyer support staff who themselves may also become more specialised (and thus efficient). Practices of lawyers with different specialties have the further benefit of *risk spreading*. Different specialisations may face different business cycles and thus fluctuations in specialist income may be smoothed across the group of specialists. The absence of risk spreading may lead to a higher fee being charged for each case. Furthermore, *economies of scope* may exist when a client has a range of legal service needs which can be serviced by specialists within the firm or when a legal problem has dimensions involving a range of specialisms. Economies of scope mean that the services required by an individual client may be provided at a lower cost in a single firm than by separate specialist firms. Economies of scope are available to the sole practitioner but in the multi-lawyer firm they are combined with economies of specialisation. The more complex the issues the more likely that specialists will dominate because the benefits of economies of specialisation outweigh the economies of scope to the sole practitioner. Lower costs associated with economies of scale, economies of scope and the benefits of risk sharing in the multi-lawyer firm are likely to lead to multi-lawyer firms dominating where they are permitted and there is unimpeded competition between organisational forms.

The present research is a first attempt to assess whether this argument is valid with respect to advocacy services in Scotland. This assessment is achieved by an examination of the current practices of advocates in Scotland who while independent practitioners have the opportunity, through access to the Faculty Library and by subscribing to Faculty Services Limited, to obtain some of the advantages of multi-lawyer practice while retaining the incentive effects of sole practice. In assessing these factors we have drawn on publicly available information on advocates' practices available from the Faculty's web site, financial data on the aggregate incomes of stables of advocates provided to us by Faculty Services Limited, the incomes

derived by advocates with criminal defence practices published by the Scottish Legal Aid Board and interviews with individual members of the Faculty, their Clerks and Faculty Officers.

(1) Specialisation of Advocates

Advocates may benefit from specialisation in two ways: in court room advocacy; in specific areas of the law. It is reasonable to suppose that successful lawyers whose practice is predominately in court advocacy will acquire superior skills in that area over those who spend only a small part of their practise carrying out such work. Interviews with advocates suggest that they are acutely aware that the development of their practice depends on how solicitors assess their performance. Furthermore many of our interviewees who had previously practised as solicitors commented that it was the increased opportunity to appear in court which attracted them to the bar. The implication being that even as a litigation solicitor there was insufficient opportunity to practise advocacy skills. In a partnership of advocates there would be less time available to the extent that advocate partners devoted time to managing the partnership. The greater the number of partners the more likely this management function could be carried out by employees of the partnership and the more time advocates would be able to devote to advocacy but see the discussion of economies of scale below.

Skill levels and thus economies are also likely to be improved through specialisation in area of law. However, the small size of the jurisdiction imposes a limit on the degree of specialisation. Information on the degree of specialisation of advocates was obtained from the web pages maintained by the stables. These indicate areas of 'special interest' to individual advocates. About one third of advocates do not indicate any area of special interest[5]. The remaining two thirds of advocates indicate a wide range of 'special interests' and many indicate a number of them.[6] The distribution of number of areas of specialisation are summarised in Chart 4.

Of those advocates listing areas of special interest more than a third indicated five or more areas. The most frequently cited areas of special interest each draw just over 20% of all advocates and include criminal trials, commercial, professional negligence and personal injury. The split between criminal trials and civil matters is not totally complete but those indicating criminal trials as an area of special interest, on the whole, have fewer other areas of interest. More than 50% of criminal trial specialists indicate three or fewer areas of special interest. Indeed, 40% of criminal trial specialists cite criminal appeals as a second area of special interest and around one third cite fatal accident inquiries. On the other hand, of those indicating commercial law as an area of special interest only 26% had three or fewer areas of special interest. On the whole it would appear that the criminal bar is relatively more specialised than the civil bar.

[5] However, it should be noted that among those not listing any area of special interest are around half of the 10 highest earners from criminal legal aid who might be regarded as criminal trial specialists.
[6] One advocate lists twelve areas of special interest.

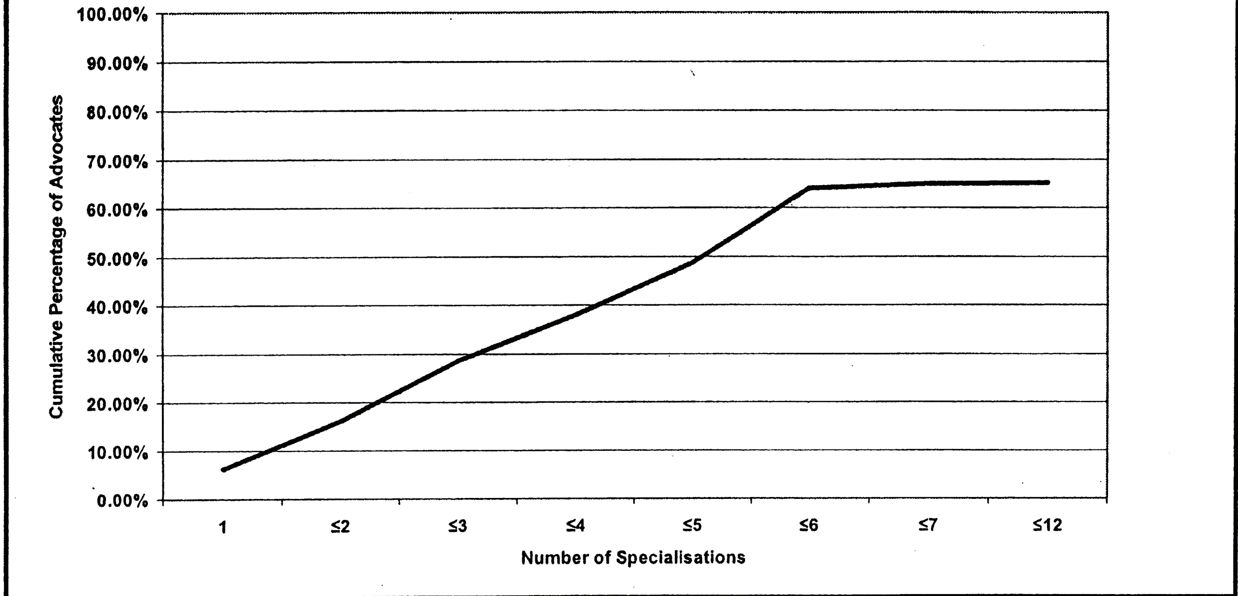
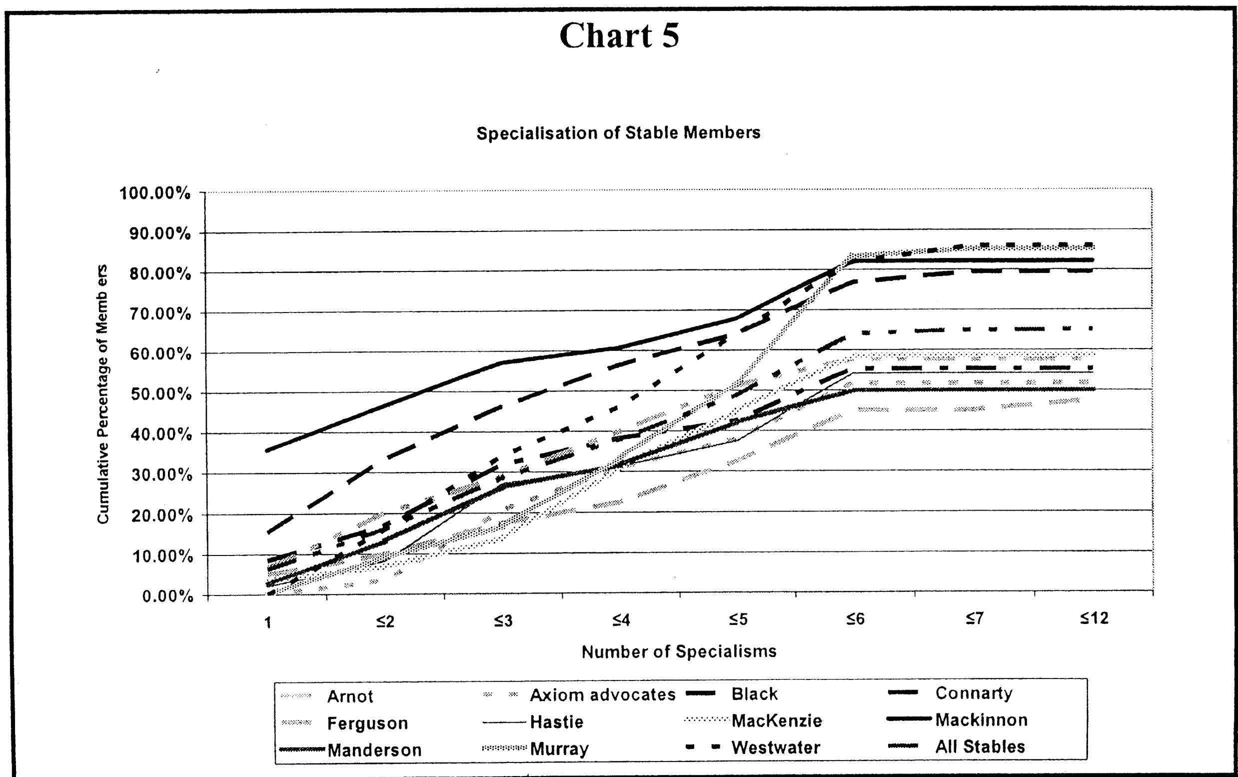


Chart 5 summarises the degree of specialisation across stables in terms of percentage of members of each stable with different numbers of areas of special interest. The two most specialised stables on this evaluation are predominately criminal stables. In each of these more than 50% of the members have three or fewer areas of special interest.



The listing of interests of members of the Faculty, of course, does not reveal the relative amount of time spent on each area of the law by each advocate. However, the interviews with members of the Faculty and Clerks provide further insight on this matter. A theme running through a number of the interviews was the need to avoid being 'pigeon-holed'. Whilst this was in some views related to a desire to avoid largely routine work it was more often seen as necessary in order to maintain a steady flow of work (i.e. risk spreading) from a range of solicitors. As one interviewee stated:

> I am not very specialised. The Scottish bar as a whole is not very specialised. There are areas that I don't do, criminal law, family, planning tribunals. I won't do these but I will cover the remaining areas of civil litigation. There are only a handful of very specialised advocates in Scotland. The limits on specialisation are due to: 1) it is a small centre. There is not enough specialised work to keep you busy, 2) it is a small bar, and there are demands on you to do all sorts of work. Solicitors want advocates that they know. They want a limited number of advocates, who they know and trust. Contacts are important.

Another interviewee who did mainly civil litigation also argued that less specialisation arose from the limited size of the market. He/she did not wish to be pigeon-holed and did some legally-aided family law work which was remunerative. There was also the need to ensure that solicitors who made direct approaches were kept happy even if a particular case was not attractive because the solicitor could be a source of future work. One interviewee simply stated 'In Scotland, advocates tend to be more generalists.' This was also emphasised by one of the Clerks who was interviewed.

The previous experience of advocates as solicitors was seen by some interviewees as a key determinant of specialisation. Some interviewees used their own career to exemplify this. Others made more general observations:

> People's work comes from people they know. So from the people of my year, if I look around, I see, for example, one person who does very little other than family work, as she specialised in that when she was a solicitor for a couple of years after qualifying as a solicitor. And somebody else, who has decades, a couple decades, of experience as a commercial solicitor, and does very little but commercial work. And someone who has been a solicitor for 10 or 15 years in crime, and only does crime. So if one has acquired a specialism already, one will be known in that field, and so one will start a specialised practice.

Others argued that specialisation should be seen as in very broad areas, often referred to as niches:

> I mainly do commercial litigation, within that, I do property litigation, commercial property litigation. It isn't really a specialisation, more one niche among several. You build up a body of knowledge. I do partnership litigation, which is also a niche field.

Another interviewee also talked in similar terms:

> I am quite specialised. I only do personal injury and professional negligence work. They are broad fields and so technically I am not that specialised, but I meant broadly. If I was asked to do a criminal case I would probably say that it was outside my expertise....... I think about expertise in blocks, like matrimonial work, commercial, personal injury. I have done many accident cases, accident claims don't cause me any problems. Mostly I do pursuers medical negligence. I find it difficult and challenging work. We all have a rough idea of what type of work people do, but we have our own areas, expertise in which we specialise.

The interviews on the whole do not suggest a high degree of specialisation by area of law but rather more broad groups of areas or niches. To some extent it is specialisation in advocacy that dominates. However, specialisation by area of law would appear to be more likely where an advocate has come to the bar after a significant period of practise as a solicitor.

(2) Risk Spreading

Running counter to the benefits of specialisation is the need for many advocates to maintain a steady income when demand in specialist areas may fluctuate over time. Not being specialised spreads risk. As reported above some advocates talked about not being pigeon-holed and others about the Bar in Scotland being too small for a high degree of specialisation. Clerks indicate that much work which came into their stables was for named advocates but some work is 'blank work' and is usually

> ....just for small appearances, something that might just come to the court in the morning, something done by orders, anyone could do it, but it has to be done by an advocate. New calls have access to this type of work which they can cut their teeth on. You also need to make sure that they have contacts with agents. If they have devilled with someone, then the agent might have got to know them and might ask for them. Some will already have a reputation as an experienced solicitor.

Both clerks and advocates stressed the sense of insecurity felt by advocates if their workload became light. All advocates, regardless of experience, said that they get nervous when the work is light for a month.

> You get very, very, very nervous when the diary starts to look empty. When they start to not get as many instructions as a few months ago. But it is a feast and famine sort of job. Any of them who have been here for any length of time knows that. One month you can be looking at a diary which is virtually empty, then next month you have so much work you don't know what to do with it.

When asked if clerks helped advocates during times of light workloads, they replied that they would pass-on work to an advocate who had free time in their diary, but only if that advocate "could do the work". Some clerks admitted that they are also mindful that they do not recommend an advocate who will potentially damage the clerk's reputation. The clerk's reputation is determined by whether the solicitor was satisfied with the service provided by an advocate that they recommended, and so they are very reluctant to recommend an "unreliable" and "non-credible" advocate. Unreliable advocates were described as those that did not complete work on time. Also clerks were reluctant to recommend an advocate if they were unfamiliar with their work – ie a newly called advocate. They would pass-on some minor cases, but generally do not provide newly called advocates with much of a hand to develop their referral base. There has been a tradition among clerks to 'pass-on' work outside their stable. However, the recent moves towards devolution of stables is influencing attitudes of clerks:

> On the other side, if we don't have the expertise then we are always willing to refer them to another stable. We have always done that. But that is now changing. Some stables are not so keen to refer out, they are not as outward looking. They are starting to keep work within their stables. It is important to us that we are the first port of call, that they come to us first, and 90% of the work we keep within the stable, but after that we will refer out to another stable.

Spreading the risk of income fluctuation is seen to be largely in the hands of individual advocates themselves through keeping a general element to their practice. Partnerships between advocates would not necessarily solve this problem unless they occurred across broad areas of specialisation. The increasing tendency of stables to become specialised (broadly speaking) suggests that this is unlikely. Furthermore, within large law firms there is always a tension between partners with different income generating capacities on whether partnership income should be based on a seniority principle or according to income generation[7].

Whilst it is commonplace for those, such as the OFT, who support the introduction of partnerships among advocates to argue that partnership would allow greater risk spreading among advocates, not so much recognition is given to the fact that the overwhelming majority of Intrants to the Faculty in recent years have come from the ranks of the solicitors profession. Of the three most recent intakes 86% were on the solicitors roll.[8] These are frequently experienced solicitors, including partners, who are voluntarily foregoing the benefits of risk sharing to become advocates. The risk in becoming an advocate is somewhat mitigated by the reputation and contacts which the Intrant has built up as a solicitor. Indeed, of the 2007 intake only one out of seventeen Intrants was not on the solicitors' roll. Many of them, especially partners, have built up savings which sustain them through their period as a devil and in the early period of practise as an advocate. Interviews with advocates explored, *inter alia*, their motivation in coming to the Bar and their experience in trying to establish a practice.

A number of the interviewees who had been litigation solicitors suggested that they came to the bar in order to spend more time in court rather than 'managing litigation':

> I came to the bar because it was an opportunity to appear in court more often. I was increasingly managing litigation rather than appearing in court. It was all management and no law.

Another expressed the matter more forcefully:

> ...I finally made the decision in light of practical experience, when I was a litigating solicitor. It is easy to get seduced by the big firms, they offer you a big package, you can earn a lot, and then you have a mortgage, a family, it can be difficult to get out of that..... The problem with working in a large solicitor firm as a litigator, you become a manager. Most litigators cannot justify time away from their office, a whole day away, or a whole week, is not feasible. There is a tendency to push you towards taking a narrow range of case, which I didn't like. In Scotland, advocates tend to be more generalised. As a solicitor, there is a lack of control, even as a partner in a large practice. Solicitors, even partners, are glorified 'employees'.

This frustration with partnership in a solicitors' firm was repeated by others:

> I always thought that I would go to the bar at some point because of the independence of it. But when I sort of got into working and became a partner, the money was quite good, I felt that the income and the security was more important and that is what kept me there. But luckily in the last couple of years of being a partner........ I found that being in partnership

[7] The classic discussion of these issues can be found in R J Gilson and R H Mnookin, 'Sharing Among the Human Capitalists: An Economic Inquiry into Corporate Law Firms and How Partners Share Profits', *Stanford Law Review*, vol. 37, 1985, 313-392.

[8] Of the eight not on the solicitors' roll, three had been called to the Bar in England & Wales and one was an employed solicitor in England & Wales.

was, well, I will use the term restrictive, but not in the terms of restrictive practices. I mean that I did not have the freedom that I would have wanted. And by that I mean that internally there was a lot of differences of opinions. ... between the two offices. And actually, once I left the partnership, the two offices separated and became two different firms. ......I became frustrated with the fact, that although I was a partner (I was effectively running my own department) I was getting caught up in the politics of the two offices. And both had different approaches to things like marketing and fees and things like that, and whether or not legal aid was to be taken on. And that was another reason for going to the bar. About 50% of my workload was legal aid, and it was becoming less profitable and more intensive in terms of administration... both criminal and civil... The paperwork was becoming far too onerous for the level of remuneration. It wasn't actually so bad in criminal, it was civil that was the problem.

Another chose the bar because of frustration with the Procurator Fiscal Service:

Switched to the bar as didn't like the way in which Fiscal Service was losing its independence. It was in the early days, and now they have lost their independence with a vengeance...

The benefit of greater independence of the bar manifest itself in other ways:

I decided to go to the bar as essentially my kids had started school, and I thought about doing full-time work, and the fiscal service was appalling, it had got very bad. I wanted the independence of the bar. I wanted that distance from the client.

Similarly:

To be honest, it was because I had a baby and it was a very much more sensible working practice. I could take the whole summer off and take school holidays off. And okay, I'm not paid for that time, but time is really valuable if you have got kids, and I thought it would work out well. And it has in many ways worked out well with children.

Both the flexibility offered by the bar and the benefit of practicing as a solicitor before calling to the bar was highlighted by another interviewee:

I had wanted to go the bar post-qualifying, but I had young children so I decided to defer. I went to the bar because I didn't want to do just the easy work, like car accidents, accidents at work. I was bored with this stuff. You can do it in your sleep. I wanted to do something more difficult. It is good to do some easy work, but the more complicated work takes more time. I couldn't justify spending that amount of time on a case as a solicitor. I would not have been recovering my fees. At the bar, I can spend all day, I can make a decision to do that, even if I don't get paid, it is my decision, whereas with solicitors spending time on a case is a problem. Even the more experienced solicitors work as a team. The solicitors don't make money sitting in court. They make money from turning clients over. In more important cases, you can't have that mentality.

Another expressed this view quite simply:

At the time I felt like, I had always wanted to try at the bar. And the independence, and the ability to do more legal work, legal research perhaps rather than administrative work. ... It's quite a nice lifestyle in terms of independence...

Mixed views were expressed concerning the sacrifice of security for the more risky career of an advocate:

> Well, I think the overriding factor was that this was clearly where I wanted to be. The others were largely questions of affordability and therefore a case of how much I would have after selling my flat. And I worked out that I would have enough to keep me going for a number of years, one year as a solicitor and one year devilling, and then 6 or 12 months before any fee earnings starting coming through. I suppose I had a safety net because I was a [previous occupation] so I could have gone back to that if I had to drop out at any point.

Another said:

> It was a hard decision as I was a partner. I was established in a good firm. It wasn't difficult financially as I was an equity partner, so I got paid out. This provided me with 2 years income. So there was little pressure in that way.

One interviewee did not see the issue as a financial one:

> The financial decision isn't that difficult. There is that 9 month non-earning period, when you are devilling, but the banks are understanding, and by that stage of your career you'll have savings. The major disincentive is not financial, it is the uncertainty of it you'll make it. It is ironic considering the context, the bar is the ultimate free market, if you don't work you don't eat, there are no barriers to competition, we are all competitors. And so people don't make it.

Having an asset to sell also makes a move to the bar more of a possibility:

> To make the switch, I had saved money, which I could do as I had worked for so long. We sold the house in [...] and bought a smaller place here. And the money from the sale saw me through. I was lucky enough to get work right away. The criminal work started out slowly, but still it paid fairly quickly. I was living on savings, on capital.

Similarly, 'Well, I used to live in London, I moved up from there. I had a flat down there which I then sold.'

(3) Economies of Scale

Partnerships, and other multi-lawyer forms of practice, have the potential to generate benefits from the sharing of the costs of support staff, premises and equipment. Whilst, as pointed out above, legal services is not a physical capital intensive service there will undoubtedly be some economies of scale to be gained from the sharing of support staff etc. What is not clear is at what size these economies of scale are exhausted for advocacy services. Furthermore, as has been pointed out[9], it is wrong to compare the overheads of solicitors firms with those of barristers (or advocates) as they provide different services.

The OFT has on a number of occasions argued that group practice will bring economies of scale without providing any quantitative evidence as to their magnitude or at what size of partnership they might be exhausted. To the extent that such economies of scale are available to partnerships of advocates they are already available to advocates through the sharing of costs through Faculty Services Ltd and access to the Faculty Library and the Faculty's consultation facilities.

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[9] Stephen Davies, *The economic implications of partnership restrictions in the legal services sector and their possible removal*, paper prepared for the Lord Chancellor's Department, September 2005. Available at: http://www.dca.gov.uk/legalsys/lsreform.htm.

(4) Sharing of Costs in the Faculty

The basis on which subscribers pay for the services provided by Faculty Services Ltd and members of the Faculty pay for their membership constitutes a form of risk spreading. Faculty Services collects a commission from subscribers based on a percentage of the fees collected on behalf of the subscriber. Thus subscriptions from those advocates with low volumes of work will be lower than those with high volumes of work and subscriptions from advocates undertaking low fee work will be less than those undertaking high fee work. The wide variation on fee income across subscribers indicates a wide distribution of shares of the costs of operating FSL. This is illustrated in Table 3. In 2006/7 12% of subscribers had gross fee income of £250,000 or greater while 21% had gross fee income of £35,000 or less.

Table 3
Fee Income Distribution
(in current prices)

(in current prices)	UNDER £35,000		£35,000 - £99,999		£100,000-£249,999		OVER £250,000	
YEAR	NUMBER	%	NUMBER	%	NUMBER	%	NUMBER	%
1996/97	116	31%	183	49%	66	18%	11	3%
1997/98	110	29%	175	46%	83	22%	12	3%
2004/05	106	23%	144	31%	173	38%	38	8%
2005/06	105	23%	138	30%	176	38%	41	9%
2006/07	97	21%	137	30%	169	37%	57	12%

The variation in income of advocates is also illustrated by Table 4 which presents data on the fee income, number of fee notes and number of advocates for each of the multi-member stables for the most recent year. Average gross fee income per subscriber ranges from just below £71,200 to over £300,000. The number of fee notes per subscriber range from 47 to 157 and gross income per fee note from £663[10] to £2,095.

The two stables with the lowest income per subscriber are stables which comprise predominately criminal practitioners whilst that with the highest income per subscriber is a predominately commercial stable. It should be noted that within the two low earning stables there are a number of high earning members. The Scottish Legal Aid Board publishes annually the legal aid fees received by all advocates. The latest figures published by SLAB imply that the two or three highest earning advocates in these two stables earn around 22% of each stable's income. Thus the remaining subscribers will have average gross incomes significantly below that shown in the table. Similar considerations may also apply to other stables suggesting that many members of most stables will be earning significantly below the

[10] This figure may be distorted because of a very large number of low value fee notes relating to one subscriber. The next lowest income per fee note is £1,234.

average for their stable. Variation in the average number of fee notes per subscriber only explains around 57% of the variation in the average income per subscriber across stables.

Table 4

	Total Stable Income	Number of Fee Notes	Number of Advocates	Silks	Proportion of Silks	Gross Income per subscriber
STABLE A	2776072	1643	39	8	0.205128	71181.34
STABLE B	2189279	1271	28	3	0.107143	78188.54
STABLE C	3401997	2726	38	5	0.131579	89526.24
STABLE D	3827844	2669	40	6	0.15	95696.10
STABLE E	4593675	6926	48	5	0.104167	95701.56
STABLE F	5185624	3487	47	11	0.234043	110332.42
STABLE G	6365371	5508	54	5	0.092593	117877.24
STABLE H	6428670	5210	50	10	0.2	128573.39
STABLE I	4838055	4551	29	7	0.241379	166829.47
STABLE J	7556544	4912	45	13	0.288889	167923.21
STABLE K	8774794	4189	29	8	0.275862	302579.11

Some statistical analysis of the factors which influence average fee incomes of stables has been conducted.[11] As mentioned above, at the extremes of income per subscriber there appears to be a difference based on the split between criminal and commercial work. Statistical analysis reveals that this effect is more complex than first might appear. The list of special areas of interest which appear on stable web pages have been used to calculate the proportion of members of each stable specialising in criminal trials and the proportion specialising in commercial matters. It is also possible in the statistical analysis to take account of the different levels of experience of members of each stable (measured by years since calling to the Bar) and the proportion of stable members who are silks.[12] Differences in area of specialisation across stables appear to have a statistically significant effect on the average number of fee notes of the stable. The higher the proportion of members of a stable specialising in criminal trials the lower is the average number of fee notes. A total of 85% of the variation in average number of fee notes per stable is explained by this factor together with the proportion of silks and the mean experience of the members. Almost 75% of the variation in average income per subscriber across stables is explained by the average number of fee notes, and the proportion of silks. When account is taken of the higher average income of members of Stable K the explanatory power of these variables increases to almost 90% of the variation in average gross fee income per subscriber.

Whilst it may be an oversimplification to suggest that the cost of providing clerking and billing services will be related to solely the number of fee notes (proxying the level of

[11] Ideally, this should have been carried out for individual advocates rather than stables but considerations of confidentiality dictated that the researchers should only have access to data relating to stables.

[12] Whilst there is a strong correlation between experience and being a silk, these factors have discernable statistical effects. Whilst basing the statistical analysis on average figures for each stable reduces the amount of variation it has the advantage of removing random fluctuations as compared with comparisons of individual advocates.

activity) this could be an alternative basis for distributing the costs of FSL across subscribers. The effect of using such a basis for defraying the costs of FSL has been calculated by the researchers. It reduces the average commission paid by one stable by 38% while almost doubling another.

The dues for membership of the Faculty comprise a small fixed component and a component related to the advocates fee income. An alternative means of defraying the Faculty's costs would be for them to be shared equally across all members. What such a level of fee would be has also been calculated. This would result in a reduction in the average dues paid for one stable of almost 60% and an increase for another of 75%.

Combining these two alternative means of funding the Faculty and FSL gives a minimum measure of the extent to which the costs to advocates are redistributed by relating them to income rather than to use of the services. The average cost to one stable would fall by 47% and another would rise by 68%. Given that using averages for stables dampens the variation it is likely that the differences will actually be greater at the level of the advocate. This redistribution of the costs of practise as an advocate can be interpreted as equivalent to a limited element of risk sharing across the Faculty.

This analysis of cost sharing across members of the Faculty suggests that the OFT's contention that permitting partnerships between advocates would enable economies of scale which are not available to independent practitioners to be captured is mistaken. Members of the Faculty already benefit from economies of scale through participation in FSL and access to the shared facilities of the Faculty. Whilst a partnership might provide risk sharing through income sharing this would depend on the rules used in partnerships to distribute income. Furthermore, there is already a degree of income sharing across Faculty members because the commission charged by Faculty Services Limited is proportional to an advocate's fees and Faculty dues are also determined in large part by an advocate's income.

Implications of the Rule against Partnership for Competition

The discussion in the *Report of the Research Working Group on the Legal Services Market in Scotland* of the rule against partnership contained in paragraph 1.2.4 of *The Guide to Professional Conduct of an Advocate* suggests that *a priori* multi-lawyer practices might be expected to operate at lower cost than sole practise. However, the more detailed examination of these factors presented above suggests that a proper understanding of advocates' practices and the cost sharing arrangements of members of the Faculty weakens this argument. The revealed behaviour of members of the Faculty who have moved from practise as a solicitor to practise at the bar further undermines the previously presumed advantages of group practise. The vast majority of Intrants to the bar in Scotland in recent years have previously practised as Solicitors in Scotland. This suggests that Intrants view the increased risks associated with independent practise at the bar to be compensated by benefits (such as increased specialisation and autonomy). Prior practise as a solicitor allows a prospective advocate to build up expertise and reputation in particular areas of law which mitigates the risks associated with sole practise.

'Lawyers' with a preference for advocacy who wish to combine this with the income and cost sharing associated with group practice have the opportunity to practise as solicitor-advocates. The educational requirements for acceptance as a 'devil' are almost identical to those for a traineeship as a solicitor. This reduces the cost of transfer between the two branches of the legal profession in Scotland as compared to transfer between the two

branches in England & Wales. Transfer in either direction is thus possible at a relatively low cost.

In principle the choice between practising as a solicitor or as a solicitor-advocate or as an advocate resolves to the individual's preferred trade-off between specialisation in court advocacy, litigation management, financial risk and personal autonomy. In practice, however, the Faculty's prohibition on mixed doubles gives advocates a competitive advantage over solicitor advocates.[13] Thus there remains an impediment to competition between the separate branches of the profession when it comes to advocacy. The analysis carried out above suggests that if this impediment were removed the choice of the branch of the profession in which to practise would be a matter of balancing greater risk against personal autonomy and opportunity for court room advocacy.

[13] This rule prohibits a solicitor advocate appearing as a junior with a member of the Faculty acting as senior. It thus impedes the ability of a solicitor advocate to gain the experience derived from working with a senior counsel. See *Report of the Research Working Group on the Legal Services Market in Scotland* pp. 67-63.

Appendix I

Interview Topics for Advocates

- **Career trajectories**

When/why move into advocacy, barriers/incentives to move into advocacy, ,need for training/retraining, movement between solicitors/advocates, specialisation (substantive area of law, desired), costs and process of switching

- **Nature of advocacy**

Nature of the work (eg also advice work), how it differs from solicitor practice (restriction on mixed doubles), acquisition of skills, working in a relatively small, jurisdiction (rural areas)

- **Structure of advocacy**

Faculty Services Limited (if they were to leave what would they lose/gain, economies of scale), relationship with clerks, other services (library etc)

- **Relationship with clients**

Limits on direct access, referrals, distribution of cases within stables, advertising

- **Legal market**

How has the market changed over time, exposure to risk (eg fluctuations in income, legal aid cutbacks), risk spreading practices, limits of partnerships (would they change their practice is restrictions were lifted, rationale/effect of restrictions, cost sharing), perceived impact of solicitor advocates (according to area of law)

Interview Topics for Clerks

- **Career trajectories**

- **Structure of stables**

Specialisations, relationship with rural areas, changes in recent years

- **Structure of advocacy**

Faculty Services Limited (if advocates were to leave what would they lose/gain, economies of scale), other services (library, administrative support etc)

- **Assigning clients**

How are clients assigned to advocates (specialisation, availability), risk sharing (fluctuations in income, stresses), relationship between clerks and clients, relationships between advocates and clients, advertising

- **Legal market**

How has the market changed over time, exposure to risk (eg fluctuations in income, legal aid cutbacks), risk spreading practices, limits of partnerships (would advocates change their practice is restrictions were lifted, rationale/effect of restrictions, cost sharing), perceived impact of solicitor advocates (according to area of law)

APPENDIX 3

APPENDIX D

FROM WHOM MAY AN ADVOCATE ACCEPT INSTRUCTIONS?

An Advocate may accept instructions from any person or body detailed in the appendix hereto and in terms of the Direct Access Rules and Standard Terms of Instruction as they may be updated by the faculty from time to time.

DIRECT ACCESS RULES (October 2006)

1. An Advocate may accept instructions from any person or body detailed in the Appendix hereto, whether on their own behalf or on behalf of a client. Instructions under these rules will be referred to as "Direct Access Instructions".

2. Advocates may not, however, accept instructions to act from, or on behalf of, any person or body from which they receive any remuneration other than the professional fees or retainers paid to them as Advocate. Thus they may not act for, or accept instructions from, a company of which they are a director, or any person or body by which they are employed, or a firm of which they are a partner, and from which they derive director's fees, a salary, or a share of the profits either in name or in reality.

3. Advocates may not accept instructions to receive or handle clients' money; nor to do administrative work which would normally be carried out by an instructing solicitor; nor to carry out investigative work which would normally be carried out by an instructing solicitor, any more than they might do so when instructed by a solicitor. An Advocate acting under these rules may, however, meet and discuss matters with a client or a potential witness without a representative of the instructing body or person being present, so long as both the Advocate and the instructing person or body consider this appropriate in terms of the code of conduct.

4. An Advocate who is instructed by any person or body detailed in the Appendix other than a Scottish solicitor must satisfy himself or herself so far as appears necessary of

(i) their competence to give the instructions in question;

(ii) if those instructions are given on behalf of a client, their authority to do so; and

(iii) their understanding of the terms of engagement and their effect, and in particular the limitations on the work which an Advocate may do and also any disadvantage which may, as a real possibility, be suffered by the client if the client does not act through a Scottish solicitor. If an Advocate cannot be satisfied of these matters, they may not accept those instructions. If an Advocate at any time concludes that they are no longer satisfied of any of these matters, or that it is not in the interest of the client or the interests of justice that such instructions be given other than through the medium of a Scottish solicitor, they must so inform the person instructing and may refuse to act further except through that medium.

5. For the avoidance of doubt, the "cab rank" rule does not apply to instructions provided under these rules.

6.It is expected that an Advocate who accepts instructions under Direct Access Rules shall follow any guidance issued by the Direct Access Guidance Committee from time to time.

APPENDIX TO DIRECT ACCESS RULES

1. Legal professionals:

(i) Members of the Law Societies of England and Wales, and Northern Ireland;

(ii) Non-practising Members of Faculty;

(iii) European lawyers registered under the European Communities (Lawyers Practice)(Scotland) Regulations;

(iv) Persons on the register of foreign lawyers held by the Law Society of Scotland;

(v) Qualified conveyancing and executry practitioners in Scotland;

(vi) Persons or bodies qualified to practise law in a jurisdiction other than Scotland who actually do so practise law;

2) Other professionals:

(i) Members of any professional body recognised for this purpose by the Faculty, and any such body itself;

(ii) Parliamentary agents;

(iii) Any person or body on the register maintained by the Office of the Immigration

Services Commissioner.

3) Public authorities:

(i) Any person or body subject to complaint to the Scottish Public Services Ombudsman;

(ii) Any public authority in terms of the Freedom of Information (Scotland) Act 2002 or the Freedom of Information Act 2000;

(iii) Any person or body subject to complaint to the European Ombudsman;

(iv) Any public authority under the law of the European Union;

(v) Any person or body acting under law in a governmental, judicial or legislative capacity;

(vi) Members of the British and Irish Ombudsman Association or the International Ombudsman Institute.

4) Other persons and bodies:

(i) Any person or body on the Financial Services Authority Register;

(ii) Any voluntary organisation in Membership of the Scottish Council for Voluntary Organisations, the National Council for Voluntary Organisations, the Northern Ireland Council for Voluntary Action, or the Wales Council for Voluntary Action;

(iii) Any body on the register maintained by the office of the Scottish Charity Regulator or the Central Register of Charities maintained by the Charity Commission for England and Wales;

(iv) Any public limited company regulated by the London Stock Exchange;

(v) Any community interest company registered as such;

(vi) Any trade union or employers association on the list maintained by the Certification Officer (see www.certoffice.org);

(vii) Any body incorporated by statute which is so established to represent or regulate any trade, business or profession;

(viii) The Medical and Dental Defence Union of Scotland, The Medical and Dental Defence Union, and the Medical Protection Society.

(ix) Any person or body, or Member of a class, recognised for this purpose by the Faculty.

Initial list of bodies recognised under part 2 (i):

1. *All professional bodies in the United Kingdom which have been awarded a Royal Charter*
2. *All Designated Professional Bodies under the Financial Services and Markets Act 2000*
3. *Architects Registration Board of the United Kingdom*
4. *Army Legal Service*
5. *Directorate of Legal Services of the Royal Navy*
6. *Naval Prosecuting Authority*
7. *Directorate of Legal Services of the Royal Air Force*
8. *Association of Average Adjusters*
9. *Association of Taxation Technicians*
10. *Insolvency Practitioners Association*
11. *Institute of Indirect Taxation*
12. *Institute of Chartered Accountants in Ireland*
13. *Officers of Arms in Ordinary (The Heralds and Pursuivants of the Lyon Court)*
14. *Incorporated Society of Valuers and Auctioneers*
15. *Pensions Management Institute*
16. *Institute of Trade Mark Attorneys*
17. *The Chartered Insurance Institute or any Member thereof*

6. Further list of bodies subsequently recognised under parts 2 (i) or 4 (ix)*:
1. The Society of Messengers-at-Arms and Sheriff Officers and Members thereof

*It is likely that this list will continue to be updated and you should consult the Faculty's Website for a fully updated list at: www.Advocates.org.uk

Direct Access to Advocates: Standard Terms of Instruction

Revised: 14 May 2007

These Standard Terms of Instruction apply whenever the person instructing is neither qualified to practise as a solicitor in Scotland, nor by law authorised to act as a solicitor to a public department in Scotland. The person or body instructing is here referred to as the instructing person, although they may be instructing on their own behalf.

1. Introduction

1.1 Except as otherwise provided hereafter, Advocates will conduct themselves in accordance with the '*Guide to the Professional Conduct of Advocates*' of the Faculty of Advocates and with the Faculty's Direct Access rules, here together referred to as '*the Guide*', and these terms of instruction should be read together with the Guide. If instructions are given by a registered European lawyer, or by a lawyer in a country of the European Union other than Scotland, these terms should also be read with Part 5 of the '*Code of Conduct for Lawyers in the European Union*' issued by the Council of the Bars and Law Societies of the European Union.

1.2 Advocates are holders of a public office, who owe duties to the Court and the public as well as to those who instruct them. They cannot in law, and do not, enter into any contractual relationship with those who instruct them or with their clients, and nothing in these terms should be taken to suggest otherwise.

2. Instructions

2.1 General

2.1.1 Subject to the Guide and the provisions below, an Advocate may accept instructions from any person under the Direct Access rules, without the need for instruction through a Scottish solicitor, in relation to any matter.

2.1.2 Such instructions should be in writing (which includes e-mail). They may be sent directly to Counsel, or to his or her clerk. If formal acknowledgement is required, the instructions should be sent to the Advocate's clerk with a request for such acknowledgement. As an Advocate cannot be responsible for the general conduct of any matter (see paragraph 2.3 below), the instructions should specify the particular services which are required from the Advocate. It is important to specify these services as accurately as possible. An Advocate would not normally be expected to provide services beyond those specified in any particular instructions.

2.1.3 It is the responsibility of the Advocate to satisfy himself or herself that any instruction received may properly be accepted in accordance with rule 4 of the Direct Access rules. Whether

or not that is the case, an Advocate may decline to accept instructions under these arrangements.

2.1.4 An Advocate is entitled at any stage to require, as a condition of continuing to act in the matter, that a person qualified to practise as a solicitor in Scotland shall take over the instruction of the work concerned or that the services of such a solicitor shall otherwise be retained to assist in the future conduct of the matter, if he or she considers that this is necessary in the interests of the client or the interests of justice.

2.1.5 As Advocates carry out all their work personally and cannot always predict with certainty their other professional responsibilities, instructions under these arrangements are accepted on the basis that the Advocate may be unavoidably prevented, sometimes at short notice, from attending at any hearing or other engagement in connection with the matter on which he or she is instructed on account of the precedence accorded to instructions for Court appearances, in terms of 8.5 and 8.6 of the Guide. However, an Advocate will not discriminate in this respect between instructions which have been accepted under the Direct Access rules and otherwise.

2.1.6 If an Advocate identifies a clash of commitments which is likely to prevent attendance at any hearing, either the Advocate or the Advocate's clerk will warn the instructing person as soon as possible and will, if desired, suggest the names of other Advocates who are willing and able to take over the instructions. The Advocate will co-operate so far as possible with any other Advocate who takes over. In no circumstances, however, will instructions be passed to any other Advocate without the express agreement of the instructing person.

2.1.7 In any case in which an Advocate accepts instructions from a person in his or her capacity as a director, partner, associate, Member or employee of a company, firm or other body, the obligations of the instructing person under these terms of instruction (and in particular obligations to make payment of fees) shall be the joint and several obligations of him or her and that company, firm or other body.

2.2 Categories of work to which these arrangements apply.

2.2.1 An Advocate may accept instructions under these arrangements in relation to any kind of

work except as excluded below. There are, however, circumstances in which it will not practically be possible for this to be done, in particular where the work is in a Scottish Court, where it may be necessary for a Scottish solicitor to be involved.

2.3 Excluded Work

2.3.1 However, an Advocate shall not accept instructions:

a) To receive or handle clients money; or

b) To do administrative work normally performed by a solicitor, such as entering into correspondence on the client's behalf (as distinct from assistance in drafting correspondence), or ensuring the attendance of witnesses at a hearing; or

c) To undertake investigative work normally performed by a solicitor, such as the collection of evidence or the instruction of expert witnesses; or

d) To take responsibility for the management or general conduct of a client's affairs or litigation; or

e) Which are inconsistent with guidance given by or on behalf of the Faculty of Advocates.

2.4 Documents

2.4.1 All papers will be returned to the instructing person on the completion of the work instructed.

2.4.2 However, unless agreed otherwise, the Advocate is entitled to keep copies of any documents sent for the Advocate's own professional purposes.

2.4.3 Copyright in any work produced remains with the Advocate who is its author, but the instructing person may publish it to any third party to whom publication was contemplated by the instructions in question.

2.4.4 All documents and other information sent to an Advocate under the Direct Access rules are received in confidence and are subject to legal professional privilege. They will not accordingly be disclosed to any third party except in terms of a statutory or legal requirement on the Advocate to do so; with the express consent of the instructing person to the disclosure; or in terms of the disciplinary rules of the Faculty of Advocates.

3. Payment of Fees

3.1 It shall be the professional obligation of the instructing person to make payment of the Advocate's fees. That is so whether or not the identity of the client is stated. No agreement to the contrary will be of any effect.

3.2 Upon acceptance of instructions, the Advocate will be entitled to payment of a reasonable fee. What is a reasonable fee depends on the whole circumstances of the particular matter on which the Advocate is instructed. Unless otherwise agreed, an Advocate's fees cover all expenses incurred in relation to the matter instructed, such as travelling expenses. All fees are stated as exclusive of, and are subject to, Value Added Tax at the appropriate rate, if applicable.

3.3 Unless otherwise agreed between the instructing person and the Advocate's clerk, a fee note will normally be submitted at the conclusion of each item of work for which the Advocate is instructed. If, by agreement, payment is made in advance, that must not exceed an agreed estimate of a reasonable fee for the work in question.

3.4 It is often helpful to all concerned to agree the amount of a fee and/or the basis of charging in advance. Discussion about such an agreement must take place with the Advocate's clerk or deputy clerks, because professional rules prohibit discussion or negotiation of fees or associated matters directly with the Advocate. Where such an agreement has been reached, neither the instructing person nor the Advocate is entitled to challenge it later.

3.5 Unless otherwise agreed between the instructing person and the Advocate's clerk, an Advocate's fee shall be paid by the instructing person within twenty-one days of submission of each fee note.

3.6 Subject to paragraph 3.4, the instructing person is entitled to challenge the fee proposed or the basis of the charge. In the event of such a challenge, the instructing person should inform the Advocates clerk concerned (or, in the case of fee notes issued by Faculty Services Limited, Faculty Services Limited) in writing as soon as possible and in any event within twenty-one days of the

issue of the fee note; and failing such challenge, the instructing person is presumed to agree that the fee proposed is reasonable and becomes responsible to make payment of it.

3.7 If an instructing person challenges the fee proposed, the matter will normally be resolved by negotiation between them and the Advocate's clerk. If they cannot agree, either the instructing person or the Advocate is entitled to require that the matter be determined by a mutually agreed third party, whom failing by the Auditor of the Court of Session, who shall then adjudicate as to what is a reasonable fee in the circumstances on an agent and client, client paying, basis.

3.8 In the case of fee notes issued by Faculty Services Limited, all fees should be paid to Faculty Services Limited, and not directly to the Advocate.

3.9 An Advocate may not accept a general retainer from the instructing person.

The Faculty's MiniTrial initiative has allowed pupils from schools across Scotland to learn about the justice system in an interesting and enjoyable way.

Justice Committee

Legal Services (Scotland) Bill

Written submission from the Faculty of Advocates

1. The Faculty of Advocates welcomes the opportunity to respond to the invitation by the Justice Committee to submit written evidence on the provisions of the Legal Services (Scotland) Bill.

2. The Faculty is in agreement with the general approach and principles of the Bill insofar as they affect the regulation of the bar and the way in which advocates practise.

3. In *Access to Justice a Scottish Perspective a Scottish Solution* the Faculty set out its detailed response to the Government's Policy Statement on Regulation and Business Structures in The Scottish Legal Profession. The Faculty's position has remained consistent throughout the consultation process.

4. It recognised the need to analyse in a rigorous fashion the relevance of what it does, to optimise the services it delivers to the public and Scottish institutions and the need to be outward looking, accessible and economically effective.

5. The Faculty argued that the maintenance of an independent referral bar subject to the cab rank rule was an essential ingredient of providing meaningful access to justice for the people of Scotland.

6. The Faculty's business model is one in which advocates operate as one-person businesses and are prohibited from entering into partnership with other advocates.

7. The prohibition on partnerships at the bar benefits the consumer because it provides the maximum range of availability of counsel to meet the needs of clients wherever they live and whatever their circumstances.

8. As the Faculty response explained, in Scotland there are about 460 practising advocates – compared with 17,000 barristers in England and Wales. While it might be commercially beneficial for some advocates to form into partnership the practical result in a jurisdiction the size of Scotland would be a significant reduction in consumer choice.

9. Where one advocate member of a firm acted for one side in a dispute any of his colleagues would be barred by reason of conflict of interest from acting for any party to the dispute.

10. There have also been suggestions by consumer groups and the Office of Fair Trading that the current business model operated by members of Faculty does not bring the benefits of economies of scale to clients.

11. However, a study by Professor Frank Stephen and Dr Angela Melville from the University of Manchester concluded: "The analysis of cost sharing across members of Faculty suggests that the OFT's contention that permitting partnerships between advocates would enable economies of scale which are not available to independent practitioners to be captured is mistaken. Members of Faculty already benefit from economies of scale through participation in Faculty Services Ltd (FSL) and access to shared facilities at the Faculty."

12. In its consultation paper, "Wider Choice and Better Protection," the Government said that on balance it had not been currently persuaded that it was necessary to require the Faculty to permit its members to form partnerships or participate in other alternative business structures (ABS) provided that transfer between the advocate and solicitor branches of the profession was a straightforward procedure.

13. The Faculty agrees that advocates who wish to form partnerships or take part in ABS should be able to do so without difficulty by becoming solicitor advocates – solicitors with extended rights of audience.

14. It has suggested a number of ways in which simplicity of transfer between the two branches of the profession can be achieved.

Regulatory Framework

15. It has been stated that the Faculty of Advocates is a self-regulating body but that is a misconception.

16. An advocate is entitled to practise because he or she has been admitted to the public office of advocate by the Court of Session. That has been the case since at least the 17th century. The Faculty of Advocates does not have the right to admit anyone to the public office of advocate.

17. The Faculty regards it as of the utmost importance for the independence of advocates from the executive that they continue to be regulated by an independent judiciary. Oversight by the court is a common practice across the world and as far as Scotland is concerned is proportionate and cost effective.

18. Throughout the admission process for advocates the Faculty must operate within the terms of Regulations as to Intrants which set the standards and training requirements. These requirements must be approved by the Court of Session.

19. In recent times significant changes to practice rules have been introduced, but this can be done only with the approval of the Lord President.

20. When the Faculty wished to exclude a candidate on the basis of poor examination results, both the Faculty and the candidate appeared before a judge who heard arguments from both sides as to whether the candidate should be excluded.

21. So it can be seen that although in practice day to day responsibilities are delegated to the Dean of Faculty, the court exercises a real and continuing oversight over the Faculty.

22. Given that there seems to be some misunderstanding about the role of the court, the Faculty agrees with the proposal in the Bill to set out on a statutory basis in a clear and transparent way the current regulatory framework, including the role of the Lord President.

23. Oversight of the Faculty is also exercised by the Scottish Legal Complaints Commission (SLCC) which in October 2008, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007, became the gateway for all complaints against advocates, replacing the Scottish Legal Services Ombudsman.

24. Complaints about the service provided by an advocate are handled by the SLCC while complaints about conduct are referred to the Faculty to deal with. The SLCC can also investigate the way in which the Faculty has dealt with a conduct complaint.

25. The Faculty has no difficulties with the regulatory objectives set out by the Government:

- Upholding the rule of law and the administration of justice
- Protecting and promoting the public interest
- Promoting access to justice
- Protecting and promoting the interest of consumers
- Promoting competition in the provision of legal services
- Promoting and maintaining adherence to professional principles.

26. In summary, the Faculty regards the current regulatory regime as proportionate and cost-effective and in the public interest.

1 December 2009