Report by the Research Working Group on the Legal Services Market in Scotland

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REPORT BY THE RESEARCH WORKING GROUP ON THE LEGAL SERVICES MARKET IN SCOTLAND

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Executive summary

1. The Working Group on the Legal Services Market in Scotland was established in March 2004 to draw together and analyse the evidence base on the Scottish legal services market. This work was driven by a desire on the part of Scottish Ministers that legal services in Scotland should be regulated in the interests of consumers, by developments at European Commission level (reviewing competition in the liberal professions) and by developments in England and Wales (a report by the Office of Fair Trading in 2001 which led to the independent review of the regulatory framework by Sir David Clementi and latterly to the publication by the Department for Constitutional Affairs of a White Paper "The Future of Legal Services : Putting Consumers First" in October 2005).

2. The agreed research **aims** were to identify, describe and analyse the different legal services markets operating in Scotland; to identify restrictions, whether deriving from statute, professional rules or custom and practice, which might have the effect of preventing, limiting or distorting competition in the different Scottish markets; and to identify access to justice, public interest and consumer protection factors that might justify such restrictions and to evaluate whether the restrictions were proportionate to their purpose. The Group also undertook to examine the evidence on alternative systems and structures across comparable jurisdictions including alternative business structures and the availability of rights of audience and rights to conduct litigation.

3. To address its key aims, the Group agreed that a number of **specific issues** would be examined, including : entry into legal education and professional training; the supply of legal practitioners; the benefits and drawbacks of different business structures; the extension of rights of audience and rights to conduct litigation; fee competition; the role of auditors of court in relation to taxation of fees/accounts; communication and quality of information flow between legal practitioners and the various users of legal services, including advertising; the roles of lawyers and non-lawyers in providing legal services and advice on legal matters in different markets; the implications of forthcoming EU competition law and policy and (where appropriate) the implications of Scottish policy developments.

4. Numerous sources of data and information were used in the course of this work. These included drawing on existing research, interviews with key parties, a specific research exercise on the practice of the auditor of the court in relation to the taxation of solicitors' accounts, and analysis of data held by the Scottish Executive and the Law Society of Scotland. However, there were areas where the evidence base was poor and where, in the absence of ready remedy, the debate had to be based on a balanced range of opinion rather than objective evidence. In particular there was a lack of evidence on the likely effects of a change in policy or practice on specific issues, including the likely effects on consumers.

The Legal Services Market in Scotland

5. The Group examined the different legal markets in operation in Scotland and assessed the relative degree of competition in each market based on a programme of interviews with key stakeholders. Twelve markets were identified. A grid showing the assessment is presented in Chapter 3 of the report. Levels of competition clearly varied markedly across markets, and across geographical areas. Markets with relatively high levels of competition included commercial law, financial services/tax advice and residential

conveyancing. Markets with relatively low levels of competition included the market for executry work, family law, welfare/debt/housing law and consumer law.

6. Further, within some markets there were distinct 'sub-markets' operating. In particular the market for employment law had distinct markets for employers and employees. There were key differences between these markets on sources of funding, levels of consumer information and consumer orientation.

7. Concerns had been expressed about the availability of specialist practitioners in various fields (e.g. family law, housing, debt, welfare, consumer law) and geographical areas, particularly rural areas. There was also concern about the number of practitioners coming into these areas, as well as criminal law, and the impact that might have on future supply in these markets. There was, however, a lack of firm evidence about either current or future supply. Research is currently being carried out into the recruitment and retention of lawyers in Scotland.

8. Overall, the evidence probably pointed to a case for non-intervention, assuming that market forces would keep supply and demand in alignment, though that might not be entirely satisfactory in some legal markets. Further, regulatory oversight of rules and practices of professional bodies which restricted competition had to ensure that the objectives of consumer protection and the administration of justice were explicitly balanced against those of competition.

Legal education and training

9. The legal profession had undergone significant change in recent decades and had been affected by globalisation, changes in business practice and technology, increased competition, greater specialisation and increasing numbers of women qualifying. The numbers entering undergraduate law courses in Scotland would continue to rise, in most part due to the accreditation of new LLB courses at Scottish Universities. There was some evidence of social barriers to entry into the legal profession; in particular there seemed to be little evidence of an increase in the proportion of students from lower socio-economic groups, who remained significantly under-represented on law courses. That was a concern for higher education generally. Increasingly women were pursuing the study of law. However, despite the increasing number of females entering the legal profession, much lower proportions of females than males were partners in firms.

10. Historically, the principal bottleneck in entering the profession had been in securing an apprenticeship or traineeship. Currently there were signs that another bottleneck might be emerging at the stage before entering the diploma. Demand for places was beginning to outstrip supply and competition for places would become fiercer as the new LLB students graduated. There were signs that the number of diploma places would increase. Limiting the number of diploma places could be construed as an anti-competitive practice. The data showed that there were slightly fewer registered training places than diploma places, but the gap was relatively small. However, with an increase in diploma places, and graduates, training places could become the main 'bottleneck' in the education and training process, since the number of training places available depended to a large extent on market forces.

11. The majority of trainees were working in firms with 11 or more partners. That impacted upon the training and experiences of trainees. There were concerns that relatively

few trainees would be experiencing work in firms which relied on legally aided work, and in particular areas of law such as family law (which tended to be the domain of smaller firms). Ultimately that would affect the supply of legal professionals to undertake that work.

12. Reform of the Faculty's entrance requirements was under active consideration. A period of pupillage of at least 6 months was required and a master did not make any payment to his pupil. The absence of remuneration during a period of up to 9 months unpaid devilling might be construed as anti-competitive practice insofar as it might act as a barrier to entry to the profession for those of limited means. The Faculty argued however that the nature of pupillage was different from an employment relationship, and that the start-up costs of practice as an advocate were low compared with other forms of self-employment.

13. Solicitors who wished to acquire extended rights of audience as solicitor advocates had to satisfy the Council of the Law Society of Scotland about both their professional conduct and reputation and their competency in the practice and procedure of the Supreme Courts. In addition they required to pass an examination. Whilst it was expected at present that applicants would have 5 years experience, that bar was due to be removed.

14. The Office of Fair Trading emphasised the continuing need to ensure that entry and qualification requirements to the profession were transparent, proportionate, non-discriminatory and based on objective standards.

Professional Rules and Practice :

15. Professional rules and practices were examined to establish whether or not they were restrictive of competition, to identify relevant public interest objectives which might justify any such restriction, and to assess whether the rules and practices represented the mechanism least restrictive of competition to achieve that objective.

(i) Restriction on practising as a principal of a law firm

16. One of the professional rules of the Law Society of Scotland[1] restricted a solicitor from practising as a principal in a law firm unless he had been employed as a solicitor for a cumulative period of three years. That rule might be challenged as having an anti-competitive effect by imposing an unnecessary restraint on able, newly qualified solicitors who might wish to practise as a principal without first having acquired three years experience. The Group found no evidence however that the rule was unnecessarily restrictive, taking account of the public interest considerations identified by the Society's experience prior to the introduction of the rule and the flexibility that the Society's power of waiver provided to deal with exceptional cases.

(ii) Restriction on receiving a payment for referring a client

17. Solicitors were not permitted at present to pay referral fees to third parties, such as estate agents or mortgage providers, who introduced business to them. The Law Society of Scotland believed that it was prejudicial to the independence of the solicitor to pay for referral business and that the disclosure of the payment of such a fee was not a protection for

[1] Rule 3(1) of the Solicitors (Scotland) (Restriction on Practice) Practice Rules 2001.

the client. The Office of Fair Trading took the view on the other hand that referral fees could enhance competition amongst solicitors and that referrals could benefit clients by putting them in touch with high quality legal services at a reasonable price. No evidence was available on the impact of such fees on clients, though recent experience of the impact of introducing referral fees in comparable jurisdictions would be informative.

(iii) Professional indemnity insurance

18. Law Society of Scotland rules required Scottish solicitors to purchase professional indemnity insurance though a Master Policy which the Society maintained on their behalf. In 2004 the Office of Fair Trading reviewed whether these rules might have the effect of restricting or distorting competition in the market for solicitors services, but concluded after investigation that it was unlikely that there was strong and compelling evidence to that effect. The Office of Fair Trading observed that difficulties reported by some legal services clients in obtaining representation should be considered as an access to justice issue, and not a competition issue.

(iv) Legal professional privilege

19. The Group considered whether legal professional privilege, whereby lawyers could not be compelled to disclose in court legal advice they had given their clients, might disadvantage other professions which did not enjoy such a privilege and present a future obstacle to the formation of multi-disciplinary practices. Except for the Office of Fair Trading which reserved its position, the Group concluded that the competition argument for abolishing legal professional privilege was not particularly strong and that legal professional privilege seemed necessary for the adversarial system to work.

(v) Restriction on solicitor advocates appearing with advocates

20. Solicitor advocates were not permitted to appear in the same case as advocates because of professional rules which prohibited such "mixed doubles". The effect of those rules was to prevent collaboration in court between two branches of the profession whose expertise was very similar. The justifications advanced for the rules were (a) that advocates and solicitor advocates were regulated by different professional bodies and complications could arise if for example a mixed team were to be the subject of a complaint; and (b) that abolishing the rule could in the long run adversely affect the choice of representation available to litigants. Except for the Faculty of Advocates, the Group believed there was a case for solicitor advocates to be able to appear with advocates.

(vi) The 'cab rank' rule

21. The Faculty's "cab rank" rule provided that advocates were not at liberty to choose their clients or to refuse to do work sent to them, except in circumstances defined in the Guide to Professional Conduct of Advocates (paragraphs 4.3.5 to 4.3.15). The Group recognised that the rule was designed to protect the public interest by ensuring clients were legally represented. Evidence was gathered from advocates as to how the rule applied in practice and the circumstances under which they might refuse to take on cases. No evidence was gathered from other sources. There was some disagreement between advocates as to whether the rule inhibited the development of specialist expertise, with some maintaining that

it encouraged a generalist orientation and others reporting that it promoted the drive towards increasing specialisation.

22. No evidence was available however on how the rule was applied in practice and whether in practice it worked in the way it was supposed to. Some members of the Group thought that the rule might inhibit the development of specialist expertise by requiring advocates to cover a wide number of areas of the law.

(vii) Restrictions on advertising

23. Some advertising by solicitors and advocates was permitted. Solicitors directed their advertising widely to the users of legal services whereas advertising by advocates was aimed mainly at solicitors who advised clients on a suitable choice of advocate. It was recognised that comparative advertising by solicitors could assist consumers to evaluate relative value for money in legal services and help them to choose a suitable provider of legal services by giving relevant information. Following consultation with its members, the Law Society of Scotland would be bringing forward changes to its advertising rules to the Society's next Annual General meeting in March 2006. The OFT identified aspects of the Faculty of Advocates' advertising rules which it considered to be unnecessarily restrictive.

(viii) Restriction on direct access to advocates

24. Advocates might appear in Scottish legal proceedings only on the instruction of a Scottish solicitor, subject to limited exceptions. As the need for clients to engage the services of both a solicitor and an advocate would in some circumstances result in additional costs for clients, the Group examined the arguments for and against the restriction, together with the implications of its removal for business structure and the regulation of advocates.

(ix) Restrictions on business structures

25. A range of restrictions existed which prevented the use of alternative business structures for the provision of legal services. These included a restriction on partnerships between advocates; restrictions which had the effect that non lawyers could not own law firms and that solicitors employed by an organisation in non-lawyer ownership could not offer services to the public; restrictions which meant that different branches of the legal profession could not work together in legal disciplinary practices (LDPs); and restrictions which meant that lawyers could not combine with members of other professions to form multi-disciplinary practices (MDPs).

26. The advantages and disadvantages of alternative business structures were explored by the Working Group, taking account of the interests of the users of legal services and the implications of change for existing regulatory arrangements. The issue of alternative business structures appeared to be likely to stay on the agenda and policy development work would be required to establish the extent to which they suited Scottish circumstances and how they might best be regulated if they were to become a reality in Scotland.

Rules of Court : Curators and Reporters

27. The Group's scrutiny of rules of court identified an issue of transparency relating to the appointment of curators and reporters by the Court; and an issue of consumer protection which arose from inconsistency in the prices charged for their reports.

Legal Fees and the Taxation of Costs

28. The Group reviewed how the fees of solicitors and advocates were determined; and how litigation and legal aid cases were funded. Scale fees for solicitors (ie fixed prices) were abolished in Scotland in 1984. In February 2005 the Law Society of Scotland decided to withdraw its annual table of recommended fees for solicitors services, having considered the views expressed by the European Commission in its report[2] on the negative effect of such guidance on competition. To improve information for clients the Society also decided to introduce a practice rule requiring solicitors to send clients a letter of engagement setting out how much the solicitor would charge or what the charging rate would be.

29. The Group undertook research to examine the practice of **auditors of court** in relation to complaints about lawyers fees. Auditing involved "taxing" or checking the account of a solicitor or advocate's fees and outlays against a particular standard. The main findings from that exercise suggested there were problems of transparency in recruitment of auditors, a lack of continuing professional development and formal procedures for the development and appraisal of auditors, a lack of clear consensus as to the role and status of the auditor (ie judicial/quasi judicial or public official) and a wide range of different standards which were applied by auditors.

30. The application of different standards was thought to exacerbate the potential for inconsistency in decisions by auditors of court. Moreover, there was no consensus between auditors on how to apportion liability for auditors' fees after taxation, which led to a lack of transparency for the paying parties and the public, and a lack of consistency over who paid for taxations. Finally, the client's right to insist on a taxation of solicitors' fees appeared to have been substantially eroded by Act of Sederunt and judicial interpretation without public discussion or awareness. The Group recommended to Scottish Ministers that the arrangements for the taxation of solicitors' fees should be reformed and modernised in the light of the research findings.

Rights of audience and rights to conduct litigation

31. There was variation in restrictions on **rights of audience** and **rights to conduct litigation** across Europe and internationally. With the exception of Sweden and Finland (which are considered among the most liberal systems), all of the jurisdictions covered by this exercise had experienced change in the structure of their legal professions in recent years, mostly in the late eighties and early nineties. More detailed descriptions are available in the full report. Overall there had been a general extension of rights of audience in the jurisdictions examined, most notably to members of other professional bodies.

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[2] European Commission report on Competition in Professional Services (available at http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf).

32. In England and Wales the provisions of the Courts and Legal Services Act 1990 which permitted rights of audience and rights to conduct litigation to be extended to non-lawyer members of authorised professional or other bodies had been commenced. Applications had been made for such rights by a number of bodies outwith the legal profession. Interested bodies had to apply to the Lord Chancellor and applications were assessed on the basis of the prospective training regime being offered to members, the existence of complaints handling procedures, standards of professional conduct and a number of other factors. So far three such bodies had been granted permission to appear in the higher courts and then only subject to very specific requirements set by the Lord Chancellor such as those outlined above. The bodies which had been granted those rights were the Institute of Legal Executives (ILEX), the Chartered Institute of Patent Agents (CIPA) and most recently the Institute of Trade Mark Attorneys (ITMA).

33. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 introduced solicitor advocates in Scotland. The Act also contained provisions that allowed the extension of rights of audience and rights to conduct litigation to members of 'any professional or other body' through a process of application. These provisions, sections 25 to 29 of the 1990 Act, had yet to be commenced. Two UK professional bodies and a Scottish professional body had been lobbying for their commencement. In their view, consumers were not being well served by the current system. In assessing whether those provisions should be commenced, the Group recognised that it would be necessary to consider both the need to protect the interests of clients and the impact which extending such rights could have on the work of the Courts. The Group concluded however that commencement could be in the interests of the users of legal services and recommended to Scottish Ministers that sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 be commenced.

CHAPTER 1 INTRODUCTION

1. Legal services are essential to society as they facilitate access to justice and enable individuals and corporations to arrange their affairs in accordance with law. Effective access to justice requires that legal advice should not only be of high quality but also be readily available, not just to the wealthy or those who can obtain legal aid. A competitive legal services market is crucial to ensure that services are provided at a reasonable cost and in a user-friendly way.

1.1 At the economic level the legal services market in Scotland has a significant impact on the Scottish economy as a whole. In 2004 expenditure on legal services in Scotland was almost £1bn[3]. Competition and efficiency in the supply of legal services has the potential therefore to benefit the Scottish economy as a whole.

1.2 Scottish Ministers are committed to modernising the justice system in Scotland and to taking forward reforms which will benefit the users of legal services. They believe strongly that legal services in Scotland should be regulated in the interest of consumers and that the consumer interest requires the legal services market in Scotland to be competitive. Scottish Ministers commissioned this research into regulation and competition in the Scottish legal services market as a first step towards achieving those goals and as an evidence base on which to develop policy. Scottish Ministers wish to be satisfied that the legal services market in Scotland is free of anti-competitive restrictions which might disadvantage the users of legal services; and to be in a position to identify any such restrictions which cannot be justified in the interests of consumer protection or the public interest.

Background

1.3 Recent developments in Brussels, England and Wales and the Scottish Parliament have been relevant to this exercise

(a) European Commission

1.4 The European Commission has reviewed competition in the legal profession as part of a wider exercise looking at the liberal professions. To prepare the ground, research was carried out for the Commission by the Vienna Institute for Advanced Studies[4]. The research looked at professional regulation in all member states. The research findings suggested that there were unnecessary regulatory barriers to the provision of professional services in some member states; and that those barriers were not in the interests of users of those services and the European economy generally. In the time available to its researchers, the Institute's study of the UK was limited to England and Wales and did not cover Scotland.

1.5 The Commission consulted widely on the research, and held a conference to discuss its findings in October 2003. The Commission's Competition Directorate published a report

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[3] Based on aggregate fee income of almost £990 million earned by solicitors and advocates in private practice in Scotland in 2004 (6,859 solicitors and 470 advocates).

[4] Paterson I, Fink M, Ogus A (2003) Economic impact of regulation in the field of the liberal professions in different member states: regulation of professional services. European Commission, DG Competition

on Competition in Professional Services in February 2004[5]. The report targeted restrictions in 5 areas : (i) price fixing; (ii) recommended prices; (iii) advertising; (iv) entry requirements and reserved rights; and (v) regulations governing business structure and multi-disciplinary practices. The report invited member states and professional bodies to review professional rules and to identify any that might hinder effective competition. In the light of the report the Law Society of Scotland conducted its own proportionality review of its rules.

1.6 In a parallel exercise, the Commission's Market Directorate consulted in 2004 on a draft Directive designed to facilitate the free movement of services in the internal market, including professional services. The Commission is preparing a new draft of the Directive in the light of the consultative response. The Commission wants to remove unnecessary barriers and ensure that the Internal Market works as well for services as it does for goods. The United Kingdom strongly supports the Commission's initiative.

(b) England and Wales

1.7 A report was issued by the Office of Fair Trading in 2001 which challenged restrictions on competition in certain professions in England and Wales[6] including the legal profession. A review process was taken forward by the former Lord Chancellor's Department involving extensive consultation. Some initial reforms were implemented and a research exercise was carried out, the report of which led up to the announcement by the Lord Chancellor in summer 2003 of an independent and far reaching review of the regulation of the legal services market in England and Wales.

1.8 The aim of the review led by Sir David Clementi, was to consider the regulatory framework in England and Wales and recommend a framework which would best promote competition, innovation and the public and consumer interest. Sir David issued his report in December 2004[7]. His main recommendations were :

- A Legal Services Board should be established as a new legal regulator in England and Wales to provide consistent oversight of the front-line bodies such as the Law Society and the Bar Council.

- The statutory objectives of the Legal Services Board should include promotion of the public and consumer interest.

- Regulatory powers should be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line professional bodies, subject to their competence and governance arrangements.

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[5] Report on Competition in Professional Services, COM(2004) 83 final, published 9 February 2004, available at http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf.

[6] Competition in Professions, published 7 March 2001, available at http://www.oft.gov.uk/NR/rdonlyres/B08439C8-C5F6-4946-8AFF-71C050D34F46/0/oft328.pdf .

[7] Report of the Review of the Regulatory Framework for Legal Services in England and Wales, published on 15 December 2004 and available at http://www.legal-services-review.org.uk/content/report/index.htm.

- Front line bodies should be required to make governance arrangements to separate their regulatory and representative functions.

- An Office for Legal Complaints should be established as a single independent body to handle consumer complaints in respect of frontline bodies, subject to oversight by the Legal Services Board. Issues about conduct would be handed down to front-line bodies.

- Legal Disciplinary Practices (LDPs) should be able to operate as law practices, bringing together lawyers from different professional bodies (eg solicitors and barristers) and non-lawyers, permitting non-lawyers to be involved in their management and ownership and allowing flotation on the Stock Exchange.

- The safeguards to be applied by the Legal Services Board in respect of non-lawyer owners should include a 'fit to own' test. Such practices should encourage new capital and new ideas in promoting cost-effective consumer friendly legal services.

1.9 In a White Paper published on 17 October 2005 "The Future of Legal Services : Putting Consumers First", the UK government confirmed its intention to create a Legal Services Board to provide consistent oversight of the legal services sector in England and Wales, to set up a new Office for Legal Complaints independent of the legal profession to handle consumer complaints about legal services, to facilitate moves towards alternative business structures through a flexible and robust licensing system and to permit external investment in law firms.

(c) Scottish Parliament : Justice 1 Committee

1.10 In the first session of the Scottish Parliament the Justice 1 Committee held an inquiry into regulation of the legal profession. The Committee focused on the way in which the profession handled complaints, which it perceived to be the main source of public concern. The Committee also looked at the general arrangements by which the legal profession regulated itself. The Committee concluded that the best option for Scotland was to retain self-regulation, but it recommended that the present system should be reformed to make it more acceptable to consumers and more representative of the public interest. The Committee made a series of recommendations aimed at building public confidence and increasing the degree of independent oversight of complaints handling by the profession.

Scottish Executive consultation paper on complaint handling arrangements

1.11 A process of reform is underway, which takes account of the Committee's recommendations. The professional bodies have already implemented a number of reforms in response to the Committee's recommendations. The Executive for its part issued a consultation paper on 11 May 2005, entitled "Reforming Complaints Handling, Building Consumer Confidence"[8]. The consultation paper invited views on a range of complaints handling issues, which included

[8] Available on the Scottish Executive website at http://www.scotland.gov.uk/consultations.

- structural issues of whether complaints handling arrangements should be retained broadly as they are (subject to an increase in the powers of the Scottish Legal Services Ombudsman), or

- whether the level of oversight of the professional bodies might be raised by the introduction of a "single gateway" for complaints based on the Ombudsman's office (with either a monitoring function or a substantive complaints handling function); or

- whether an independent complaints handling body should be introduced which would be managed by a board with a lay Chair and lay majority.

1.12 Scottish Ministers considered the outcome of that consultation and announced on 22 December 2005 their decision to introduce legislation in the current session of the Scottish Parliament to establish a new independent body to handle such complaints. The new body would act as a gateway to receive those complaints about lawyers which could not be resolved at source; and would take over the handling of complaints about inadequate professional service from the legal professional bodies, the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal. Effective complaints handling arrangements are essential to a competitive legal services market, but are not covered by this report in view of the reform process which is already in progress.

The legal profession in Scotland

1.13 Though the legal profession in Scotland is divided into two main branches of solicitors and advocates, there is a common core to the education and training of all Scots lawyers. The traditional role of the Scots solicitor has been as a general adviser to clients, buying and selling property on their behalf, preparing wills and winding up estates[9], conducting litigation and providing advice on specific areas of the law. Solicitors are able to appear in the sheriff and district courts and tribunals and inquiries on an extensive range of matters. Since 1993 solicitor advocates, who are solicitors with specialist training, may also appear in the Supreme Courts. Advocates, who are specialists in the art of advocacy or pleading and in advising clients on every aspect of litigation, have extensive rights of audience in all Scottish courts. Chapter 2 presents a fuller picture of the sources of legal services.

Scottish legal services market

1.14 The purpose of the research has been to provide an evidence base wherever possible which would permit policy to be formulated to meet Scottish circumstances and to inform a Scottish response to the European Commission's initiative. The research into the legal services market in Scotland has been steered by a widely representative working group to ensure that the research carried out has been as balanced and well-focussed as possible. The research focussed on the legal services market and did not seek to cover the whole of the justice system in Scotland. On issues where evidence was not available or could not readily be commissioned in the time available, the report identifies the position of the key stakeholders, including consumer interests, and provides relevant economic analysis.

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[9] Conveyancing and executry practitioners working in an employed capacity may provide conveyancing and executry services, but practitioners registered since 2003 may not offer such services direct to the public.

Purpose and aims of research

1.15 The wider policy objectives underlying the research were :

- to respect and further the interests of justice;
- to improve consumer protection and promote better access to justice;
- to strengthen the competitive market to benefit the users of legal services in Scotland;
- to develop a more competitive market sector which could compete better in international markets to the benefit of the Scottish economy; and
- to respect the duty of the lawyer to the Court.

1.16 The agreed research **aims** were to :

- identify, describe and analyse the different legal services markets operating in Scotland.
- identify restrictions, whether deriving from statute, professional rules or custom and practice, which may have the effect of preventing, limiting or distorting competition in the different Scottish markets.
- identify access to justice, public interest and consumer protection factors that may justify such restrictions and to evaluate whether the restrictions are proportionate to their purpose.
- examine the evidence on alternative systems and structures across comparable jurisdictions including alternative business structures and the availability of rights of audience and rights to conduct litigation.

Specific issues

1.17 The Group's priority was to examine whether regulation of the Scottish legal services market was free of anti-competitive restrictions and that those restrictions which did exist were proportionate to the need to protect the public interest. The Group also agreed however that where practicable a number of **specific issues** might be looked at, including :

- Entry into legal education and professional training.
- Supply of legal practitioners, number of potential entrants and career choices.
- Benefits and drawbacks of different business structures and the extension of rights of audience and rights to conduct litigation.
- Fee competition.

- The role of auditors of court in relation to taxation of fees/accounts.

- Communication and quality of information flow between legal practitioners and the various users of legal services, including advertising.

- Roles of lawyers and non-lawyers in providing legal services and advice on legal matters in different markets.

- Implications of forthcoming EU competition law and policy.

- Implications of Scottish policy developments such as legal aid reform, community legal services and the Public Defence Solicitors' Office.

1.18 The remit of the Research Working Group was set early in 2004. Though the findings of the Clementi review were published in December 2004, the report nonetheless provides evidence or analysis relevant to consideration of the implications of a number of Sir David Clementi's recommendations to the Scottish legal services market. The research informs and contributes to the debate and policy development process required to identify the Scottish implications of Clementi's recommendations. It does not present agreed conclusions, nor was it expected to do so given the widely representative composition of the Group. The report identifies evidence wherever possible and records differing views on key issues. It also points to areas where further research would be helpful and draws attention to reforms already achieved.

1.19 The Working Group decided that the Scottish legal services market should be examined as a number of sub-markets and selected as sub-markets to be researched : wills/trusts/executries/estates, employment law, personal injury, financial services/tax advice, immigration, criminal law, residential conveyancing, commercial conveyancing, commercial law, family law, welfare/debt/ housing and consumer law (see chapter 3).

1.20 The work of the Group resulted in different outcomes :

- where the Group's research enabled it to reach agreed conclusions and make specific recommendations to Scottish Ministers;

- where the Group's discussion of the issues did not identify consensus, but provided an assessment of the arguments and identified the nature of the decisions which would be needed by Ministers; and

- where the Group's work provided an evidence base for future policy consideration.

Research Working Group membership

1.21 The Research Working Group met on 10 occasions between March 2004 and November 2005. Chaired by the Scottish Executive Justice Department, it included representatives of consumer interests and the legal professional bodies, and senior academic researchers working in the fields of law, economics and consumer rights. The membership of the Working Group is at annex A.

CHAPTER 2 SETTING THE SCENE

2. This chapter explains the regulatory framework for legal services in Scotland, examines issues relating to governance of the legal professional bodies and looks at the implications of Scottish policy developments such as legal aid reform, community legal services and the Public Defence Solicitors' Office.

(a) The Regulatory Framework for Legal Services in Scotland

2.1 One of the Group's first steps was to map the regulatory framework for legal services in Scotland, focussing mainly on legal services provided by solicitors, solicitor advocates, advocates and conveyancing and executry practitioners.

(i) The role of Parliament, Government and the Court

UK Parliament

2.2 Competition is reserved to the UK Parliament, subject to an exception which devolves responsibility for "the regulation of particular practices in the legal profession for the purpose of regulating that profession or the provision of legal services"[10]. The legal profession is defined in that context to mean advocates, solicitors and conveyancing and executry practitioners[11]. The legislative responsibility for some aspects of the work of Scottish lawyers, such as investment business, immigration advice and consumer credit, is reserved to the UK Parliament and the policy lead rests with UK Government Departments.

Scottish Parliament

2.3 Regulation of the legal profession in Scotland is a matter which is within the legislative competence of the Scottish Parliament. The legal profession operates within a statutory framework which the Scottish Parliament can repeal, alter or amend. As noted in chapter one, the Parliament's Justice 1 Committee carried out an inquiry into the regulation of the legal profession, on which it reported in November 2002.

Scottish Executive

2.4 The policy lead on regulation of the legal profession in Scotland lies with Scottish Ministers.

The Office of Fair Trading

2.5 The Office of Fair Trading has power to review and provide advice on restrictions on competition in professions under the Enterprise Act 2002 and to enforce the provisions of both domestic and EC competition law on a UK basis. Its aims are that the professions, including the legal profession, should be fully subject to competition law and that any

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[10] Schedule 5 to the Scotland Act 1998, Head C3

[11] within the meaning of Part II of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

unjustified restrictions on competition should be removed in the interest of the users of legal services.

The Court

2.6 Lawyers who practise advocacy before the Courts must conduct themselves in a manner which is acceptable to the Court. The performance and conduct of such lawyers is subject to continuous public scrutiny from an informed third party, namely the judge, and may also be seen by other lawyers, their clients and members of the public. Moreover, such lawyers have a dual role : as well as representing their clients, they owe duties to the Court which may in some circumstances conflict with the desires and interests of their clients. Lawyers are "officers of the court" with duties and responsibilities beyond those to their individual clients. They are not a simple service provider able to provide their clients with a service in a way and at a time entirely of their or their clients choosing.

The Court of Session

2.7 The Court and the Lord President of the Court of Session also have responsibilities in relation to the regulation of the legal profession :

- The Court of Session is responsible for the admission of solicitors[12] and has various disciplinary powers in relation to them (see paragraph 2.33 below), including a power to strike a solicitor off the roll;

- Rules of the Law Society of Scotland require the concurrence or approval of the Lord President;

- Any scheme for rights of audience or rights to conduct litigation under sections 25-29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 would require the approval of the Lord President (see paragraph 2.28); and

- Advocates are admitted by the Court of Session, changes to the requirements for admission as an advocate require the approval of the Lord President, and any lawyer who practises advocacy is subject to the immediate control of the Court in relation to his conduct in court.

(ii) Regulation of solicitors

2.8 Arrangements for the regulation of solicitors by the Law Society of Scotland are set out in the Solicitors (Scotland) Act 1980. The Law Society of Scotland has statutory responsibility for the promotion of the interests of the profession of solicitor in Scotland and the interests of the public in relation to that profession[13]. In carrying out its functions therefore, the Society must not only have regard to the interests of the solicitors' profession but also to the interests of the public in relation to that profession.

[12] Under section 6 of the Solicitors (Scotland) Act 1980.
[13] Under section 1(2) of the Solicitors (Scotland) Act 1980.

2.9 The 1980 Act provides for the statutory basis for the Society, the right to practise, professional practice, conduct and discipline, and complaints and disciplinary proceedings relating to solicitors in Scotland. It has since been amended by subsequent legislation[14] which has strengthened some of the statutory protections available to the client. The business of the Society is conducted through a Council comprising up to 53 members, 44 of whom are elected by the members of the profession and up to 9 of whom may be co-opted by the Council. In turn, the Council exercises its authority both itself, through a variety of Committees and through the Executive Officers of the Society. The Council deals both with the Society's regulatory functions (eg the setting of standards for entry and education, rule making and monitoring and enforcement) and its representative functions (eg negotiating with Government, contributing to the development of the law and the system of administration of justice, representing the profession to the public and other stakeholders, services to members, marketing, and international activities).

2.10 The 1980 Act provides the Society with powers to

- make regulations in respect of admission to the profession and training within it (section 5);
- make rules in relation to applications for and issue of practising certificates (section 13);
- make rules relating to admission as a solicitor with extended rights of audience (section 25A);
- make rules relating to professional practice, conduct and discipline (section 34);
- make rules relating to the keeping of accounts (sections 35, 36 and 37(6));
- make rules relating to professional indemnity insurance (section 44);
- control and manage the Scottish Solicitors Guarantee Fund (section 43, Schedule 3, Part I);
- handle compliance, enforcement and disciplinary issues arising out of the rules of the Society; and
- handle complaints about solicitors (sections 38 - 42C).

The Society also has statutory responsibility for investigating complaints that a solicitor has been guilty of professional misconduct or provided inadequate professional services[15].

[14] The Law Reform (Miscellaneous Provisions) (Scotland) Acts of 1985 and 1990 and the Solicitors (Scotland) Act 1988
[15] under section 33 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

Approval of rules

2.11 Rules made by the Society require either the concurrence or approval of the Lord President of the Court of Session. Rules relating to incidental investment business require the approval of the Financial Services Authority. Any rule made by the Society which has the effect of prohibiting multi-disciplinary practices requires to be approved by Scottish Ministers, who are required in turn to consult the Office of Fair Trading[16]. A similar requirement applies to rules relating to rights of audience for solicitor advocates.[17]

Reserved work

2.12 Certain legal work is reserved to those with legal qualifications or to those who meet other statutory qualifications (section 32). The preparation of deeds transferring heritable property and grants of confirmation in favour of executors is reserved to solicitors, advocates and conveyancing and executry practitioners. The preparation of writs relating to court proceedings is reserved to solicitors and advocates, subject to exceptions (for example, unqualified persons not being paid for their services).

Solicitors from England, Wales and Northern Ireland and the European Union

2.13 Solicitors from England, Wales, Northern Ireland and lawyers from other parts of the European Union who wish to requalify as Scottish solicitors may sit a transfer test set by the Law Society of Scotland. The Intra-UK Transfer Test is applicable to solicitors qualified in England, Wales and Northern Ireland, while the Aptitude Test for EC Qualified Lawyers applies to all other European Union qualified lawyers.

Registered European Lawyers

2.14 Registered European lawyers may practise in Scotland by virtue of legislation[18] which implemented the EC Lawyers Establishment Directive of 16 February 1998 in Scotland. The Directive provides for European lawyers to practise on a permanent basis under their home State professional title in another European jurisdiction and to be able to integrate into the host state profession after 3 years of regular and effective practice. The European lawyer must register with a competent authority in the host State, which in Scotland is either the Law Society of Scotland or the Faculty of Advocates. Registration entitles the European lawyer to practise the law of the relevant part of the UK as well as the law of the home State, thus enabling the 3 years of regular and effective practice to start to be accumulated.

Registered foreign lawyers

2.15 Regulations came into force in October 2004 which enable Scottish solicitors and incorporated practices to enter into multi-national practices with registered foreign lawyers[19]. The Regulations provide a statutory framework for regulation by the Law Society of Scotland of the entry of Scottish solicitors and incorporated practices into multi-national practices and

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[16] under section 34(3A) of the Solicitors (Scotland) Act 1980.

[17] under section 25A of the Solicitors (Scotland) Act 1980.

[18] the European Communities (Lawyer's Practice) (Scotland) Regulations 2000 (SI 2000 No 121).

[19] The Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004, SI 2004 No 383.

for the registration of foreign lawyers who wish to enter such practices. The registration process permits the Council of the Law Society of Scotland to satisfy itself that the legal profession of which the foreign lawyer is a member is properly regulated.

2.16 The Regulations meet an obligation on EC member states under the General Agreement on Trade in Services (GATS) to allow foreign lawyers and firms to come into Member States' legal services markets and practise their home country and public international law.

2.17 Multi-national practices will involve Scottish solicitors and incorporated practices and foreign lawyers from overseas jurisdictions, but may also be multi-jurisdictional practices which in effect involve solicitors and incorporated practices from the three jurisdictions within the United Kingdom. Registered foreign lawyers will not be able to carry out reserved legal work or appear in court proceedings.

(iii) Regulation of advocates

2.18 The Faculty of Advocates was not established by statute, but its role as the professional body to which all advocates belong has long been recognised by the Court. The Faculty exercises a dual role of representing the interests of advocates and regulating advocates in the public interest.

2.19 The Faculty is led by its Dean who is elected by the whole membership and assisted by four elected officials : the Vice Dean, the Treasurer, the Clerk and the Keeper of the Library. In July 1992 the Faculty adopted a constitution for an elected Council. The powers conferred upon the Council include the formulation and implementation of policy for the administration and development of the Faculty; the maintenance of the Advocates Library and the approval of rules regulating its use; the provision, through Faculty Services Ltd or otherwise, of administrative facilities and services to members of the Faculty; and the formulation of regulations governing admission as well as codes of conduct and professional practice.

2.20 The Court of Session admits to the public office of advocate, but has, since the seventeenth century, delegated responsibility for the examination of the suitability of candidates to the Faculty. Changes to the requirements for admission as an advocate require the approval of the Lord President. The Faculty is otherwise self-regulating and controls its own disciplinary procedures, though lay representation is involved. The Faculty has statutory responsibility for investigating complaints that an advocate has been guilty of professional misconduct or provided inadequate professional services[20].

(iv) Regulation of conveyancing and executry practitioners

2.21 In August 2003 the Law Society of Scotland took over statutory responsibility for the regulation of conveyancing and executry practitioners[21]. It acquired this responsibility, together with relevant rule-making powers, on abolition of the Scottish Conveyancing and

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[20] under section 33 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

[21] under sections 16-23 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

Executry Services Board[22]. Costs incurred by the Society in relation to the regulation of conveyancing and executry practitioners are met by grant-in-aid from Scottish Ministers. At the time of transfer of responsibility about 20 practitioners were registered with the Board; only 3 of the practitioners were practising in an independent capacity and the others were working in an employed capacity.

(v) Rights of audience

Lay rights of audience

2.22 Individuals may normally always represent themselves in court proceedings. Notable exceptions are that personal conduct of a defence is prohibited in the case of certain sexual offences under the Sexual Offences (Procedures and Evidence) (Scotland) Act 2002; and in cases involving child witnesses under the age of 12 or other cases involving vulnerable witnesses under the Vulnerable Witnesses (Scotland) Act 2004. In general, only a person who is legally qualified may represent someone else in Court proceedings. The main circumstances when a person can be represented by non-lawyers are small claims, proceedings under the Debtors (Scotland) Act 1987 and proceedings before a sheriff relating to attachment under the Debt Arrangement and Attachment (Scotland) Act 2002 :

- In small claims an authorised lay representative may in representing a party do everything for the preparation and conduct of a small claim as may be done by an individual conducting his own claim, if the sheriff is satisfied that such a person is a suitable representative and is duly authorised to represent the party. (Sheriff Courts (Scotland) Act 1971, Section 36 and related rules of court).

- In summary cause actions a party may also be represented by an authorised lay representative at the first calling and, unless the sheriff otherwise directs, any subsequent or other calling where the action is not defended on the merits or on the amount of the sum due.

- Under the Debt Arrangement and Attachment (Scotland) Act 2002 and the related Act of Sederunt a party to any proceedings under the Act may be represented by a person other than an advocate or a solicitor if the sheriff is satisfied that such a person is a suitable representative and is duly authorised to represent the party. (This followed similar provision in earlier legislation).

- At the first diet in summary criminal proceedings where the accused is not present, a person (who is not an advocate or solicitor) who satisfies the court that he is authorised by the accused, may tender a plea of guilty or not guilty on behalf of the accused[23].

2.23 In terms of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 any person entitled to appear at an inquiry may appear on his own behalf or be represented by an advocate or a solicitor or, with the leave of the Sheriff by any other person.

2.24 Representation by non-lawyers is also permitted in many statutory tribunals.

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[22] by the Public Appointments and Public Bodies etc (Scotland) Act 2003.

[23] By virtue of section 144(2)(b) of the Criminal Procedure (Scotland) Act 1995.

Rights of audience : solicitors

2.25 Those who are qualified to practise as solicitors may practise as a solicitor in any court in Scotland. Solicitors have rights of audience in the district and sheriff courts and in those Tribunals where legal representation is allowed. Unless a solicitor has qualified as a solicitor advocate, a solicitor may not in general appear in the Court of Session, the High Court, the House of Lords or the Judicial Committee of the Privy Council.

Rights of audience : solicitor advocates

2.26 The Law Society of Scotland has powers[24] to appoint solicitor advocates, who are solicitors who have gained rights of audience in the supreme courts in Scotland, as well as the House of Lords and the Judicial Committee of the Privy Council, through additional training and examinations. Rules made by the Society under those powers in relation to training for solicitor advocates require to be approved by the Lord President of the Court of Session, and by Scottish Ministers who are required in turn to consult the Office of Fair Trading. Rules dealing with conduct in relation to the exercising of any right of audience also require the approval of the Lord President and Scottish Ministers; Scottish Ministers are required to consult the Office of Fair Trading where they consider that any such rule would directly or indirectly inhibit the freedom of a solicitor to appear in court.

Rights of audience : advocates

2.27 An advocate is entitled to plead in any Court in Scotland, including the Supreme Courts (the High Court of Justiciary, the Court of Criminal Appeal and the Court of Session); the Judicial Committees of the House of Lords and the Privy Council; the European Court of Human Rights and the Court of Justice of the European Communities; and a wide range of tribunals, inquiries and other such proceedings.

Rights of audience and rights to conduct litigation : members of a professional or other body

2.28 Sections 25-29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, which have not yet been commenced, set out arrangements by which rights to conduct litigation and rights of audience can be granted to members of a professional or other body. These provisions are considered more fully in chapter 12.

(vi) Scottish Legal Services Ombudsman

2.29 The Scottish Legal Services Ombudsman is appointed by Scottish Ministers[25] and has a remit to investigate the handling of complaints against legal practitioners. The Ombudsman is independent from the legal profession and is not a lawyer. S/he is also independent from Government and the Ombudsman's findings and recommendations are not reviewed by Scottish Ministers or the Scottish Executive.

2.30 Complainers who consider that their complaint has not been dealt with satisfactorily by the relevant solicitor, law firm or advocate may take the complaint to the Law Society of

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[24] Under section 25A of the Solicitors (Scotland) Act 1980.

[25] under section 34(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Scotland or the Faculty of Advocates, who must investigate the complaint and thereafter report on their investigations to the complainer and to the practitioner concerned. If a complainer is dissatisfied with the outcome of an investigation by the professional body concerned, he or she may then take a complaint to the Ombudsman, requesting the Ombudsman to examine how the complaint has been handled by the professional body. The Ombudsman is concerned with the professional body's handling of the complaint, i.e. whether the investigation by the professional body has been fair and thorough, whether all the relevant heads of complaint have been properly addressed and whether appropriate action has been taken.

2.31 Having arrived at an opinion, the Ombudsman may make appropriate recommendations to the professional body which is required to consider them and to notify both Ombudsman and complainer as to what action it has taken or if it has decided not to comply wholly with the recommendations. If the professional body has not wholly complied with such recommendations within a period of three months, the Ombudsman may publicise that fact. The Ombudsman may include any such case in an Annual Report to Scottish Ministers, without identifying the parties involved, and may report a case to the Scottish Solicitors' Discipline Tribunal where it appears that a solicitor may have been guilty of professional misconduct. In her Annual Report the Ombudsman may also make general recommendations about how the complaints handling procedures of the professional bodies might be improved.

(vii) External regulators : discipline

2.32 The members of the Law Society of Scotland and the Faculty of Advocates are subject to external regulation by the Court of Session and the legal profession discipline tribunals. Non-lawyers are already involved in the Scottish Solicitors' Discipline Tribunal and the Faculty of Advocates Disciplinary Tribunal. In relation to complaints-handling, the Law Society of Scotland increased lay membership of its Client Relations Committees to 50% in 2003.

Court of Session

2.33 In the case of professional misconduct by a solicitor, the Court of Session on appeal from a decision of the Scottish Solicitors' Discipline Tribunal may use its powers under section 55 of the Solicitors (Scotland) Act 1980 to

- cause the name of a solicitor to be struck off the roll; or
- suspend the solicitor from practice as a solicitor for such period as the court may determine; or
- suspend the solicitor from exercising any right of audience held by him by virtue of section 25A for such period as the court may determine; or
- revoke any right of audience so acquired by him; or
- fine the solicitor; or
- censure him; and in any of those events,

- find him liable in any expenses which may be involved in the proceedings before the court.

The Court of Session does not exercise its powers in relation to professional misconduct, unless there has been a decision by a Discipline Tribunal.

Scottish Solicitors' Discipline Tribunal

2.34 The Tribunal is a statutory body empowered to adjudicate on complaints about professional misconduct and the provision of inadequate professional services by solicitors. The composition of the Tribunal is defined in statute[26] and must consist of between 10 and 14 solicitor members and 8 lay members, all appointed by the Lord President of the Court of Session.

2.35 The Council of the Law Society of Scotland nominate solicitor members to the Lord President and Scottish Ministers nominate lay members to the Lord President, who makes the appointments in accordance with the 1980 Act. The Tribunal has a range of disciplinary powers under section 53 of the 1980 Act, including the power to order the name of a solicitor to be struck off the roll, to order a solicitor to be suspended, fined, censured etc.

Faculty of Advocates Complaints Committee and Disciplinary Tribunal

2.36 Complaints against advocates are handled in the first instance by the Dean (or another office-bearer of the Faculty to whom he may delegate this task), who may refer the complaint to the Complaints Committee for determination and disposal. The Complaints Committee may dispose of the complaint itself or may remit it to the Disciplinary Tribunal for determination or disposal. The Disciplinary Tribunal may impose more severe penalties than the Complaints Committee. If the complaint is determined by the Complaints Committee, the complainer or the advocate may appeal, with leave of the Complaints Committee to the Disciplinary Tribunal. The Faculty's Disciplinary Rules set out the membership and procedures. Both the Complaints Committee and the Disciplinary Tribunal include lay members from a panel of lay persons nominated by Scottish Ministers for the purpose. With effect from 1st January 2005, the Complaints Committee in a particular case has four members, two of whom are lay persons, and the Disciplinary Tribunal consists of a Chairman (who is either a retired Senator of the College of Justice, Sheriff Principal or other appropriate person appointed by the Lord President), and five other persons of whom three are lay persons.

(viii) External regulators : specific professional activities

2.37 Co-regulation involving the Society and other bodies occurs in the areas of investment business, insolvency, legal aid, immigration and consumer credit.

Scottish Legal Aid Board

2.38 Under the Legal Aid (Scotland) Act 1986 the Scottish Legal Aid Board maintains a Register of Solicitors who can provide criminal legal assistance and has issued a Code of Practice in relation to criminal legal assistance. The Board has powers to remove solicitors

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[26] Schedule 4 to the Solicitors (Scotland) Act 1980.

from the Register and powers to require information, enter solicitors' premises and investigate compliance with the code or contraventions in relation to criminal legal assistance.

2.39 The 1986 Act allows any solicitor to provide Advice and Assistance on any matter of Scots law if the client meets the statutory tests. Solicitors providing advice on criminal matters have to be registered as already noted. Civil legal assistance was reformed in October 2003 and practice rules made by the Law Society of Scotland require solicitors providing civil legal assistance to be registered with the Board and subject to a quality assurance regime involving peer review. The 1986 Act does not place any restrictions on counsel providing Advice and Assistance.

2.40 The Act does however provide that the Law Society of Scotland, the Scottish Solicitors' Discipline Tribunal or the Faculty of Advocates can decide to exclude a solicitor or an advocate from providing advice and assistance or from representing someone who has been granted legal aid. This can be done on the following grounds

- their conduct when acting or selected to act for persons to whom legal aid or advice and assistance is made available; or

- their professional conduct generally; or

- in the case of a member of a firm of solicitors or a director of an incorporated practice, such conduct on the part of any person who is for the time being a member of the firm or a director of the practice.

A solicitor or advocate can be excluded for a specified period or without limit of time. An appeal against such a decision lies to the Court of Session.

2.41 Separately, the Solicitors (Scotland) Act 1980 permits the Scottish Legal Aid Board to make a complaint to the Scottish Solicitors' Discipline Tribunal where it appears that

- a solicitor may have been guilty of professional misconduct; or

- an incorporated practice may have failed to comply with any provision of the Solicitors (Scotland) Act or of rules made under the Act applicable to it, or a solicitor of an incorporated practice may have provided inadequate professional services.

2.42 A Strategic Review was carried out of the delivery of legal aid, advice and information in Scotland, including the role of the Scottish Legal Aid Board. The aim of the review was to modernise legal aid, streamline criminal justice and improve the access to justice agenda for the benefit of the citizen. The report to Ministers and the Scottish Legal Aid Board was published in October 2004 (Strategic Review on the Delivery of Legal Aid, Advice and Information ISBN 0-7559-4372-4). The issues were the subject of a consultation paper “Advice for All” which set out the Scottish Executive’s vision for reforming publicly funded legal assistance in Scotland; the consultation closed on 9 September 2005.

Financial Services Authority

2.43 The Financial Services Authority is directly responsible for the authorisation and regulation of solicitor firms which conduct mainstream investment business under the Financial Services and Markets Act 2000. The Law Society of Scotland is a recognised professional body under the 2000 Act and responsible as such for the licensing and regulating of solicitor firms which conduct incidental investment business, that is investment business which is incidental and complementary to the provision of legal services.

Insolvency Practitioner regulation

2.44 The Law Society of Scotland is a recognised professional body under the Insolvency Act 1986 and issues licences to solicitors who wish to be appointed as insolvency practitioners. The Society monitors and inspects all its insolvency solicitors and is itself subject to monitoring and supervision by the Department of Trade and Industry Insolvency Service every 3 years.

Consumer Credit

2.45 The Law Society of Scotland holds a group licence under the Consumer Credit Act 1974. The licence is granted by the Office of Fair Trading, lasts for 5 years and enables members of the Society to provide services in consumer credit, credit brokerage, debt-adjusting and debt-counselling and debt-collecting.

Immigration and asylum services

2.46 The Law Society of Scotland and the Faculty of Advocates are designated professional bodies in terms of section 86 of the Immigration and Asylum Act 1999. Designation removes the need for Scottish solicitors or advocates to be registered individually with the Immigration Services Commissioner. The Commissioner has the power to receive complaints against Scottish solicitors or advocates giving immigration advice and is required to monitor how any complaints passed to the Society or Faculty are handled[27]. The Commissioner is required to review the list of designated professional bodies and report to the Scottish Ministers if a designated professional body is failing to provide effective regulation of its members.

(ix) Other legal service providers

2.47 Provision of legal information and advice in Scotland by non-lawyers has developed over the years, as a result of local initiatives of providers in the public, private or voluntary sectors. The most common sources of legal advice on civil matters are solicitors and local Citizens Advice Bureaux. There is however a wide variety of other sources of advice, ranging from the police to trade unions, local authority departments, housing associations, insurance companies, advice agencies, welfare rights and trading standards officers, law centres, voluntary organisations and interest groups, social workers and court staff.

[27] Schedule 5, paragraph 10 of the Immigration and Asylum Act 1999.

2.48 Local authorities are the principal funders of the voluntary advice sector as well as being significant providers of advice services themselves. Central government funding (of voluntary sector provision or for specific initiatives in local authorities) is less prominent, but does involve a number of UK Government Departments, such as the Department for Trade and Industry which provides funding for Citizens Advice Scotland and support initiatives such as the Consumer Support Networks. The Scottish Executive also provides funding for advice provision, through several Departments, such as its Development Department which provides financial support for locally based money and debt advisers; and funds organisations such as Shelter, the Shelter Housing Law Service and Legal Services Agency, through its housing sector voluntary grant scheme. The report of the Strategic Review on the Delivery of Legal Aid Advice and Information published in October 2004 recommended better integration and coordination of legal advice services by solicitors (funded through legal aid) and non-legally qualified advisers funded from other public sources; and an enhanced role for the Scottish Legal Aid Board to help deliver a better coordinated and more flexible and responsive system.

2.49 There are also mediators who seek to develop effective communication and build consensus between parties in dispute with the aim of securing their agreement to a settlement. Mediators may be regulated through voluntary adherence to certain training standards and codes of practice but they are not subject to any statutory regulation.

Claims assessors and claims management companies

2.50 In recent years companies have started up, often on a GB basis, which pursue personal injury cases on behalf of clients. There is no statutory definition of what they do and the companies work on an unregulated basis, though a Claims Standards Council was established in 2004 which has been working to self regulate in that area and has prepared draft codes of conduct for its members. Claims companies in Scotland usually charge on a contingency fee basis under which they receive a percentage of any damages awarded or of the agreed settlement and usually seek to negotiate settlements without litigation. Claims management companies are known to contract with solicitors to act on their behalf and operate by advertising their services on a "no win, no fee" basis. Employees without a legal qualification carry out the initial assessment of claims and pass those they think worthwhile to solicitors contracted to the claims management company. If the claim succeeds, the company will usually take one third of the damages awarded.

2.51 The Compensation Bill introduced in the House of Lords on 2 November 2005 contains provisions for the regulation of claims management services in England and Wales. Scottish Ministers are monitoring the progress of the Bill and will consider whether future Scottish legislation on similar lines may be required in the light of its progress and their assessment of Scottish circumstances.

(b) Governance and competition

2.52 The Scottish Executive's consultation paper on complaint handling arrangements (see chapter one) also addressed issues dealing with the constitution of the professional bodies. The Law Society of Scotland has a statutory duty at present to promote both the interests of the solicitors' profession in Scotland and the interests of the public in relation to that

profession.[28] The Faculty of Advocates has a similar, but non-statutory, dual role. Potential tensions exist between these dual functions and the consultation paper invited views on whether the Law Society of Scotland should keep its regulatory and representative functions undivided as at present or whether these functions should be split and made the subject of separate governance arrangements. Of those who expressed a clear view in response, over 84% were in favour of these functions being split.[29]

Competition issues

2.53 With regard to the existing regulatory arrangements of the Law Society of Scotland and the Faculty of Advocates, the Office of Fair Trading (the OFT) noted that

- under current arrangements both bodies were engaged in functions that were both representative and regulatory and there was little evidence of significant attempts having been made to separate these functions;

- while some areas of the regulatory activity carried on by the Law Society of Scotland and the Faculty of Advocates were subject to adequate oversight by external bodies, there were in the OFT's view significant areas where there was either no oversight or oversight arrangements did not appear to be adequate or in line with best practice.

The Law Society of Scotland disagreed with the OFT view that significant attempts had not been made to separate representative and regulatory functions, noting that the Council of the Law Society of Scotland Act 2003 had permitted its Council to delegate responsibilities to individual committees, resulting in appreciable separation of these functions and in regulatory decisions being made by committees.

2.54 The OFT believed that separation of the representative and regulatory functions of the main professional bodies had an important role to play in both consumer protection and in competition. An important public interest objective of the regulatory task (one of a number of such objectives) was to ensure that rules did not unnecessarily restrict competition. Meeting these might conflict with the task of representing members' interests in the OFT's view. The OFT saw a danger that where one and the same body was charged with making rules and representing members' interests, the resulting rules would not strike an appropriate balance between public interest objectives, such as competition, and the interests of members.

2.55 Separating regulatory and representative functions helped to avoid this danger but was unlikely to be a sufficient safeguard, given the ongoing need to strike an appropriate balance between what would often be competing objectives. This suggested to the OFT that, in order to help ensure that professional rules serve the public interest, it was desirable that any significant regulatory activity by the professional bodies should be subject to external oversight by an independent body charged with ensuring that such rules were in the public interest. The Scottish Consumer Council believed that complete separation of the professional bodies' regulatory and representative functions would help to achieve higher priority for the public interest in their work.

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[28] Under section 1 of the Solicitors (Scotland) Act 1980.

[29] "Reforming complaints handling, Building consumer confidence" Analysis of written consultation responses (available at http://www.scotland.gov.uk/Resource/Doc/77843/0018721.pdf)

Clementi

2.56 In the report of his review[30] (see chapter one), Sir David Clementi recognised the difficulty inherent in a professional body both regulating and representing a profession in the following terms :

- In a regulatory body the public interest should have primacy. Issues such as changes in practice rules should be examined, not against the wishes of the membership, but against the test of the public interest;

- In a representative body the interests of the membership should have primacy;

- Even where a body did place the public interest ahead of that of its members, there remained an issue of perception. Though restrictive practices to be found in the practice rules of professional bodies might have operated in the public interest, there was a perception that the issues had not historically been addressed with the vigour and independence to be expected of a regulatory body.

- Just as there had been criticism that professional bodies gave insufficient weight to the public interest, so there could be criticism from members of professional bodies that their respective bodies gave insufficient attention to representative needs.

- The function of representing the interests of its members to raise remuneration levels funded by the state sat uneasily with the regulatory responsibility of a professional body to act in the public interest.

- It was particularly difficult for professional bodies who combined both regulatory and representative roles to deal with competition issues.

2.57 From his review of experience in England and Wales Clementi concluded that the current combination of regulatory and representative powers within professional bodies had not resulted in the public interest being consistently placed first. A key recommendation of his review was that the regulatory and representative functions of professional bodies in England and Wales should be clearly split. The White Paper "The Future of Legal Services : Putting Consumers First" published by the Department for Constitutional Affairs in October 2005 accepted Sir David's recommendation that front line legal professional bodies should be required to separate their regulatory and representative functions.

Conclusion

2.58 The Scottish Executive is considering the way forward on this issue in the light of the views expressed in the responses made to its consultation.

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[30] Report of the Review of the Regulatory Framework for Legal Services in England and Wales, published on 15 December 2004 and available at http://www.legal-services-review.org.uk/content/report/index.htm.

(c) Legal aid reform, community legal services and the Public Defence Solicitors' Office

2.59 Among the specific issues for examination by the Group were the implications of Scottish policy developments such as legal aid reform, community legal services and the Public Defence Solicitors' Office. These had largely been the subject of continuing policy consideration over the period of the Group's work and in significant areas there was as yet no final policy outcome. It would not therefore have been possible or appropriate for them to be the subject of formal research. It was agreed that the proposals which had been or were being brought forward should be described, and a general preliminary assessment made of their impact on competition.

Proposals for Reform

2.60 Proposals for reform in the main policy areas had been under consideration for some considerable time. The then Justice 1 Committee of the Scottish Parliament published a report on legal aid in November 2001. The findings of a Working Group established by Ministers to consider how a community legal service might be developed for Scotland were also published in November 2001, under the title of "Review of Legal Information and Advice Provision in Scotland". This was followed by the Strategic Review of the Delivery of Legal Aid, Advice and Information, undertaken jointly by officials of the Executive and the Scottish Legal Aid Board (SLAB). Their report to the Board and Ministers was published in October 2004. Finally, in June 2005 the Executive published a consultation paper entitled "Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward", setting out a number of proposals for change in the medium and longer term. Comments on the proposals in that paper were sought by 9 September 2005.

2.61 The general thrust of the various reviews which had been undertaken was broadly consistent. The Strategic Review found that the current arrangements for publicly funded legal assistance provided valued services to a wide range of people in Scotland, but were in need of considerable reform and development. The Executive's June 2005 consultation paper set out a range of proposals for change in legal assistance paid for from the public purse (advice provided by the legal profession as well as advice on such matters as housing or debt from a wide range of other providers such as local authorities and the voluntary sector).

2.62 The consultation proposed measures to address long term strategic issues, including better coordination and planning of services and service providers, better matching of supply to demand, better value for money and continued, quality advice provision for the future. It envisaged compatible systems of quality assurance covering all types of advice. In order to ensure the availability of appropriate services, it proposed that SLAB should be able to respond to gaps in supply more flexibly, using a range of mechanisms. On the criminal side, flexibility might be achieved through the use of contracts or via expansion of the work of the Public Defence Solicitors' Office (PDSO). On the civil side, it might also involve the direct employment of solicitors alongside the use of contracts or grant funding arrangements with a range of advice providers, including both lawyers and others, in the private and not-for-profit sectors. For the longer term it envisaged the possible establishment of a national coordinating body which would subsume the current role of SLAB and would also have powers to co-ordinate the delivery of other forms of advice provision. It sought views on the roles to be played in such a co-ordinated mechanism by the legal profession, SLAB, local authorities, other advice providers including the voluntary sector, and the Scottish Executive.

2.63 The proposals sought to balance access to advice with the need to ensure better value for money. They included the introduction of clearer and fixed financial eligibility criteria and more extensive and flexible powers for SLAB to provide greater control over how public funds were spent. They were aimed at ensuring that those who could pay towards their legal costs did so, and at minimising any form of exploitation of the current system. On the criminal side, one specific proposal was that responsibility for granting legal aid in solemn criminal cases should be transferred from the Courts to SLAB, in order to improve the assessment of applicants' financial eligibility. For the longer term the paper floated the idea of a system of contributions in legally-aided criminal cases for those who could afford them, as was already the case in civil legal aid. Proposals to improve planning and coordination would also ensure that public funds were spent more effectively.

2.64 In terms of civil legal advice, the proposals set out a number of improvements in access. In response to concerns that many people on modest but not very low incomes were not getting the access to advice they needed, the paper proposed more flexible ways of paying contributions towards legal costs. For the longer term the paper sought views on the principle of a system of tapering whereby eligibility for civil legal aid would be open to people on considerably higher incomes than at present, subject to concomitant higher contributions being payable: in many cases that would result in people paying the full cost of their case, but would provide a safety net where the costs of the case were genuinely higher than the legally-aided person could afford.

2.65 Separately from the consultation on strategic policy matters, much work had been and was being undertaken on detailed changes to the legal aid system. In some cases these sought to ensure that the legal aid system properly underpinned and supported changes being brought forward in other parts of the justice system, such as High Court reform and the forthcoming proposed reform of summary criminal justice. In other cases the changes sought to streamline the system and improve efficiency and value for money. A review of civil legal aid had already been put in place, as had a new system of fees for Counsel in solemn criminal cases which would be reviewed and refined in autumn 2005. Further proposals for the review of fees for solicitors in solemn criminal cases, and for the modernisation of summary criminal legal aid generally, were under consideration.

Competition issues

2.66 The full implications for competition in the legal services market of those varied and sometimes complex proposals for changes in the legal aid and advice systems could not be clearly assessed until decisions had been taken by Ministers, and where appropriate by Parliament. The timescale for the full range of decisions to be made would extend over a number of years, and certainly well beyond the timescale of the Group's work programme. In broad general terms, however, it could be anticipated that the provision of a wider and better co-ordinated range of advice and related services should encourage the development of competition where that was clearly desirable, while reducing the potential for wasteful duplication where that would best serve quality, efficiency and effectiveness.

CHAPTER 3 CHARACTERISING THE LEGAL SERVICES MARKETS IN SCOTLAND

(a) Research methodology

3. The main aim of this phase of research was to identify those legal markets with relatively high and low levels of competition, with a view to more intensive investigation at a subsequent stage. This research was carried out by way of a series of face to face interviews. The research sought interviewees' perceptions on the level of competition in the various legal markets. Interviewees were also asked, where appropriate, to identify any strengths or weaknesses at particular stages of the legal provision process in the various markets, as well as to comment on advantages and disadvantages for consumers and providers of: professional rules and practices; organisational structures; and providers' profiles. The summary findings for each of the identified legal markets are presented below, as are the more general views of key stakeholders. This is followed by a grid to represent the market-level findings systematically.

3.1 Interviews were conducted with representatives of the CBI Scotland, the Law Society of Scotland, Citizens Advice Scotland, the Scottish Legal Aid Board, the Office of Fair Trading and the Scottish Consumer Council, the Scottish Legal Action Group (SCOLAG), a representative of the Society of Solicitor Advocates, as well as members of the Faculty of Advocates.

(b) Interview findings

Commercial law

3.2 The market for commercial legal services was reported to be robust and competitive, with the corporate client frequently a professional buyer of legal services and better informed than most other legal services clients. Further, a range of providers operated in this market including solicitors, advocates, in-house lawyers and 'non-lawyer' specialists. Competition operated along both quality and cost dimensions. The larger (mainly Edinburgh and Glasgow commercial) firms were now competing in a UK-wide market and were reported to be taking business away from Magic Circle and other large City firms because of their relatively lower cost base.

3.3 Commercial law firms competed in the quality realm by exhibiting an understanding of the businesses of their potential customers and by demonstrating their ability to provide legal services tailored to the needs of business clients. For this same reason, there was a growing tendency for commercial law providers to position themselves in the locality which they served, with large firms setting up satellite practices in other cities so as to establish themselves as part of the local business community.

3.4 Recognising that they had to provide the highest quality services to retain clients, firms providing commercial legal services maintained their clientele by providing premium/ incremental services and giving their clients no reason to seek provision for legal services elsewhere (often providing services that were not paid for – e.g. corporate entertainment). There was some uncertainty as to whether negotiation over price was extensive. As in other markets, powerful clients were more likely to have the ability to negotiate price than others.

3.5 For their part, clients/customers were most likely to look for lawyers delivering a good package of services, of which price was only a small part. They were likely to retain the same firm for dealing with all legal matters pertaining to the operation of their company, such as employment, commercial conveyancing and personal injury (defender work), as well as commercial and company law. Building up and maintaining relationships with organisations that had empathy with their business needs was a crucial aspect of business life, and this also applied to relationships with the providers of their legal services. Hence, loyalty was thought by some to play an instrumental role in business life and the business client was unlikely to behave in the legal services market like the archetypal supermarket shopper. According to one interviewee, however, client loyalty was no longer found to play the role it once had in commercial law practice.

Wills, trusts, executries, estates

3.6 This was a growth area in Scotland, as the population aged and, perhaps for some social groups, became wealthier. Nevertheless, entry into the market remained low, with approximately 30% of Scots making wills. Since the proportion of property owners had increased dramatically over the past 20 years (with the purchase of council housing, the demutualisation of banks and share ownership following privatisation), this was a matter of some concern.

3.7 There was strong concern, from both the legal profession and representatives of consumer interests, as to the "unfortunate spectre" of people making their own wills. In particular, they were often found to be guided by materials for producing wills under English law. Even where that was not so, DIY wills found no support from any interviewee.

3.8 There was thought to be little price competition between firms for wills and executries. Wills might be drawn up 'free' and given at no extra cost, often in connection with conveyancing matters. Firms viewed them as loss leaders because they brought in executry business on the death of their clients. So, for example, the "going rate" for wills in one area of Scotland was estimated to be between £45 and £50, while the actual cost of preparing a will varied between £150 to £300, depending on the time taken with the client. Interestingly, Will Aid was reported to have had the effect of increasing cost in some areas, with Will Aid now recommending a donation of between £75 and £90.

3.9 It was reported that consumers rarely shopped around for executry services. That was not because of anything inherent in the market but rather because consumers ceased to behave as archetypal supermarket shoppers at this particular life stage. Instead, they preferred to honour the relationship between the will-maker and the legal services provider. This might have militated against the success of newly established professional executors who found themselves unable to recruit clients. Because of consumer vulnerability at the time of their need for executry services, it was suggested that price controls might be needed to safeguard them (much like controls over funeral charges).

Employment law

3.10 Employment law had become an increasingly complex area of law and there had been constant changes, mainly due to the application of EU directives. This had led to a growing specialisation in the field. It had also made an impact on the need for legal services in the

area. So, for example, tribunals were set up to allow people to appear without representation. It had become increasingly difficult to do so, because of the complexity of the law.

3.11 There were two distinct markets operating within this field of practice, one for employees (claimants) and one for employers (respondents). This is best illustrated in the grid later, but the consumer types, level of information and consumer orientation in particular varied across those distinct markets.

3.12 The legal services market for employees was not a viable one, with little competition between a few providers. That was partly because legal aid was available for representation at tribunals only under special circumstances. At the same time, lay representatives avoided employment tribunals since they had become so legalised.

3.13 There were a small group of firms that had close connections with particular Trade Unions and did a substantial amount of work on their behalf. These firms, however, would often absorb the costs of acting on behalf of employees if the case was lost, and would be paid by the other side (or the other side's insurance company) if their case was won. However, this service was available only to members of the relevant Unions. Since unionisation amongst Scotland's employees was declining, the service was available to a decreasing proportion of the population.

3.14 Unlike the market for employees, the legal services market for employers was reported to be strong and competitive. Employers had already established connections with legal services providers through their commercial and company practices and these firms would provide specialists in employment law for the needs of their commercial clients. Unlike many employees, they were also able to pay for these services.

Personal injury

3.15 Up until 20 years ago, almost every Scottish law firm had some personal injury practice and provided this service to existing clients. The decline in heavy industry in Scotland was only partially responsible for the withdrawal of legal services in personal injury law from the High Street. Growing specialisation in the personal injury field and the limited availability of civil legal aid had also contributed to the changing structure of the legal services market for personal injury.

3.16 Claims management companies had also made inroads into the market. Unlike England, however, the pursuers market was not shared with claims firms to the same extent since civil legal aid might still be provided in personal injury actions in Scotland. Claims management companies constituted an unregulated sector of the personal injury markets and there was no systematic evidence as to their impact on consumers.

3.17 There was reported to be a serious gap in provision for pursuers who were neither legally aided nor sponsored by Trade Unions. Few law firms were reported to be acting on a speculative basis, and only those with a high volume of personal injury work were prepared to do so.

3.18 Like employment, two different and distinct markets were operating in the personal injury field: one for pursuers and one for defenders. Concentration of personal injury work in a small number of firms was evident in both of these markets. Trade Union work was

channelled through a small number of firms instructed by the Trade Unions. There was a similar concentration amongst defenders. Insurers had limited the number of firms they instructed in an apparent bid to control expenses and were reported to have made substantial reductions in the amounts that they were prepared to expend per case. That was responsible for forcing a few firms into a volume situation.

Financial services and tax advice

3.19 This was a growth area, but with much external competition (with main competition from accountants, but an element of competition from London lawyers). Indeed, the legal profession was reported to be in almost direct competition with accountants for market share.

3.20 From the consumer perspective, the problem in this legal market resided in the low level of financial literacy amongst individual (though not business) consumers. Hence, consumers were unable to evaluate the complex products on offer. The Scottish Consumer Council (SCC) was of the view that the most straightforward solution to this problem was to exert pressure on financial institutions to simplify the complexity of financial products and to specify their risks more clearly.

Criminal law

3.21 Criminal law was virtually a 'stand-alone' market, with many providers of legal services in the criminal law committing themselves to this area of legal service practice to the exclusion of all others. This qualified them for substantial discounts on their premiums, which might also impact on their decision to undertake work in no other practice area.

3.22 Competition in this market was intense, and particularly so in some parts of Scotland. Nevertheless, there was considerable concern as to future supply since few young solicitors were being recruited into this practice area. There appeared to be a reduction in the number of traineeships available. The Public Defence Solicitors' Office (PDSO) had become prominent in the Edinburgh market for criminal legal services, and there were new PDSO offices established in Glasgow and Inverness. However, these were relatively small scale.

Residential conveyancing

3.23 Price competition was thought to be robust in the cities, with conveyancing costs cut quite significantly in recent years. Indeed, quite different stakeholders thought this to be the legal market exhibiting the strongest competition and the greatest price sensitivity. Compared to their knowledge of other legal service markets, individuals were reported to be knowledgeable, to be "acutely aware" of what they wanted from this service and the price that they were willing to pay for it. Large commercial organisation, in contrast, might have considerations other than price in respect to the conveyancing services they required.

3.24 The domestic conveyancing market was more local than many other markets for legal services, with some local markets more competitive than others. Consumers tended to opt for firms with local knowledge, particularly in relation to the purchase of a property. They were more likely to bring in firms from outside the area to sell their properties, though that was not widespread.

3.25 The estate agency aspect of selling domestic property was more lucrative than the legal aspect of buying and selling property. It was reported that there was growing competition for this area of work between solicitors and estate agents, particularly in the West of Scotland, though there was no evidence currently available to support this. Indeed, the Scottish Consumer Council was of the view that vendors and purchasers benefited from the power of Solicitors' Property Centres by creating a visible and accessible marketplace for consumers.

3.26 While conveyancing (rather than the estate agency aspects of buying and selling property) remained in the hands of solicitors, the Monopolies and Mergers Commission concluded in 1997 that this monopoly was not contrary to consumer interests in Scotland.

Family law

3.27 Family law was reported to be a 'difficult' market, with considerable concerns as to current and future supply of practitioners. Though there were some users of family law services with considerable assets (mostly in Edinburgh and Glasgow), a far higher proportion sought legally aided advice.

3.28 The market for family law services was split between legal aid and non-legal aid work, with reports from an interviewee of a marked exit from legal aid work in family law over recent years, including practitioners of repute. The same interviewee reported problems in the recruitment of young solicitors into the area. This was of particular concern to the profession since family law was one of those practice areas for which the profession was exclusively required to provide services. The profession perceived that legal aid funding was making it difficult to recruit law graduates into this area of practice. At the same time, it was becoming a particularly complex area of law.

3.29 The Scottish Consumer Council noted that it was sometimes difficult to separate out the family law market from other markets, since the provision of legal services in this area often required services in other areas.

Welfare, debt and housing

3.30 Since consumers had little or no buying power in these areas, there was little competition between service providers in Scotland. Certainly, there were no financial incentives for solicitors to operate in these markets. The competition, so far as it existed, was between publicly funded agencies for public funds and was therefore thought to be inappropriate. There was little competition between publicly funded agencies for clients since rules often circumscribed the location of clients. While Law Centres might provide advice on a range of social welfare matters, their funding arrangements had traditionally restricted their service provision to particular geographic areas.

3.31 The Scottish Consumer Council reported that the supply side, and the contribution of the voluntary sector to these markets, were not helped by complex and arcane court rules, dealing with such matters as the rights of audience of lay representatives, particularly in housing eviction cases. While housing advice might be good, difficulties pertaining to representation in eviction cases (rights of audience were available only to party litigants or solicitors after the first calling in summary cause) and the varying approaches taken by sheriffs to such cases were of some concern to the Scottish Consumer Council.

3.32 The consumer was faced with substantial difficulties on entering the market for these services, given the absence of information as to quality. There was thought to be greater competition in England and Wales in these markets due to the way in which contracts were awarded.

Immigration law

3.33 There was some provision of legal services in relation to immigration in Glasgow, principally because Glasgow participated in the Home Office dispersal scheme. There were also a few Edinburgh firms that had acquired expertise because of the immigration appeals system which was based in Edinburgh. Altogether, there were probably at least 15 firms in Scotland which had expertise in this area. They were competing with advisers certified by the Immigration Services Commissioner, as well as non-certified advisers. There were probably less than 5,000 asylum seekers in Glasgow at any one time. However, as ports of entry were liberalised, the demand for services in this market area was likely to grow.

Advocacy

3.34 The Scottish bar had grown substantially over the past 10-15 years and had almost doubled in the past 30 years (from 250 to about 470 advocates). With only one advocate to 20 solicitors, the bar was relatively small nonetheless when compared with bars in England and Wales and Ireland, where the equivalent ratios were 1 to 11 and 1 to 9 respectively. This was partly because of the comparatively broad rights of audience in Scotland, which had encouraged solicitors to develop their advocacy skills. Cultural differences within Scotland could also be discerned : East Coast solicitors were less likely to compete with advocates and West Coast solicitors were more likely to do so.

3.35 A high proportion of new entrants to the bar were solicitors and their average age at admission to the Faculty was in their mid-30s, after a range of previous legal experience. That had implications for the way in which the market for advocates' services operated.

3.36 In understanding the operation of the advocacy market, it was necessary to separate out the two distinct roles of the Scottish bar : specialist advice and courtroom advocacy. In Scotland, others competed with members of the Faculty of Advocates for the provision of specialist advice. So, for example, some solicitors' firms had built up an opinion practice in specific areas, while academia also maintained a strong tradition of opinion practice in certain fields such as conveyancing, wills and succession. Solicitors might also seek advice outwith Scotland on tax and company matters.

3.37 As for courtroom advocacy, advocates competed with solicitors in the Sheriff Court and with solicitor advocates in the Court of Session. Interestingly, few solicitor advocates appeared regularly in the Court of Session on the civil side, though many appeared in the High Court on the criminal side. Several reasons were offered for this. Competition with solicitor advocates was therefore variable, depending on the particular market.

3.38 The major division in the markets for advocates' services was between the civil and criminal bar, though even here the division was informal and based on pragmatic considerations. Hence, some advocates with a mainly criminal practice took on civil work while senior advocates on the civil side had been instructed in criminal trials and civil

practitioners regularly became Advocates Depute in the Crown Office. While there was specialisation in the criminal sphere, this was mainly related to seniority, with senior counsel commonly handling cases involving alleged murder, rape and other serious crimes. In the civil sphere, specialisation was more marked, though many advocates did not locate themselves within particular substantive legal markets. Specialist practice, for example, was unlikely to constitute more than 50% of the practice of most self-styled specialists. Even where advocates had established themselves in a specialist area, they were unlikely however to monopolise provision of legal services in that specialist area. Indeed, flexibility of practice was reported to be amongst the chief strengths of the Scottish bar, allowing advocates to respond to changes in the demands for advocacy from different markets and to move between different fields over the course of their legal career. The flexibility of the generalist orientation of advocates was said by some to be reinforced by the “cab rank” rule (see chapter 5) and also by the necessities of a small jurisdiction.

3.39 Nevertheless, some advocates maintained that the 'cab rank' rule was responsible for making their practice more 'demand-led' and this was driving them towards greater specialisation. As solicitors became more specialised in their areas of practice, so they were increasingly seeking out specialist knowledge amongst the advocates that they instructed. As a result, not only were advocates specialising in specific areas in the civil sphere, such as reparation law, but they were specialising within that field, for example in clinical negligence actions, disease cases, head injury accidents, pursuer or defender work, and so on.

3.40 Solicitors were the main consumers of services provided by members of the Faculty and made their ‘purchase’ decisions either on the basis of reputation, previous experience, or the recommendations of clerks to the stables. However, some clients, such as insurance companies, often played a major role in their decision-making. Advocates were responsive to the needs of solicitors because they were the source of their business. The interviews did not explore the issues of how those needs were perceived and the changes to which they were subject. Because many advocates were former solicitors, it was frequently the case that new recruits to the Faculty had already made a reputation for themselves in a particular area of the law and were therefore well known to instructing solicitors.

3.41 Many solicitors instructed a narrow range of advocates from a few stables on the basis of prior experience, often choosing different advocates for different parts of their case and at different levels of experience so that they could put together a team that fitted the case in a cost effective way that best advanced their client’s position. Indeed, in the civil sphere the large bulk of advocates’ work was instructed by a relatively small number of Edinburgh firms that had “the knowledge”. Advocates in the criminal sphere, however, were instructed by a larger number of firms located across Scotland, though most instructions came from the Central Belt. At least two interviewees argued that the speed and competency with which an experienced solicitor could brief an advocate justified the restriction of direct access by members of the public (see chapter 7).

3.42 Clerks to the stable were also instrumental in recommending advocates according to the specification provided by solicitors. Indeed, clerks appeared to play an important gate keeping role in the market for advocacy services, particularly in relation to junior members of the Bar, negotiating availability in the civil and criminal spheres – as well as payment and level of seniority in the civil sphere. The role played by clerks and its impact on the market for advocacy services might merit further exploration.

(c) Stakeholders perspectives

The market for legal services : commercial interests

3.43 The operation of Scotland's legal markets did not appear to be an issue for concern on the part of the membership of CBI Scotland. The organisation raised several legal issues as matters of some importance to its membership, but those issues lay outwith the operation of Scotland's legal markets. The sheer volume of new legislation was reported to have an adverse impact upon Scottish business and to require businesses to have greater recourse to legal services. Secondly, the pace and requirements of tribunals and court based procedures did not appear to recognise the needs of business, especially the need of small businesses, for a speedy and affordable solution.

The market for publicly funded legal services : a view from the funder

3.44 Legal aid was going through a period of substantial change and reform. The Scottish Legal Aid Board was committed to working with the Scottish Executive, the profession and others to further develop and improve the delivery of legal aid in Scotland.

3.45 One of the most important developments was the introduction of quality assurance across all aspects of legal aid. A peer review system was now in place for solicitors undertaking civil and children’s legal assistance. Peer review arrangements for solicitors and counsel providing criminal legal assistance would be introduced in 2006.

3.46 It was essential to ensure an adequate supply of good quality practitioners to provide legal aid services if access to justice was to be made available to those who could not themselves meet the cost of legal cases.

3.47 There was some concern that the number of solicitors providing legal aid services was in decline and that fewer of those coming into the profession might be exposed to this kind of work in future, not least as there had also been concern that there had been a decline in the number of traineeships in legal aid firms. Previous research by the Scottish Legal Aid Board showed a reduction in the numbers of solicitor outlets providing civil legal assistance services between 1997 and 2001. More recent analysis suggested that this trend had continued and indeed accelerated.

3.48 There had also been an overall reduction in the number of solicitors on the Board’s Criminal Legal Assistance Register, which was introduced in 1998. The Board did not believe that the current level of provision in criminal legal assistance was problematic, but did have some concern that there might be problems in the medium term if more solicitors were not encouraged to enter this area of work. The Board also believed that the issues were slightly different for civil and criminal legal assistance.

3.49 The Board, the Law Society of Scotland and the Scottish Executive were in the process of commissioning research into the recruitment and retention of solicitors into publicly funded legal services, which would explore both the current situation and why and how young solicitors entered this area of work, identifying any barriers to doing so.

3.50 The Board also saw merit in a more mixed approach to the provision of publicly funded legal services using the private sector, employed solicitors and law centres. There

also needed to be closer working between local government, the Not-for-Profit advice sector and the legally qualified sector to better co-ordinate legal advice and representation for clients and ensure better referral mechanisms between providers. The Board also believed there was a need for greater management and co-ordination of the supply and demand for publicly funded legal services.

3.51 The Board considered that the system of taxation, whilst valuable in helping protect funders and providers, needed review and reform of its transparency, effectiveness and consistency.

Law Society of Scotland : a view from the profession

3.52 The Law Society of Scotland provided some general information on recent developments in the various markets for legal services in Scotland.

3.53 The profession was going through a period of expansion in Scotland. While just over 200 solicitors were retiring every year, the profession was now admitting over 430 solicitors a year. However, the increasing complexity of the law had contributed to gaps in the supply of providers in some substantive areas of the law, such as employment and tax. The Law Society believed that trainees and young professionals were now particularly responsive to legal aid rates in making their career choices, in view of the increasing indebtedness of recent graduates, and that was responsible for concerns about the future supply of solicitors in criminal and family law. In some areas, such as welfare, debt, housing and consumer law, the weak buying power of consumers was responsible for shortages in provision.

3.54 Gaps in provision in rural areas were increasingly likely, with younger members of the profession reluctant to move out of the major conurbations. This was not thought to be a problem peculiar to Scotland. Nor was it thought to be a problem peculiar to the legal profession. Nevertheless, it was a matter of some concern and in rural areas was impacting on the markets for legal services in family and private law in particular. The problem was one of growing demand for specialisation in the law, as well as supply. As the law became increasingly complex, solicitors found it difficult to remain general practitioners. Rural areas, however, were unable to support specialist practitioners. The Law Society identified a need for networking between rural firms and central belt practitioners, to enable rural firms to refer their clients for specialist advice. However, the Law Society recognised that a change in culture might be required before some rural practitioners became comfortable about referring clients to city based consultants. The Law Society identified the growing disparities in rural and urban legal services provision to be one of the main problems facing Scotland. Indeed, it expressed concern that the Research Working Group into the Legal Services Markets in Scotland was too narrowly focused on competition issues. A forum was required where the more fundamental issue of what legal services were required across Scotland in the next 20 years could be discussed.

3.55 Significant growth was to be found in the larger firms in the urban conurbations while the fee income of 2-5 partner firms had remained relatively static.

3.56 The Law Society reported that competition between solicitors and the ‘unregulated sector’ in some markets, such as reparation, was a source of concern for the profession.

There had been no attempt to regulate in these markets and the profession looked forward to a level playing field, whereby all providers would be regulated and required to have a complaints system in place, as well as indemnity insurance to provide clients with similar levels of protection to that provided by solicitors.

3.57 The Solicitors (Scotland) Act 1980 reserved three areas of practice for qualified solicitors : the preparation of conveyancing writs, executry documents, and documents pertaining to court action[31]. In general only solicitors could provide those services for reward[32] and anyone other than a solicitor who took on the preparation of such documents for reward was breaking the law. However, when reference was made to the conveyancing or executry monopolies that solicitors[33] enjoyed, there was very often a gross misunderstanding of solicitors' 'monopoly' in these areas. In executry services, for example, application for confirmation of executors was the only reserved area while all other services were unreserved. In conveyancing, it was often assumed that solicitors enjoyed a monopoly over many different aspects of the conveyancing process, such as the preparation of missives, security documents and registration. In fact, they were outwith solicitors' reserved areas. Paradoxically, pitfalls in conveyancing were now most commonly due to missives, which had increased enormously in their complexity over recent years and reflected a growth of law in these areas. Yet solicitors did not enjoy a monopoly over the preparation of missives. Hence, the notion of 'reserved areas' had provided an inflated sense of importance to what was actually reserved.

3.58 The Law Society of Scotland estimated that a very small proportion of the income earned by large law firms in Scotland derived from work over which the profession enjoyed a strict monopoly, though such work was still a substantial part of the income of smaller High Street law firms. The level of such work was decreasing year on year as a proportion of the profession's total income, while growth was in other areas of practice such as commercial law and intellectual property. However, in practice, consumers rarely sought the inputs of different professions in the course of residential conveyancing, or indeed in executry work. Some of the larger commercial firms were reported to be unwilling to engage in two of the three reserved areas. Nevertheless, the Law Society was clearly of the view that reserved areas should be maintained because of the professional certification, integrity and consumer protection that they demanded.

3.59 The Law Society reported growing movement of high and low value business between firms. So, for example, some of the larger commercial firms passed on private client work to smaller firms because they found it unprofitable, given their high overheads. Similarly, smaller firms might pass on their higher value business to larger firms if they found it necessary to buy top-up cover, which might prove economically unviable. While there was reported to be substantial networking in Scotland in that respect, the Law Society was of the view that more should be encouraged.

3.60 The extent to which legal markets were UK wide depended on the substantive area of the law. In the area of immigration, for example, English solicitors had been holding on to clients who had entered through English ports of entry, most of which were currently in the south of England. As ports of entry became liberalised however, the market was likely to

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[31] Section 32(1) of the Solicitors (Scotland) Act 1980.

[32] Conveyancing and executry services may also be provided by conveyancing and executry practitioners in Scotland, though their numbers are small.

become more local. The markets for family, and criminal law, as well as residential conveyancing, were mostly contained within Scotland. The markets for company and tax law were those which were most likely to extend outwith Scotland.

3.61 As expressed elsewhere, the Law Society of Scotland was strongly opposed to many aspects of the Clementi Report. The Society regarded the structure of its complaints procedures, insurance scheme and Guarantee Fund to be essentially collective measures, based on the profession at large, which provided protection for the public. It argued that Clementi's proposals could not be grafted on to that underlying structure. It argued that the exponential growth of the City of London was responsible for an enormous gulf between City firms and other firms, and that even Scotland's largest commercial firms could not be compared with City firms. It was of the view that Clementi "was backing the City horse, as opposed to the High Street horse", and its recommendations with regards to proprietorship might be understood in that context. In particular, the Law Society of Scotland expressed grave concerns for regulation of the profession where ownership was in the hands of those outwith the legal profession,

Citizens Advice Scotland: The perspective of an advisory and referral service

3.62 From the perspective of an organisation that offered advice in the areas of debt, welfare, housing, employment and immigration, the main problem identified by Citizens Advice Scotland (CAS) was on the supply side of those legal markets in which it was involved. There was frequently no one to whom Citizens Advice Bureaux could refer their clients, especially in the areas of welfare and debt. That was particularly the case at the representation stage given the unavailability of legal aid for most tribunal work. Lack of representation at employment tribunals was also identified as a problem.

3.63 Despite the availability of legal aid Advice and Assistance, CAS reported a dearth of solicitors willing or able to give advice in the areas of welfare and debt. At the same time legal advice was thought to have become increasingly important, with more people going into debt in recent years and consumer credit reforms looming. The need for advice and assistance on immigration issues outside the major conurbations was also identified.

3.64 Even where supply was not in question, Citizens Advice Bureaux were reported to lack confidence as to the quality of their referrals. While not themselves consumers of the services, their task was to provide informed referrals to other legal service providers where necessary. They therefore felt themselves to be responsible for the quality of their referrals. They were frequently unable to provide informed referrals however because of a dearth of information as to the quality of identified legal service providers. CAS therefore looked to the Law Society to act as a central repository of information as to "who did what, and with what level of experience" and looked forward to quality assurance of publicly funded legal services providers from the Scottish Legal Aid Board. For the time being however, the absence of public quality measures was often responsible for the lack of confidence with which Citizens Advice Bureaux made referrals to legal service providers.

3.65 Because of professional confidentiality rules, Citizens Advice Bureaux did not receive feedback from the legal service providers to whom they had referred their clients. Once clients had been referred, their involvement had to come to an end. So, for example, Citizens Advice Bureaux received no information as to the services that their former clients had received once they had been referred on. Hence they could only evaluate the services

received by their clients from their clients' accounts, which they could not always accept at face value. Because of the absence of feedback, Citizens Advice Bureaux could not be sure that they were referring on their clients appropriately.

Scottish Consumer Council : The Consumer's Perspective

3.66 Besides commenting on discrete legal markets (see above), the Scottish Consumer Council also raised points of general interest. It reported that public and voluntary sectors were now far more likely to change legal service providers than previously because they had been opened for review. Businesses, companies and lawyers, however, made substantial investments in the loyalty of their clients. The Scottish Consumer Council was of the view that though individuals were likely to change legal service provider more frequently than previously, they were nevertheless more subject to inertia –or loyalty – than the public or voluntary sectors.

(d) Conclusions

3.67 The exercise demonstrated the high degree of variability in the characteristics of the legal markets in Scotland. Some markets were identified as demonstrating 'high' levels of competition (financial services and tax, residential conveyancing, commercial) while others were assessed as having relatively 'low' levels of competition (family law, welfare, debt and housing and consumer). The other markets sat somewhere in between.

3.68 Further, within some markets there were distinct 'sub-markets' operating. In particular the market for employment law had distinct markets for employers and employees. There were key differences between these markets on sources of funding, levels of consumer information and consumer orientation. There were also geographical differences within markets across Scotland. For example there appeared to be marked variation in the availability of family law practitioners across Scotland. Further, the provision of housing, debt and consumer law specialists might be problematic in some areas.

3.69 Some concerns were raised about the future supply of legal practitioners in specific markets. In particular, there was an expected shortfall in family law practitioners, in practitioners engaged in welfare, debt and housing work, and in criminal legal aid work. That had emerged as a future problem in other exercises conducted as part of the Research Working Group's remit and was being addressed (in research terms) by work planned on the recruitment and retention of lawyers in Scotland.

3.70 The researchers involved in this exercise were also asked to highlight areas for further research work, specifically where there was a need for more information about the operation of specific markets to assess whether consumer protection could be improved. The research team recommended that further work on the market for wills, trusts and executries and employment law (particularly from the employee's perspective) should be priorities for future work.

(e) Tables showing characteristics of legal services markets in Scotland

Area of Law	Provider*	Consumer Type	Consumer : level of info	Consumer : level of participation	Consumer : orientation	Service Type	Funding source – provider[#]	Funding source - consumer
	1. Solicitor **2. Advocate** **3. In-house lawyer** **4. Non-lawyer specialist** **5. Non-lawyer non specialist**	**1. Individual** **2. Company** **3. Public Sector** **4. Referral** **5. Association/ other organisation**	**1. High** **2. Medium** **3. Low** **4. Mixed**	**1. Bulk business** **2. Repeat** **3. One off**	**1. Habitual** **2. Loyal** **3. Bureaucratic** **4. Rational** **5. Convenience**	**1.Search (Quality assessable in advance)** **2. Experience (Quality assessable post service)** **3. Credence (Quality not assessable)**	**1. State** **2. Private** **3. Trade Union** **4. Consumer**	**1.State** **2.Private individual** **3.Corporate** **4.Trade Union** **5.Insurance** **6. Contingent**
Employment – **Employee**	Solicitor Advocate In-house lawyer Non-lawyer specialist Non-lawyer non specialist (split market)	Individual Referral Association/ other org	Low High	One off Repeat Bulk business	Loyal? Rational Bureaucratic	Credence Experience	- TU/Assoc	State Private individual Contingent
Employment – **Employer**		Company Public Sector	Mixed	Bulk business Repeat One off	Rational	Credence/Experience	Consumer	Corporate contingent
Personal Injury	Solicitor Advocate In-house lawyer Non-lawyer specialist	Individual Company Public Sector Referral Association/other org	Mixed	Bulk business Repeat One Off	Rational**(don't understand footnote?)	Experience	Consumer TU/Assoc	State Corporate Trade Union Insurance Contingent
Financial Services / Tax	Solicitor Advocate In-house lawyer Non-lawyer specialist	Individual Company Public Sector Association/other org	Mixed	Repeat One off	Loyal Bureaucratic Rational	Experience Credence	Consumer	Private individual Corporate
Immigration	Solicitor Advocate Non-lawyer specialist Non-lawyer non specialist	Individual Public Sector	Mixed	One Off	Convenience	Credence	Consumer	State Private individual

Criminal Law	Solicitor Advocate	Individual Company	Mixed	Repeat One off	Loyal Rational Convenience	Experience Credence	State consumer	State Private individual
Residential Conveyancing	Solicitor Advocate Non-lawyer specialist (aspects)	Individual	High	Repeat	Rational	Search Experience	Consumer	Private Individual
Commercial conveyancing	Solicitor Advocate	Company Public Sector Association/other org	High	Repeat	Rational	Experience	Consumer	Corporate
Commercial	Solicitor Advocate In-house lawyer Non-lawyer specialist	Company	High	Bulk business Repeat	Rational Bureaucratic	Experience Credence	Consumer	Corporate
Family	Solicitor Advocate Non-lawyer specialist	Individual	Medium	One off	Rational Convenience	Experience Credence	Consumer State	State Private individual
Welfare/ Debt/ Housing	Solicitor Advocate Non-lawyer specialist Non-lawyer non specialist	Individual Public Sector Association/other org	Low	Repeat One off	Convenience	Experience Credence	State Consumer	State Private individual
Consumer	Solicitor Advocate Non-lawyer specialist Non-lawyer non specialist	Individual	Low	Repeat One off	Convenience	Experience Credence	State Consumer	State Private individual

* Indicates reservation of work to this provider **Purchase driven by rational economic enquiry (on price/quality) *** Where consumer of end service is referred by informed specialist

[#]This column indicates the source of funding for the provider, where consumer is indicated this implies a payment of fee other sources indicate a funding of a service not of a particular case.

Area of Law	Supply and demand	Numbers of providers	Market Reach	Degree of competition
	1. over- supply many areas **2. over-supply some areas** **3. Market sensitive** **4. under-supply many areas** **5. under-supply some areas**	**1. narrow (few providers)** **2. medium** **3. wide (many providers)**	**1. Local** **2. Regional** **3. National**	**1. High** **2. Medium** **3. Low**
Wills / Trusts / Exec/ Estate	Market sensitive (loss leader) Under supply some areas*	Wide (many providers)	Local	Medium (trusts/executries/estates) Low (wills – loss leader
Employment – **Employee**	Under-supply some areas (one off employees)	Medium	Regional National	Medium
Employment – **Employer**	Market sensitive	Medium	Regional National	Medium
Personal Injury	Market sensitive	Narrow (few providers)	Regional National	Medium(Price)
Financial Services / Tax	Market sensitive	Wide (many providers)	Local Regional National	High
Immigration	Under-supply some areas	Narrow (few providers)	National	Medium
Criminal Law	Market sensitive*	Wide (many providers)**	Local	High
Residential Conveyancing	Market sensitive	Wide (many providers)	Local	High
Commercial Conveyancing	Market sensitive	Wide (many providers)	Regional National	Medium
Commercial	Market sensitive	Medium	National	High
Family	Under-supply some areas* Market sensitive and low funding	Medium**	Local Regional National	Low
Welfare/ Debt/ Housing	Under-supply many areas Market sensitive and low funding	Narrow (few providers)	Local	Low
Consumer	Under-supply many areas Market sensitive and low funding	Narrow (few providers)	Local	Low

***Under supply some areas, particularly rural**

**** Concerns over future recruitment**

CHAPTER 4 LEGAL EDUCATION AND LEGAL CAREERS IN SCOTLAND

4. The Research Working Group was tasked with examining a number of specific issues that might affect competition in the legal services market. These included entry into legal education, professional training and the resulting structure of the profession in Scotland, covering both solicitors and advocates. This chapter is based upon data provided by the Law Society of Scotland, the Faculty of Advocates and the Education, Training and Lifelong Learning Department at the Scottish Executive. The chapter also draws on key studies of law students and law graduates in Scotland and across the UK, and briefly sets out the perspectives of key stakeholders on education and training considerations.

4.1 The issue of particular concern to the Group was whether there were any anti-competitive restrictions on entry to the profession of solicitor or advocate. It was clearly in the public interest to have an accessible and affordable legal profession who could deal with the full range of civil and criminal work in Scotland, and indeed beyond. It was equally necessary in the public interest that those who offered legal services should have an appropriate level of competence. As the Clementi Review Consultation Paper had noted, "the setting of [entry] standards requires careful judgement between setting the standard too high, and restricting entry, and setting the standard too low, and not maintaining proper levels of competency."[34]

4.2 It was important to see very recent trends in legal education in a wider context. There had been significant changes in the legal profession internationally, and in Scotland specifically, over the last half century. Deregulation, changes in business structures and communications, increased competition and specialisation, and increasing numbers of women graduating with law degrees had all been key drivers for change.[35] There had also been an overall growth in the profession. That had led to on-going debate about how best to provide legal education and training. In 2004 the Law Society consulted on a draft Foundation Document for the future development of professional legal education and training[36]. A limited number of responses were received. The Society was at present working on drafting outcome statements for the different strands of the training process which would link into future development of the Foundation document. Consultation on the outcome statements would be carried out through an Education Forum to which interested parties were being invited. The Faculty of Advocates was also examining its entrance requirements.

Entering the profession

4.3 The standard route to entry to the solicitors' profession in Scotland was an ordinary or honours Bachelor of Laws degree from an accredited university, followed by a post graduate diploma in legal practice, followed by a two year period of professional training. During the latter period a Professional Competence Course and Test of Professional Competence was undertaken. That test was based on a series of logbooks which were maintained by the trainees and Quarterly Training Performance Reviews which were completed by the training

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[34] *Review of the Regulatory Framework for Legal Services in England and Wales* March 2004, at para.18 (available at http://www.legal-services-review.org.uk/content/consult/review.htm).

[35] Paterson AA, Bates St JN, Poustie MR. The Legal System in Scotland: Cases and Materials. Edinburgh 1999.

[36] A Foundation document proposed by the Law Society of Scotland on the future development of professional legal education and training in Scotland, 2004.

solicitor in discussion with the trainees and then submitted to the Society for monitoring. A small proportion of entrants took a three year 'in-office' traineeship and the professional examinations set by the Law Society as an alternative to the law degree prior to the Diploma in Legal Practice and the two year post-Diploma traineeship.

Undergraduates

4.4 Following the inception of the full time LLB degree in the early 1960s the number of law graduates in Scotland rose to 300 in 1970 and 545 in 1979 before plateauing at that level for a decade. Gradually, numbers crept up again through the 1990s and by 2003 the total had reached approximately 700. With further LLB accredited courses coming on stream in the last two years, the total would increase again. The accreditation by the Law Society of Scotland of a further five law schools in the previous two years might suggest that entry to law schools was now relatively unrestricted in Scotland. The accreditation standards of the professional bodies were not subject to external regulation, however, and could have the potential to control aspects of the market for recruitment into the legal profession.

4.5 There were now 10 Scottish universities that offered LLB degrees : Aberdeen, Abertay, Dundee, Edinburgh, Glasgow, Strathclyde, Glasgow Caledonian, Napier, Stirling and Robert Gordon. (The Society had accredited Stirling University as a further LLB provider in April 2005). It was important to note that 2 year accelerated LLB courses were also available at a number of those universities and most of those LLB programmes had Honours level courses in combination with other subjects (often languages and business administration). Further a substantial number of undergraduate students were studying law and legal studies (outwith the LLB programmes) combined with languages, social policy, business administration and accountancy and European studies (among others) at Scottish Universities. While students graduating from these degrees would still require an LLB to become a practising solicitor, they could enter legal service markets as non-lawyer professionals.

4.6 A study of first year students by Hamilton in 2002 estimated that there were over 1,200 students embarking on an LLB in Scotland in that year, some of whom were part-time students.[37] Further, as noted above, courses with a law component were also commonly available at Scottish Universities. Data from the Scottish Executive suggested there had also been an increase in the study of law across the board.[38] A total of 5,721 students were studying law (either solely or as part of a university course) at either postgraduate or undergraduate level in 2002/2003.

4.7 The increase in law graduates might bring its own problems, however, since some within the profession believed that there were now too many law graduates. That view overlooked the fact that for more than a decade the LLB degree in Scotland had come to be seen as a liberal degree which equipped graduates for a wide range of careers. In recent years, approximately a quarter to a third of law graduates had not sought to take the Diploma or to enter the profession. Were the number of entrants to the profession to rise in line with the recent growth in LLB students however, such a rise might produce a situation where the current and prospective levels of remuneration of the profession would fall. In economic

[37] Hamilton J, Martin P. Law Student 2002: a profile of law students in Scotland.

[38] Data from ETLLD statisticians.

terms, and assuming that the proportion of LLB graduates who chose not to enter the profession did not increase, that might entail that the demand for places to study law could reduce when remuneration fell and as the number of solicitors increased. There was some debate, however, as to whether high remuneration was the main aim of those embarking upon the study of law. First year law student respondents in Hamilton's study cited a wide range of reasons for choosing to study law, though approximately three-quarters of them cited 'remuneration' as one reason for choosing to study law.

4.8 Recent concerns had been expressed in some quarters as to the length of time taken to qualify as a solicitor in Scotland and the cost burden on entrants to the profession. That school of thought had questioned the utility of an Honours degree for those choosing to enter the profession, as had effectively become the norm, raising the question as to whether an ordinary degree would be sufficient. However, the student desire to take an Honours degree also reflected the attraction of the added stimulus and sophistication of Honours level study, and it was difficult to see how students could be denied the right to choose to take an Honours degree, or how law firms could be prevented from recruiting Honours students. There was a general trend across a number of disciplines in Scottish Universities towards the attainment of Honours level degree courses.

4.9 There were some other interesting changes in the profile of law students. In Scotland, as in many other countries, the majority of law students were now female. In Hamilton's 2002/2003 survey of first year students in Scotland, 64% were female, and indeed the majority of entrants to law schools in Scotland had been female for more than a decade. That compared with less than 20% in 1970. Hamilton's study also noted that law students were a young population with more than 70% of law students identifying themselves as 18 years of age or younger. That differed in one university where a part-time LLB course was offered. The increasing proportion of females entering legal education in the 1980s and 1990s was now evident in the data on practising solicitors from the Law Society for Scotland, broken down by age (see table 5 below). Scottish Executive data also suggested that a higher proportion of females were studying law specifically, or as a component part of a first degree : 2,420 (61%) females compared to 1,528 males (39%). That data showed that those studying for postgraduate degrees in law were evenly split between males and females; 898 females (51%) and 875 (49%) males were defined as postgraduate law students in 2002/2003. For several years, however, the majority of students on the Diploma in Legal Practice had been female.

4.10 Although the growth in law school places might appear to have removed most entry barriers for those embarking on an LLB degree, the profile of law students in Scotland still suggested that there might be barriers to entry into the profession for certain groups in Scottish society. A recent Scottish Executive funded study on minority ethnic and social class composition of law students noted that despite a general increase in the number of students entering higher education, there seemed to be little evidence of an increase in the proportion of students from lower socio-economic groups, who remained significantly under-represented.[39] Relative to all other subjects, law performed slightly worse in terms of proportions of students from lower socio-economic groups. As with Higher Education generally, the social class profile of applications and acceptances had not changed over the last few years, and there was thus no likelihood of a short-term change in the numbers of

[39] Anderson S, Murray L, Maharg P. Minority and social diversity in legal education in Scotland. Scottish Executive 2003.

student in lower socio-economic groups (classed as C2DE) entering the profession. Almost half (47%) of students surveyed by Hamilton had parents defined as 'in management or the professions'. Further, 67% of students were not the first in their family to attend university.

4.11 The Scottish Executive research highlighted the lack of consensus about whether it was sufficient to simply inform and encourage applications from young people in disadvantaged groups, or whether a much clearer policy of 'lowering the bar' was necessary. That was clearly an issue for the higher education sector as a whole, not just law specifically, as it attempted to broaden access. The research highlighted the likely resistance to such a proposal in law driven by concerns about fairness and ensuring students would be adequately supported at the outset of their degrees. However, it was worth noting that the entry requirements for law already varied across Scotland. The impact of the recently accredited LLB courses on entry requirements and student profiles had yet to be established. There were initiatives underway to encourage more pupils from state schools in Scotland to apply to study for law and medicine. For example Edinburgh University's 'Pathways to the Professions' initiative involved an outreach programme for pupils and their families in partnership with relevant university faculties, the professional bodies and state schools. It offered advice, support for work experience and opportunities to shadow current students. The Law Society of Scotland was also active in providing information to school pupils about the legal education process. In 2005 the Society's Education and Training Department attended 8 large careers events and spoke informally to approximately 250 pupils plus parents and teachers. The Society also attended 16 individual schools where the audience included 450 pupils plus their parents and the Society had been involved in organising two further events – one in co-operation with the Edinburgh University Pathways Project for around 80 pupils. The Society's outreach in respect of the education system included schools from all parts of Scotland and applied to state schools as well as private schools.

4.12 The same research highlighted that both in the UK as a whole and in Scotland, minority ethnic groups were over-represented in higher education. The authors noted however that that probably masked considerable variation by specific ethnic group and by academic discipline. Analysis of UCAS data for Scotland suggested that, relative to all other subjects, law was about the same level as other disciplines in terms of minority ethnic representation. They also noted that the distinctive character of Scottish law degrees might be the most important factor in recruiting minority ethnic students. Most of those applying for and studying law in Scotland lived in Scotland. While most Asian law students interviewed as part of the study perceived legal education (and the legal profession more generally) as overwhelmingly white, respondents rarely felt that they had been the victim of overt discrimination.

4.13 The Law Society of England and Wales had launched its Diversity Access Scheme which aimed to 'help talented, committed people overcome obstacles to becoming a solicitor'. The Society noted that those obstacles might be due to disability, or social, educational, financial or family circumstances. The scheme had two strands; a vacation placement scheme and a scholarship scheme.

Competition issues

4.14 With regard to the LLB degree, the Diploma in Legal Practice and the period of "in-office" training, the OFT recognised that it could be difficult to find the balance between (a) requiring levels of training which were sufficient to ensure competence and (b) restricting

entry by imposing unnecessarily stringent requirements. The OFT argued that there was a strong case for ensuring that decisions in that area were subject to an approval process and a system of independent regulatory oversight which were external to the professional body concerned and which could help to ensure that an appropriate balance was struck between what would sometimes be competing objectives.

4.15 Where decisions were taken in relation to qualification or training requirements, the OFT believed it was important that those requirements should be :

- transparent (avoiding for example excessive recourse to discretion without guidance as to how that discretion should be exercised);
- proportionate (the overall level of difficulty in relation to each category of applicant should be no more than necessary to ensure competence);
- non-discriminatory (the relative onerousness of requirements placed upon each category of applicant might be relevant for example); and
- based on objective standards.

Where failure to qualify would result in exclusion, the OFT emphasised the importance of having a proper appeals procedure in place.

4.16 The Law Society of Scotland was embarking upon a review of what should constitute the 'fit and proper' test for admission as a solicitor and noted that the Admission as Solicitor (Scotland) Regulations provided for appeal to the Court of Session following a Council decision in an admissions case.

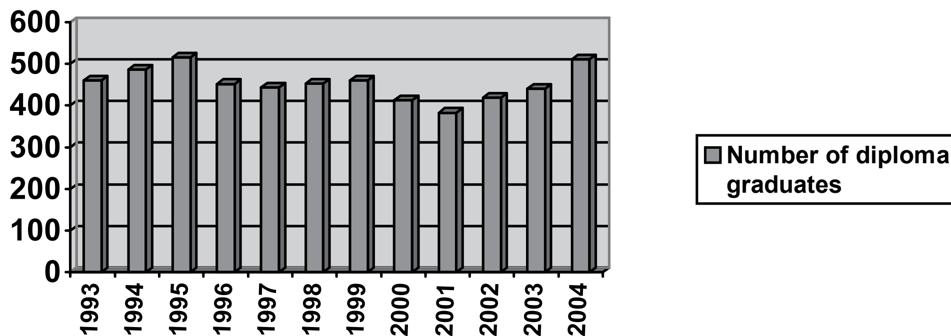
Diploma in Legal Practice

4.17 After completion of the LLB Degree or professional examinations, all those intending to become solicitors were required to take the Diploma in Legal Practice. This course, which was of 26 weeks duration, could be taken at Aberdeen, Dundee, Edinburgh and Robert Gordon Universities, and the Glasgow Graduate School of Law which was run jointly by the Universities of Strathclyde and Glasgow. The cost of this skills-based course to the students was partially offset by the presence of 300 Diploma fees grants. Despite a recent growth in capacity to approximately 500 Diploma places in Scotland, competition for Diploma places might become tighter when the number of those graduating with a first degree in law increased even further. The Law Society estimated that 580 diploma places would be available in the academic year 2005/2006. Capacity in the Diploma had hitherto been a product of demand and the resource constraints of existing providers. In recent years only about 65% of law graduates had sought to take the Diploma, but there were signs that for the first time demand for Diploma places (particularly with the advent of graduates from the new law schools) might be about to outstrip supply.

4.18 As Figure 1 below shows, the number of diploma graduates had fluctuated slightly during the 1990s (after its introduction in 1981). In 2004 the number was 511, the highest since 1995 (516). By the late 1990s, a lesser proportion of law graduates was going on to take the diploma - 68% compared to 80% in the early 1990s. A quota for Diploma grants was introduced by the government in the 1980s. This, amongst other factors, lowered the demand

for Diploma places in the late 80s and early 90s to a level well below the number of Diploma places available in Scotland. That might be changing, however, since recent research conducted with first year law students suggested that at the outset of their legal education, most respondents perceived the LLB as a vocational course and intended to enter the legal profession. 76% specifically stated their intention to be to study for the Diploma after graduating. The second sweep of the survey (among second year students) showed that a similar, if slightly higher, proportion of students (compared with the first year survey) still intended to undertake the Diploma in Legal Practice immediately after graduation (80% of full time undergraduates, 87% of graduate entrants and 92% of part time undergraduates).[40] However, it should be noted that the response rate in the second survey was considerably lower. Student preferences for post-Diploma traineeships (at this stage) were similar across both surveys, with most students willing to consider a high street or large commercial firm traineeship but fewer willing to consider a legal aid or rural traineeship.

FIGURE 1
Number of Diploma graduates 1993-2004
(Source: Law Society of Scotland)



4.19 The data suggested that if interest in entering the profession held up amongst undergraduates then a smaller proportion of graduates who wished to study for the Diploma would be able to do so, unless there was an increase in the number of Diploma courses, or places on the current courses. There were signs that unless the universities which had recently been accredited to teach LLB degrees received some reassurance that places would be made available for their graduates on the existing Diploma courses, they would apply to the Law Society for the accreditation of their own Diploma course. In either case the overall number of Diploma places in Scotland was likely to increase. If there was an attempt to impose a limit in the supply of Diploma places in response to concerns over the growing number of law graduates however, such a move might constitute an anti-competitive restriction. The OFT agreed that there should be no attempt to seek to limit the supply of Diploma places and noted that realistic career advice might be helpful at an early stage. The Law Society of Scotland provided careers advice at different stages of legal education, highlighting that the LLB and the subsequent Diploma and trainee stages were competitive processes. For example the Society offered to send a staff member to all Scottish Universities to speak to undergraduates each year and (where relevant) Diploma students at least twice a year to discuss those issues.

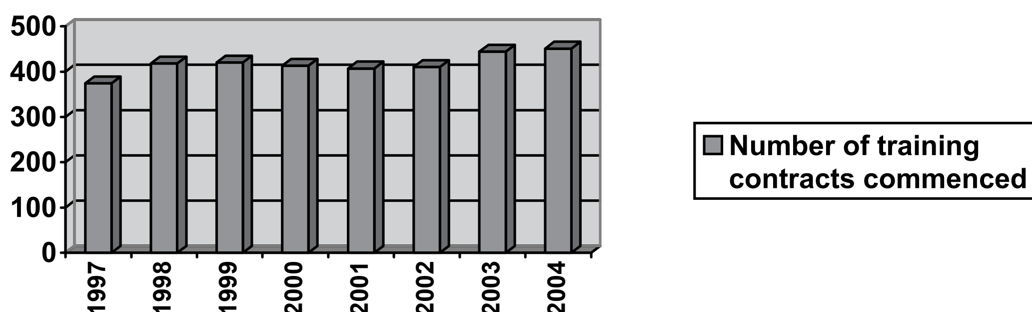
[40] Hamilton J, Martin P. Law Student 2003: a profile of law students in Scotland.

Post diploma training contracts

4.20 After successful completion of the Degree and Diploma, all intending solicitors were required to serve a two year post-Diploma training contract with a practising solicitor in Scotland. Traditionally, the traineeship and its predecessor, the apprenticeship, had been the major bottleneck for those seeking entry to the legal profession in Scotland. That remained the case, although demand for training places had fluctuated over the last twenty years. There were signs however that the 400 or so traineeships per year that had been becoming available in recent years, might become insufficient to meet demand from Diploma graduates for training places. It was also important to note that that figure might hide changes in the types of traineeships available. For example, there appeared to have been a substantial reduction in the number of training places in criminal firms (which might be in part due to the introduction of fixed payments), while concurrently there appeared to be great interest among qualified lawyers in working for organisations such as the Public Defence Solicitors' Office and the Crown Office. To look in more detail at the profile of traineeships over time would require manual checking of paper-based information. Trainee solicitors were normally paid by their employers at a mutually agreed rate, based on salary scales recommended by the Law Society of Scotland for post-Diploma trainees. Trainees in some of the largest firms would receive significantly more than the recommended rates, while some working in local authorities would be paid according to organisational pay scales. Some trainees were paid below the recommended scales. After completing the first year of training, a trainee could, subject to satisfactory progress, apply to be admitted as a solicitor under the relevant regulations[41].

4.21 As Figure 2 below shows, the number of training contracts commenced increased generally since 1997, with some fluctuations. The number commenced in 2004 was 451, compared to 374 in 1997. Thus, in 2004, the number of training contracts commenced was slightly lower than the number of diploma graduates. However, those two figures did not necessarily tie up neatly because some graduates might actually commence their traineeship in the same calendar year.

FIGURE 2
Number of training contracts commenced 1997-2004
(Source: Law Society of Scotland)



[41] Admission as Solicitor (Scotland) Regulations 1991 and 2001, made under section 5 of the Solicitors (Scotland) Act 1980.

Number and size of firms in Scotland

4.22 The number of traineeships available should, at least to some extent, be related to the number and size of firms operating in Scotland. According to the most recent data available from the Law Society of Scotland there were 1,255 firms in Scotland. A total of 472 (38%) of these firms were based in Glasgow and Edinburgh. Sole practitioners accounted for 45% of legal firms in Scotland and firms with 2-4 partners accounted for a further 39%. The number of firms in Scotland appeared to have been relatively stable over the previous 10 years (Table 2), with an 8% increase in the number of firms between 1994 and 2004. However, there had been a substantial increase in the number of practising certificates in firms with 10+ partners, even though the number of such firms had dropped. Law Society of Scotland data showed that the number of practising certificates in firms with 20+ partners had increased from 806 in 1994 to 2,139 in 2004.

Table 2: Number of legal firms in Scotland by size and % of total (1994-2004)
Source: Law Society of Scotland

Year	Sole Practitioners	2-4 partners	5-9 partners	10+ partners	Total
1994	461 (40%)	485 (42%)	154 (13%)	67 (6%)	**1,167**
1995	478 (40%)	504 (42%)	150 (13%)	65 (5%)	**1,197**
1996	508 (42%)	514 (42%)	140 (12%)	62 (5%)	**1,224**
1997	544 (44%)	504 (40%)	140 (11%)	57 (5%)	**1,245**
1998	554 (44%)	511 (41%)	130 (10%)	61 (5%)	**1,256**
1999	548 (44%)	520 (41%)	126 (10%)	63 (5%)	**1,257**
2000	549 (44%)	531 (42%)	116 (9%)	65 (5%)	**1,261**
2001	532 (43%)	527 (42%)	117 (9%)	69 (6%)	**1,245**
2002	548 (44%)	517 (41%)	122 (10%)	59 (5%)	**1,246**
2003	560 (45%)	504 (40%)	128 (10%)	63 (5%)	**1,255**
2004*	561 (45%)	495 (39%)	138 (11%)	61 (5%)	**1,255**

NB All data mid year, with the exception of 2004 (data as of 6th Jan 2004)

4.23 Table 3 shows the number of trainees in firms between 1999-2002. The number had fluctuated over the 4 year period. There had been a steady increase in the number of trainees in firms with 20 or more partners. As noted above, there had been a substantial increase in the number of practising certificates in firms with 10+ partners, even though the number of firms of this size had dropped. While firms with 1-4 partners represented approximately 85% of total firms in Scotland over recent years, fewer than 20% of trainees were working in those firms in 2001 and 2002. That might suggest that there were fewer young trainees in rural-based firms and in firms undertaking criminal legal aid work (which tended to be concentrated in small firms). To establish the nature of work conducted by trainees in firms of every size, further work would need to be completed to match electronic and paper records. Further research might also be required (and was now planned) to look in detail at the recruitment and retention practices and experiences of firms in Scotland.

4.24 In 2002 the majority of trainees were working in firms with either more than twenty partners (165 or 45% of trainees) or between 11 and 20 partners (66 or 18% of trainees) – just less than two thirds of trainees overall. These firms were predominantly located in Glasgow

and Edinburgh. Those trainees in 2002 located within firms with 5 or fewer partners tended to be in locations other than Glasgow and Edinburgh ('other areas') – 50 trainees out of the 81 in these firms (62%) were located in 'other areas'. The data could be disaggregated by Glasgow, Edinburgh and other areas only. Aberdeen and Dundee were included in 'other areas'.

Table 3: Number of trainees in firms 1999-2002
Source: Law Society of Scotland

Firm Size (by no of partners)	1999	2000	2001	2002
1	18 (5%)	15 (4%)	12 (3%)	10 (3%)
2-5	79 (22%)	91 (24%)	55 (16%)	71 (19%)
6-10	61 (17%)	52 (14%)	58 (17%)	53 (14%)
11-20	50 (14%)	59 (15%)	58 (17%)	66 (18%)
20 plus	124 (34%)	141 (37%)	158 (46%)	165 (45%)
Unknown	33 (9%)	23 (6%)	5 (2%)	1 (<1%)
TOTAL	**365 (100%)**	**381 (100%)**	**346 (100%)**	**366 (100%)**

4.25 As already mentioned, the excess demand for Diploma and training places could be seen from an economic perspective as suggesting that prospective entrants to the profession believed that prospective remuneration within the solicitors' profession more than repaid the investment in training. It might of course, be possible that those prospective entrants were misinformed and that the attractiveness of a profession to potential entrants only adjusted to reality with a significant time lag. That suggested that further evidence on salary prospects on qualification might clarify the situation.

4.26 The Law Society of Scotland had been seeking to enhance the quality of the overall training experience in the post-Diploma phase: firstly, by increasing the obligations on providers of in-office training and secondly by establishing a Professional Competence Course in 2002 which was compulsory for all trainees[42]. The Professional Competence Course consisted of 36 hours of core modules and 18 hours of elective modules and had to be attended at any time between the 6 and the 18 month stage of the traineeship. The fee for the course was about £1,000 and in most cases was being paid by the firms rather than the trainees. There was a possibility that the enhanced training and supervision requirements, combined with the cost and "disruption" associated with the professional competence course, might lead to some smaller firms ceasing to offer traineeships. That was being explored in research which had commenced in 2005.

Membership of the Law Society of Scotland

4.27 As of 31 October 2004 the number of members of the Law Society of Scotland holding practising certificates was 9,443. That number had been rising steadily since 2001. The number of members not holding practising certificates in 2004 was 639, bringing the total to 10,082.[43] It was possible to examine the sector of the law profession which those

[42] in terms of the Admission as Solicitor (Scotland) Regulations 2001.
[43] The number of solicitors whose names were retained on the Roll (by paying only the annual retaining fee) as at 31 October for the practice years 2000 – 2004 was 1,135, 1,194, 1,334, 1,356 and 1,480 respectively.

with practising certificates worked in (Table 4). Just under three-quarters of those with practising certificates were in private practice between 2001 and 2004, while a further 13-14% worked either for central or local government. Only 2% of those with practising certificates between 2001 and 2004 were not employed as solicitors.

Table 4: Occupations of members of Law Society of Scotland holding practising certificates
(Source: Law Society of Scotland)

Occupations	2001		2002		2003		2004	
Private practice	**6,471**	**(74%)**	**6,537**	**(73%)**	**6,674**	**(73%)**	**6,859**	**(73%)**
As principals	3,569		3,571		3,585		3,589	
As consultants	248		253		269		253	
As associates	817		843		932		967	
As assistants	1,837		1,870		1,888		2,050	
Local authorities	**600**	**(7%)**	**620**	**(7%)**	**611**	**(7%)**	**639**	**(7%)**
Central government	**565**	**(6%)**	**617**	**(7%)**	**666**	**(7%)**	**697**	**(7%)**
Public bodies	**134**	**(2%)**	**147**	**(2%)**	**157**	**(2%)**	**163**	**(2%)**
Commerce / industry	**316**	**(4%)**	**326**	**(4%)**	**318**	**(3%)**	**342**	**(4%)**
Retired	**17**	**(/)**	**16**	**(/)**	**5**	**(/)**	**9**	**(/)**
Not employed as solicitor	**159**	**(2%)**	**170**	**(2%)**	**145**	**(2%)**	**196**	**(2%)**
Undisclosed	**505**	**(6%)**	**492**	**(6%)**	**544**	**(6%)**	**537**	**(6%)**
Maternity leave	**1**	**(/)**	**1**	**(/)**	**0**	**(/)**	**1**	**(/)**
TOTAL	**8,768**		**8,926**		**9,120**		**9,443**	

4.28 The proportion of women holding practising certificates had increased substantially over recent years. In 2004 41% of those holding practising certificates were female, though that proportion increased substantially in the younger female cohorts (Table 5). Among those under 30 years, 61% were female. That reflected the recent profile of law graduates from Scottish universities.

Table 5: Practising certificate holders by age and gender, 2004
Source: Law Society of Scotland

Age	Male		Female		Total	
Under 30	564	(39%)	887	(61%)	1,451	(100%)
30-39	1,484	(49%)	1,522	(51%)	3,006	(100%)
40-49	1,794	(62%)	1,083	(38%)	2,877	(100%)
50-59	1,362	(80%)	342	(20%)	1,704	(100%)
60-69	295	(88%)	42	(12%)	337	(100%)
70 plus	60	(91%)	6	(9%)	66	(100%)
Undisclosed	0		2		2	
Total	**5,559**	**(59%)**	**3,884**	**(41%)**	**9,443**	**(100%)**

4.29 Despite the increasing number of females entering the legal profession, much lower proportions of females than males were partners in firms (see table 6). In the 30-39 year age band onwards, fewer females had partner status. However, amongst the under 30s (which represented small numbers of the total) there were almost equal numbers of males and females. The Law Society of Scotland commissioned research into the position of women in the legal profession in Scotland which examined in more detail the question of women

obtaining proportionately fewer senior positions in practice. The research was published in November 2005[44].

Table 6: Partners holding practising certificates by age and gender, 2004 Source: Law Society of Scotland

Age	Male		Female		Total	
Under 30	9	(53%)	8	(47%)	17	(100%)
30-39	581	(68%)	271	(32%)	852	(100%)
40-49	1,181	(78%)	326	(22%)	1,507	(100%)
50-59	908	(89%)	111	(11%)	1,019	(100%)
60-69	152	(91%)	16	(9%)	168	(100%)
70 plus	19	(76%)	6	(24%)	25	(100%)
Undisclosed	0		1		1	(100%)
Total	**2,850**	**(79%)**	**739**	**(21%)**	**3,589**	**(100%)**

Career aspirations

4.30 There had been less research on career aspirations and progression of legal graduates in Scotland than in England and Wales. In an attempt to address questions about the aspirations, development and career progression of law students, the Law Society of England and Wales had set up and supported a graduate cohort survey throughout the 1990s. At that stage the original cohort was at the two year post-qualifying stage. Detailed findings from various sweeps of the cohort study could be downloaded at the Law Society publication webpage at http://www.lawsociety.org.uk/.

4.31 The **sixth** sweep of the survey (the last published)[45] was conducted at the point where respondents were entering the workplace. At that time the authors noted that solicitors were then engaged in a range of quite diverse activities and specialisms.[46] Increasing numbers of lawyers were employed in the public sector at the same time as an increase in the size and wealth of commercial firms. The difference between those types of work and the high street practitioner serving local communities was particularly marked. The sixth sweep of the study showed that the cohort who made it through their legal education and training carried out a very wide range of work. However, that work was often in quite specialised fields. The authors concluded that that could lead to a degree of occupational immobility for legal professionals. There was evidence that having secured a place at a law firm, many young graduates chose to remain there. Nearly two-thirds of newly qualified solicitors remained in the organisation that they had trained in the year after qualification.

4.32 The possibility of movement between the private and public sector, and between city and provincial firms, did appear to exist and might be realistic for some south of the border. There was a more strongly expressed desire among respondents to move from the public sector to the private sector which might be explained, at least in part, by the lower rates of

[44] Women in the Legal Profession in Scotland - a study by the Law Society of Scotland and the Equal Opportunities Commission Scotland
(available at http://www.lawscot.org.uk/Diversity/PDFs/Women_LegalProfession_full%20report.pdf)
[45] Duff E et al. Entry into the legal professions: The law student cohort study Year 6. Law Society 2000
[46] Boon A, Duff E, Shiner M (2001) Career paths and choices in a highly differentiated profession: the position of newly qualified lawyers. The Modern Law Review 64(4): 563-593.

post-qualification pay in the public sector. However, at that stage in graduate careers such moves were not evident. The authors also concluded at that stage that while the distribution of respondents did to some degree reflect practical, social and intellectual choices, there remained a failure of opportunity equality.

4.33 Overall, the study found that while a large proportion of trainees went on to become employed solicitors, there were some groups who appeared to be disadvantaged at early stages of the career pathway; those groups included minority ethnic groups, those from less privileged backgrounds, those who attended what were described as 'new' universities and (to a lesser extent) women. The stages at which those groups appeared to be most disadvantaged were at the point where they were seeking training contracts.

4.34 There was less of that type of evidence on career aspirations, progression, choices and pathways in Scotland. However, research on recruitment and retention of law graduates and post-graduates in Scotland commenced in 2005. That was a jointly funded exercise between the Scottish Executive, the Scottish Legal Aid Board and the Law Society of Scotland. The driver for that research had been concern about the future supply of practitioners in some legal markets, particularly legal aid work and in some (more rural) areas of Scotland.

Entering the profession of advocate

4.35 The number of practising advocates had increased markedly over the last decade and there were now approximately 470 practising advocates in Scotland. While advocates were admitted by the Court, and changes to the admission requirements had to be approved by the Lord President, the Court delegated examination of the suitability of intrants to the Faculty of Advocates.

4.36 Admission required either an Honours degree (at 2:2 level or above) or an ordinary degree with distinction, though the Dean had power in exceptional circumstances to exempt an applicant from those requirements, having regard *inter alia* to such objective evidence of intellectual ability as the applicant might produce. Intrants normally also had to have completed the Diploma in Legal Practice and undergone a period of training in a solicitor's office. At present many intrants had in fact practised as solicitors before matriculating although that was not required. In addition, intrants were required to take the Faculty of Advocates five week Foundation Course and to undertake a period of pupillage (during which they would attend a number of skills training courses), totalling a further five weeks of study.

4.37 Reform of the Faculty's entrance requirements was currently under active consideration. The requirement for a 2.2 Honours degree was being revisited. The proposals had still to be finalised and would require to be adopted by the Faculty and approved by the Lord President.

4.38 No period of pupillage could be less than 6 months and a pupil-master did not make any payment to the pupil (or devil), though there was no Faculty rule which actually prohibited payment. The absence of remuneration might act as a barrier to entry for those of limited means. The Faculty had from time to time considered whether pupils should be paid a salary, but had decided against remuneration, chiefly on the grounds that it had no control of the number of intrants and would find it impossible to budget for the payment of salaries to an unrestricted number of pupils. The Faculty did however offer some annual scholarships

to intrants who intended to practise at the Scottish Bar. The size and number of scholarship awards was at the discretion of the Scholarship Committee, after consideration of the number and quality of applicants as well as the funds available in any given year.

4.39 The Faculty suggested that any consideration of the question of whether the absence of payment to pupils constituted a barrier to entry had to have regard to the nature of pupillage, which was different from an employment relationship. Pupils did not provide services for the benefit of the pupil-master – rather, the relationship was directed to providing the pupil with experience, education and training. Typically, for example, although a pupil would have a principal pupil-master, the pupil-master would arrange for the pupil to spend time during the period of pupillage with other advocates with a view to exposing the pupil to different aspects of practice at the bar.

4.40 It would also be relevant to have regard to the relatively low start-up costs of becoming an advocate in Scotland as compared with taking up other forms of self-employment. Any intrant who completed pupillage and fulfilled the other entrance requirements was entitled to admission as an advocate and to enter practice at the bar with full access to the Advocate's Library and clerking services on an equal basis with all other advocates. The Faculty as a whole supported the Foundation Course (which was taught very largely by experienced practitioners for no fee) and other skills courses which were provided to intrants free of charge, while individual pupil-masters spent time in the training of pupils. The effect of any requirement for pupil-masters to pay pupils on the number of experienced advocates who would be willing to take pupils, as well as on the nature of pupillage, would have to be considered in addressing this issue.

Competition issues

4.41 The OFT recognised that it was difficult to draw the line between (a) requiring levels of training which were sufficient to ensure competence and (b) restricting entry by imposing unnecessarily stringent requirements. The OFT believed nonetheless that there was a strong case for ensuring that decisions in that area were subject to an approval process in which the objectives of consumer protection and the administration of justice were explicitly balanced against those of competition. In addition, the OFT considered that the availability of a partnership structure might bring improvements in the arrangements, financial and otherwise, for developing future advocates.

4.42 With regard to any examination and qualification procedures that the Faculty operated either in relation to the various categories of intrants (those who had qualified as solicitors in Scotland, those who were qualified in England, Northern Ireland or elsewhere), it would be important in the OFT's view to ensure that requirements were transparent, proportionate, non-discriminatory and based in objective standards (as with entry into the solicitor's profession - see above).

Practising as a solicitor advocate

4.43 Under section 25A of the Law Reform (Miscellaneous Provisions) Scotland Act 1990 suitably qualified solicitors in Scotland could for the first time apply to be granted rights of audience in the Supreme Courts in Scotland as well as in the House of Lords and the Judicial Committee of the Privy Council (see chapter 2).

4.44 In Scotland, any solicitor who wished to acquire extended rights of audience had to satisfy the Council of the Law Society of Scotland about both their professional conduct and reputation and their competency in the practice and procedure of the Supreme Courts. In addition they required to pass an examination. Whilst it was expected that applicants would have 5 years experience, that somewhat artificial bar was removed in 2003 and all potential candidates could apply to the Society. The initial cost of the application was presently set at £250 or £400 for both civil and criminal rights. If successful the prospective candidate would require to attend a Training/Assessment Course. There were separate courses for civil and criminal candidates, both operating in general terms on the basis of continuous assessment. The cost of this course was presently around £1,500, but varied depending upon numbers.

4.45 Membership of the Society of Solicitor Advocates was open to all solicitor advocates in Scotland and the Society represented solicitors advocates who had gained rights of audience in the civil or criminal courts or in both.

Conclusions

4.46 The legal profession had undergone significant change in recent decades: globalisation, changes in business practice and technology, increased competition, greater specialisation and increasing numbers of women qualifying had all affected the profession.

4.47 The numbers entering undergraduate law course in Scotland would continue to rise substantially, in most part due to the accreditation of new LLB courses at Scottish Universities.

4.48 There was some evidence of social barriers to entry into the legal profession; in particular there seemed to be little evidence of an increase in the proportion of students from lower socio-economic groups, who remained significantly under-represented on law courses. That was a concern for higher education generally.

4.49 Historically, the principal bottleneck in entering the profession had been in securing an apprenticeship or traineeship. Currently there were signs that another bottleneck might be emerging at the stage before entering the diploma. Demand for places was beginning to outstrip supply and competition for places would become fiercer as the new LLB students graduated. There were signs that the number of diploma places would increase. Any attempt to limit the number of diploma places could be construed as an anti-competitive practice.

4.50 The data showed that there were slightly fewer registered training places than diploma places, but the gap was relatively small. However, with an increase in diploma places, and graduates, that was likely to remain the main 'bottleneck' in the education and training process, since the number of training places available depended to a large extent on market forces.

4.51 The majority of trainees were working in firms with 11 or more partners. That impacted upon the training and experiences of trainees. There were concerns that relatively few trainees would be experiencing work in firms who relied on legally aided work, and in particular areas of law such as family law (which tended to be the domain of smaller firms). Ultimately that would affect the supply of legal professionals to undertake this work.

4.52 Increasingly women were pursuing the study of law. However, despite the increasing number of females entering the legal profession, much lower proportions of females than males were partners in firms. The Law Society of Scotland had published joint research with the Equal Opportunities Commission which explored issues around gender and career progression within the legal profession (see footnote 44).

4.53 Reform of the Faculty's entrance requirements was under active consideration. A period of pupillage of at least 6 months was required and a master did not make any payment to his pupil. The absence of remuneration during a period of up to 9 months unpaid devilling might act as a barrier to entry to the profession for those of limited means. The Faculty observed however that the nature of pupillage was different from an employment relationship, and that the start-up costs of practice as an advocate were low compared with other forms of self-employment.

4.54 Any solicitor who wished to acquire extended rights of audience as a solicitor advocate had to satisfy the Council of the Law Society of Scotland about both their professional conduct and reputation and their competency in the practice and procedure of the Supreme Courts. In addition they required to pass an examination. Whilst it was expected presently that applicants would have 5 years experience, that bar was due to be removed. Further discussion of rights of audience is set out in Chapter 12.

4.55 The OFT emphasised that where decisions were taken in relation to qualification or training requirements it was important that those requirements should be transparent, proportionate, non-discriminatory and based on objective standards. In the OFT's view there had been no systematic examination of whether that was the case in Scotland, and whether the current training and education system systematically ensured that a supply of appropriately trained professionals was available to cover all areas of law. The Law Society of Scotland disagreed with the latter view.

CHAPTER 5 PROFESSIONAL RULES ETC WITH POTENTIAL IMPLICATIONS FOR COMPETITION IN THE SCOTTISH LEGAL SERVICES MARKET

5. Chapters 5-8 identify the competition issues associated with certain professional rules and the sometimes diverging views which exist about where the public interest lies in relation to such rules. These chapters contribute to the specific aims of the Research Working Group :

- to identify restrictions, whether deriving from statute, professional rules or custom and practice, which may have the effect of preventing, limiting or distorting competition in the different Scottish markets;

- to identify access to justice, public interest and consumer protection factors that may justify such restrictions and to evaluate whether the restrictions are proportionate to their purpose.

Background

5.1 These particular aims were designed to take forward in relation to Scotland the review agenda provided by the EC Report on Competition in Professional Services (see chapter 1). To discharge that agenda the UK national competition authority (the Office of Fair Trading), the Scottish Executive and the Scottish legal professional bodies needed to ensure that regulation of the Scottish market for legal services was compatible with both European and domestic competition law.

5.2 The approach advised by the Commission was that a proportionality test should be applied in scrutiny of professional regulations. The test advocated by the Commission was that professional rules had to be (a) objectively necessary to attain a clearly articulated and legitimate public interest objective and (b) the mechanism least restrictive of competition to achieve that objective. The Commission believed that rules which satisfied these requirements served the interests of users and professionals alike. The Commission invited regulatory authorities in the member states and professional bodies to review existing rules, taking into account:

- whether those rules were necessary for the public interest;

- whether they were proportionate; and

- whether they were justified.

5.3 The EC Treaty contained competition provisions (Articles 81 and 82) which had been applied in UK law by the Competition Act 1998. The 1998 Act provided that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the UK were prohibited and void (subject to certain exceptions). Law firms were regarded as "undertakings" and the legal professional bodies as "associations of undertakings" and therefore fell within the ambit of competition law.

5.4 The 1998 Act had to be applied consistently with the principles of Community law. With effect from May 2004 Articles 81 and 82 of the EC Treaty had applied direct in EU member states and the Commission was pressing competition bodies in member states to ensure their governments applied the Articles uniformly throughout their state. Member states were required to take competition principles into account when approving professional rules made by professional bodies in addition to the public interest considerations which the bodies might have had in mind in promoting such rules.

5.5 These chapters have been based on discussions within the Research Working Group. Comments from the Group on points of detail have been assimilated, but more substantial commentary, such as that from the Law Society of Scotland, the Faculty of Advocates and the Office of Fair Trading is clearly attributed. Economic analysis has been provided by Professor Frank Stephen of the University of Manchester (formerly of the University of Strathclyde).

A LAW SOCIETY OF SCOTLAND

(a) Restriction on practice as a principal

5.6 One of the professional rules of the Law Society of Scotland[47] restricted solicitors from practising as a principal in a law firm unless they had been employed as a solicitor for a cumulative period of three years. This rule might be challenged as having an anti-competitive effect by imposing an unnecessary restraint on able, newly qualified solicitors who might wish to practise as a principal without first having acquired three years experience.

Rationale for the restriction

5.7 The Law Society of Scotland believed that the rule was justified on the basis of previous experience of what could go wrong if newly admitted solicitors were permitted to act as principals of law firms immediately. There was evidence that such solicitors were not always able to provide an adequate service to their clients, which included proper risk management and compliance with the Society's practice rules. The Society's note at annex B explains the public interest which the rule was designed to protect more fully.

5.8 The Group found no evidence that the rule was unnecessarily restrictive, taking account of the public interest considerations identified and the flexibility which the Society's power of waiver provided to deal with exceptional cases.

(b) Restriction on receiving a payment for referring a client

5.9 The rules of the Law Society of Scotland did not permit solicitors to pay commission/referral fees to third parties (such as estate agents or mortgage providers) for the introduction of business[48].

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[47] Rule 3(1) of the Solicitors (Scotland) (Restriction on Practice) Practice Rules 2001.

[48] Rule 4 of the Solicitors (Scotland) Practice Rules 1991.

Rationale for the restriction

5.10 The Law Society of Scotland believed it was prejudicial to the independence of the profession for solicitors to pay for referred business, as doing so might lay them open to charges of pursuing their own financial interests in advance of the best interests of their clients. The Society considered that clients should be free to choose their own agent rather than have their work commoditised and sold on to solicitors who were prepared to pay for it. The Society maintained that referral fees did not increase competition as solicitors required to compete against one another for all work. The Society noted that solicitors currently involved in referral schemes where no referral fee was payable already had an incentive to maintain a high standard of service so as to get repeat custom. Where referral fees were involved, the Society believed that the company referring would judge which solicitor to refer the business to by the amount it would receive by way of fee.

5.11 If that rule were to be relaxed to allow payment of referral fees, the Society believed there would be considerable pressure on some solicitors to pay a fee for the referrals, and that in certain areas referrals would be awarded to whoever was prepared to pay the highest fee, not necessarily to the firm giving the best service. The Society did not believe that disclosure to the individual client that a firm had paid for the referral was a protection for the client.

5.12 The Law Society of Scotland had prohibited solicitors from sharing commission since 1964. In response to media reports that solicitor firms in England and Wales were offering doctors payments for referring patients, the Law Society of Scotland issued a news release on 2 September 2004 confirming that solicitors in Scotland continued to be banned from paying other people for introducing clients. The Society's view was that intermediaries created an economic activity which was entirely unnecessary, potentially prejudicial to the independence of the adviser and which would ultimately be paid for by the consumer.

Competition issues

5.13 In its report on *Competition in Professions*[49] the OFT expressed concern that a restriction on referral fees in England and Wales might be hampering *inter alia* the development of an online market place that could bring clients and solicitors together (eg payment to an intermediary firm that 'introduced' clients and suppliers over the internet) and the ability of solicitors to compete with non-legally qualified practitioners.

5.14 The OFT considered that:

- a blanket prohibition on the payment of referral fees was unlikely to be necessary to guarantee solicitor independence, which could generally be protected by transparency rules requiring that the client be fully informed of any referral fee paid;

- referral fee arrangements could enhance competition, as solicitors had to compete against each other to obtain such referral work;

[49] See page 14

- solicitors who were involved in referral fee schemes would have an incentive to maintain a high standard of service so as to get repeat custom from referred clients as well as the referrer. The reputation of both firms was dependent on both providing a quality service to build their reputation and to gain repeat custom; and

- A prohibition on referral arrangements would therefore have the effect of reducing competition amongst solicitors to the detriment of clients, who were less likely to obtain the quality and price of legal services that best met their needs.

5.15 The OFT noted that consumers generally found it difficult to access information about professional services. A prohibition on referral fee arrangements increased clients' search and transaction costs. Referrers might develop a better understanding about professional services than clients and therefore be in a better position than clients to identify solicitors who provided legal services of a high quality for relative good value. On that basis a referral fee arrangement was likely to minimise the effects of information asymmetry in the legal services market between lawyers and clients, and a prohibition on referral fees would prevent such benefit. Further, referral websites could significantly reduce search costs[50], thereby enabling clients to find the quality and price of legal services that best met their needs.

5.16 As referrers developed a good understanding about legal services and thereby developed bargaining power, they were likely to be able to negotiate for high quality services for relative good value. The OFT considered that the effect of a prohibition on referral fees might therefore be to impede the development of better services and lower fees, thereby potentially limiting competition amongst solicitors. Referral services would provide an additional choice by which a client could choose a solicitor. A prohibition on referral fees might also have the effect of restricting clients' freedom to access a solicitor indirectly i.e. through a referral arrangement.

5.17 The OFT concluded that referral fee arrangements could act as a competitive tool for new firms entering the market, where such arrangements were not common practice in the market.

Conclusion

5.18 The Law Society of Scotland considered that more research required to be done before a firm conclusion could be reached. As referral fees were banned in Scotland, the only practicable form for such research would be to consider experience of the impact of referral fees in similar jurisdictions where they were permitted.

5.19 In England and Wales the Law Society debated the removal of the restriction on several occasions in 2003 and resolved in December 2003 that it would be in the public interest to allow referral fees, provided that such payments were disclosed to clients[51]. The

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[50] Statement for the Federal Trade Commission's workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet Auto Panel", Professor Fiona Scott Morton, Yale School of Management.

[51] A postal ballot of members of the Law Society of England and Wales was held following adoption of a resolution in favour of re-instating the ban at the Society's AGM on 15 July 2004. There was a 17% response rate for 120,000 ballots issued; 73% of those solicitors who did respond were in favour of the resolution deploring the Council's decision to sanction referral fees. The President of the English Law Society observed however that when the Council made or changed rules, it had to make decisions on the basis of the public interest and for that reason the Council could not be bound on regulatory issues by any ballot of members.

Law Society of England and Wales undertook a review of the impact of the changes it made in 2004 to the professional conduct rules on referrals, which included a survey of the experiences and attitudes of clients. At its Council meeting in July 2005, the Law Society of England and Wales decided that it would not for the time being reintroduce a prohibition on referral fees, but would instead issue enhanced guidance to the profession. The Society's Council decided to refer the issue of the reintroduction of the ban to the Law Society's new Regulation Board.

5.20 The Scottish position should be reviewed when clearer evidence became available of experience in England and Wales.

(c) Professional indemnity insurance

5.21 The Law Society of Scotland maintained a Master Policy to provide indemnity for all Scottish solicitors. The arrangement was governed by rules which required solicitors to purchase professional indemnity insurance through the Master Policy[52].

Competition issues

5.22 The OFT believed that it had reasonable grounds to suspect that a restriction on competition might arise from the inability of Scottish solicitors to choose their own provider for professional indemnity insurance and perhaps to seek professional indemnity insurance on better terms than were offered by the Master Policy. The OFT wished to assess whether the decision by the Law Society of Scotland to require all solicitors in Scotland to obtain their professional indemnity insurance through the Master Policy might be an unnecessary restriction on competition between solicitors in Scotland.

5.23 The OFT also considered whether the Master Policy might be reducing the capacity for solicitors with a good claims record to benefit from the competitive advantage inherent in a lower premium for professional indemnity insurance.

5.24 Lastly, the OFT considered an allegation made by some users of legal services that Scottish solicitors had a mutual interest in avoiding claims on the Master Policy and might therefore refuse to advise a client who required assistance in acting against another solicitor.

(i) Choice of insurance provider

5.25 The OFT compared the requirement for all Scottish solicitors to obtain their professional indemnity insurance cover under the Master Policy with arrangements in other jurisdictions, such as England and Wales where solicitors could choose their insurer from a list maintained by the Law Society of England and Wales.

5.26 It was not clear however that the apparent benefits of the arrangements in England and Wales, in terms of greater freedom to solicitors to seek insurance directly from an approved pool of insurers, could similarly be achieved in the context of the much smaller solicitor profession in Scotland. In the course of its investigation the OFT had not received representations from any Scottish law firm alleging that their ability to compete was

[52] The Solicitors (Scotland) Professional Indemnity Insurance Rules 1995, made under section 44 of the Solicitors (Scotland) Act 1980.

restricted by the current arrangements. The OFT concluded that it was unlikely that there was strong and compelling evidence that the decision by the Law Society of Scotland to maintain in force the Master Policy arrangements had the effect of preventing, restricting or distorting competition.

(ii) Impact of good claims records on premiums

5.27 Having considered the Master Policy guidelines and premium documentation, the OFT was satisfied that under the arrangements then in place the premiums set for professional indemnity insurance did take account of the relative levels of risk associated with different sized law firms, and the level of expertise provided by the number of partners within the firm. It appeared to the OFT that bigger practices paid more in premiums; and those practices with a high ratio of partners to non-partners paid less than practices with very few partners (and therefore more limited supervision or expertise). Most importantly, a discount or penalty was included in the calculation of premium depending on the practice's claims record. Thus firms with a good claims history were eligible to receive a premium discount, whereas firms with a poor claims history would pay a higher premium.

5.28 The OFT noted from the information provided that the Law Society of Scotland had in the past regularly reviewed and increased the impact of a firm's claims record on the level of premium payable under the Master Policy. The Society had also expressed an intention to continue reviewing that in the future. The OFT encouraged the Society to continue to do so to ensure that the claims record of a solicitors' firm was adequately reflected when premiums were set under the Master Policy.

(iii) Alleged refusals by solicitors to provide services

5.29 The OFT considered lastly whether the alleged mutual interest of Scottish solicitors in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor.

5.30 While the OFT was aware of instances of complainants reporting difficulty in finding a solicitor to represent them, the OFT did not have sufficient evidence to establish that an alleged mutual interest of Scottish solicitors in avoiding claims under the Master Policy was a significant factor in a solicitor's decision not to represent a client. In the absence of such evidence the OFT considered that any difficulties experienced by legal services clients in obtaining representation ought to be considered as an access to justice, and not a competition, issue.

Conclusion

5.31 The OFT noted that the Law Society of Scotland had reviewed on a number of occasions the appropriateness of its arrangements for professional indemnity insurance and encouraged it to continue to conduct such reviews regularly with a view to ensuring that the arrangements in place were those that minimised restriction to competition while ensuring that solicitors had adequate professional indemnity insurance. Having reviewed the extensive information provided by the Law Society of Scotland, the OFT announced on 11 February 2005 that it had decided to close its investigation.

(d) Legal professional privilege

5.32 Lawyers could not be compelled in court to disclose legal advice which they had given to their clients. The Code of Conduct for Solicitors holding Practising Certificates issued by the Law Society of Scotland provided that the observance of client confidentiality was a fundamental duty of solicitors (rule 4). That principle was recognised by the courts as being essential to the administration of justice and to the relationship of trust which had to exist between solicitor and client. Legal professional privilege was a privilege which belonged to the client, rather than to the solicitor or advocate, and affected advice as well as litigation.

5.33 A similar privilege did not however apply to other professions, who complained that there was not a level playing field. In the White Paper "The Future of Legal Services : Putting Consumers First" published in October 2005 the UK Government indicated that it did not at that stage propose to extend legal professional privilege to include communications between a particular client and non-lawyer members of a firm providing legal and other services to the consumer (see chapter 6).

Competition issues

5.34 Where the subject of exchanges between clients and their legal advisers was advice that could equally be provided by a member of another profession, the OFT believed that there was a case on efficiency and competition grounds for either a reduction in the scope of privilege of legal advisers or a limited extension of privilege to others in order to remove the distortion of competition that favoured the lawyer. An example was tax advice where accountants felt themselves at a disadvantage to lawyers.

Conclusion

5.35 The issue of whether privilege should be extended to others than lawyers was beyond the scope of the report. The balance of opinion within the Group was that the competition argument for getting rid of legal professional privilege did not seem particularly strong. Following consultation in England and Wales, the Department for Constitutional Affairs decided for its part that there should be no alteration to the scope of legal professional privilege, that there was no evidence that the existing privilege was significantly distorting the market in favour of lawyers and that the drawbacks in terms of public interest would outweigh the removal of any minor distortions that may exist. With the exception of the OFT, the Group concluded that there was not a strong competition argument for getting rid of legal professional privilege. Solicitors should not be compelled in court to describe the legal advice they have given their client; though this meant that there was not a level playing field, the privilege seemed necessary for the adversarial system to work.

(e) Solicitor advocates

5.36 Until 1990 solicitors were able to appear only before the district and sheriff courts and only advocates were permitted to represent clients before the supreme courts. The Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 introduced a right of audience in the supreme courts in Scotland (as well as in the House of Lords and the Judicial Committee of the Privy Council) for solicitors who could satisfy the Council of the Law Society of Scotland about both their professional conduct and reputation and their competency in the practice and

procedure of the Supreme Courts. Solicitors who wished to practise as solicitor advocates also required to pass an examination.

5.37 The reform was introduced as part of the then Government's policy of increasing competition in the provision of legal services and improving consumer choice, and was intended to promote greater choice for the public as to whom they could choose to represent them, while at the same time maintaining the quality of service provided.

5.38 The first solicitor advocates (i.e. solicitors with extended rights of audience) were admitted in May 1993. As at January 2006 there were 192 solicitor advocates with 108 practising criminal law, 82 practising civil law and 2 practising both criminal and civil law.

Competition issue

5.39 Solicitor advocates were not permitted to appear in the same case as advocates by virtue of a rule of the Faculty of Advocates which prohibited "mixed doubles" (considered in section B of this chapter). The Society's Rules of Conduct for Solicitor Advocates 2002 also provided that "A solicitor advocate may not accept instructions on any basis which would deprive him of the responsibility for the conduct of the case…". That rule might be construed as preventing a solicitor advocate from appearing with senior counsel, as in such circumstances the solicitor advocate might not be regarded as having responsibility for the conduct of the case.

5.40 The Law Society of Scotland did not perceive the rule to have the effect of barring solicitor advocates from combining with advocates, though the rule had not been tested in practice.

5.41 An equivalent rule applied to advocates which stated "An advocate may not accept instructions on any basis which would deprive him of responsibility for the conduct of the case or fetter his discretion to act (in consultation with the solicitor and the client) in accordance with his professional judgment and public duty."[53]

Conclusion

5.42 The Scottish Consumer Council, the Office of Fair Trading, the Scottish Legal Aid Board and the Law Society of Scotland believed there was a strong case for solicitor advocates to be able to appear with advocates and for both of these rules to be modified for the avoidance of doubt. The Faculty of Advocates disagreed and its views on this issue are set out more fully below.

B FACULTY OF ADVOCATES

(a) Restriction on 'mixed doubles'

5.43 The Faculty's rule[54] against "mixed doubles" prevented an advocate appearing with a solicitor advocate in the same case.

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[53] rule 4.3.8 of the Guide to the Professional Conduct of Advocates.

[54] Set out in a ruling by the former Dean of Faculty, ACM Johnston QC.

5.44 Research was commissioned by the former Scottish Office to assess the impact of the introduction of solicitor advocates. The research sought to establish the extent to which the policy objectives of widening consumer choice in the market for legal services, while maintaining quality of service, were being maintained. The reports and research findings summaries published in 2000[55] addressed among other issues the impact of the Faculty's rule against "mixed doubles". A summary of relevant findings from that research is at annex C.

Rationale for the restriction

5.45 The justifications advanced for the rule were (a) that advocates and solicitor advocates were regulated under the different regulatory codes of the Faculty and the Law Society of Scotland respectively (the appearance of an advocate and a solicitor advocate in the same team might therefore present possible difficulties, if for example the handling of a case by a mixed team were to be the subject of a complaint either by the Court or the client); and (b) the need to preserve choice and access to justice over the long term, for the reasons identified by the Scottish Office research mentioned in Annex C.

5.46 The Faculty agreed that the introduction of "mixed doubles" could have the long term effect of reducing choice and access to justice, and that the differences between the roles of solicitor advocates and advocates and the regulatory codes applicable to them could give rise to difficulties if they were to appear together as part of the same team.

5.47 The Faculty provided some further explanation of the latter point. A solicitor was the client's agent and had responsibility, on the client's behalf, for the management of the case. He would be responsible, for example, for precognoscing witnesses, for dealing with the offices of Court, and for advising the client on the choice of an advocate. Advocates however were free to concentrate on the presentation of the case. The Faculty saw this as a logical and practical division of responsibilities, and noted that when a solicitor advocate appeared, he would often in practice be instructed by someone from his own firm. The function of the person performing the advocacy in the case was not a duplication of the management and administrative functions performed by the solicitor. In every case, these distinct functions required to be performed, whether by the same person or by different persons. If a case justified the attention of two advocates, the Faculty believed that it was essential that both of them devoted themselves fully to the presentation of the case and that one of them was not also trying to perform the functions of instructing solicitor.

5.48 The Faculty recognised that the solicitor's role in advising the client on the choice of an advocate was an important one. Court proceedings were often of critical importance to the personal lives and businesses of clients. Advocacy was a specialised skill and most clients

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[55] The reports and Research Findings summaries published by the Scottish Executive Central Research Unit were :
Hanlon, G. and Jackson, J. (2000) *Solicitor Advocates in Scotland: The Impact on Clients (Report and Legal Studies Research Findings No. 33)*
Headrick, D. (2000) *Solicitor Advocates in Scotland: A Statistical Analysis (Report and Legal Studies Research Findings No. 32)*
Kerner, K. (2000) *Solicitor Advocates in Scotland: The Impact on the Legal Profession (Legal Studies Research Findings No. 34, based on an unpublished report to the Scottish Executive)*
Platts, A. (2000) *Solicitor Advocates in Scotland: A Research Overview (Report and Legal Studies Research Findings No. 35)*
(They are available at http://www.scotland.gov.uk/publications/search.aspx?key=solicitor%20advocate)

were not in a position to assess the suitability of the person who was going to present the case on their behalf. The client relied on his solicitor to give him wholly impartial advice as to the respective merits of representation by a solicitor advocate on the one hand or an advocate on the other, and on the selection of the advocate or advocates to be instructed for the case. The Faculty maintained that a solicitor advocate, or a solicitor in a firm which included solicitor advocates, inevitably faced a potential conflict of interest in advising his client in relation to this[56].

5.49 The Faculty believed that the playing field between a solicitor advocate and counsel was not a level one. Solicitor advocates who practised in the Supreme Courts, had the freedom, as did all solicitors, to act or to decline to act for a particular client. In practice they also had power to pick and choose which cases, or which parts of cases, they would conduct themselves, and for which cases they would instruct counsel or another solicitor advocate. While a solicitor advocate had responsibilities in respect of the cancellation of instructions[57], the Faculty argued that it was implicit in those rules that he might, provided he observed them, cancel instructions which he had previously accepted. By contrast, in accordance with the cab-rank rule advocates had to accept any instructions to appear in court, subject only to the qualifications set out in the Guide to Professional Conduct, and might withdraw from acting only in circumstances where it would no longer be proper for them to continue to act. While solicitor advocates were required to accept that it was the responsibility of the Council of the Law Society of Scotland to make rules to secure that any person wishing to be represented before a court by a solicitor advocate was so represented[58] where reasonably practicable, the Faculty did not believe that this rule replicated the cab-rank rule as it was observed by members of Faculty.

5.50 Should "mixed doubles" be permitted, the Faculty anticipated that difficulties could arise from the differences between the roles of solicitor and advocate. It would be anomalous that the solicitor member of the team could speak to witnesses to fact[59] while the advocate could not. There would be a risk in the Faculty's view that the solicitor advocate would be distracted from his role in the advocacy team by the expectation that he would be available to speak to clients and witnesses. Acute difficulties could arise in circumstances where there was a difference of view as to the proper conduct of a case (and such issues could arise at any stage in a litigation). At present, if a solicitor instructed senior and junior counsel, the respective roles and responsibilities of senior and junior counsel and the instructing solicitor were well understood. If there was a difference of view between senior and junior counsel as to the propriety of a particular course of action, it could be resolved immediately by reference to a Faculty office-bearer. There was no equivalent mechanism for resolving differences of view between an advocate and solicitor advocate instructed as part of the same team. If senior counsel was not content with the assistance provided by junior counsel, he might take the matter up with the instructing solicitor, who might withdraw the instructions from junior counsel. There would be obvious difficulties if the instructing solicitor, or a member of his firm, was also acting as "junior counsel".

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[56] The Solicitors (Supreme Courts) Practice Rules 2003, which impose certain duties on solicitors to advise their clients of the respective merits of representation by a solicitor advocate or by counsel, do not remove the underlying potential conflict of interest in which a solicitor advocate may be placed in giving such advice.

[57] Solicitors (Scotland) Order of Precedence, Instructions and Representation Rules 1992, rule 5.

[58] Solicitors (Scotland) Rules of Conduct for Solicitor Advocates 2002, rule 1(1).

[59] While solicitor advocates are entitled to accept instructions on the basis that they will not discuss the case with a potential witness (Rules of Conduct for Solicitor Advocates 2002, rule 7(6)), there is no obligation on them to do so.

Society of Solicitor Advocates

5.51 The Scottish Executive invited the Society of Solicitor Advocates to comment on this restriction. The main points made by the Society were :

- A solicitor advocate could provide a client with the benefit of continuity of experience as the solicitor advocate would have handled the case from the outset and built up a detailed knowledge of it. These benefits were diminished by the "mixed doubles" rule which meant that the solicitor advocate was unable to appear in court in the same team as Senior Counsel. The Society believed that it was not in the interests of the client to have to engage junior counsel in such circumstances;

- The rule prevented solicitor advocates from gaining experience by appearing in Court in the same team as senior counsel;

- Removal of the rule would extend choice of representation for the users of legal services; and

- Mixed teams of barristers and solicitor advocates appeared in the courts in England and Wales without apparent problems.

5.52 The Society's letter setting out its views is at annex D. The Faculty commented on that letter as follows :

- The Faculty believed that the Society's point about continuity of representation was overstated. Continuity of representation might be secured by instructing the same counsel for various stages of a case. On occasion, the counsel of choice could not appear at a particular stage in the case because of a prior or overriding commitment. The Faculty thought that this would be equally a problem for any solicitor advocate who was practising with any degree of regularity in the Courts. In the Faculty's view it was a mistake to believe that the accumulated knowledge of the solicitor was lost to the client if he instructed counsel. It was his responsibility to ensure that counsel was fully briefed. The solicitor would in any event often be present in court to instruct counsel. The client was not "deprived of his services" simply because he was in the second row instructing counsel rather than sitting in the front row presenting the case;

- The respective roles and functions of the advocate (whether solicitor advocate or counsel) and solicitor needed to be kept in mind when addressing the issue. The solicitor was his client's agent and had full responsibility on his client's behalf for the management of the case, including taking instructions from the client, precognoscing witnesses and ensuring their attendance, and dealing with the offices of Court. A variety of matters might demand his attention in the course of the preparation for and conduct of any sort of court hearing. By contrast, counsel, in order to do his job effectively, had to focus solely on the presentation of the case. The demands which senior counsel might make of a junior were quite different from the functions which the instructing solicitor was called upon to do. They might include researching the law, drafting relevant court documents,

preparing particular aspects of the case for the purposes of its presentation, and noting and analysing the evidence. In a debate or appeal, the junior might be required to make the first speech. Neither senior nor junior counsel had any contractual relationship with the client and both were free to focus on the presentation of the case. The anomalous position if a solicitor advocate were to appear as "junior counsel" would be apparent; and

- The Society's letter emphasised the potential benefits which solicitor advocates might obtain by learning from participation with senior counsel in presenting a case. The Faculty agreed with the Society that skill in advocacy was enhanced by experience in advocacy. A court practitioner was constantly learning not only by doing, but also from opponents and by seeing other people at work. A solicitor advocate had available every opportunity to practise advocacy and did not need to appear with a senior to do this.

Competition issues

5.53 The practical effect of the rule against "mixed doubles" was to avoid regulatory complications, but more importantly to prevent some 470 advocates and 190 solicitor advocates, whose expertise could be very similar despite the difference in regulatory code, from appearing together as part of the advocacy team in the same case.

5.54 The Office of Fair Trading believed that such a rule clearly restricted the freedom of both advocates and solicitor advocates and by limiting the opportunity available to solicitor advocates to gain experience of higher court work might be an unnecessary restriction on competition.

5.55 With regard to redress, the OFT suggested that it should be sufficient for each professional to identify to the client the professional body by which he or she was regulated. That would ensure that the client was aware to which body or bodies he should turn if an issue of misconduct arose. The OFT pointed out that that would be in line with the recent draft European Commission Directive on Services that called on Member States to ensure that all service providers provided this information to clients. (This approach would also be relevant if a single body were to be set up with responsibility for dealing with complaints from all users of legal services.) In any event the OFT found it difficult to see how the hindering of professional collaboration between advocates and solicitor advocates could be justified. The Scottish Consumer Council agreed with the OFT's views on this issue.

5.56 With regard to specialisation, the Faculty's argument suggested that current structures, and in particular, self-employed advocates within Faculty, were a necessary pre-condition. While the OFT entirely agreed that specialisation might raise quality and enhance efficiency, and thus benefit consumers, the question that the prohibition on mixed doubles (and on partnerships between advocates) raised was whether the prohibition was necessary to achieve that efficiency. Permitting advocates who wished to practise alongside solicitors in either mixed doubles or in partnership to do so, would not in the OFT's view deprive clients of the benefits of specialisation. In the legal profession in other jurisdictions, and in other professions, where no such prohibition was imposed, specialisation emerged in response to client needs. Indeed within the legal profession in Scotland, as the Faculty pointed out, the solicitor advocate represented an example of such specialisation.

Conclusion

5.57 The Scottish Consumer Council, the Office of Fair Trading and the Law Society of Scotland noted the arguments advanced by the Faculty in support of this restriction, but believed that the rule had a negative impact on competition in the provision of advocacy services. Except for the Faculty, the Group considered that it would be in the interests of users of legal services for the rule to be withdrawn. Research previously carried out by the Scottish Office suggested it was at least possible over the long run that the abolition of the mixed doubles rule might weaken the bar and have an adverse impact on choice and access to justice, particularly for the less well off. If the rule were to be abolished, it might be necessary to consider safeguards to secure access to justice.

(b) The "Cab rank" rule

5.58 The market for advocates' services operated on the basis that the client was free to select the advocate of his choice, though in practice the client would usually choose an advocate on the basis of the advice of his instructing solicitor.

5.59 A cardinal principle of the Faculty was that an advocate could not choose his clients. Provided that a reasonable fee was tendered, an advocate might not refuse to do any work which was sent to him except upon reasonable cause, for example because he had already been instructed to appear in another court. This duty, the "cab rank" rule applied to all practising members of the Faculty of Advocates. The Guide to the Professional Conduct of Advocates stated the rule to be that : "an advocate may not pick and choose between clients according to his personal preference, or refuse to act for a client for whom he is otherwise professionally at liberty to act."[60]. The rule was also a rule of law and not merely a rule of professional practice[61].

Competition issues

5.60 The issues which the Group considered in relation to the "cab rank" rule were : (a) whether its existence inhibited the development of specialism; (b) whether the arrangements for policing the operation of the rule were adequate; (c) whether it required advocates to practise only as sole practitioners; and (d) transparency as to how the rule was operated and whether it actually worked in practice in the way it was supposed to.

5.61 It could be argued that the existence of the rule inhibited the development of specialisms because advocates had to be prepared to accept any kind of case that came to them. By and large advocates were generalists who had traditionally been regarded as being able to deal with the full range of business which came to them; advocacy itself might be regarded as a specialism. Specialised experience could certainly be identified within the Faculty however and the Faculty's Guide to Professional Conduct required an advocate to inform an instructing solicitor if a client would be better served by another advocate.

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[60] paragraphs 4.3.1 to 4.3.3

[61] Batchelor v. Pattison & Mackersy (1876) 3R 914, 918 per Lord President Inglis.

Rationale for the restriction

5.62 The rule was intended to be a public interest safeguard which ensured litigants always had representation in a case in the Supreme Courts, where the litigant could pay the advocate's fee or was in receipt of legal aid**.** If one advocate was unable to take the case, the cab-rank rule ensured that another advocate would be available to take over.

5.63 The Faculty believed strongly that the cab-rank rule operated in the public interest and noted that the constitutional importance of the rule had been recognised at the highest judicial level[62]:

> "The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes his client but it is also in the public interest that this duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system used adversarial procedures. … the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite, in a manner too often taken for granted, this constitutional safeguard."

The rule ensured that an advocate could not decline to represent a particular client because the advocate disapproved of the client or the client's views, or because the advocate perceived some personal disadvantage in acting for the particular client (e.g. because the opposing party was influential or powerful). For example, in one early case where the Lord President of the day was one of the parties to the litigation, the Court ordered an advocate who had declined to act for the other party to accept the instruction. The rule operated within a context in which advocates were providing referral services on the instructions of solicitors and other qualified professionals. The Faculty did not consider that the cab-rank rule could reasonably be applied to a professional who offered services directly to lay clients.

5.64 The Faculty was not aware that the arrangements for ensuring adherence to the cab-rank rule gave rise to any particular difficulties in practice. As with all rules of professional practice, there was no direct or immediate policing of the cab rank rule, but any failure to abide by the rule could be the subject of a complaint by a solicitor or his client which would render the advocate liable to disciplinary action. Advocates accepted instructions in accordance with the Guide to Professional Conduct. Where an advocate had a reason for declining instructions, this was communicated to the instructing agent through the advocate's clerk and the matter was resolved by the solicitor instructing an alternative advocate. On occasion the solicitor might be able to accommodate the difficulty which the advocate of choice had (e.g. by re-arranging a diet, or accepting that a piece of work would not be done as quickly as initially indicated).

[62] Medcalf v. Mardel [2003] 1 AC 120, paragraphs 51-52 per Lord Hobhouse of Woodborough.

5.65 As regards the existence of specialism within the Bar, the Faculty did not maintain data about the degree of specialism of its members, but certain broad areas of specialised practice existed. For example, a body of advocates practised exclusively or almost exclusively in the criminal courts, and others in point of fact specialised in family law, personal injury law, planning law and commercial law, among other subjects. Moreover, individual members might have more specific specialisms arising from their particular interests and experience. There were special interest groups within the Faculty, such as a planning, local government and environmental law group, a commercial law group, an advocates personal injury law group. These groups arranged seminars (which were not normally limited to members of the group) and provided other opportunities for advocates to enhance their skills and knowledge in particular areas of practice. Members were free to disclose their areas of particular interest and to include these in the Faculty Directory. Clerks were well aware of the experience and interests of the advocates in their stables and were accordingly in a position to discuss this with solicitors and others who wished to instruct counsel. The Faculty was not convinced that the cab-rank rule in fact inhibited the development of specialist expertise. Any limitations in the extent to which specialist expertise had developed were probably attributable to the inherent nature of practice in a relatively small jurisdiction such as Scotland rather than to the cab-rank rule. In any event, the rule was in the Faculty's view sufficiently justified by the public interest considerations identified above.

Office of Fair Trading

5.66 The OFT did not object to the cab-rank rule on competition grounds, but did question whether the operation of the rule was dependent upon advocates continuing to practise as sole practitioners. While it might be the case that advocates in partnership might not be subject to the cab-rank principle, the OFT believed that the principle would continue to apply to advocates in independent practice and might apply also at the level of the partnership.

Scottish Consumer Council

5.67 The Scottish Consumer Council thought that it was not clear how the cab rank rule operated in practice. The procedures involved were not sufficiently transparent in the Council's view : in particular the circumstances under which an advocate might refuse to take on a case and the action a client might be able to take where that happened. While in theory the rule appeared to be in the public interest, the consumer benefits were less clear in practice and the Scottish Consumer Council would like to see greater transparency in how the rule was operated and enforced.

(c) Professional indemnity insurance

5.68 Indemnity insurance was effected by the Faculty for its members on a block basis[63].

5.69 The OFT observed that the main competition issues were likely to be similar to those considered in its review of the Law Society of Scotland Master Policy (see above). It would be for the Faculty to review its current indemnity arrangements, having regard to the

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[63] By virtue of a resolution of Faculty of 19 May 1976.

conclusions reached in the OFT's investigation of the Law Society of Scotland's Master Policy.

CHAPTER 6 RESTRICTIONS ON ADVERTISING

6. The issue which the Group examined was whether current restrictions on advertising by solicitors and advocates represented the most proportionate balance between the interests of the profession and of the public.

(a) Advertising by solicitors

6.1 Between the 1930s and 1985 there was a blanket prohibition on solicitors advertising their services, on the grounds (a) that advertising diluted the relationship of trust between solicitor and client by suggesting that the relationship was one from which a solicitor would gain; and (b) that advertising was precluded by a solicitor's wider duty to the public. The prohibition was lifted in 1985 and gradually further relaxed in 1987, 1991 and by the Law Society of Scotland's current rules which were made in 1995[64].

Restrictions on advertising by solicitors

6.2 The key restrictions on the way in which a solicitor might promote his services under the Solicitors (Scotland)(Advertising and Promotion) Practice Rules 1995 were :

- solicitors may not seek instructions from another solicitor's client by way of a direct or indirect approach (rule 5); and
- a solicitor's advertisement must not (in terms of rule 8) :

  a) claim superiority for his services or practice over those of or offered by another solicitor;

  b) compare his fees with those of any other solicitor; or

  c) contain any inaccuracy or misleading statement; or

  d) be of such nature or character… as may reasonably be regarded as bringing the profession of solicitors into disrepute;

  e) identify any client or item of his business without the prior written consent of the client; or

  f) be defamatory or illegal.

(b) Advertising by advocates

6.3 Until 1991 there was an absolute prohibition on advocates advertising. In March 1989 the Scottish Office consulted on the proposal that advocates should be permitted to advertise to solicitors and to others entitled to instruct them. By resolution of May 1991 the

[64] the Solicitors (Scotland)(Advertising and Promotion) Practice Rules 1995, made under section 34 of the Solicitors (Scotland) Act 1980.

Faculty resolved that advocates be permitted to advertise, subject to the ultimate control of the Dean of Faculty.

Restrictions on advertising by advocates

6.4 The Faculty's current rules on advertising and publicity provided as follows :

(1) An advocate may engage in any advertising or promotion in connection with his or her practice which conforms to the British Code of Advertising Practice (and in the case of work outside the United Kingdom conforms to any further requirements binding under local law or under the rules of any national or local bar) and such advertising or promotion may include:

- (a) photographs or other illustrations of the advocate;
- (b) statements of rates and methods of charging;
- (c) statements about the nature and extent of the advocate's services;
- (d) with that client's express written consent, the name of any professional or lay client.

(2) Advertising or promotion must not :

- (a) be inaccurate or likely to mislead;
- (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
- (c) make comparisons with other advocates or members of any other profession;
- (d) include statements about the quality of the advocate's work, the size or success of the advocate's practice or the advocate's "success rate";
- (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions will be accepted otherwise than in accordance with the Guide to Professional Conduct;
- (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.

(3) A practising advocate must not in relation to any current matter in which he is or has been instructed comment to or in any news or current affairs media upon the facts of or the issues arising in that matter.

6.5 The Faculty produced a Directory of Advocates and published a website, both of which provided information about advocates, including, for those who wished to include such information, areas of the law in which they took a particular interest. Advocates' clerks were able to provide further information on request. Part 10 of the Faculty's Guide to Professional Conduct, which predated the Faculty's resolution on advertising referred to above, required that advocates should not tout for professional work or do anything to draw attention to themselves in their professional capacity which would be liable to impair public trust in themself or their profession and contained some further guidance in that regard. The provisions of the Guide were currently under review and it was anticipated that Part 10 would be reviewed in light of the Faculty resolution on advertising set out above.

Economic analysis

6.6 Professor Stephen drew attention to an extensive empirical literature on the restriction of advertising of professional services and what happened to fee levels when such restrictions were relaxed[65]. The general thrust of the evidence from that literature was that restrictions on advertising increased the fees charged for the profession's services and that the more advertising there was the lower were the fees. There were, however, a number of limitations to those studies.

6.7 The early empirical studies of advertising by members of the legal profession found that law firms which advertised, on the whole, charged lower fees than those that did not advertise. However, such research did not say anything about whether advertising impacted on prices throughout the market. More recent studies found the stronger result that the more advertising by lawyers there was in a locality, the lower were the fees charged by *all* lawyers in the locality (at least for certain transactions)[66]. That suggested strongly that advertising increased competition in the market. However, UK studies[67] had found that that result was only valid for some forms of lawyer advertising. Most studies did not distinguish between different forms of advertising.

6.8 Critics of professional advertising frequently asserted that advertising would drive down the quality of services provided. Economists had examined the relationship between advertising and quality. It had been shown formally that even if price could communicate no information directly about quality, it could do so indirectly because price served as a positive signal of quality *when price advertising was allowed*. Price advertising was therefore welfare enhancing because it improved consumer choice.

6.9 A problem arose, however, if price advertising was undertaken exclusively, or at least principally, by low-price/low-quality suppliers. In those circumstances price advertising became an adverse signal on quality. That was a general argument, and did not depend on price being a clear signal on quality. It was reasoned that consumers who were unable to assess quality before (and possibly even after) having received a service and who observed a low price for a non-standardised service might assume that more knowledgeable purchasers had assessed the service as being of low quality. Professionals were keen to avoid such adverse signals on quality, and so it was concluded that price advertising would be uncommon in most professions[68]. Thus not only might advertising have an effect on quality, perceptions of quality might have an effect on the form of advertising chosen by professionals. Evidence from the USA and UK on low rates of price advertising supported that view.

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[65] This literature is reviewed in J H Love and F H Stephen, 'Advertising, Price and Quality in Self-regulating Professions: A Survey', *International Journal of the Economics of Business*, vol. 3 No. 2, 1996.

[66] For example J R Schroeter, S L Smith and S R Cox, 'Advertising and competition in routine legal service markets: an empirical investigation', *Journal of Industrial Economics*, vol 36, 1987.

[67] J H Love, F H Stephen, D D Gillanders and A A Paterson, 'Spatial aspects of the deregulation of conveyancing markets', *Regional Studies*, vol. 26, 1992 (for England & Wales) and F H Stephen , 'Advertising, consumer search costs and prices in a professional service market', *Applied Economics*, vol 26, 1994. (for Scotland).

[68] This argument is due to J A Rizzo and R J Zeckhauser, 'Advertising and the price, quantity and quality of primary care physician services', *Journal of Human Resources*, vol 27, 1992.

6.10 The extent and impact of solicitor advertising in Scotland was the subject of a study funded by the then Scottish Home and Health Department[69]. That revealed that by 1988 although 56.8% of solicitors' firms in the sample had advertised in some way and 41.2% had advertised in print, sound or visual media, only 2.6% had advertised the price of a service. Analysis of the data from that study revealed that higher levels of non-price advertising across the local markets had the effect of reducing the conveyancing fees charged by all firms in the market for one (of two) specimen transactions. Variations in price advertising across local markets had no effect. However, no effect of advertising was found for the other (higher value) transaction[70].

Competition issues

6.11 The OFT report *Competition in Professions* [71] argued that removal of restrictions on comparative fee advertising could enable small firms to compete more effectively and help prospective clients to evaluate relative value for money.

6.12 The OFT was generally concerned about the effects on competition of any rule of a professional body that prohibited any form of comparative advertising, including comparative fee advertising, in relation to services provided by its members. In defence of such a rule it was often argued that the rule was necessary, in essence, because the professional body considered it impossible to compare any two instances of service provision. As a consequence, the professional body argued that advertising that compared services would be misleading.

6.13 The OFT entirely accepted that it was in the interests of consumers that advertising should not be misleading, as already required by the rules of most professional bodies, and those of the Law Society of Scotland. Other rules of the professional body required that advertising by its members be legal and accurate, and that advertising should not bring the profession into disrepute.

6.14 The OFT regarded advertising as an important element of competition on any market. Advertising provided consumers with a better picture of the merits of each of the operators, the quality of their services and their fees. A simple prohibition on comparative advertising of services denied information to clients that would help them to choose a provider. It also restricted the ability of more efficient service providers to develop their services. The OFT questioned whether the cost of local advertising, which might be of greatest relevance to smaller suppliers, was likely to be prohibitive.

6.15 The OFT had concerns about two of the Faculty's rules :

- rule (2)(c) which banned comparative advertising, ie advertising or promotion which made comparisons with other advocates or members of any other profession; and

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[69] A A Paterson and F H Stephen, *The Market for Conveyancing in Scotland: Solicitors' Responses to Competition through Advertising and Fee Quotations*, Scottish Office CRU Paper, December 1990, Edinburgh.

[70] Stephen (1994), *supra*.

[71] available at http://www.oft.gov.uk/nr/rdonlyres/b08439c8-c5f6-4946-8aff-71c050d34f46/0/oft328.pdf

- rule 2(d) which prohibited advertising from including statements about the quality of the advocate's work, the size or success of the advocate's practice or the advocate's "success rate".

In defence of these rules, the Faculty argued that

- whether a case was won or lost might be influenced by effective advocacy, but would also depend on other considerations, not least the merits of the case. Moreover, "success" could not necessarily simply be measured in terms of winning or losing: one might consider e.g. the importance in a family action which might be placed on the arrangements for contact with children, or in a damages action the significance of the amount of the award.

- whether a particular advocate won or lost more cases which were fought to a decision was unrelated to that advocate's skill. An advocate could not pick and choose between cases. Furthermore, a good advocate might well give clients sound and accurate advice upon the basis of which cases could be settled rather than fought to a conclusion. Whether any particular case was settled or ran to a conclusion depended on a variety of circumstances, in particular the individual client's instructions. Thus, the cases which were fought to a conclusion might be a wholly unrepresentative sample (in terms of "success rate") of the advocate's practice, while the proportion of those cases in which the advocate's clients achieved a successful result depended on a number of factors, not least the merits of the case.

- For those reasons it was difficult to judge the quality of an advocate objectively by reference to success rates, and advertisements which referred to "success rates" would be liable to be actively misleading.

6.16 The OFT accepted that some claims could be misleading but believed that the rules went further than actually necessary to avoid such claims. The OFT considered that in most cases prohibition of comparative advertising that was factual and verifiable was unlikely to be justified. Rules of most professional bodies already required that advertising be factual and verifiable. With regard to fee advertising for example, it followed therefore that the OFT was unlikely to accept that comparative advertising on fees that was factual and verifiable should be prohibited. On the other hand there might exist cases where, notwithstanding that the comparative information was factual and verifiable, the OFT would accept that prohibiting its publication might be justified. With regard to the advertising of success rates for example, the OFT was likely to take the view that a prohibition on comparative advertising, restricted in its scope to success rates, might be justified, where it was clear that to permit such advertising might make advocates less likely to take more difficult cases and might therefore operate against the public interest. The Scottish Consumer Council agreed with the views of the OFT on advertising generally, including those on comparative advertising.

6.17 The Group noted that

- the Faculty's advertising was not at present directed at the general public but at other professionals who should be informed enough to make a judgement; and

- where a market was small and the providers were well known to the clientele, restrictions on advertising might have relatively little effect.

Conclusion

6.18 In the light of its review of the proportionality of its rules on advertising, the Law Society of Scotland decided to consult its membership on its rules, and in particular on proposals by its Professional Practice Committee to relax (a) the restriction on comparative advertising; (b) the prohibitions on claims of superiority and comparison of fees; and (c) the rule on general circulation to allow a focused promotion to a group of people with something in common (whilst at the same time continuing the prohibition on a targeted approach to specific persons known to be clients of other solicitors). The Council had agreed to bring forward changes to the Society's Annual General Meeting in March 2006, which would come into effect if approved by the Annual General Meeting.

(c) Communication and quality of information flow between legal practitioners and the various users of legal services

6.19 The Group recognised the potential value of an exercise to look at ways to tackle the asymmetry of information which was known to exist between legal services providers and users and to look at how the information available about lawyers was used by consumers to choose the correct type of service and service provider. An analysis of the marketplace might be a useful check on whether there was a shortage of information on quality and how that might be addressed. Time was not available to mount such an exercise in the course of the Group's deliberations but the Group agreed that it might be flagged for future action.

CHAPTER 7 RESTRICTION ON DIRECT ACCESS TO ADVOCATES

Restriction

7. The Faculty's rules provided that an advocate might appear in Scottish legal proceedings only on the instructions of a Scottish solicitor[72]. The Group reviewed the issue of whether the restriction on direct access to advocates was in the public interest.

Background

7.1 Advocates did not provide legal services directly to lay clients but to other professionals (particularly solicitors) who provided services directly to lay clients. The direct access professional decided whether or not it was necessary to instruct counsel, and advised the lay client on the selection of counsel. It was the solicitor who was responsible, on behalf of his client, for the conduct of litigation in the Scottish courts. The solicitor acted as the agent of the client in taking any necessary procedural steps in relation to the conduct of litigation, in communicating with the agents of the other parties and in instructing counsel as and when required. A number of exceptions had been recognised to the rule that an advocate might appear in Scottish legal proceedings only on the instructions of a Scottish solicitor. A Dean's Ruling of 1970 permitted advocates to accept instructions from:

- The chief executive of a local authority;
- A patent or Parliamentary agent; and
- A lawyer furth of Scotland in matters in which no litigation in Scotland is contemplated or in progress.

7.2 Since 1990 it had been permissible for an advocate to accept direct instructions from a member (or certain classes of member) of a recognised professional body in relation to a matter which fell generally within the professional expertise of the instructing member. An advocate might accept instructions from a member of a professional body recognised by the Faculty of Advocates as entitled to instruct direct (of which there were currently 28 [73]). That

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[72] See Guide to the Professional Conduct of Advocates which provides that "An advocate may act in a professional capacity only on the instructions of a Scottish solicitor…" (paragraph 4.2.1).

[73] Architects Registration Board of the United Kingdom
Army Legal Services
Association of Average Adjusters
Association of Consultation Architects
Association of Taxation Technicians
Insolvency Practitioners Association
Institute of Chartered Accountants of Scotland
Institute of Mechanical Engineers
Royal Institute of Chartered Surveyors
Scottish Public Services Ombudsman
The Architects and Surveyors Institute
The Association of Authorised Public Accountants
The Chartered Association of Certified Accountants
The Chartered Institute of Management Accountants

right of direct access applied in relation to any matter of a kind which fell generally within the professional experience of the instructing professional.

7.3 An advocate might accept instructions from a member of one of the direct access groups to conduct proceedings before a public inquiry, tribunal or other forum before which the instructing person himself had a right of audience. Advocates were not however permitted to accept instructions which involved the conduct of court proceedings from a member of one of the direct access groups, but had always to be instructed by a solicitor to act in a court action. Where an advocate had been instructed by an appropriate professional to appear before a tribunal or inquiry, the administrative functions required for the conduct of that litigation would be performed by the instructing professional and not by the advocate.

Rationale for restriction

7.4 The Faculty's rules provided that a member of the public might not engage an advocate direct to handle a case, but had first to instruct a solicitor who would identify and instruct an advocate when required. That rule had the advantage for clients that, in deciding whether or not the services of an advocate were required, and if so, which advocate would best serve the client's requirements, the client would be advised by an experienced professional. Advocacy services were typically of great importance to clients. In criminal cases, the client's liberty might be at stake. In family cases the fate of children might be an issue. The financial consequences of winning or losing a particular litigation might be of great importance both to an individual litigant and to a business or commercial client.

7.5 Most clients used advocacy services very rarely and were accordingly in no position to select an advocate who would be appropriate to the matter in hand. Indeed, advocacy services were credence services in relation to which it was very difficult for a client to evaluate the effectiveness of the advocate, even after the event. The Faculty therefore believed that it was in the public and the consumer interest for the client to have an informed intermediary in the selection of an advocate for a particular case, as the instructing professional was in a better position than the client to assess the requirements for the particular case. The solicitor played an important "gatekeeper" role correcting the asymmetry of information which existed for most clients in relation to advocacy services.

7.6 The rule had the further advantage that advocates did not require to maintain an office and support staff or to handle clients' money, which was a cost saving to the advocate and therefore to the client. Through the Faculty and Faculty Services Limited advocates enjoyed economies of scale from the use of shared services and facilities.

The Chartered Institute of Taxation
The Chartered Insurance Institute
The Faculty of Actuaries
The Institute of Chartered Accountants in England and Wales
The Institute of Chartered Accountants in Ireland
The Institute of Chartered Secretaries and Administrators
The Institution of Civil Engineers
The Institution of Electrical Engineers
The Office of the Banking Ombudsman
The Officer of Arms in Ordinary (The Heralds and Pursuivants of the Lyon Court)
The Royal Incorporation of Architects in Scotland
The Royal Town Planning Institute

7.7 The Faculty believed that a legal practitioner who wished to offer services directly to lay clients might do so as a solicitor and, if he wished to combine advocacy in the Supreme Courts with the provision of services directly to lay clients, might do so if he was a solicitor advocate. In the Faculty's view, consideration of that rule needed to take account of the particular characteristics of an independent referral bar and the benefits which the existence of an independent referral bar provided for the administration of justice in Scotland as a whole. It was also necessary to recognise the different relationships which the solicitor and the advocate had with the lay client. The provision of services directly to lay clients had regulatory implications (e.g. the need for regulation in relation to the handling of clients' money) which did not apply to advocates who acted solely on a referral basis.

7.8 The Faculty argued that there was accordingly a logic in requiring lawyers who wished to provide services directly to members of the public to do so as members of the Law Society of Scotland, which had the regulatory apparatus appropriate to such work and, conversely, in requiring members of Faculty to operate on a referral basis. If advocates were to be permitted to provide services directly to lay members of the public, the Faculty would require to replicate the regulatory arrangements which the Law Society of Scotland had in place for solicitors. To do so would impose both an additional burden of regulation and consequent costs on the Faculty and on practitioners (which would be unnecessary for those who practised on a referral basis).

7.9 If advocates were to be permitted to provide services on a direct access basis, the Faculty believed that the "cab rank rule" would require to be modified to allow an advocate to decline to accept direct instructions.

7.10 The Faculty observed that advocates had an unusual legal status. They had no contract with either the lay client or the instructing professional. They could not, in law, sue for their fees[74] (except, perhaps, where the solicitor had been put in funds by the client for payment of counsel's fees). Advocates accordingly relied for payment of their fees on the professional responsibility of the instructing professional. Any change to the rule about direct access would require the rule of law which prohibited advocates from suing for their fees to be amended.

7.11 A legal practitioner who wished to provide advocacy services in the Supreme Courts directly to lay clients might do so as a solicitor advocate. The provision of services directly to lay clients had regulatory implications (e.g. the need for regulation in relation to the handling of clients' money) which did not apply to advocates, who acted solely on a referral basis. In the Faculty's view there was a logic to requiring practitioners who wished to provide services directly to lay clients to be members of the Law Society of Scotland, which provided a regulatory framework apt to such services. It was hard to see the merit in requiring the Faculty to duplicate such a regulatory framework (at additional cost) when the option of practising as a solicitor advocate was available to practitioners who wished to offer services directly to the lay public.

[74] Batchelor v. Pattison & Mackersy (1876) 3R 914, 918 per Lord President Inglis.

Competition issues

7.12 The restriction on direct access was inefficient where a client was fully capable of instructing counsel without using a solicitor. For such clients the requirement to use a solicitor was simply an additional cost, requiring them to engage the services of two lawyers rather than one. It could be argued that the professional rules of the Faculty should not impose restrictive practices which went beyond the requirements of the law governing the legal profession and the administration of justice; and that each advocate should be free to choose whether to take instructions directly from a lay client or whether to require instructions only through another professional.

7.13 The OFT agreed with the points made about the inefficiency of the restriction on direct access. It viewed the concern about the costs of handling clients' money as essentially a practical problem, rather than one of principle and did not believe that it should prevent the Faculty from allowing its members to conduct cases on a direct access basis (if necessary, subject to a continuing prohibition on handling clients' money). That would give some advocates, in some areas of practice, an important freedom where for example the advocate considered it unnecessary to take fees on account. Where it was necessary to handle clients' money, practical solutions might then be explored, adopting a cost/benefit analysis to determine the most effective way of addressing the question.

7.14 With regard to arguments about the relative overhead costs of solicitors and advocates, the OFT emphasised that it was important to bear in mind that the activities of each remained significantly different for the time being. It would therefore be wrong in the OFT's view to draw the conclusion that the difference in business structure was responsible for the difference in overheads. To the extent that one type of business structure was more efficient than another, it would in any case be favoured by the normal operation of the market. The OFT believed that it was unnecessary to have rules restricting business structure on cost grounds. Lifting the prohibition on partnership and on direct access would allow advocates the freedom to choose alternative structures and any efficiency benefits that these might bring.

7.15 The Scottish Consumer Council shared the OFT's view that the prohibition on direct access should be removed.

CHAPTER 8 RESTRICTIONS ON BUSINESS STRUCTURES

(a) Restriction on partnerships between advocates

8. Advocates are obliged to practise as sole practitioners by a rule which provides that "An advocate may not form a partnership with another advocate or any other person in connection with his or her practice." The Group reviewed this restriction.

Background

8.1 The Bar in Scotland was constituted by the Faculty of Advocates and was a library-based bar. Each member of Faculty was entitled to use the Advocates Library and the other resources of the Faculty of Advocates, such as its consultation facilities. Other services, including clerking services in particular, were made available to advocates who chose to use them by a service company, Faculty Services Limited. There were about 470 practising advocates at present in Scotland.

8.2 In England and Wales barristers practised from chambers (though they were not permitted to practise in partnership) and a barrister needed to obtain a tenancy in chambers in order to be able to engage in independent practice; there were currently about 11,000 barristers in independent practice in England and Wales and about 3,000 employed barristers.

8.3 In Scotland the number of advocates who were employed in legal practice (as opposed to being engaged in independent practice) was very small indeed. That might be because of the common training followed by solicitors and advocates, the relative ease with which an advocate might be admitted as a solicitor if he or she wished to practise in that form, and the absence of any restriction analogous to the requirement to obtain a tenancy in chambers. In England and Wales there was a practical need for the Bar Council of England and Wales to provide for and to regulate the category of employed barristers, but that had no equivalent in Scotland.

8.4 That brief comparison indicated the very different scale of the market for the services of advocates and barristers north and south of the border, but also suggested that the small size of the Scottish Bar needed to be taken into account when considering where the consumer interest lay in relation to the Faculty's existing prohibition on partnerships between advocates. It might be that partnerships would diminish consumer choice (if all the experts in a particular field were in one partnership, one of the parties would have to go elsewhere) and result in increased costs (by dispensing with the very cost effective service currently provided by Faculty Services Ltd). These were considerations which needed to be borne in mind in considering the implications of adopting legal disciplinary practices[75] in Scotland (see section (c) below).

8.5 Advocates in Scotland were bound by a rule that "[An advocate] cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate."[76]. Statute provided however that any rule whereby an advocate was prohibited from forming a legal relationship with another advocate or with any other person for the

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[75] Clementi considered that removal of the Bar Council's restriction against partnerships between barristers would make it easier to achieve greater choice of business structures in England and Wales (op cit, pages 129 to 132).

[76] The Guide to the Professional Conduct of Advocates, paragraph 1.2.4.

purpose of their jointly offering professional services to the public should have no effect unless it was approved by the Lord President and the Scottish Ministers.[77] It also required the Scottish Ministers to consult the Office of Fair Trading on such a rule[78].

8.6 The form of the rule originally approved on 17 March 1993 was :

"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."

Rationale for the restriction

8.7 The Faculty of Advocates observed that, apart from the relative sizes of the two bars, there were some other features of the bar in Scotland which differed from the position in England and Wales and which should be borne in mind when considering this issue :

(a) In Scotland the education and training of solicitors and advocates was typically common up to the point when the practitioner decided to become an advocate. No doubt because of that common training, there was a tradition of movement between the two branches of the profession in Scotland. Most intrants to the bar would have qualified as solicitors and many would have practised as solicitors for a number of years before deciding to become advocates. They might subsequently decide to return to the solicitor's branch of the profession.

(b) Unlike the position in England, there was no requirement for someone who wished to practise as an advocate to find a tenancy in chambers. Anyone who completed pupillage and fulfilled the entry requirements was entitled to practise, with full access on an equal basis with all other advocates to the library and to the facilities provided by Faculty Services Limited.

(c) Unlike the position in England, the number of employed advocates in Scotland was very small indeed. The overwhelming majority of advocates practised as sole practitioners specialising in advocacy and advice work on a referral basis.

(d) In the Faculty's view, the decision to become an advocate was usually taken at the stage in a practitioner's career when the practitioner had a practical choice between pursuing or continuing to pursue a career as a solicitor. The decision was to practise as a sole practitioner specialising in advocacy and advisory work on a referral basis rather than as a practitioner providing services directly to lay clients in partnership with others. A practitioner who wished to combine advocacy in the higher courts with direct access to clients and/or practice in partnership with other lawyers was free to do so as a solicitor advocate.

(e) The Faculty believed that the availability of the independent referral bar enhanced the choice and potential quality of legal representation available to clients throughout Scotland. Because each advocate was available to be instructed by any solicitor in Scotland (and for any court or tribunal in Scotland), consumers throughout

[77] Section 31(1) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.
[78] in accordance with section 40 of the 1990 Act.

the country were able to obtain access to the highest level of expertise which the bar could provide. Small firms (wherever located) might, through their access to the bar, be able to provide a greater range and quality of legal service to their clients than would otherwise be the case: that might not only have benefits for their clients and for the administration of justice throughout Scotland but perhaps for competition between solicitors' firms. Because advocates were sole practitioners, it was unlikely that the advocate of choice would have to decline instructions because of conflict of interest. Moreover, the introduction of partnerships could well diminish the flexibility which the current position afforded to the solicitor to select a team of advocates appropriate for the case in hand from across the whole bar.

(f) The essential tools of effective advocacy (and indeed of advisory work of the sort which advocates were called on to do) were legal training and experience, forensic ability, access to legal resources and the ability, when required, to free themselves from other demands to devote the necessary time to the task in hand. The Faculty believed that there was no obvious disadvantage for that sort of work (and indeed some apparent advantages) in sole practice as compared with other business forms.

(g) The necessary infrastructure for practice on a referral basis was available to all advocates immediately upon qualifying through the Faculty and Faculty Services Limited. The Faculty believed that the introduction of partnerships could not only increase costs but also, if partnerships were to become the norm, undermine the relatively open access to practice at the Scottish bar. A new entrant to the profession would require to find a place with an existing partnership, particularly if the development of partnerships were to undermine the existing arrangements which were made through Faculty Services Limited. For practical purposes that would create a restriction on entry analogous to the requirement in England and Wales to find a tenancy in chambers. Moreover, if advocates engaged in particular areas of work were to become concentrated in a relatively small number of partnerships, such concentration could have an adverse impact on access to justice and might have anti-competitive effects.

Competition issues

8.8 The OFT noted the Faculty's argument that permitting partnership would lead to an inadequate choice of advocates which would prove detrimental to competition and the public interest. The OFT questioned that argument in the context of Scottish advocates as it had done in the context of barristers in England and Wales and for the same reasons. While it might be true that in some areas of advocates' practice, the number of practitioners was relatively small, not all areas of practice were concentrated. In any event competition rules existed to prevent concentration, where that might damage competition. The total ban failed to discriminate between partnerships that might increase competition and choice and those that might not.

8.9 On the other hand, prohibiting partnerships restricted choice: the choice of advocates to adapt their business structures in the way that best met their needs and those of their clients was restricted. That choice should be open to advocates as advocates in OFT's view, and without the need to requalify and to market themselves as solicitors. Similarly, the client's choice to seek the benefits of an integrated service was restricted where partnerships with

non-advocate professionals were prohibited. In any event, in the context of partnerships between advocates and other professionals, partnership might expand the availability of advocates.

8.10 The OFT noted the 3 differences highlighted by the Faculty which distinguished it from the Bar in England and Wales :

(a) the fact that most intrants qualified as solicitors before joining the Faculty which resulted in a tradition of movement between the two branches of the profession;

(b) the fact that once admitted, an intrant did not face the obstacle of finding a position (tenancy) in chambers; and

(c) the fact that the relative size of the Faculty was small.

8.11 Commenting on these arguments in turn, the OFT pointed out that :

(a) Movement between the two branches of the profession would clearly be relevant to a consideration of whether or not the restrictions on structure were appreciable. Common qualifications and training undoubtedly facilitated movement, but were unlikely however to be determinative on this issue where in order to move, an advocate had to surrender membership, title and practising rights enjoyed as an advocate. It remained the case that an advocate was restricted from practising as an advocate (using that title and exercising associated rights) other than in sole practice. Advocate participation in a partnership that could provide an integrated legal service (litigation and advocacy done by the same practice) therefore remained restricted. Where the advantages of advocates providing integrated services in partnership with others were not evident, one would then expect movement to practise in partnership to be slow. If on the other hand there were efficiencies perceived, the move might be more rapid. Lifting the restriction would allow that to be properly tested.

(b) The OFT recognised and welcomed the absence within the Faculty structure of any equivalent restriction to the "tenancy" restriction that might be placing a restriction on practice at the England and Wales Bar. It was unclear, however, that the availability of an option to practise in partnership would undermine in any way the current infrastructure for sole practice. Specialisation in advocacy might continue both by advocates continuing in sole practice or by the development of advocate specialists or teams of advocates within partnerships.

(c) Where an integrated service (litigation and advocacy done by the same practice) would best meet the needs of clients, such restriction might be material where a significant proportion of advocates were prevented from participating by a professional rule. The Faculty, though small in number, clearly represented a very significant proportion of the supply of advocacy services, particularly in the higher courts.

Economic analysis

8.12 To consider the likely impact of the Faculty of Advocates rule against partnerships, Professor Frank Stephen suggested it was necessary to consider the factors which might influence a lawyer's desired choice of the organisational form in which to practise. Different organisational forms might have an effect on the lawyer's cost of providing legal services.

8.13 Professor Stephen drew attention to a number of factors which suggested that permitting practice through the organisational form of partnership would be attractive to lawyers. These were related to size. The most general was that economies of scale could be captured the greater the output of the firm and output was likely to be a function of size (the number of lawyers). Every introductory textbook in economics listed sources of *economies of scale*. Principal among these were those emanating from the more efficient use of capital and specialisation of labour. The former of these was doubtful in the case of legal services, at least where it was physical capital that was involved. The physical capital requirements of legal services were quite small and were likely to involve limited economies of scale. Access to appropriate reference works and case reports might be the exception. Legal services were essentially human (rather than physical) capital intensive.

8.14 Provision of legal services through a group practice organisational form allowed *specialisation* of lawyers in particular areas of law, with the consequence of lowering the cost of providing services. Multi-lawyer firms would also benefit from economies of scale in the use of non-lawyer support staff who themselves might also become more specialised (and thus efficient). Practices of lawyers with different specialities had the further benefit of *risk spreading*. Different specialisms might face different business cycles and thus fluctuations in specialist income might be smoothed across the group of specialists. The absence of risk spreading might lead to a higher fee being charged for each case. Furthermore, *economies of scope* might exist when a client had a range of legal service needs which could be serviced by specialists within the firm or when a legal problem had dimensions involving a range of specialisms. Economies of scope meant that the services required by an individual client might be provided at a lower cost in a single firm than by separate specialist firms. Economies of scope were available to the sole practitioner but in the multi-lawyer firm they were combined with economies of specialisation. The more complex the issues the more likely that specialists would dominate because the benefits of economies of specialisation outweighed 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 were likely to lead to multi-lawyer firms dominating where they were permitted and there was unimpeded competition between organisational forms.

8.15 The foregoing would appear to suggest that the Faculty of Advocates' rule against partnerships increased the cost of the services which its members provided as compared to what might be the case were partnerships of advocates permitted. However, that took no account of the impact of two cost sharing devices provided to members of the Faculty. The first was the Faculty library and the second was Faculty Services Limited. Both devices spread these costs over a large number of practitioners: 470 or so members of the Faculty[79].

[79] Faculty Services provides clerking services through 11 'stables' as well as billing and typing services. These are paid for by the subscribers as a percentage of fees collected. Thus the support costs provided by Faculty Services are spread across all subscribing members of the Faculty.

Thus for those services the Faculty had to be achieving economies of scale (to the extent that they existed) greater than any firm of solicitors in Scotland.

8.16 Against these economies of scale available to members of the Faculty there had to be set any loss of benefits from risk spreading, economies of specialisation or economies of scope[80] available to partnerships. In the case of the multi-lawyer practice all three of those might be achieved with an appropriate number of practitioners. In the case of a sole practitioner, specialisation worked against risk spreading and economies of scope. The impact of the rule against partnerships on the cost of providing legal services depended on the relative magnitudes of these factors which was, essentially, an empirical question on which there was no data.

8.17 Removal of the rule against partnerships would allow advocates who wished to gain the benefits of risk sharing and possibly economies of scope to do so, but presumably they would have to forego the economies of scale derived from using Faculty Services Limited. Again, which factor would dominate depended on their relative magnitudes. The table below summarises these considerations comparing the likely situation of specialist and generalist advocates under the present system with advocates in partnerships.

	Sole Practitioner Advocate		Advocate in Partnership
	Specialist	Generalist	
Economies of scale	High, due to Faculty Services Ltd	High, due to Faculty Services Ltd	Yes, but probably lower than through Faculty Services Ltd
Economies of specialisation	Yes	No	Yes
Economies of Scope	No	Probably No	Yes
Risk Spreading	No	Yes	Yes

The argument put forward above by the OFT was essentially that the current rule against partnerships prevented advocates from exercising a choice between sole practice and partnership. If the Faculty of Advocates' points of justification were valid, few if any would exercise the right to practise in a partnership if that option were available.

8.18 It was likely that a practitioner's attitude to risky or uncertain income streams might be the determining factor in choice of organisational form. Highly risk-averse advocates would be more likely to prefer group practice if the risk spreading and economies of scope offered by partnership, at least, compensated for the reduction in economies of scale from being unable to use Faculty Services Limited. On the other hand less risk-averse individuals were likely to opt for the economies of specialisation and greater economies of scale as a specialist advocate. In the absence of empirical evidence on the magnitude of these factors

[80] Economies of scope are likely to be less for an advocate than for a sole practitioner solicitor.

the arguments of both the Faculty and the OFT were speculative. That might be an area where empirical research was needed.

8.19 The OFT argued that the rule against partnerships meant that advocates could not choose freely their organisational form and only removal of the rule would allow the optimal organisational form to be discovered. However, that was not the case. The fact that solicitors had been willing to re-train as advocates at some cost suggested there were benefits to be obtained from so doing. On the other hand advocates who were willing to give up the benefit of specialisation (at least in opinion work) for the benefit of risk spreading could re-qualify as a solicitor. Furthermore, since the creation of solicitor advocates it had become possible even for those who specialised in advocacy to make a similar move. Again the costs (including foregone income during retraining) might have an influence. Nevertheless, in a world where no area of legal service was the monopoly of one branch of the profession, flexibility in organisational form should be viewed across both branches of the profession and not separately for each branch as appeared to be the position of the OFT.

8.20 Combining specialisation with risk spreading through partnership was now possible for those specialising in advocacy as they could become solicitor advocates. The cost structures of solicitor advocates and advocates would differ but so too would the risks they faced. The issue at hand was whether there were implications for competition in legal services. There would appear to be none so long as there was no impediment to competition between solicitor advocates and advocates. Competition in that context would imply freedom of entry to (and exit from) each market for a legal service. Unfortunately, it would appear that the rule against 'mixed doubles' (see chapter 5) was an impediment to freedom of entry to the market for advocacy for solicitor advocates. It restricted competition between lawyers for advocacy work. It also prevented solicitor advocates from gaining the experience of working with a senior counsel, an experience which was available to junior advocates.

8.21 Were there no rule against 'mixed doubles', there would be a situation where there were two categories of lawyer in practice in Scotland. One category would be free to practise as a sole practitioner or in partnership according to their preference (and if qualified as a solicitor advocate to plead in any court in the land). The second category would voluntarily restrict themselves to independent practice but, as members of the Faculty of Advocates, share non-lawyer cost through participation in Faculty Services Limited. For the practitioners concerned the choice was likely to be one of trading the benefits of risk spreading against the benefits of specialisation[81]. In the long run[82] (with no rule against 'mixed doubles') consumers of legal services would be able to choose between practitioners offering their services in different organisational forms with differing levels of specialisation and corresponding costs. There would be a situation of competition between categories of lawyers who chose different organisational forms in which to practise. The fact that one category of lawyer voluntarily chose to restrict its options for organisational form had no implications for competition so long as the other category of lawyer could choose alternative organisational forms and was free to enter all markets for legal services unimpeded.

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[81] This presumes that the practitioner's choice will be based on economic considerations and not socio-cultural factors.

[82] It might take time for the supply of legal services to adjust its organisational forms due to the past decisions of suppliers. However over time as new suppliers were faced with greater flexibility in choice of organisational form adjustment would take place.

8.22 In summary, the Faculty of Advocates rule against partnerships would not be anti-competitive (from an economic perspective) if there were no impediments to competition between advocates and solicitors (including solicitor-advocates). The rule against 'mixed doubles' is such an impediment to competition.

Further competition arguments

8.23 The OFT agreed that the removal of the rule against mixed doubles would be a positive step in competition terms (see chapter 5 above), but questioned whether it would be a sufficient step in order to meet competition concerns raised by the prohibition on partnerships. Where partnerships remained prohibited, an advocate would be obliged to surrender membership, title and practising rights enjoyed as an advocate in order to enter partnership. Given the historical dominance of Faculty members in advocacy in the Higher Courts, the absence of advocates practising as such within partnerships might act as a disincentive to clients and as a brake on the development of alternative business structures.

8.24 Although the Scottish Consumer Council had some concerns about the small size of the Scottish bar and the potential impact on consumer choice, the Council was persuaded on balance by the OFT argument in favour of permitting partnerships between advocates. If the restriction on partnerships between advocates was lifted, the Council believed that the OFT could if necessary use its competition powers to ensure that concentration did not distort the market.

(b) Restrictions on non-lawyers owning a law firm and on employed solicitors acting for third parties

8.25 Restrictions were imposed on non-lawyers owning a law firm and on employed solicitors acting for third parties by a rule which prohibited solicitors from sharing their fees with any unqualified person[83]. The effect of the rule was that non-lawyers might not own a law firm and employed solicitors might at present act only on behalf of their employers and not the clients of their employers.

8.26 The Clementi report proposed for England and Wales that ownership of legal practices by non-lawyers should be permitted, subject to a ‘fit to own’ test and also to a number of safeguards built around the identity of those who managed the practice and the management systems they employed. Clementi also recommended that solicitors employed by organisations owned by non-lawyers should be able to offer services direct to the public (ie third parties).

Rationale for the restrictions

8.27 The proposed lifting of these prohibitions had been publicly opposed by the Law Societies of Scotland, Northern Ireland and Ireland and the Faculty of Advocates as in conflict with the core values of the lawyer : namely, guaranteed independence, avoidance of

[83] rule 4 of the Solicitors (Scotland) Practice Rules 1991.

conflicts of interest and client confidentiality. It had however been supported by the UK Government in relation to England and Wales[84].

8.28 The Law Society of Scotland could see no circumstances in which the ownership and control of law firms by non-lawyers could be permitted, without surrendering the prime objectives of maintaining independence and public protection. The Society foresaw grave risks to maintaining the rule of law if non-lawyers were to have either ownership or control of law firms. The Society considered furthermore that the risk to clients and the difficulties of regulating such firms would be insurmountable, particularly with regard to potential conflict between the commercial interests of the owners and the professional duty of solicitors working in the firm to serve the interests of the client.

Competition issues

8.29 The OFT considered that removal of that rule could allow competition from those suitably qualified, working in different business structures. That would, for example, further enhance opportunities for capitalisation from outside the profession of the provision of services typically provided by solicitors such as litigation, advocacy, executry work and conveyancing. Such change would also allow for a different career structure and working hours for some solicitors. The Law Society of England and Wales had recognised that might be a factor in ensuring equal opportunity for those wishing to join the profession and might broaden entry to the profession.

8.30 The Scottish Consumer Council agreed with the OFT view. The Council believed that the removal of the rule would potentially open up a variety of new and more convenient methods of providing legal services to consumers, thus increasing consumer choice.

Economic analysis

8.31 Professor Frank Stephen noted that restrictions on employed solicitors raised economic issues of a different type from those of legal disciplinary practices (LDPs) and multi-disciplinary practices (MDPs). The opposition of the Law Societies to removing that prohibition rested on the solicitor's duty to the client being in conflict with an employee's loyalty to an employer. The OFT argued that such a prohibition might preclude desirable innovations in service provision, exclude sources of capital for providers and limit the career opportunities of professionals. A further potential benefit might accrue to the clients of these providers of professional services: the 'owners' of firms employing solicitors were 'repeat purchasers' of legal services and were therefore better informed about quality issues than individual clients. The employers of the solicitors became, in effect, regulators of the professionals which could be interpreted as another form of 'self-regulation'. Professor Stephen believed it was important to recognise that that argument relied on the significant reputational capital of the employers of the professionals being at stake to guarantee its interest in maintaining the quality of professional service.

8.32 Professor Stephen recognised that to non-economists the foregoing might seem a strange argument but it was one which had begun to emerge in the economics literature on

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[84] Speech by Lord Falconer of Thoroton to Legal Services Reform Conference on 21 March 2005 (available at http://www.dca.gov.uk/speeches/2005/lc210305.htm)

the professions recently[85]. It was based on an older economic argument concerning reputational capital. In the case of legal services being provided by an employed solicitor, the employer had an incentive to monitor the quality of the services provided by the employee because any failure of the employee to provide an appropriate quality of service rebounded on the employer's reputation which might be of greater value than that of a small solicitors firm. Indeed the loss of reputation might go beyond the area of professional services. For example, if 'Tesco law' were to come to pass and solicitors employed by Tesco were to provide legal services, that view suggested that Tesco had a strong incentive to provide an appropriate quality of service because failure to do so would result in adverse publicity which would undermine their role throughout the market for legal services and even beyond. Some had argued that Tesco's incentive to ensure an adequate quality of service was greater than that of the solicitors' professional body[86].

8.33 The Law Society of Scotland for its part did not agree that "employers" could be viewed as "regulators" or that "employment" was a form of "self-regulation". The Society thought that this phraseology revealed a confusion in meaning which underscored the need to be conscious that the unscrupulous would manipulate the system to their own advantage.

(c) Restrictions on legal disciplinary practices (LDPs)

8.34 In considering business structure regulations, the EC Report on Competition in Professional Services observed that such regulations appeared to be least justifiable in cases where they restricted the scope for collaboration between members of the same profession, noting that collaboration between members of the same profession would appear least likely to reduce the profession's independence or ethical standards (paragraph 62 of EC Report). (That observation was also relevant in the context of the Faculty of Advocates rule against 'mixed doubles').

8.35 In his review of legal services in England and Wales Sir David Clementi drew a distinction between MDPs and LDPs. He described LDPs as law practices which brought together lawyers from different professional bodies, such as for example solicitors and barristers working together to provide legal services to third parties; and envisaged a split between those who owned the practice and those who managed it, both in relation to LDPs and MDPs.

Rationale for restrictions

8.36 The Law Society of Scotland was concerned about the prospect of LDPs with non-lawyer ownership and was strongly opposed to the idea unless satisfactory arrangements for the regulation of non-lawyer proprietors could be identified. The Society was concerned that the ownership of legal disciplinary practices might fall into in the hands of non-lawyers involved in organised crime, money laundering or drug running. With regard to the proposals made by Sir David Clementi in his Final Report, the Society did not believe that the case had been made out on an empirical basis which demonstrated consumer demand for legal disciplinary practices. In the Society's view a satisfactory explanation had not been given of

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[85] B. Arrunada, 'Managing Competition in Professional Services and the Burden of Inertia', in Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions*, Hart Publishing, Oxford and Portland, Oregon, forthcoming.

[86] Arrunada, *supra*.

the arrangements for the regulation of such practices; and the fitness to own test would require to be sufficiently rigorous to prevent solicitor firms becoming prey to organised crime. Exposure of the Society's Master Policy, the Guarantee Fund and the complaints system to non-solicitors might have substantial implications for the continuity of such valuable public protections.

8.37 The Faculty took the view that there was a logical division between practice on a referral basis and practice offering services directly to lay clients, which was reflected in the organisation of the profession in Scotland. The existence of an independent referral bar of lawyers operating as sole practitioners was of great benefit to the administration of justice (including access to justice) in Scotland. It was pro-competitive. Practitioners who wished to practise in other ways might do so, as solicitors (including as solicitor advocates). There was accordingly no practical need for permitting advocates to enter into partnership with non-advocates.

8.38 Difficult regulatory issues would arise if such partnerships were to be permitted. An advocate practising in partnership with solicitors would (presumably) be liable jointly and severally with the other partners for the firms' debts. Such an advocate would (presumably) be responsible along with the other partners for the relationship of the firm with its clients and for the proper handling of clients' funds. In the Faculty's view the advocate would, to all intents and purposes, be practising as a solicitor. The Faculty believed that the logical approach to regulation was for a practitioner who wished to provide advocacy services in the context of a partnership structure to become a solicitor advocate, and thereby be regulated by the Law Society of Scotland. This option was available to practitioners at present.

8.39 So far as ownership of legal practices was concerned, the Faculty had serious concerns about the implications of permitting legal practices to be owned by non-lawyers. Firstly, there was a risk of the independence of the legal practitioners being compromised. Secondly, if a change were to have an adverse impact on the economics of High Street legal practice, there could ultimately be implications for access to justice throughout Scotland.

8.40 Clementi addressed concerns about non-lawyer ownership by proposing a "fit to own" test which might have regard to (a) honesty, integrity and reputation; (b) competence and capability; and (c) financial soundness (report page 117). It would be the responsibility of the Legal Services Board proposed for England and Wales to carry out such tests.

8.41 Sir David also considered the concern that outside owners, even if they passed the "fit to own" test, might bring unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties, but concluded that adequate safeguards would exist. LDPs would be regulated entities and the outside owner would not be entitled to pursue his own financial interests, and certainly not where they conflicted with the best interests of clients of the firm or with other core values of the legal profession (report, page 118).

Competition issues

8.42 The OFT for its part would welcome the introduction of legal disciplinary practices that would bring together advocates and solicitors to provide legal services to third parties. The introduction of LDPs, in particular those in which ownership could be separate from management, would address a number of significant restrictions on the freedom of lawyers to

adapt their services to meet the needs of clients. It would also be a significant step towards the subsequent introduction of MDPs.

Economic analysis

8.43 Professor Stephen noted that markets for legal services, historically, had not been viewed as competitive markets. They were subject to market failure arising from the asymmetry of information between consumers and suppliers. This had resulted in those markets being subject to regulation. Because the form of regulation adopted included restrictions on the form of business organisation through which legal services might be provided, there was no guarantee that the traditional form of business organisation remained the most cost effective form. In these circumstances it was not clear how a demand for a more efficient service might manifest itself. If the case for regulating a market was based on the premise that consumers lacked the knowledge by which to judge the quality or adequacy of the service provided to them, how were they in a position to know how the service might be provided ? Further, in a market where the form in which a service was provided was restricted to prescribed forms what incentive was there for existing producers to devise new business forms ? Thus an argument for the status quo based solely on 'lack of demand' was not persuasive in the present context.

8.44 A possible approach to evaluating the case for LDPs might begin by identifying the advantages and disadvantages of permitting such an organisational form. That was essentially the approach taken by Clementi, which might be built on by seeking to attach magnitudes either to the actual advantages and disadvantages and/or their likelihood of occurrence. That was however very difficult for a phenomenon that did not yet exist. What could be done was to set the proposals within the analytical framework of economics, which might allow a reasoned view to be taken on the significance of the various points that had been made.

8.45 Essentially, Clementi argued that in the absence of 'valid' arguments against an organisational form it should be permitted. If it reduced costs, it would be attractive to suppliers and the process of competition would result in the cost reductions being passed on to consumers in the form of lower fees. If it did not reduce the cost of providing legal services of an acceptable quality, it would not be adopted and consumers would be neither better nor worse off.

8.46 LDPs involved the bringing together of 'lawyers' from different branches of the profession in a single business organisation. The different branches of the profession had their own qualifications and regulatory norms and were at present prohibited from being principals in the same business organisation. What would be the advantage of their forming an LDP? First, there might be the advantage of all forms of group practice: *risk spreading*. Risk spreading in that context would only arise if the members of the different branches of the profession had different areas of specialisation in their practice. There would seem to be limited gains from risk spreading from generalist advocates combining with generalist solicitors that would not be obtained by the advocates entering into partnership with other advocates or solicitors entering into partnership with other solicitors. In other words, the risk spreading was not so much a function of combining different types of lawyers but of combining different areas of law.

8.47 Only where the lawyer's licence to 'practise' was in a limited area (such as conveyancing) would there be a gain from risk spreading by combining 'authorised conveyancing practitioners' with solicitors[87]. In that case the combined practice's income would fluctuate less than that of a conveyancing practice if the business cycle in the conveyancing market was uncorrelated with business cycles in other areas of legal practice. Present rules prevented a conveyancing practitioner/licensed conveyancer becoming a principal in a firm of solicitors. However there were few areas of legal practice in Scotland with such limited recognition.

8.48 It was more usual, perhaps, to think of an LDP combining the litigation role of the solicitor with the advocacy role of the advocate as generating *economies of scope.* That implied that the combined cost of providing litigation and advocacy services in a single firm would be lower than the combined cost of providing the litigation services through a firm of solicitors and the advocacy services through an advocate in independent practice. However, it was not obvious that that would be so if in the LDP the two types of service were provided by different individuals: both have to become acquainted with the nature and facts of the matter in dispute. Economies of scope might be more obvious when the litigation and advocacy services were provided by the same individual e.g. a solicitor advocate[88]. In that instance the economies of scope were available without LDPs. LDPs would only be relevant here were advocate members of the LDP permitted to provide litigation services. Here the gains from economies of scope would have to be compared to any loss of economies of specialisation from the advocate no longer specialising in advocacy services. As in many other instances that was an empirical question on which there was no evidence.

8.49 Another way of looking at an LDP involving solicitors and advocates was to view it as a form of vertical integration between the litigation stage and the advocacy stage in the solution of a dispute. The division between stages in this context was perhaps not as clear cut as in the case, for example, of brewers integrating forward into the ownership of the retail outlets which sold their product. Nevertheless, the comparison did have some merit.

8.50 Why did industrial firms wish to integrate forward into the retail market for their product ? Traditionally many economists had argued that was in order to exercise monopoly power by extending the power which they had in the upstream market to the downstream market, or in order to foreclose the downstream market to their rivals in the upstream market. That argument was less prevalent nowadays, having been replaced by a view that vertical integration arose from a desire to reduce transaction costs.

8.51 Transaction costs might be viewed simply as the costs of co-ordinating activity between the two stages or involving the costs of ensuring that the conditions under which the

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[87] Research carried out in the 1990s on licensed conveyancers in England & Wales found that in geographical markets investigated a majority of licensed conveyancers were employed by solicitors as opposed to being in independent practice. The explanation offered was that the high risk associated with setting up a single service firm in a market which was subject to the cyclical behaviour of the housing market made independent practice less attractive than employment (Frank H Stephen and James H. Love, 'Deregulation of Legal Services Markets in the UK: Evidence from Conveyancing', *Hume Papers* on *Public Polzcy,* Vol. *4.4,* 1996,53 - 66.

[88] This issue is somewhat more complex when more than one individual is providing the litigation service, as is often the situation in complex cases.

product was sold in the downstream market did not harm the reputation of the product and its upstream producer.

8.52 Did any of these general arguments apply to LDPs involving solicitors and advocates? Given the structure of the market for litigation services it seemed unlikely that any firm of solicitors had sufficient market power that integrating forward into the market for advocacy by forming an LDP would be motivated by the extension of market power. Anyway, integrating forward into the market for advocacy was already possible for firms of solicitors through solicitor advocates.

8.53 On the other hand, forward integration to foreclose the market to its rivals might be a more plausible reason. The formation of an LDP with one or more senior counsel could be seen as foreclosing the market for those particular senior counsels' services. However, what incentive would there be for senior counsel to join an LDP ? Given the significant difference between the overheads of solicitors and those of advocates[89] in independent practice it was not clear that would be attractive to senior counsel.

8.54 Joining an LDP might be more attractive to junior counsel for whom income from independent practice might be less certain. That could not, however, be seen as foreclosing the market for advocacy in the sense discussed above. However, to the extent that an LDP would be using advocacy services of its own members the choice of advocate for a particular client would be more restricted than under the present system. The significance of that argument depended on the extent to which choice was truly exercised on behalf of clients under the present system. The research being undertaken on the market for advocacy services should shed some light on this issue.

8.55 It was pointed out above that the reduction of transaction costs was nowadays seen as a more significant motivation for vertical integration by economists. It was probable that the costs of co-ordinating the two stages would be less in an LDP, although they would still exist. At present advocacy services were essentially purchased in a spot market. That would not be the case with an LDP. The LDP would have to have a sufficient demand for advocacy services to justify the membership of an advocate. More flexibility might be obtainable from a solicitor advocate. It was difficult to judge whose reputation would benefit from the LDP : solicitors or counsel.

8.56 Clementi linked the discussion of LDPs to the introduction of non-lawyer managers and particularly external owners. Managers were Principals in the LDP and owners could be Principals or external to the firm. Of course LDPs and external ownership of law firms were not necessarily linked. There could be LDPs without outside ownership and there could be outside participation in the ownership of firms composed of only one branch of the profession. (See discussion of legal services provided to third parties by employed solicitors at [8.29, 8.30] *supra*). It was not clear why Clementi tied the two together.

8.57 The role of outsider (partial) ownership was seen by Clementi as having the advantage of bringing new sources of capital, modern business organisation and a consumer orientation. However, his final report did not substantiate the view that the current

[89] It is assumed here that an advocate who joins an LDP would no longer have access to the clerking services of Faculty Services Ltd.

arrangements resulted in under investment in law firms. Given that law firms were human capital intensive rather than physical capital intensive (information technology notwithstanding), it was not clear that financial capital was a binding constraint for contemporary law firms.

8.58 There was a stream of literature on the economics of business organisations which argued that partnerships were the most efficient organisational form for professional service firms because of the asymmetry of information between professional and others[90] and the absence of the need for the financing of large amounts of physical capital. There was now an extensive literature on 'corporate architecture' which related observed forms of business organisation to the characteristics of the industries concerned and the nature of the agency problems inherent in each industry.

8.59 Clementi also dealt with the complex issue of how lawyers from different branches of the legal profession who formed LDPs should be regulated. The proposed solution was that it was the business unit (LDP) that should be regulated, not the individual members. Given that the nature and composition of an LDP was likely to be related to the submarket in which it operated that might come close to the regulation of sub-markets rather than the regulation of individual professionals.

8.60 The foregoing discussion attempted to put the issue of LDPs into the wider context of the economics of business organisation because there was no data on which to judge the performance of LDPs.

Faculty of Advocates

8.61 The Faculty of Advocates thought that an LDP would have a very strong incentive to encourage its clients to use its "in house" advocate whether or not that advocate was in fact the most suitable representative for the client. There was a real issue of client choice and consumer protection which would have to be addressed. The Faculty was less sanguine than Professor Stephen about the risks associated with foreclosure of the market and the extension of market power if LDPs were to be permitted. It was also concerned about the potential access to justice implications and referred to the Scottish Office research summarised in Annex C. There was a risk that, at least in relation to certain areas of work, sufficient practitioners might join a single LDP, or a small number of LDPs, to create real issues about access to justice and market power. The availability of a body of independent advocates equally available to any client anywhere in Scotland provided real benefits in terms of access to justice and competition. In circumstances where any individual practitioner could choose to practise as a solicitor advocate (and where accordingly advocacy services could be provided by any solicitor's firm) there was no convincing justification for permitting LDPs.

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[90] The literature begins with two papers by Eugene Farna and Michael Jensen published in *Journal* of *Law and Economics, 26,* 1983: 'Separation of Ownership and Control' and 'Agency Problems and Residual Claims'. It should be recognised that the implications of this literature may conflict somewhat with the literature on investment in reputation.

Conclusion

8.62 The economic analysis suggested that the market should be left to determine whether LDPs would be a business structure which the users of legal services would find of value. It was however difficult to determine how LDPs with advocates and solicitors could be effectively regulated under current arrangements, in the absence of a Legal Services Board in Scotland with specific powers in relation to LDPs similar to those suggested by Sir David Clementi for a Legal Services Board in England and Wales.

8.63 The repeal or modification of certain professional rules would also be necessary to enable LDPs to be established, such as :

- the Faculty of Advocates rule against an advocate entering into partnership with another advocate or with any other person in connection with his practice as an advocate[91];

- the Law Society of Scotland's rule which prohibited a solicitor forming a legal relationship with a person or body who was not a solicitor with a view to their jointly offering professional services as a multi-disciplinary practice to any person or body.[92]

- the Law Society of Scotland's rule which restricted membership of an incorporated practice to solicitors or other incorporated practices.[93]

The introduction of close collaboration between branches of the profession in LDPs would also make rules restricting advocates and solicitor advocates from appearing in the same team anomalous (see chapter 5 on the restriction on 'mixed doubles').

(d) Restrictions on multi-disciplinary practices (MDPs)

8.64 In Scotland the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 removed the statutory restriction[94] which prevented solicitors engaged in private practice from entering into multi-disciplinary practices with non-solicitors. The 1990 Act did not however prohibit the Law Society of Scotland from making rules which would have a similar effect.

8.65 The Society's rules currently provided that "A solicitor shall not form a legal relationship with a person or body who is not a solicitor with a view to their jointly offering professional services as a multi-disciplinary practice to any person or body."[95]

8.66 The rule was made under a statutory provision[96] which provided that a rule prohibiting the formation of MDPs did not have effect unless the Scottish Ministers, after consulting the Office of Fair Trading[97], had approved it. The rule was approved in 1992 by the then Secretary of State for Scotland, following consideration of advice submitted to him in June 1992 by the Director General of Fair Trading (though that advice favoured the

[91] Guide to the Professional Conduct of Advocates, paragraph 1.2.4
[92] Solicitors (Scotland)(Multi-Disciplinary Practices) Practice Rules 1991, rule 4
[93] Solicitors (Scotland)(Incorporated Practices) Practice Rules 2001, rule 3.
[94] in section 27 of the Solicitors (Scotland) Act 1980.
[95] Solicitors (Scotland)(Multi-Disciplinary Practices) Practice Rules 1991, rule 4.
[96] section 34 of the Solicitors (Scotland) Act 1980, subsection 3A.
[97] in accordance with section 64A of the Solicitors (Scotland) Act 1980.

amendment of rules to facilitate the introduction of MDPs). It was only a legal relationship which was prohibited; there had been examples of parallel partnerships eg the relationships between McGrigor Donald and Klegal/KPMG and between Dundas and Wilson and Andersen Legal, both of which subsequently broke down, the latter in the wake of Enron. The parallel partnership meant that the solicitors' practice and the other professional practice were kept entirely separate and there was no legal relationship. Consumer protection for clients of the solicitors' practice would be the same as the protection available to the clients of Scottish solicitors generally.

Rationale for the restriction

8.67 The Law Society of Scotland Working Party on MDPs measured MDPs against the 4 core values of the solicitor profession. As regards **independence** (to give advice without fear or favour), the Working Party concluded that there could well be greater commercial or other pressures on solicitors in an MDP, which could threaten a solicitor's duty not to allow their independence to be impaired. Strict rules apply to solicitors on **conflict of interest** (not to act in a conflict of interest situation) and the concept of "Chinese walls" was not operated. Though it would be possible in theory to impose the Society's rules on all other persons in an MDP, the Working Party thought it would be difficult to achieve and to regulate compliance. On **confidentiality** (to treat all discussions with the highest confidence), any Chinese walls would have to separate one department from another within an MDP clearly and decisively, which would raise questions about the operational viability of MDPs. On **privilege** (the client's right to sanctity of discussion) the Society did not favour a restriction of the doctrine of legal professional privilege in view of its importance to the rule of law.

8.68 The Society was concerned that the economic advantages of MDPs were incompatible with the 4 core values. If means could be devised to establish MDPs without compromising those protections, the Society had indicated that it would be prepared to reconsider its view. The Society could not however see how MDPs could operate without compromising those principles, short of requiring all other MDPs to become subject to the rules of the Society.

8.69 The Society had been concerned about the effect that MDPs might have on the provision of legal services across Scotland and especially in rural areas. If MDPs resulted in greater concentration of legal service provision within urban areas, rural communities could in its view be less well served than they were at present. Large MDPs might draw more profitable work away from smaller rural practices which would be a concern, given the relative remoteness from larger towns and cities of a considerable proportion of the Scottish population. It was necessary to weigh in the balance however that the delivery of legal services by electronic means and the development of an online market place might mean that such concerns became less substantial over the next decade.

Competition issues

8.70 The longheld position of the OFT had been that it was desirable in principle to permit the formation of MDPs. In its report *Competition in Professions* in 2001, the OFT noted that restrictions on MDPs might both inhibit new entry and prevent the exploitation of possible economies of scale and scope. It remained the OFT view that the opportunities to provide combinations, in particular, of High Street professional services under one roof, should unlock potential cost efficiencies and enhance customer choice and convenience at that level of the market. Potential benefits might accrue also from combinations at other levels of the

market. Given continued improvements in communications, it seemed unlikely that access to more restricted (and less efficient) legal services would be in the long term interests of rural users of such services in Scotland.

8.71 The OFT recognised in its 2001 report that particular safeguards would be necessary, in particular in relation to combinations involving auditors. They doubted however if the need for such safeguards in relation to audit services could justify the current blanket prohibition on MDPs outside of the field of auditing services; nor did they consider that to be a necessary implication of recent European case law. Even in the field of audit, the response of those with responsibility for regulating audit following the Enron situation had not been blanket prohibition of the provision of non-audit services by auditors, but had been to consider the specific risks involved in the provision of each combination of services and only to prohibit those combinations of service where identified risks could not be addressed by appropriate safeguards.

8.72 The issue of legal professional privilege was highlighted by the Law Society of Scotland as a possible inhibitor to the development of MDPs (see chapter 5). In the OFT report on *Competition in Professions* in 2001 and its subsequent progress statement, the OFT highlighted the concern that where lawyers were in competition with non-lawyers, legal professional privilege might distort competition in favour of the lawyer. The OFT drew no conclusions as to whether protection for lawyers' clients might be decreased or that afforded the clients of other professionals increased. The Government subsequently concluded that it would not be in the public interest to alter the scope of privilege.

8.73 The OFT considered the following point to be of general relevance when any new business structure was considered. The question of how services were supplied was generally best determined by unfettered competition between producers for the custom of consumers. Regulators at whatever level should therefore avoid prescribing how professional services should be supplied. It followed that where, as currently, restrictions were placed on the freedom of patterns of supply to evolve and improve, those restrictions should be removed unless they could be justified. The OFT remained of the view that the removal of restrictions in professional rules and in statute which prevented lawyers participating in MDPs was likely to have a positive effect on competition in the supply of legal services throughout the UK. The Scottish Consumer Council endorsed the OFT's views.

Economic analysis

8.74 The survey at annex E looked at the position of MDPs within jurisdictions worldwide. It summarised the key arguments put forward in literature to justify removal of prohibitions on MDPs, and also the arguments put forward by those wishing to maintain the prohibition. Models of MDPs were discussed, and a brief jurisdictional comparison was undertaken.

8.75 Professor Frank Stephen observed that the debate on MDPs was somewhat bedevilled by a lack of empirical evidence since MDPs were precluded in most jurisdictions (as annex E confirms). The debate usually centred on whether any economies of scale and (particularly) scope attributable to MDPs would be at the cost of compromising what the Law Society of Scotland referred to as the four core values of the solicitors' profession. There was little detailed analysis in the debate of what form the economies of scale and scope might take or what their magnitude might be. Furthermore, little consideration was given to the variety of forms and combinations MDPs might take. MDPs involving lawyers, accountants and

management consultants servicing multinational enterprises were likely to be different in scale and function from a 'High Street' MDP encompassing a solicitor, a surveyor and, say, an estate agent, or perhaps an accountant. The former were likely to be justified largely on the basis of economies of scope since the individual professional firms were likely to have exhausted economies of scale. 'High Street' MDPs might involve both economies of scale and scope. The individual professional firm might not yet have exhausted economies of scale. The greater generation of business by the MDP might allow each profession to benefit from lower costs available to larger mono-profession firms. In addition economies of scope would arise if the cost of producing more than one type of professional service in the MDP was less than the cost of producing the same services in mono-profession firms. That could arise from the sharing of fixed costs such as advertising, billing and accommodation as well as in assessing clients' multiple needs.

8.76 Professor Stephen concluded that to a certain extent, both the benefits and costs of MDPs remained hypothetical. Where they were permitted, however, they seemed to emerge with a significant market share, particularly in markets serving major business clients (e.g. legal markets in Germany). From an economic point of view it could be argued that MDPs which supplied combinations of professional services would only survive if clients gained net benefits. Large commercial clients were likely to be sufficiently informed to make a judgement on that. Infrequent (usually personal) clients might not be as well informed as to potential problems and might need assurance from a regulator. That suggested that 'High Street' MDPs might need greater scrutiny than those providing services to commercial clients. Since the professional combinations were likely to differ across those market types, the focus of policymakers should be on the particular combinations of professions that might be problematic rather than excluding all forms of MDPs.

8.77 In a small scale jurisdiction with a widely dispersed population such as Scotland, the viability of professional practice in rural areas might arguably be safeguarded by an MDP which provided a range of professional services, but there was no certainty that professional firms in rural areas would wish to form MDPs, assuming that an appropriate regulatory model could be identified.

Clementi's views on MDPs

8.78 In his final report Sir David Clementi identified a number of issues around Multi-Disciplinary Practices. He acknowledged the fundamental difficulty of regulatory reach which would arise from bringing lawyers and other professionals together to provide legal and other services to third parties. In those circumstances he recognised that a regulator, such as the Legal Services Board proposed for England and Wales, would have no jurisdiction over activities outside the legal sector. Clementi's conclusion was to recommend that attention should focus on the setting up of a new regulatory system for lawyers with the Legal Services Board at its centre, and the authorisation of LDPs. He believed that this experience would facilitate the emergence of MDPs at a later date, if the regulatory authorities should at some time in the future consider that sufficient safeguards could be put in place.

Conclusions

8.79 The Group concluded that the issue of MDPs appeared likely to stay on the agenda and that identifying an appropriate regulatory model would be an essential first step if they were to become a reality.

8.80 The Group noted in the latter context that the UK Government in its White Paper "The Future of Legal Services : Putting Consumers First" published in October 2005 had expressed its intention to liberalise very extensively the way in which legal services could be provided in England and Wales. The White Paper explained how the UK Government envisaged that the alternative business structures would be regulated by the Legal Services Board proposed for England and Wales in conjunction with front-line regulators; and how the necessary safeguards would work in practice. The White Paper defined alternative business structures widely to include MDPs, LDPs, and other ownership structures including non lawyer ownership and external investment, including public limited companies that could issue shares.

8.81 The White Paper suggested that prospective ABS firms should be licensed by an authorised ABS regulator or by the Legal Services Board (in the absence of an ABS regulator); that different types of lawyers such as barristers and solicitors and lawyers and non-lawyers should be able to work together in ABS firms on an equal footing; that ABS firms should be able to tap into external investment; and that existing front line regulators (such as the legal professional bodies in England and Wales) should be able to apply to the Legal Services Board for permission to regulate ABS firms.

8.82 The Group concluded that

- the case for alternative business structures in Scotland and the suitability of regulatory arrangements such as those proposed for England and Wales were a matter for further policy development by the Scottish Executive in consultation with interested parties; and

- its report would serve as a basic source of evidence for future consideration of the case for alternative business structures in Scotland.

The Scottish Consumer Council was of the view that such further work must happen quickly, in order to ensure that Scottish consumers were not at a disadvantage in the market in comparison to their counterparts in England and Wales. The competition review process in Scotland had begun in 2004 however in response to the EU report on *Competition in Professions* as was the case in other EU member states, whereas in England and Wales the competition review had been triggered in 2001 by a report from the Office of Fair Trading.

CHAPTER 9 RULES OF COURT : CURATORS AND REPORTERS

Introduction

9. The Group considered that certain rules of court could have potential implications for the Scottish legal services markets and thus be relevant to the particular aims of the research

- to identify restrictions, whether deriving from statute, professional rules or custom and practice, which might have the effect of preventing, limiting or distorting competition in the different Scottish markets.

- to identify access to justice, public interest and consumer protection factors that might justify such restrictions and to evaluate whether the restrictions were proportionate to their purpose.

9.1 Certain rules of court are a factor in the taxation process or raise wider consumer and interests of justice interests. Moreover, what the courts do has a bearing on the market, the legal profession and the legal costs which litigants can incur. The resourcing of the Courts and the organisation of Court business can result in delays and additional costs to litigants, for example when a case cannot be heard on the date when it is expected to be heard because there are insufficient judges. The Group looked at rules of court/Acts of Sederunt dealing with court expenses and taxation, rights of audience and the fees of solicitors and advocates and also examined how judicial fees were set. These matters are covered in chapter 10 which deals with legal fees and taxation.

9.2 The Group's scrutiny of rules of court/Acts of Sederunt otherwise identified a transparency issue relating to the appointment of curators and reporters by the Court and a consumer protection issue with regard to the charges made for their reports and other work.

Curators ad litem

9.3 The Court has a power at common law to appoint a curator ad litem in any case where a person who does not have legal capacity (e.g. by reason of youth or mental disorder), is a party to any legal process and does not have a guardian, or has a guardian with an adverse interest. The function of a curator ad litem is to protect or safeguard the interests of the ward so far as those interests are affected by the particular litigation. The curator ad litem has no wider powers in relation to the ward or the ward's property.

9.4 Specific statutory provision is made for the appointment of a curator ad litem in the following circumstances:

- in an action of divorce or separation where it appears to the court that the defender is suffering from a mental disorder[98];

- to protect the interests of a child who is the subject of proceedings for adoption or freeing for adoption[99];

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[98] RCS, rule 49.17; Ordinary Cause Rules (OCR), rule 33.16

[99] Adoption (Scotland) Act 1978, s. 58; Rules of the Court of Session (RCS), rule 67.4.

- to protect the interests of a child in any application for a parental responsibilities order[100].

9.5 The Ordinary Cause Rules 1993 are generally silent as to the appointment of curators ad litem to adults in civil actions, the only exception being rule 33.16 which provides that in an action of divorce or separation where it appears to the court that the defender is suffering from a mental disorder, the sheriff can appoint a curator ad litem to the defender. The rule also states that the pursuer should be responsible in the first instance for payment of fees and outlays of the curator ad litem incurred during the period from his appointment until he either lodges a minute stating that he does not intend to lodge defences; or he decides to instruct the lodging of defences or a minute adopting defences already lodged; or he is discharged. While that might be seen as placing an unfair burden on the pursuer, the curator had to be paid and if the pursuer was successful the fee may be recoverable. On the other hand that could be argued to affect consumer interests. Despite the defender being mentally incapable, it is the pursuer who is held responsible for the costs of the curator ad litem. It could be argued that it would be equitable for the defender to be held responsible for such costs.

9.6 The Law Society of Scotland noted that if the defender was suffering from a mental disorder and was not capable, he/she could not be responsible for the costs of appointing a curator ad litem. As it was the pursuer who had brought the action, the Group agreed that the rule was equitable.

9.7 The wording of Rule 33.16 is reflected in Rule 39.1, which deals with the appointment of curators to children in any civil action. Rule 39.1(2) required the pursuer (again "in the first instance", unless the court otherwise directed) to be responsible for the fees and outlays of the curator ad litem up to the occurrence of certain events. The nature of the discretion conferred by these rules allows the cost-burden to be shifted to the opponent. In some cases, this can mean that a legally aided defender, rather than a privately paying pursuer, becomes responsible for the curator's costs. If it is not possible to recover those costs from the opponent, this will be an irrecoverable cost to the Scottish Legal Aid Fund, unless the sums can be clawed back from any property recovered or preserved by the successful legally aided party.

9.8 The rule is silent as to what was expected of the curator, although it was understood that many curators would prepare a report more akin to that envisaged by rule 33.21, discussed below. However, a perceived lack of focus in interlocutors appointing a curator could result in the curator's involvement in functions far beyond reporting to the court including therapeutic measures such as mediating between the parties or the supervision of contact arrangements. That raised issues as to the appropriateness of certain work undertaken by a curator and could have serious cost implications for privately paying clients or the Fund (and, by extension, the assisted person) as neither the court nor the Scottish Legal Aid Board has control over the cost of the work carried out by curators (or reporters, below).

9.9 These functions tended to be carried out in most courts by solicitors acting as an officer of the court. It was noted that the role of curator was quite separate and distinct from that of a solicitor in that a curator was not representing the child and was not providing professional legal services. The skills required of a curator are not solely attributable to solicitors. In addition, there is also a cost implication. The Scottish Legal Aid Board pointed

[100] Children (Scotland) Act 1995, section 87(4).

out that solicitors who performed these functions tended nonetheless to charge at rates based on the judicial Tables of Fees or, formerly, the general table. Since the general table had been withdrawn, and there was no prescribed Table of Fees, fees notes continued to be lodged based on the cost of time survey at rates in the region of £120 an hour.

Reporters

9.10 The court had general power to make a remit to a reporter (a) to provide an opinion on a technical matter, (b) to investigate the circumstances and to report on them to the court, and (c) to preserve evidence[101]. The circumstances in which the power to make a judicial remit might be used were very various indeed, as was the nature of the reports required and the expertise of the reporter.

9.11 Rule 33.21 of the Ordinary Cause Rules concerned the appointment of a local authority or reporter to investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child. Although this function was formerly carried out by local authority Social Work Departments, often at no cost, it now appeared that solicitors in private practice were most commonly appointed by the court to perform this role. Responsibility for payment of the reporter's fees and outlays fell in the first instance upon the party who sought the appointment or, where the court made the appointment of its own motion, the pursuer or minuter.

9.12 The wording of Rule 33.21(2)(b) therefore raised similar issues to those discussed above in relation to curators ad litem. The Scottish Legal Aid Board pointed out that where the reporter was a solicitor, payment was claimed at the same rates as those charged by curators and only in circumstances where a party seeks the appointment of a reporter does the Scottish Legal Aid Board have control over the costs.

Reporting Officers

9.13 Statute provided for the appointment of a reporting officer in proceedings for adoption, freeing for adoption and in applications for a parental responsibilities order. The function of the reporting officer in adoption proceedings was to witness agreements to adoption and to perform such other duties as might be prescribed[102]. In applications for a parental responsibilities order, the function of the reporting officer was to witness agreements to such orders and to perform such other duties as might be prescribed[103].

Curators and Safeguarders in Proceedings under Part II of the Children (Scotland) Act 1995

9.14 The Scottish Legal Aid Board had raised a number of operational issues relating to the appointment of curators and safeguarders in proceedings before the sheriff arising out of earlier Children's Hearing proceedings. Those proceedings included appeals under section 51

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[101] See Maxwell, Court of Session Practice, pp. 312-316; Macphail, Sheriff Court Practice, Vol. 1, paras 13.27-13.34. The power of the Court of Session in petition procedure is provided for in the Court of Session Act 1988, section 25(2). In actions of division and sale a remit to a reporter is required by the Rules of Court: see RCS, rule 45.1.
[102] Adoption (Scotland) Act 1978, s. 58; RCS, rule 67.4.
[103] Children (Scotland) Act 1995, section 87(4)(b).

and referrals under section 68 of the Children (Scotland) Act 1995. The statutory structure envisaged by the 1995 Act had been that a safeguarder might be appointed by the sheriff under section 41, whose costs would be borne by the local authority. However, it appeared that in some courts a practice had also developed whereby a curator ad litem, appointed under common law, was being appointed rather than a safeguarder,. In the interests of transparency, there should be clarity about the circumstances in which a curator rather than a safeguarder is appointed and who should bear the costs incurred where a curator has been appointed. Curators were paid at (higher) legal aid rates for this work than the rates recommended by the Convention of Scottish Local Authorities for safeguarders. It had also come to the attention of the Scottish Legal Aid Board that some sheriffs were appointing individuals as both curator and safeguarder. Those safeguarders and curators were generally practising solicitors who made applications on behalf of a child to the sheriff for legal aid under section 29 of the Legal Aid (Scotland) Act 1986.

9.15 Chapter 3 of the Child Care and Maintenance Rules 1997 dealt with procedure in cases under Part II of the Children (Scotland) Act 1995. Rules of Court could be made under section 32 of the Sheriff Court (Scotland) Act 1971, as read in conjunction with section 91 of the 1995 Act. Whilst provision was made regarding the appointment, powers and duties of safeguarders in rule 3.6 to 3.10, no rules had been made regarding the appointment of curator to either children or adults in such proceedings. Moreover, the wording of rule 3.19 which stated that "no expenses shall be awarded in any proceedings in which this chapter applies" raised a substantial question as to whether provision could be made specifying which party should bear the costs of a curator ad litem. Unless statutory provision could be made restricting the ability of the court to appoint anyone other than a safeguarder, and the current practice continued, it was thought to be desirable for this procedure to be regulated by rules of court.

Appointment and qualifications of curators and reporters

9.16 The Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 required each local authority area to have a panel of individuals from whom curators ad litem and reporting officers might be appointed for the purposes of section 87(4) of the Children (Scotland) Act 1995 (where a parental responsibilities order was sought) or section 58 of the Adoption (Scotland) Act 1978. The Court was not obliged to appoint a member of the panel.

9.17 A local authority had the power to determine the standard of qualifications or experience that should be attained by persons who might be appointed, in consultation with the sheriff principal. Before a local authority made any appointment they could invite nominations from the sheriff principal, other local authorities and other individuals the local authority might consider appropriate. A person could be a member of a panel for three years and might be re-appointed.

9.18 In most courts, individuals previously wrote to the sheriff principal to request entry to the list. In adoption cases and children's referrals, the practice was now more formal in Glasgow Sheriff Court and one or two other courts. In that system, an individual had to apply to the local authority to become a curator or reporter. An application form had to be completed which included questions for those working with children under the Disclosure (Scotland) Act. Once the disclosure element had been checked, the application was then submitted to the sheriff principal for approval. However, it was understood that the remaining sheriff courts still operated a system of requests to the sheriff principal.

9.19 In all other types of family cases, individuals could apply to the sheriff principal to be included on an informal list. The use of that list was under review in Glasgow Sheriff Court, as provision was not made for the Disclosure (Scotland) Act.

9.20 The Law Society of Scotland believed the most important aspects of such appointments to be that the Court making the appointment had confidence in the person being appointed to provide an objective report if appointed as a reporter and to act in the best interests of the party if appointed a curator. Such decisions were subjective and could not be based entirely on objective standards.

9.21 The Office of Fair Trading considered that the public interest was unlikely to be properly served unless the appointments process met certain criteria. In particular, it would be important to ensure that the process was transparent, proportionate, non-discriminatory and based on objective standards.

Conclusion

9.22 The Group concluded that the lack of common process for the appointments of curators and reporters across sheriffdoms and the variation in charges for the reports which were produced could raise matters of public and consumer interest and that more detailed research was necessary. It was not clear whether the system could be said to operate fairly for appointees or prospective appointees or in the public interest if the most qualified individuals were not appointed or able to apply.

9.23 The Scottish Executive was already looking at the payment of curators, etc for their reports as an access to justice and legal aid issue; and the appointments issue in the context of the recommendation by the Summary Justice Review Committee chaired by Sheriff Principal McInnes in relation to the education of Sheriffs and by way of possible changes to rules of court.

CHAPTER 10 LEGAL FEES AND THE TAXATION OF COSTS

PART I : INTRODUCTION

10. This chapter discusses solicitors' and advocates' fees (Parts II and III), how litigation is funded (part IV) and how cases are funded by legal aid (part V). It also reports on research carried out on behalf of the Group into the functions of the auditor of court in relation to the taxation of fees (part VI).

Competition Background

10.1 The EC Report on Competition in Professional Services[104] argued that fees charged for professional services should be negotiated freely between practitioners and clients and that fixed prices had detrimental effects on competition, eradicating or seriously reducing the benefits that competitive markets delivered for consumers. Scale fees for solicitors (ie fixed prices) were abolished in Scotland at the end of 1984.

10.2 The EC Report also expressed reservations about recommended prices[105] which the Commission believed might have a significant negative effect on competition, as recommended prices might facilitate the co-ordination of prices between service providers and could mislead consumers about reasonable price levels. The Office of Fair Trading for its part had been concerned that fee guidance might inhibit or distort price competition[106].

10.3 On 25 June 2004 the European Commission fined the Belgian Architects' Association 100,000 Euros for failing to abolish the system of recommended fees that applied to its members[107]. The view of the Commission was that the recommended minimum fee scale of the Association was in breach of competition rules because it sought to co-ordinate the pricing behaviour of architects.

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[104] European Commission report on Competition in Professional Services (paragraph 31) (available at http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf).

[105] Op cit. paragraphs 37 to 41.

[106] For the OFT's view, see paragraphs 19, 94 and 95 below. Professor Frank Stephen observed that the EC and OFT reports were following a long line of such bodies in the UK and abroad in making this assertion, but believed that it was contestable on both theoretical grounds and in terms of the limited evidence available whether that was a valid claim. Shinnick and Stephen (2000) argued that the usual claims regarding recommended fees flew in the face of the difficulty of enforcing 'cartel prices' in a cartel with a large number of members, where demand fluctuated and where prices were not transparent. The conceptual argument led them to conclude that enforcing a national *recommended* scale fee for conveyancing would be difficult but that collusion between suppliers in a local market might be more likely. Data for Scotland in 1984 and Ireland in the 1990s provided evidence of considerable discounting on recommended scale fees in both jurisdictions. The evidence for Ireland was the strongest. Conveyancing fees varied from locality to locality frequently below the recommended fee. However, the available data could not differentiate between the local fees being competitively or collusively determined.

[107] COMP/38.549 - PO / Barême d'honoraires de l'Ordre des Architectes belges, available on the Commission's website at http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_77.html#i38_549. The decision issued on 24 June 2004 and was not appealed. The OFT noted that the decision provided a useful example of the application of Article 81 EC in the context of fee recommendations by a professional body.

General Introduction

10.4 The Group decided to consider solicitors' and advocates' fees separately in view of the different statutory and regulatory contexts which applied to each (Parts II and III below).

10.5 The funding of litigation also required separate consideration because :

- Litigation involved the interests not only of the lawyer and client but also of the other party or parties to the litigation, as well as the interests of the Court itself in the efficient and proper dispatch of business[108];

- The time and work involved in litigation could not be predicted and controlled as readily by lawyer and client as might be the case with other types of legal work. These matters would be affected not only by the way in which the other party or parties to the litigation chose (quite legitimately) to conduct the case, but also by the Court and by the professional responsibilities which lawyers had to the Court.

- The constitutional significance of access to the courts for the determination of civil rights and obligations and criminal charges, and the availability of proper representation for that purpose, was recognised both at common law[109] and under the European Convention on Human Rights[110];

10.6 In the context of litigation it was necessary to keep in mind the distinction between:

- the question of funding as between the client and his own lawyer ("agent and client expenses"); and

- the questions which arose where one party to an action (usually the losing party) was required to pay the expenses of another party (usually the winning party) ("party and party expenses").

A party against whom an award of expenses was made was an involuntary funder of at least part of the other party's legal expenses. Such a party had had no opportunity to bargain with the lawyer and accordingly was not protected by the ordinary working of the market. The present law did not regard it as appropriate or fair to require a party against whom an award of expenses had been made to bear all the costs in terms of fees and outlays which, as between the client and his own lawyer, were entirely reasonable. The present law accordingly drew a distinction between the fees and outlays which it was appropriate to require a client to pay his own legal representatives and the expenses which it was appropriate to require a party to an action to pay to the other party to the action.

10.7 Civil and criminal litigation also needed to be considered separately :

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[108] E.g. *Tods Murray v. Arakin Ltd,* Lady Smith.

[109] E.g. *R v. Secretary of State for the Home Department ex parte Leech (No. 2)* [1994] QB 198, 210A-D; *R v. Lord Chancellor ex parte Witham* [1998] QB 575.

[110] Article 6; *Golder v. United Kingdom* (1975) 1 EHRR 524, 536. In certain types of case this may require the State to make legal aid available to the litigant: e.g. *Airey v. United Kingdom* (1979) 2 EHRR 305.

- Civil litigation, in practice, exhibited a greater variety of types of funding. A relatively small proportion of civil litigation was funded by civil legal aid. Expenses were routinely awarded against the losing party in civil cases.

- By contrast, criminal prosecutions were brought by agencies of the state. The great majority (although not all) of accused persons and persons appealing against conviction were funded by criminal legal aid. There was only very limited provision for the recovery of expenses from another party in criminal proceedings. Thus, criminal litigation was a market which was dominated by state funding.

10.8 Accordingly, the funding of litigation is addressed separately in Part IV below. The legal aid system is described in Part V.

PART II: SOLICITORS' FEES

(a) Current statutory provisions

10.9 The Competition Act 1998, the main provisions of which were modelled on and had to be applied consistently with Articles 81 and 82 EC, prohibited agreements between undertakings, decisions by associations of undertakings or concerted practices which:

(a) might affect trade within the United Kingdom, and

(b) had as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

As the legal professional bodies fell within the classification of associations of undertakings, their decisions on fees were within the ambit of the 1998 Act.

10.10 Other statutory provisions relevant to solicitors' fees were as follows :

- Excessive fee charging by a solicitor might amount to professional misconduct in terms of section 39A of the Solicitors (Scotland) Act 1980.
- Where a solicitor and his client had reached an agreement in writing as to the solicitor's fees, section 61A of the Solicitors (Scotland) Act 1980 provided that it was not competent to remit the solicitor's account for taxation.
- The Council of the Law Society of Scotland had powers to reduce or set aside a solicitor's fees and outlays where it held the services rendered to have been inadequate (in terms of section 42A of the 1980 Act); or, where it held a fee to have been grossly excessive, to withdraw the solicitor's practising certificate (section 39A of the 1980 Act).

(b) Current professional rules

10.11 The Code of Conduct for Scottish Solicitors required the fees charged by solicitors to be fair and reasonable in all the circumstances. Factors to be considered in relation to the reasonableness of fees included :

(a) The importance of the matter to the client;

(b) The amount or value of any money, property or transaction involved;

(c) The complexity of the matter or the difficulty or novelty of the question raised;

(d) The skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;

(e) The time expended;

(f) The length, number and importance of any documents or other papers prepared or perused; and

(g) The place where and the circumstances in which the services or any part thereof were rendered and the degree of urgency involved.

10.12 The Law Society of Scotland issued a Practice Guideline to Scottish solicitors in November 2005 on how they should present their accounts to their clients and the further information they should make available if their clients seek a breakdown of the fees (see annex F).

(c) Fees for non-court business

10.13 Until the end of 1984, solicitors' fees for non-court business such as conveyancing, trust and executry work, corporate work and general business were regulated by the Law Society of Scotland by means of a prescribed scale of fees. From 1 January 1985 the Law Society of Scotland ceased to prescribe the level of fees. From that date until its withdrawal on 1 August 2005 the Society published an annual Table of Fees for General Business, the purpose of which was to recommend charges for professional services rendered by solicitors in Scotland.

(d) Cost of Time Survey

10.14 Since the late 1970s the Law Society of Scotland had carried out an annual survey of the cost of running a solicitor's practice, known as the Cost of Time Survey. The survey was used to calculate the value of the unit in the Society's recommended table of fees which it published each year. The purpose of the annual Table of Fees for General Business was to "… recommend charges for professional services rendered by solicitors in Scotland…" and the Society's annual cost of time informed the unit cost figures recommended. The Society recommended an hourly charge rate, but explained that it was for the solicitor and client to agree on an acceptable method of pricing the work done, whether by an agreed hourly rate or by a fixed fee for the whole work.

10.15 The Law Society of Scotland considered the implications of the Commission's decision in the case of the Belgian Architects' Association for its Table of Fees for General Business and the implications for the profession of withdrawing the recommended fees table. The Council of the Law Society of Scotland decided to withdraw the table of recommended fees on 25 February 2005. The legal opinion on which the Society based that decision did however advise that the Society might continue to carry out its annual Cost of Time Survey of legal firms. The survey was prepared by an independent actuary who worked out the average cost of running a solicitor's practice from figures provided to him by firms across Scotland about the previous year's costs[111]. The annual survey assisted individual firms to calculate what they needed to earn to meet their overheads, including staff wages and running costs[112]. With the abolition of that table, the Society decided in future to publish the annual Cost of Time Survey as a historical hourly cost rate.

10.16 The Society's guidance on recommended fees, which was withdrawn with effect from 1 July 2005, accepted that solicitors might assess their own unit values, though noted

[111] The average cost of running a solicitor's practice in 2004 worked out at a rate of £115 per hour of solicitors' chargeable time. That rate was based on notional salaries of £55,000 pa for profit sharing partners aged 35 or over and £48,800 for profit sharing partners aged under 35. Salaried partners were included at their actual salaries.

[112] The methodology used in the Cost of Time Survey is discussed below at paragraphs 10.19 and 10.20.

these would have to be justified at a taxation if challenged. Though the withdrawal of the Society's guidance on fees might increase competition in the legal services market (as argued by the European Commission Report), there was a risk that its withdrawal might also reduce transparency for consumers wishing to complain about the level of fees charged.

10.17 Where a client considered a proposed fee to be excessive or declined to pay it or when a solicitor wished to enforce the fee in such circumstances, the Auditor of Court (an official based in every Sheriff Court in Scotland) could "tax" or assess the reasonableness of the fee in question (see Part VI).

(e) Competition issues

10.18 The Office of Fair Trading noted that to achieve compliance with competition law, it would be important to ensure that any information on price provided by a professional body was historical only, collated and aggregated by a third party and framed to show that it was not intended as a recommendation but as a description of historical prices. The Law Society of Scotland confirmed that it planned to take the Cost of Time Survey forward on that basis, and suggested that auditors could use survey data to develop their own table.

10.19 With the Society's agreement, a researcher discussed the methodology used with the actuary responsible for the Cost of Time Survey. Historically, the Cost of Time Survey had been used in conjunction with 'notional salaries…for senior and junior profit-sharing partners. Those salaries were estimated by increasing the figure for the previous year in line with national average earnings'[113]. It was understood that those notional salaries had been produced by the Society's Remuneration Committee. In calculating the hourly expense rates a number of specific assumptions were made about chargeable hours for different categories of fee earners, rates of return for interest on working capital, pension provisions and changes in the retail price index. Participants in the Survey were offered the possibility of having their firm's benchmarks generated for them by the consulting actuary and an Appendix provided a *pro forma* through which others could calculate their firm's benchmarks (Appendix II to the Survey).

10.20 From the 2005 Cost of Time Survey the method had changed (the questionnaire used for the 2005 Survey is at annex G). The notional salary for profit-sharing partners was now the median level of profitability (excluding return on capital and pension provisions) from the 2004 Cost of Time Survey. The researcher noted that this notional salary although derived from the median level of profitability could be, possibly, indirectly influenced by the Remuneration Committee's choice of notional salary from the previous year. This would occur if firms responding to the 2004 Cost of Time Survey used the hourly rates produced from the 2003 Survey when setting their charging rates for 2004. In such a case their profitability level would be determined, *inter alia*, by the notional salary level. Indeed, even if firms did not use the actual rate from the Cost of Time Survey but their choice of rate had been influenced by the actual rate that influence would be perpetuated through the use of the median profitability figure as a benchmark in the future. The Law Society of Scotland agreed to discuss the matter with the actuary.

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[113] Page 50, *Benchmarks and Cost of Time, The 2004 Survey of Legal Practices in Scotland*, Law Society of Scotland, 2005

(f) Client Paying

10.21 By far the greatest proportion of work done by solicitors was charged against the solicitor's own client.

i) Written fee charging agreements

10.22 In terms of Section 61A of the Solicitors (Scotland) Act 1980 solicitors and clients could enter into a written fee charging agreement in respect of any work done or to be done. Where such agreements had been entered into, it was not competent in any litigation arising out of any dispute as to the fees to be paid under such an agreement for the Court to remit the solicitor's account for taxation. In 1993 the Law Society of Scotland passed a practice rule, with the concurrence of the Lord President, the effect of which was to require solicitors to raise a Court action for payment of outstanding fees and give the client an opportunity to defend the action before the solicitor could obtain a decree on which diligence could be done. They could not go straight to diligence (ie enforcement of an unpaid debt).

10.23 From 1 August 2005 solicitors had been required by virtue of the Solicitors (Scotland) (Client Communication) Practice Rules 2005 to advise clients in writing of certain information at the outset of a matter, including either an estimate of the total fee to be charged plus VAT and outlays, or the basis upon which the fee would be charged (including VAT and outlays which might be incurred). A separate Guidance Note issued with the Rules[114] made clear that where an external fee charger, such as an auditor or law accountant, was asked to assess the fees to be charged (for example, in an executry), solicitors should explain to their clients the basis on which the auditor or accountant would be asked to fee up the file. If the work was being charged at an hourly rate, the actual rates applicable to different personnel carrying out the work would need to be stated as well as any commission charged on capital transactions such as the sale of a house. Where an account was to be rendered on a detailed basis, the charges for letters, drafting papers, etc also needed to be expressed as well as the hourly rate.

10.24 Intimation of such an estimate would not necessarily constitute a written fee charging agreement, but if the client accepted such proposed fees in writing, such acceptance would in the Society's view be an agreement in terms of section 61A of the Solicitors (Scotland) Act 1980. If the agreement set out an hourly rate or basis of charging but did not quote a total fee, the client would still be entitled to challenge whether or not all the work done was necessary, but would not be entitled in the Society's view to challenge the rates to which he had previously agreed.

ii) Taxation

10.25 If there was no written fee charging agreement, the client was entitled to require the solicitor to submit the account to the auditor for taxation. It was also possible for a solicitor on his own initiative and for his own guidance to send a file to an auditor of court or an independent law accountant to have a fee assessed; such

[114] available on the Society's website in the section on Commonly Used Rules : http://www.lawscot.org.uk/members/common_rules/ClientComm_Rules2005_Guidance.pdf.

unilateral action was not improper, but such an assessment could not be represented as a taxation or as having any official status. The fee for such a reference was not chargeable to the client unless it was included in a terms of business letter issued by the solicitor at the commencement of the work and the work had been instructed on that basis.

10.26 Taxation was a formal process where both the solicitor and the client had the opportunity to make representations to the Auditor about the reasonableness or otherwise of the fees. The outcome of a taxation was binding on both solicitor and client and the expenses of the taxation were entirely at the discretion of the Auditor, the latter being an issue which attracted adverse comment in the research on auditors reported in part VI of this chapter.

10.27 If a solicitor required to sue a client for unpaid fees, the Court might, but did not necessarily require to, remit the account to the auditor of court for taxation. The law on this question was fully reviewed by Sheriff Principal Sir Stephen Young[115] who held that a Sheriff had discretion as to whether to remit to the Auditor by virtue of the relevant rule of court[116]. The exercise of such discretion would depend on the particular circumstances of the case. In the case in question the Sheriff Principal decided not to remit the account to the auditor and granted decree for the sum sued for.

10.28 The Scottish Consumer Council thought that the taxation process could be viewed as a useful consumer protection mechanism in theory, but had concerns that it might not be widely used and that consumers either might not know about it or might be deterred from using it for fear of the cost should the auditor not find in their favour. It was also clear from the auditor of court research that the taxation process was complex, lacked transparency and had considerable potential for inconsistency. The Council was concerned that there was no clear evidence as to whether the process did provide adequate protection for consumers, as it had not been possible for the auditor of court research to include a survey of the views and experiences of individual court users.

10.29 The functions and operation in practice of the auditor of court in relation to taxation are examined in greater detail in part VI to this chapter.

iii) Speculative fees

10.30 There was no prohibition on a solicitor carrying out work on a speculative basis, where a fee was only charged in the event of success. That basis was common in litigation, particularly personal injury cases (see Part IV), but was also very common in estate agency (no sale – no fee) and commercial work. In such transactions, the fee might be enhanced in the event of success, and might either be substantially discounted or waived altogether if the matter was unsuccessful. Such arrangements had to be agreed between solicitors and clients, preferably in writing to

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[115] Stronachs Corporate v Mountwest 166 Limited (A1677/03 in Aberdeen Sheriff Court, on the Scottish Courts website).
[116] Rule 2(1) of the Act of Sederunt (Solicitor and Client Accounts in the Sheriff Court) 1992 (1992 SI No. 1434)

eliminate problems caused by differing recollections of verbal agreements. Such an arrangement was not truly *pro bono* work (see below).

(g) Third Party Paying

10.31 In the context of a litigation, one party to the litigation might be found liable to the other party for some or all of the latter's legal expenses. The party entitled to an award of expenses was liable in the first instance to pay his own expenses, but was entitled to recover some or all of the expenses from the other party. This is discussed further in Part III below.

10.32 Apart from litigation, there were several situations where the solicitor's own client was not responsible for payment of the solicitor's fee. The most common of these were:

- leases where the tenant was normally liable for the landlord's solicitor's fees and outlays;
- secured loans where the borrower was liable by statute for the lender's solicitors fees and outlays;
- executries where the residuary beneficiaries were not executors (in an executry the clients are the executors not the beneficiaries[117]);
- business relocation where the individual's legal expenses were to be paid by the employer or a relocation company;
- legal expenses insurance;
- any other contractual arrangement for payment of one person's legal expenses by another person.

In all of these situations the third party paying had the right to require a taxation of the solicitor's account, unless such a right had been contractually excluded. The taxation would be conducted on the same basis as if the client was paying, except that the auditor might disallow a particular charge notwithstanding that the client had specifically instructed that item to be carried out.

(h) Clients in receipt of legal advice and assistance under the Advice and Assistance Scheme

10.33 Advice and Assistance under legal aid legislation was also available for general business where the client was financially eligible and the position is dealt with fully in Part IV below. If the authorised expenditure under the Advice and Assistance scheme had been exhausted, it was open to the solicitor and client to agree that work could continue to be done, treating the client as a private fee paying client for such work subsequent to such an agreement. That could not be retrospective, and fees had to be charged at Advice and Assistance rates for the period when the client was under the scheme and subject to the level of authorised expenditure available when the work was done. The client had a statutory right to taxation.

[117] Loretto School v Macandrew & Jenkins 1992 SLT 615)

(i) Solicitor advocates

10.34 For the purposes of the regulation of fees (apart from legal aid and party and party expenses in litigation), solicitor advocates were solicitors and subject to the same regulation as other solicitors. No research had been carried out as to the fees charged by solicitor advocates.

(j) *Pro Bono*

10.35 Solicitors could undertake work without charging a fee, known as *pro bono*[118] work. Many firms did so for charities, or for long standing clients needing advice about a particular matter. Many firms prepared wills for no charge, or for a donation by the client to charity; the Will Aid scheme was the best known example of that but there were others. In some circumstances outlays would be incurred.

[118] *pro bono publico* literally, for the public good, ie free of charge.

PART III : ADVOCATES' FEES

(a) Current statutory provisions

10.36 Except in legal aid cases, there were no statutory provisions which controlled or regulated the fees which advocates might charge.

(b) Professional Guidance

10.37 The Faculty of Advocates did not set any scale of fees and did not offer any indication as to the fees which it was appropriate for advocates to charge.

10.38 The Faculty's Guide to the Professional Conduct of Advocates contained the following guidance on fees :

> "5.2 It is thought that, as the law stands, an advocate is not entitled to sue for his fees unless the solicitor has claimed payment of them from the client and the client has paid them to the solicitor - *Cullen v. Buchanan* (1862) 24 D. 1132; Keay v. A.B. (1837) 15 S. 748 (note). See also *Drummond v. The Law Society of Scotland* 1980 S.C. 175.
>
> 5.3 Although he may not be entitled to sue for his fees, it is recognised that an advocate is entitled to payment of a *reasonable* fee for his services. In the absence of express prior arrangement to the contrary, the instructing solicitor impliedly undertakes a professional commitment to pay a reasonable fee. The arrangements between the Faculty of Advocates and the Law Society of Scotland for payment of fees to counsel are published separately, as are the arrangements for payment of fees in Legal Aid cases.
>
> 5.4 What is a "reasonable fee" depends on the whole circumstances of the particular case. Unless otherwise stipulated, counsel's fees cover all expenses incurred by counsel in the conduct of the case, such as travelling expenses.
>
> 5.5 Fees are normally charged after the work is done. Faculty Services Limited, acting on counsel's behalf, issues a Note of Proposed Fee to the solicitor. The solicitor is entitled to challenge the amount of the fee proposed within the time agreed between the Faculty and the Law Society. Failing such challenge, the solicitor is presumed to agree that the fee proposed is reasonable and comes under a professional obligation to pay it.
>
> 5.6 If the solicitor challenges the fee proposed, the matter will normally be resolved by negotiation between the solicitor and counsel's clerk. If they cannot agree, the solicitor and/or counsel is entitled to require that the matter be determined by the Auditor of the Court of Session. The Auditor is entitled to have regard to all the circumstances and is, in particular, entitled to allow a higher fee than would be allowed on party-and-party taxation.
>
> 5.7 Except in Legal Aid cases, where fees are regulated by Statutory Instrument, there is no scale of fees nor does the Faculty offer any indication as to the fees which

it is appropriate for counsel to charge. Counsel is entitled to charge his fee on any basis appropriate to the work involved – for example, a composite or "block" fee for all work done, a daily rate, an hourly rate, etc. The solicitor is entitled to challenge the basis of the charge as well as the amount.

5.8 The amount of the fee and/or the basis of charging may be agreed in advance between the solicitor and counsel's clerk. Provided that an unequivocal agreement has been reached, the solicitor is not entitled to challenge it later.

5.9 It is not appropriate for counsel to negotiate fees with his instructing solicitor. This is the function of counsel's clerk. All fees should be paid to Faculty Services Limited. If any fee happens to be paid direct to counsel, counsel must account for it forthwith to Faculty Services Limited. Counsel should not under any circumstances whatever discuss or negotiate fees with or receive fees directly from the lay client.

5.10 *Speculative actions.* It is permissible for counsel to accept instructions "on the footing that the [client is] unable to meet the expenses of the litigation and that there [will] be no remuneration for [his] services except in the event of success... It has long been recognised by our courts that this is a perfectly legitimate basis on which to carry on litigation and a reasonable indulgence to people who, while they are not qualified for admission to [Legal Aid], are nevertheless unable to finance a costly litigation", per Lord President Normand in *X Insurance Co. v. A. & B.* 1936 S.C. 225, 238-9. The rules governing the conduct of speculative actions are set out in paragraph 9.6 below. So far as fees are concerned, counsel is only entitled to the fees recovered on taxation from the party found liable in expenses. (The instructing solicitor may include fees to counsel, although not paid, in his account of expenses - see *Sim v. Scottish National Heritable Property Co. Ltd.* (1889) 16 R. 583 and earlier cases there cited.) Counsel may not agree to act on the basis that additional fees will be paid by the client out of the principal sum recovered in the action ….

5.11 *Retainers* …. The purpose of a general retainer is to ensure that, during the currency of the retainer, counsel will not accept instructions to advise or appear for any other party in any proceedings involving the client giving the retainer. A special retainer has the same purpose but is restricted to the specific subject matter of the retainer. A general retainer endures for the lifetime of the client and counsel, unless otherwise specified. A special retainer falls after one year if not renewed or, in the case of a depending process, on completion of the case or matter to which the retainer relates. A general retainer falls if the client fails to instruct the advocate retained in any case or matter whatever. A special retainer falls if the client fails to instruct the advocate retained in the case or matter to which the retainer relates. There is no rule as to the amount of the fee payable for a retainer, other than that it must be reasonable in the circumstances.

5.12 *Fees for settled or discharged cases.* Normally, a fee is only chargeable when instructions have been given and accepted. Where instructions have been given and accepted, an advocate is entitled to charge the full fee for the work instructed even if the case is subsequently settled or the diet is discharged. In addition, where the solicitor knows, or ought in the circumstances reasonably to be aware, that counsel, in order to comply with his obligations under paragraphs 4.6.1-8 above, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged.

Relevant circumstances will include time spent in preparation and the extent to which counsel has been unable to accept other instructions. Counsel may also charge a fee for negotiating a settlement.

5.13 Paragraph 5.12 applies equally, *mutatis mutandis*, where a case is settled after the hearing has begun. Counsel's fees are a matter for discussion between the instructing solicitor and counsel's clerk in the individual case. Advocates' clerks are available to discuss feeing arrangements with instructing solicitors in advance of the work being done. The level of fee will depend on such matters as the seniority, experience and specialist expertise of the advocate in question and the nature of the piece of work in question, having regard to such matters as its difficulty, the level of responsibility involved, the time taken and any other special features of the case."

10.39 There was no objection to counsel undertaking work on a speculative or pro bono basis. Counsel might not lawfully agree to act on the basis that he or she would be paid a share of the amount recovered[119].

(c) Practice

10.40 Each advocate had a clerk who was available to discuss with solicitors or with direct access professionals the basis upon which the advocate would charge for a particular item of work in advance of any instruction being given and to discuss and agree fees either before or after the work had been done. Clerking services were provided by Faculty Services Limited to advocates who chose to subscribe to the company. Almost all advocates did so. Clerking services within Faculty Services Limited were provided on the basis of "stables" (i.e. groups of advocates who shared a clerk and deputy clerks). There were currently eleven stables, each served by a clerk and between one and three deputy clerks.

10.41 A solicitor or other direct access professional who wished to instruct counsel could contact advocates' clerks and seek advice from them as to such matters as the availability of a range of counsel, the basis upon which different counsel would charge for a particular item of work and the relative experience of different counsel. The choice of advocate would depend on various considerations, apart from fee levels, including the nature of the work, the seniority and experience of advocate considered appropriate, and (for written work) the timescale within which the work could be done. Once the solicitor (or other instructing professional) had decided to instruct a particular advocate, the basis and level of fees which would be charged could be agreed in advance with that advocate's clerk. If the level and basis of feeing had not been agreed in advance, the fee could be discussed between the advocate's clerk and the instructing agent after the work had been done, either before or after the issue of a proposed note of fee.

10.42 The instructing solicitor had a duty to act in the client's best interests and to advise the client as to the appropriateness of instructing counsel, the advocate who should be instructed and about the level of fees which would or might be incurred. As a relatively informed intermediary, the instructing professional was normally in a better position than the lay client to consider whether or not counsel should be instructed and (having obtained such information as the instructing professional should consider appropriate from advocates' clerks

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[119] See further below.

or otherwise) which advocate should be instructed, and to negotiate an appropriate basis and level of fee with the clerk to the advocate instructed.

10.43 The arrangements for the accounting for and recovery of counsel's fees from solicitors were set out in a Scheme for the Accounting for and Recovery of Counsel's Fees issued by the authority of the Faculty of Advocates and the Council of the Law Society of Scotland (the full text of which is available at http://www.advocates.org.uk/2002scheme.html).

10.44 In terms of the Scheme it was open to a solicitor to negotiate and agree the fees to be paid and the basis upon which fees were to be settled with the advocate's clerk in advance of the work being done. Where an agreement of this kind had been made then, unless the right to taxation had been reserved, the agreement could not be altered nor could the fees charged be taken to the Auditor for adjudication except by subsequent agreement between counsel and solicitor[120].

10.45 If the fee to be charged had not been agreed in advance, then following each item of work a note of proposed fee was to be issued. If the solicitor wished to question the fee proposed, he had to inform Faculty Services Limited within 6 weeks. If he felt that the fee was grossly excessive he might refer the matter to the Dean. If, following notification to Faculty Services Limited, the fee could not be agreed between the solicitor and counsel's clerk, the Auditor of the Court of Session or the Auditor of the appropriate Sheriff court was to adjudicate on what was a reasonable fee. Unless otherwise agreed in advance, this would be on an agent and client, client paying basis[121].

10.46 If an advocate were to charge a grossly excessive fee, this could in principle amount to misconduct and be dealt with under the Faculty's disciplinary procedures.

(d) Rule that advocates may not sue for their fees

10.47 The legal position of advocates in relation to fees was anomalous. Uniquely among professionals, as the law currently stood, advocates were not entitled to sue either the instructing solicitor or client for their fees unless the solicitor had been put in funds for the payment of counsel's fees[122]. The rule was based on the fact that an advocate had no contract either with the client or the instructing solicitor but held an office in which he owed duties to the public and to the Court as well as to his client[123].

10.48 The rule that advocates might not sue for their fees meant that advocates might not, ultimately, enforce the payment of fees by legal process. They depended on the professional responsibility of those who instructed them for the payment of fees. The rule potentially put advocates at a disadvantage as compared with other professionals, including solicitor

[120] Paragraph 4(1).
[121] Paragraph 5.
[122] *Batchelor v. Pattison & Mackersy* (1876) 3R 914, 918; see also *Drummond v. Law Society of Scotland* 1980 SC 175. Advocates fees were however specifically included in the Late Payment of Commercial Debts (Scotland) Regulations 2002 (SSI 2002/335) which implemented the terms of an EC Directive on combating late payment in commercial transactions (Directive 2000/35/EC of 29 June 2000). The Regulations applied the terms of the Late Payment of Commercial Debts (Interest) Act 1998 to fees for professional services payable to members of the Faculty of Advocates in the same way as to a contract for the supply of services.
[123] *Batchelor v. Pattison & Mackersy, loc. cit.*

advocates. The principle that counsel had no contractual relationship either with client or instructing solicitor was not, as a matter of logic, incompatible with the notion that counsel should have an enforceable right to payment of fees. The rule would require to be changed if advocates were to be permitted to accept instructions directly from lay clients.

(e) Retaining fees for advocates

10.49 The Faculty's Guide to the Professional Conduct of Advocates sets out arrangements for retaining fees (at paragraphs 5.11 and 5.12, set out above). The Group concluded that retainers might raise an issue about equal access to justice, but not about competition.

(f) Office of Fair Trading view

10.50 The OFT noted that the role of the clerk generally appeared to involve the negotiation of fees on behalf of a number of advocates. The OFT believed that it was likely to arise that the advocates in question would be practising within the same specialist area and might be in direct competition with one another. Given that role, it would be important to ensure that, in carrying out those duties, clerks were fully aware of each advocate's responsibility under competition law. As independent undertakings, advocates should be competing on price for the supply of their services and were obliged to ensure that, through the medium of the clerk or otherwise, competition on price was not restricted or distorted.

PART IV : FUNDING OF LITIGATION

Introduction

10.51 As explained at the beginning of this chapter, the funding of litigation raises some special considerations which this Part considers.

Civil litigation

(a) Agent and Client Expenses

10.52 Litigation might be funded by the party (self-funding) or funded by a third party.

(i) Self-funding : availability of taxation

10.53 Litigation which was self-funded was subject to the same rules and arrangements which applied to the funding of other legal services. In relation to solicitors' fees, in the absence of a written fee-charging agreement, the client was entitled to have the solicitor's account taxed[124]. In relation to counsels' fees, in the absence of an agreement in advance between the instructing solicitor and the advocate's clerk, the account was subject to taxation[125].

10.54 Rules dealt with the taxation process and set out a procedure where the sheriff remitted the account of a solicitor payable by his client to the auditor of court for taxation[126]. The rules provided the auditor of court with principles to be applied in such a taxation where the account related to litigation work.

10.55 The rules provided that where the auditor taxed the account of a solicitor to his client in respect of the conduct of a litigation on behalf of the client, he should

(a) allow a sum in respect of such work and outlays as had been reasonably incurred;

(b) allow in respect of each item of work and outlay such sum as might be fair and reasonable having regard to all the circumstances of the case;

(c) in determining whether a sum charged in respect of an item of work was fair and reasonable, take into account :

(i) the complexity of the litigation and the number, difficulty or novelty of the questions raised;

(ii) the skill, labour, specialised knowledge and responsibility involved;

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[124] Solicitors (Scotland) Act 1980, section 61A.
[125] Scheme for Payment of Counsel's Fees.
[126] Act of Sederunt (Solicitor and Client Accounts in the Sheriff Court) 1992 (SI 1992 No 1434) and Rule 42.7 in the Court of Session Rules 1994 (SI 1994 No. 1443).

(iii) the time spent on the item of work and on the litigation as a whole;

(iv) the number and importance of any documents or other papers prepared or perused without regard to length;

(v) the place where and the circumstances (including the degree of expedition required) in which the solicitor's work or any part of it has been done;

(vi) the amount or value of any money or property involved in the litigation; and

(vii) the importance of the litigation or its subject matter to the client;

(d) should presume (unless the contrary was demonstrated to his satisfaction) that :

(i) an item of work or outlay was reasonably incurred if it was incurred with the express or implied approval of the client;

(ii) the fee charged in respect of an item of work or outlay was reasonable if the amount of the fee or the outlay was expressly or impliedly approved by the client; and

(iii) an item of work or outlay was not reasonably incurred, or that the fee charged in respect of an item of work or outlay was not reasonable if the item of work, outlay or fee charged, was unusual in the circumstances of the case, unless the solicitor informed the client prior to carrying out the item of work or incurring the outlay that it might not be allowed (or that the fee charged might not be allowed in full) in a taxation in judicial proceedings between party and party; and

(e) might disallow any item of work or outlay which was not vouched to his satisfaction.

(ii) Special arrangements

10.56 ***Pro bono and restricted fees*** There was no rule of law which prohibited a solicitor or advocate from acting on a *pro bono* basis[127] or from restricting the fees charged for litigation.

10.57 ***Pacta de quota litis*** (bargains for a share of the amount recovered). A bargain by a legal adviser for a share of the amount recovered or for commission on property recovered in a litigation was unenforceable at common law[128]. This rule of Scots law, which had its roots in Roman Law, was recognised in other jurisdictions and was reflected in the CCBE Code of Conduct which prohibited lawyers from entering into such arrangements[129]. The rule applied

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[127] *Pro bono publico* for the public good, i.e. free of charge.

[128] Gloag, *The Law of Contract in Scotland*, 2d edn, p. 578.

[129] The CCBE is the acronym in French for the confederation of the bars and Law Societies of Europe. It is recognised by the European Union and is consulted by the institutions of the Union as representing the legal profession in Europe.

only to lawyers: there was no rule of law which prohibited other parties from agreeing to fund or handle a claim in return for a percentage of any sum which might be awarded[130].

10.58 ***Speculative fees*** ("no-win-no-fee"). There was no rule of law which prohibited a solicitor or advocate from acting on the basis that a fee would be charged only if the action was successful[131]. In such circumstances, a solicitor or advocate might charge an enhanced fee. The increase which might be charged was limited by statute to 100% of the fee[132]. Rules of court applied to speculative actions in both the Court of Session and the sheriff court[133]. They defined "success" for the purpose of determining whether the solicitor was entitled to a fee; and defined the fees element for the purpose of applying the agreed percentage increases.

10.59 It could be argued that a speculative basis for litigation involving either solicitors or advocates improved access to justice for clients who could not otherwise afford legal fees or would not be eligible for legal aid. The purpose of the enhancement was to compensate the solicitor or advocate for the risk of receiving no fee at all if the action failed. The Group was not aware of any evidence that these rules had a negative impact on competition in the legal services market and noted that no win – no fee arrangements were commonplace in relation to personal injury work.

(iii) Third party funding

10.60 There was no prohibition or restriction in Scots law on a litigation being funded in whole or in part by a third party[134]. The most common sources of third party funding were insurance, trade union or professional body funding, and the Legal Aid Fund. Payments from the Legal Aid Fund were made in accordance with the relevant statutory provisions.

10.61 ***Insurance*** It was necessary to distinguish, when considering the funding of litigation by way of insurance, between (a) legal expenses insurance and (b) liability insurance[135]. Legal expenses insurance was insurance specifically against legal costs. The cover was for the costs of pursuing or defending a case which fell within the terms of the policy. The insurer had no other interest in the outcome of the litigation. By contrast, in the case of liability insurance, the cover was against a liability within the terms of the policy which the insurer might incur to a third party. If an action against the insured within the terms of the policy was lost, then it was the insurer who would require to meet the pursuer's

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[130] *Quantum Claims Compensation Specialists Ltd v. Powell* 1998 SLT 228.
[131] *X Insurance Co v. A & B* 1936 SC 225.
[132] Solicitors (Scotland) Act 1980, section 61A (solicitors); Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, section 36 (advocates); RCS, r. 42.17 (solicitors); Act of Sederunt (Fees of Advocates in Speculative Actions) SI 1992 No. 1897 (advocates).
[133] The Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 (SI 1992 No 1599).

[134] Scots law does not recognise the doctrines of champerty and maintenance which apply in English law. A funder who directs and controls the conduct of the litigation and who has an interest in the outcome may render himself liable in expenses to the other side, as a *dominus litis.* The detailed rules in relation to this can be found in the standard works on civil procedure: e.g. I.D. Macphail, *Sheriff Court Practice,* 2nd edn, paragraphs 4.112-4.113.
[135] There is a third situation in which litigation is funded by an insurer, namely when an insurer has indemnified the insured in respect of some loss and pursues a third party who is legally liable for that loss in the name of the insured under the doctrine of subrogation. Although this is a common situation, it is probably not correct to treat this as a method of funding litigation, since although the nominal pursuer is the insured, it is the insurer who has the principal interest in the outcome of the litigation.

claim. It was a normal incident of liability insurance that the insurer would have control and conduct of the defence of the action as well as being responsible for its funding (subject to any excess). Many (but not all) personal injury, property damage and professional negligence claims were in fact defended at the expense of the defender's liability insurer.

10.62 ***Trade union/professional organisation*** Trade unions and professional organisations might offer to fund litigation for their members. A proportion of personal injury claims were, in practice, funded by the pursuer's trade union.

10.63 ***Civil legal aid*** Civil legal aid could be made available to a person (excluding a body corporate or unincorporate) if the Scottish Legal Aid Board was satisfied that there was probable cause, that it was reasonable to grant legal aid and the person was financially eligible. A person in receipt of legal aid was referred to in the Process as an "assisted person". The statutory provisions set out in Part V below apply.

10.64 ***Taxation of agent and client expenses*** Except where the solicitor and client had a written fee-charging agreement[136], a solicitor instructed for a litigation in the Court of Session might, by motion to the Court, have his own account to his client remitted to the Auditor for taxation[137]. Likewise, in any action in which the solicitor sued his client for payment of the solicitor's account, the Court might remit the account to the Auditor for taxation[138]. Equally, in the Sheriff Court, there was provision for expenses allowed in any cause to be taxed before decree was granted and a structure was set down for the procedure at taxation[139].

(b) Party and party expenses[140]

10.65 ***Liability to expenses*** The Court had an inherent discretionary power to determine whether to make an award of expenses in any case which might come before it and, if making an award, to determine by whom, on what basis and to what extent expenses were to be paid. The general rule was that "the cost of litigation should fall on him who has caused it"[141] – and might be summarised, albeit somewhat inaccurately, by the notion that "expenses follow success".

10.66 Questions of expenses were, however, generally dealt with in respect of incidental steps in a litigation (e.g. motions, debates, preliminary proofs) as they occurred. The Court might :

- make an award of expenses in relation to the incidental matter (which would, following the general rule, usually reflect success in relation to the incidental matter);

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[136] Solicitors (Scotland) Act 1980, section 61A(1).
[137] Rules of the Court of Session (RCS), r. 42.7.
[138] RCS, r. 42.7.

[139] Ordinary Cause Rules 1993 r. 32.1 to 32.4 (Parliament House Book Section D44/80).
[140] The following account discusses party and party expenses in the Court of Session, Sheriff Court and statutory tribunals. It does not deal with expenses in the House of Lords, for which see Forms of Bills of Costs applicable to Judicial Taxations in the House of Lords in Civil Appeals 1997, set out in the Parliament House Book, Volume 1, pp. B530 ff. The best short modern accounts of the law of expenses are I.D. Macphail, *Sheriff Court Practice*, 2nd edn, Chapter 19; and Lord Carloway, "Expenses", in Macfadyen (ed), Court of Session Practice.
[141] *Shepherd v. Elliot* (1896) 23R 695, 696 per Lord President Robertson; see also *Howitt v. Alexander & Sons* 1948 SC 154, 157 per Lord President Cooper.

- reserve the question of expenses (i.e. hold over the question of expenses until later);

- award expenses in the cause (i.e. the expenses of the incidental matter would follow any award of expenses made at the end of the litigation in relation to the litigation as a whole); or

- find no expenses due to or by (i.e. each party bore its own expenses of that matter).

10.67 At the end of a litigation there would usually also be an award of expenses of the litigation as a whole (insofar as expenses had not already dealt with). A party who was ultimately successful and who received an award of expenses in his favour at the end of the litigation might accordingly (by virtue of incidental findings in relation to expenses) be liable for part of his own expenses, or indeed for some of the other party's expenses.

10.68 The general rule that "expenses follow success" was subject to exceptions.

10.69 ***Modification, etc.*** In some cases, the expenses of the successful party might be modified (i.e. restricted to a proportion of the taxed expenses or to a specific sum), that party might be refused expenses, or might even be found liable for the unsuccessful party's expenses. Such awards typically reflected disapproval or dissatisfaction by the Court of some aspect of the successful party's conduct of the litigation.

10.70 ***Litigation against a legally aided party*** Where a party found liable in expenses was litigating with the benefit of legal aid, the Court might (and in general did) modify the expenses to be paid by the legally aided party to a fixed sum or to nil[142]. Separately, an award of expenses might be made against the Legal Aid Fund in favour of an unassisted party in whose favour the proceedings were finally decided, but only where (a) the Court was satisfied that in a Court of first instance the unassisted party would suffer severe financial hardship unless such an order was made; and (b) in any case, the Court was satisfied that it was just and equitable in all the circumstances that the award should be paid out of public funds[143]. In a court of first instance, that was only available to an unassisted party who did not institute the proceedings.

10.71 ***Tenders*** The application of the general rule might be affected by the lodging of a tender. That was a formal offer on the part of the defender to pay a particular sum of money, plus taxed expenses to the date of the tender, in settlement of the action[144]. If the pursuer succeeded at the end of the day, but did not "beat the tender" by being awarded a greater sum than that offered, the pursuer would normally be found liable for the defender's expenses from the date of the tender. The theory was that, from that date, the costs of the litigation had been incurred as a result of the successful party's failure to accept the offer which, having regard to the outcome of the litigation, was one which should have been accepted.

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[142] Legal Aid (Scotland) Act 1986, section 18; RCS, r. 42.6.

[143] Legal Aid (Scotland) Act 1986, section 19.

[144] Similarly: (A) one of several defenders sued jointly and severally may tender to the pursuer and to the other defenders that they contribute in certain proportions (*Houston v. British Road Services* 1967 SLT 329); and (B) one of several defenders sued jointly and severally may offer to the other defenders that he will admit liability to the pursuer if the other defenders will contribute to that defender in certain proportions (*Williamson v. McPherson* 1951 SC 438).

10.72 ***Particular types of cases*** The general rule that "expenses follow success" was not applied in certain types of cases. For example, in an action brought to determine a question involving the construction of a testamentary writing, all parties were usually found entitled to expenses out of the estate[145]. In many matrimonial cases, no award of expenses was made against either party.

10.73 The Auditor had power, where it appeared that a party found entitled to expenses was unsuccessful or incurred expenses through his own fault in respect of a matter which would otherwise be included in those expenses, to disallow those expenses in whole or in part[146].

10.74 ***Basis of award of expenses*** There were three different bases available to the auditor for the taxation of expenses: (a) party and party; (b) agent and client, third party paying; and (c) agent and client, client paying. The normal basis for an award of expenses between parties to a litigation was "party and party". In practical terms, an award on a party and party basis was unlikely to cover the whole of the expense which the party entitled to the award of expenses would require to pay his solicitor. Exceptionally, the Court might award expenses on an agent and client, client paying basis, in order, for example, to express its disapproval of the manner in which the party found liable had conducted itself in the litigation[147].

10.75 ***Taxation*** Unless expenses were modified in a fixed amount, or the amount of expenses to be paid had been agreed between the parties, the expenses had to be taxed[148].

10.76 ***Recoverable expenses*** The basic rule, in a question between the parties to a litigation, was that only such expenses as were reasonable for conducting the cause in a proper manner were allowed to be recovered from a party found liable in expenses[149]. Expenditure which was not incurred "for conducting the cause" was not recoverable[150]. It had been said that expenditure incurred for that purpose should be disallowed only if a competent solicitor acting reasonably would not have incurred it[151].

10.77 The basis upon which the solicitor was entitled to prepare his account in the Court of Session was set out in Tables in the Rules of Court. The basis upon which the solicitor was entitled to prepare his account in the sheriff court was set out in the Table of Fees attached to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993. In the sheriff court there were two scales of expenses, namely the ordinary cause scale and the summary cause scale. In a Court of Session action, an award of expenses might be made on the sheriff court ordinary cause or summary cause scale. That might be done, for example, to reflect the Court's view that the action should have been raised in the sheriff court rather than in the Court of Session. Likewise, the sheriff might direct that expenses in an ordinary cause should be taxed on the summary cause scale.

10.78 The element of solicitors fees in party and party expenses were regulated by statutory instrument made by the Scottish Parliament. In practice the Lord President of the

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[145] I.D. Macphail, *Sheriff Court Practice*, 2nd edn, paragraph 19.13.
[146] RCS, r. 42.5; AS (Fees of Solicitors in the Sheriff Court) 1993, General Regulations, r. 9.
[147] *Independent Pension Trustee v. LAW Construction Co Ltd* 1997 GWD 31-1493.
[148] RCS, r. 42.1; OCR, r. 32.1.
[149] RCS, r. 42.10(1); 19, AS (Fees of Solicitors in the Sheriff Court) 1993, General Regulations, r. 8.
[150] *McNair's Exrs v. Wrights Insulation Co Ltd* 2003 SLT 1311, para. 9.
[151] *Malpas v. Fife Council* 1999 SLT 499, 501E per Lord Bonomy.

Court of Session put forward proposals for solicitors fees in party and party expenses on the recommendation of his Advisory Committee. There was no statutory basis on which advocates fees were regulated.[152] .

10.79 The Law Society of Scotland, the Lord President's Office and the Scottish Executive were considering the impact of withdrawing the table of recommended fees,

- because auditors of court used it as a basis for the taxation of solicitors' accounts; and

- the hourly rate for judicial fees (payable by the unsuccessful party in a court action to the other party involved) was fixed annually by the Lord President of the Court of Session with regard to the unit suggested in the Society's table of fees.

It was clear from the research into the role and functions of the auditor of court set out in part VI of this chapter that auditors regarded the loss of guidance from the Society's table of fees as a significant problem and that some kind of objective replacement was required.

10.80 In the Court of Session, the solicitor might charge an account either on the basis of Chapter I or on the basis of Chapter III of the Table of Fees but not a mixture of the two[153]. Chapter III set out inclusive fees for particular types of cases or for separate stages or procedures within a case without reference to the actual level of work done. The auditor had power to increase or reduce an inclusive fee in appropriate circumstances[154]. Chapter I of the Table of Fees set out detailed charges for particular items of work. An account might be charged on the basis of Chapter I if the inclusive fees set out in Chapter III were not conveniently applicable or did not properly cover the work involved[155]. (The current Sheriff Court and Court of Session Tables of Fees are to be found in the Parliament House Book at pages A239 – 258 of Volume 1 and pages C341-351 of Volume 2 respectively). Counsel's fees would be set out in the solicitor's account and were subject to taxation. The auditor might, for example, decide that it was unreasonable to instruct senior counsel[156], or conversely, to instruct junior counsel where the case required only the instruction of senior.

10.81 In the sheriff court, the solicitor might charge either on the basis of inclusive fees set out in Chapters I and II of the Table of Fees or on the basis of the detailed fees of Chapter III but not partly on one basis and partly on the other[157]. Where an action had been brought under summary cause procedure, only expenses under Chapter IV of the Table of Fees should be allowed unless the Court otherwise directed[158]. In the taxation of accounts where counsel was employed, counsel's fees and fees for the instruction of counsel were allowed only if the Court had sanctioned the employment of counsel, and, except on cause shown, fees to counsel and solicitor for only two consultations in the course of the cause were allowed[159].

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[152] Part VIII of Chapter 3 of the Court of Session Table provided that the Auditor should allow a solicitor advocate such fee for each item of work done in that capacity as he would allow to an advocate for an equivalent item of work.

[153] RCS, r. 42.10(3). The Table of Fees is annexed to RCS, r. 42.16.

[154] RCS, r. 42.10(5).

[155] RCS, r. 42.10(4).

[156] *Signet Group plc v. C & J Clark Retail Properties Ltd* 1995 GWD 27-1454; *McDonald v. Salmond* 1999 SC 396, 400G.

[157] Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993, General Regulations, r. 7.

[158] Ibid., r. 3; see also r. 14.

[159] Ibid., r. 12.

10.82 ***Additional fee*** A party who had been awarded expenses might, by motion, seek an additional fee[160] to reflect one or more of the following factors:

(a) the complexity of the cause, and the number, difficulty or novelty of the questions raised;

(b) the skill, time and labour and specialised knowledge required of the solicitor or the exceptional urgency of the steps taken by him;

(c) the number or importance of any documents prepared or perused;

(d) the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause had been carried out;

(e) the importance of the cause or the subject-matter of it to the client;

(f) the amount or value of money or property involved in the cause;

(g) the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.

In the Court of Session the Court might determine whether an additional fee was appropriate or might remit that question to the auditor[161]; and the amount of the additional fee was for the auditor[162].

Advocates and solicitor advocates fees

10.83 In party and party expenses in the Court of Session, auditors had unfettered discretion on the fees they allowed for work done by advocates and solicitor advocates. Where solicitor advocates were instructed by their own firms, the work done by them in that capacity would be shown separately in the account. Such work would comprise drafting Court documents and appearing in Court. Such work was reserved for advocates and solicitor advocates. Where a solicitor advocate was instructed by a different firm of solicitors, the position was indistinguishable from that of an advocate.

(c) Expenses in Tribunal proceedings

10.84 The question of whether a statutory tribunal had power to award expenses, and if so, in what circumstances, depended on the terms of the relevant statutory provisions. For example, an Employment Tribunal had power to make a costs order only in restricted circumstances and the amount of the award might not exceed a statutory maximum[163].

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[160] RCS, r. 42.14; AS (Fees of Solicitors in the Sheriff Court) 1993, General Regulations, r. 5(b).
[161] RCS, r. 42.14(2)
[162] RCS, r. 42.14(4).
[163] Employment Tribunals (Constitution etc) Regulations 2004, Sched 1, paras 38-41.

Criminal Proceedings

10.85 ***Prosecution*** Criminal prosecutions were brought by the state. In practice, almost all prosecutions in Scotland were at the instance of (a) the procurator fiscal (in the Sheriff Court); or (b) the Lord Advocate (in the High Court). In the Sheriff Court most cases were, in practice, prosecuted by the procurator fiscal or his staff. Temporary fiscals depute might be appointed from the profession. In the High Court indictments ran in the name of the Lord Advocate and were prosecuted by an advocate depute, who might be assisted by a Crown Junior.

10.86 ***Defence*** While self-funding of criminal defence work was not unknown, the representation of the great majority of accused persons and of appellants following conviction was funded by the Criminal Legal Aid Fund.

10.87 ***Awards of expenses in criminal proceedings*** In general, no award of expenses might be made in connection with solemn procedure. That rule was subject to the following exceptions:

> (a) in the event of an appeal against the grant of bail being refused, the Court might make an award of expenses against the public prosecutor[164];
>
> (b) any Court before which a prosecution was instituted on indictment for a corrupt election practice might order the accused to pay the prosecutor's reasonable expenses[165]; and
>
> (c) a private prosecutor might be found liable in expenses[166].

In stated cases and appeals against summary sentences by note of appeal, the High Court had power to award such expenses, both in the High Court and in the inferior court, as it thought fit[167].

10.88 ***Criminal Legal Aid*** Criminal legal aid was made available by the court in solemn proceedings (High Court and Sheriff and Jury) or by the Board in summary cases. The term "criminal legal aid" included a variety of forms of legal assistance including automatic criminal legal aid, the Duty Solicitor Scheme and appeals. The statutory provisions set out in Part 4 apply as regards the remuneration of solicitors and, where appropriate, counsel providing legal aid.

Competition issues

10.89 Since 1992 the fees that solicitors charged their own clients for litigation work had not been covered by Rules of Court. There were no restrictions on the fees that solicitors could charge their own clients for litigation, except for the general requirement in Article 6 of the Solicitors' Code of Conduct that all fees had to be fair and reasonable in the circumstances.

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[164] Criminal Procedure (Scotland) Act 1995, s. 32(6).
[165] Representation of the People Act 1983, s. 172(4).
[166] Renton & Brown, *Criminal Procedure,* 6th edn., para 23-163.
[167] Criminal Procedure (Scotland) Act 1995, s. 183(9); see Renton & Brown, paras. 23-164, 165.

10.90 The only fees that were governed by Rules of Court were fees that could be recovered from the other party following an award of expenses (judicial fees). Those fees were regulated by the Court in the public interest to ensure that there was proper control over what the unsuccessful party required to pay in expenses to the successful party.

10.91 Solicitors fees in party and party expenses were set by the Lord President of the Court of Session on the advice of his Advisory Committee on Court Fees, which was chaired by a Judge and included the Auditor of the Court of Session, solicitors representing firms who acted for pursuers, solicitors representing firms who acted for defenders such as insurance companies, and a member of the Faculty of Advocates. These fees were contained in Tables made by Act of Sederunt[168]. The Office of Fair Trading and the Scottish Consumer Council were concerned that the Lord President's Advisory Committee did not include any consumer representation.

10.92 The Law Society of Scotland considered that tables of fees for party and party expenses did not distort competition, though the Office of Fair Trading took the view that the setting of solicitors' fees by Courts or public authorities could have a negative impact on price competition if it served as a focal point for fee levels in other contexts. The extent to which this might be a problem would depend on the way in which the Court set fees. The Scottish Legal Aid Board saw the setting of fees by the Court as a useful means of regulating the costs which would be payable by an unsuccessful opponent. In the absence of any set fees, that opponent would have no benchmark against which he could assess the likely costs he might have to pay, at least insofar as they related to solicitors' fees. Likewise, the successful party would have no basis for knowing the likely shortfall between his own solicitor's bill, and the sums payable by the opponent, and thus the amount he would have to find from other sources. The Scottish Consumer Council agreed with the Board's view on this issue.

10.93 The Faculty pointed out that it was necessary to distinguish between agent and client fees on the one hand (the fees which a client would pay his own solicitor) and party and party fees on the other (the legal expenses which a losing party might have to pay a winning party in a litigation). The Faculty believed that fairness dictated that a party to a litigation which was found liable for the expenses of another party should not be at the mercy of the level of fees which the latter's solicitor might charge. Moreover, if the current approach to taxation of party and party expenses was to be abandoned, such a step could make it much more difficult for litigations to be settled, since the implications in expenses of a settlement could be much more difficult to predict. That could have an impact on the administration of justice.

10.94 The OFT recognised that where a losing party might have to pay the fees of the solicitor of the winning party (i.e. in party and party costs), it was in the public interest that fees be subject to taxation by the courts. In the OFT's view, therefore, the issue was not whether there should be a taxation process, but what information should inform the taxation process in order to ensure that any damage to competition resulting from the process was kept to a minimum. In particular, the OFT was concerned that where a professional body was engaged in providing fee information to the courts for that purpose, the manner in which the

[168] Table of Fees of Solicitors in the Court of Session : Act of Sederunt (Rules of the Court of Session) 1994 (SI 1994 No 1443). Table of Fees of Solicitors in the Sheriff Court : Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993 (SI 1993 No 3080).

information was collected and presented might give rise to competition concerns. In order to minimise this risk and to achieve compliance with competition law, it would be important to ensure that any information on price provided by a professional body was historical only, collated and aggregated by a third party and framed to show that it was not intended as a recommendation but as a description of historical prices**.**

10.95 Additionally, where fees were set by public authorities, such as for example judicial fees for taxation purposes, it would be important in the OFT's view to ensure that a consultation process operated to ensure that the wider public interest and not just the interests of suppliers, was fully represented. With regard to the information on which the process relied, the OFT welcomed the fact that following withdrawal of the Law Society's table of recommended fees with effect from 1 August 2005, reliance would in future be placed on the Law Society's Cost of Time survey. The OFT remained concerned, however, that if the current consultation mechanism was retained (see paragraph 10.91), it did not appear likely to ensure that the wider public interest was represented. It would be important to ensure that any such arrangements met requirements set out in EC law. In the Arduino[169] case, for example, the European Court of Justice considered the compatibility with EC competition rules of the participation by a legal professional body in a process where lawyers' fees were set by public authorities.

10.96 The Law Society of Scotland regarded the process of taxation of judicial accounts potentially as a safeguard in the public interest. The only possible impact on price competition was to encourage volume referrers of personal injury work such as trade unions to seek referral arrangements where the solicitors would not charge the referrer or the individual client fees over and above those that could be recovered from the other side in the event of success. Such arrangements had been developed in the last few years, particularly by the trade unions.

10.97 The value of auditors of court in protecting the public was touched on in the research into the operation of taxation in Scotland, reported in part VI of this chapter. The research findings suggested that the training of auditors, the guidance available to them and the consistency of their decisions, including those in relation to who should pay for the cost of a taxation, were areas for potential concern.

10.98 The fees payable to the Court itself were set in statutory instruments made by the Scottish Executive[170]. They had increased very significantly in recent years to reflect a policy of recovering the cost of running the civil side of the Courts from the litigants.

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[169] Case C-35/99 ECJ Judgment of 19 February 2002

[170] Solicitors' outlays : Table of Fees payable in the Court of Session : Court of Session etc Fees Order 1997 (SI 1997 No 688). Solicitors' outlays : Table of Fees payable in the Sheriff Court : Sheriff Court Fees Order 1997 (SI 1997 No 687).

PART V: FUNDING OF LEGAL AID CASES

(a) Introduction

10.99 The Scottish Legal Aid Board ("the Board") was established under the Legal Aid (Scotland) Act 1986 and had a statutory duty to establish and maintain the Scottish Legal Aid Fund.

10.100 The Act expressly provided what should be paid out of the Fund and what should be paid into the Fund. Payments out of the Fund[171] included the fees and outlays of solicitors and counsel properly incurred in accordance with the Act and Regulations, and expenses awarded by the Court to an unassisted person.

10.101 Payments into the Fund[172] included contributions from assisted persons, expenses and property recovered or preserved for any party to any proceedings who was in receipt of civil legal aid. Contributions and expenses had to be paid into the Fund, property recovered and preserved only to the extent of the net liability of the assisted person.

10.102 There were four main types of legal aid :

- (i) Advice and Assistance;
- (ii) Civil legal aid;
- (iii) Criminal legal aid; and
- (iv) Children's legal aid.

Each category had a different feeing structure. The Board was seeking to move towards a system of civil legal assistance, criminal legal assistance and children's legal assistance, recognising the need for a unified, integrated applications and feeing structure within what was often the same process.

10.103 Legal aid and advice and assistance were only available through solicitors, and where appropriate counsel, although proposals for a wider system of publicly funded assistance including the "not for profit" sector were presently being consulted on as part of the strategic review of legal aid.

(b) Definitions

10.104 Advice and assistance was defined[173] as "oral or written advice provided to a person by a solicitor on the application of Scots law to any particular circumstances which had arisen in relation to the person seeking the advice" including advice as to any steps which that person might appropriately take having regard to the application of Scots law to those circumstances and assistance provided to the person in taking such steps.

10.105 Assistance By Way of Representation ("ABWOR") was a form of advice and assistance provided to a person by "taking on his behalf any step in instituting, conducting or defending any proceedings"[174] This allowed a solicitor to represent (and not just advise and

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[171] section 4(2) of the Act.
[172] section 4(3) of the Act.
[173] section 6(1)(a)
[174] section 6(1)(b)

assist) a client in certain specified proceedings set out in the ABWOR Regulations, for example an Employment Tribunal.

10.106 Civil legal aid was defined[175] as "representation by a solicitor and, where appropriate, by counsel in civil proceedings and includes all such assistance as is usually given by a solicitor or counsel in steps preliminary to or incidental to proceedings, or in arriving at or giving effect to a settlement to prevent them or bring them to an end".

10.107 Similarly, criminal legal aid was defined[176] as "representation by a solicitor and, where appropriate, by counsel in criminal proceedings and includes all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings".

10.108 Children's legal aid was defined[177] as "representation by a solicitor and, where appropriate, by counsel in proceedings under Chapter 2 or 3 of Part II of the Children (Scotland) Act 1995 and includes all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to such proceedings".

(c) Standard (or Scale) of Taxation – Solicitor and client, third party paying

10.109 The Board had a statutory obligation to pay solicitors and counsel who had provided advice and assistance or legal aid fees and outlays properly incurred or the fixed payments prescribed in the regulations[178]. A solicitor or counsel providing legal aid could not take any payment in connection with advice given or anything done in the proceedings except for such payment as might be made in accordance with the Act[179].

10.110 The Board was not a party to proceedings. Nothing done by the Board for the purpose of securing that legal aid or advice and assistance was available to any person in connection with any proceedings rendered it liable to be held *dominus litis* (the master of the litigation) in relation to the proceedings[180]. The Board funded the provision of legal services, as a third party, and the scale of taxation that determined the basis on which accounts should be assessed was that of "solicitor (or agent) and client, third party paying".

10.111 While specific reference was made in the civil regulations to the test of solicitor and client, third party paying, the tests for advice and assistance and criminal legal aid were stated in different but equivalent terms[181].

10.112 Maclaren[182] stated that "in taxing the account of an agent against the third party on the basis of agent and client the fact that the agent had done the work for his own client and may be a good charge against the latter does not conclude the matter in a question with a third

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175 section 13(2)
176 section 21(4)
177 section 29(11)
178 section 4(2)(a)
179 section 32
180 paragraph 15, schedule 1 to the Act
181 in advice and assistance a solicitor is only paid for "work actually, necessarily and reasonably done" and in criminal legal aid "for work actually and reasonably done… due regard being had to economy"
182 Maclaren on Expenses, page 511

party, as many items may be modified or taxed off, though not to so great an extent as in a taxation between party and party". The test had been described as that "when a statute authorises the taxation of expenses as between agent and client, what is given is the expenses which would be incurred by a prudent man of business without special instruction from his client would incur in the knowledge that his account would be taxed"[183]. The assessment of advice and assistance and legal aid accounts had to be seen within that context. Work done for a client, even on the client's instructions, was not necessarily chargeable to the Fund.

10.113 In a recent significant Court of Session Judgement[184] Lord Eassie, having reviewed the case law on the issue, stated that "…general observations about the generosity of one basis of taxation as opposed to another have a capacity to mislead. There are different ways in which comparative generosity may arise. Items of work or expenditure may be eligible under the one, but not under the other, scale of taxation. But that does not mean that as respects the recoverable amount of items eligible under both scales a more generous remuneration must be allowed in the amount recoverable for those common items in the one account as opposed to the other." He stated (and this was in the context of counsel's fees) that "the amount of the fee to counsel recoverable under a party and party award ought not to diverge markedly from that recoverable on an agent and client, third party paying basis".

10.114 Lord Eassie further observed that "…so far as fees to counsel are concerned, it appears to me that, given the propriety and reasonableness of the particular instruction to counsel in question, the amount found on taxation on a party and party basis to be recoverable should equiparate with what someone who is not in control of the amount of the fee payable would consider to be reasonable remuneration to counsel for the work encompassed by the instruction".

10.115 These remarks recognised that the Board, like a party against whom an award of expenses was made, had had no opportunity to bargain with the lawyer and was not protected by the ordinary working of the market (see paragraph 10.6 above).

(d) The Payment Structures

10.116 Legal aid payment structures and the levels of fees were all set out in subordinate legislation and consisted of a complex mix of remuneration structures.

10.117 ***Payment of Solicitors*** There were three principal methods of payment employed across the various aid types:

(i) Detailed Fees

10.118 Detailed ("time and line") fees remunerated the solicitor for time spent on work (the actual time spent in court or in a meeting with the client) as well as for individual items of work (letters or telephone calls). There were 'sheetage' charges for drafting documents. The legal aid regulations provided Tables of Fees for time spent on specified items of work at set rates, usually distinguishing between advocacy and non-advocacy rates.

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[183] *Hood –v- Gordon,* per Lord McLaren at page 676

[184] *Nicholas Dingley –v- Chief Constable of Strathclyde Police 2003* SCLR Notes 160

10.119 Although flexible, it was a system which created complicated and lengthy accounting, both for the solicitor in preparing the account and the Board in assessing it, and it could be difficult to identify whether all work was necessary and reasonable. It could also allow the slow and inefficient worker to be remunerated at the expense of the efficient solicitor, and might not actively encourage the efficient conduct of the case.

10.120 This type of charging was found, in the main, in:

- advice and assistance cases (including ABWOR cases);
- all types of civil proceedings in the Court of Session, House of Lords and Judicial Committee of the Privy Council; and
- civil cases in the Sheriff Court, listed in the Civil (Fees) Regulations[185] as chargeable under Schedule 5, including adoption proceedings in the Sheriff Court, fatal accident inquiries, proceedings in the Sheriff Court where the assisted person was a *curator ad litem*[186] or a third party minuter in a family action; and summary applications.
- Childrens Proceedings under Part II of the (Children) (Scotland) Act 1995 in the Sheriff Court and the Court of Session;
- solemn criminal proceedings;
- summary criminal proceedings which were "excluded proceedings" set out in the Fixed Payment Regulations eg. a solemn case reduced to summary, or the Board had considered the case to have "exceptional status" ; or
- criminal appeal proceedings, including proceedings before the Judicial Committee of the Privy Council.

(ii) Block Fees

10.121 Block fees were a type of inclusive fee relating to stages of or procedures within a case. Such fees remunerated the solicitor for defined stages of proceedings by reference to completed work. They could encourage efficient conduct by only paying for completed stages, reflecting what needed to be done in a case. There was no encouragement to have unnecessary meetings or correspondence, as the payment was capped for all work within the stage. They could be inflexible and had to be geared towards cases of similar profile or include provision for variations. The initial block Table of Fees introduced with civil reform in October 2003 was currently being reviewed to address certain flaws identified by the Board and practitioners.

10.122 Block fees had been adopted for most Sheriff Court civil cases as a result of the recent civil reforms. Most civil cases in the Sheriff Court (other than adoption, fatal accident

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[185] Civil Legal Aid (Scotland)(Fees) Regulations 1989, as amended by the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2003 [S.S.I. 2003 No 178], repealed and re-enacted to include children's legal aid in SSI 2004 No 281.

[186] A curator appointed by the court to act for a person under legal disability (eg who has no guardian or by reason of youth or mental disorder) whose interests have to be safeguarded in legal proceedings.

inquiries and where the assisted person was the *curator ad litem* or third party minuter, and others listed in Schedule 7) would now be charged on a block fee basis in terms of Schedule 6 of the Civil (Fees) Regulations.

10.123 Travel and court work in these cases were paid on a detailed basis, the blocks dealing more with the progress and preparation of the case.

10.124 There was also an initial block fee in place for criminal ABWOR cases where the accused was pleading guilty or making a preliminary plea. The block fee in that respect currently stood at £70[187] and covered all work prior to and including the first court appearance where the plea was tendered.

(iii) Fixed Payments

10.125 Fixed payments were similar to an inclusive fee payable for a case (see paragraph 10.80). They were used in most summary criminal cases[188] and were based on a "core" payment for the case, with additional "add on" block payments where necessary, eg. trials per day, deferred sentences.

10.126 The core payment in a Sheriff Court summary case currently stood at £500 (supplemented by £50 in rural courts) and £300 in the District Court.

10.127 A single core fixed payment allowed more certainty as to the case cost, but could be criticised for lack of flexibility by remunerating the whole case as opposed to paying on a stage by stage basis. An issue to be discussed in implementing the McInnes proposals was whether those fees should be split up and adjusted to recognise and promote early pleas and pleas after investigation as well as those which might proceed to trial. The current arrangement anticipated all cases going to trial.

10.128 ***Payment of Counsel*** The methods for remunerating counsel were equally varied. The cost of counsel was an outlay in advice and assistance (including ABWOR) but not in legal aid, although for historic reasons counsels' fees were lodged by the solicitor in civil cases but direct by Faculty Services Limited in criminal cases. Solicitor advocates were defined as "counsel" when and only when exercising their right of audience in the Supreme Courts. They were treated as "junior" or "senior" counsel, for the purposes of payment, depending on the level of counsel available, either automatically or sanctioned by the Board, in the proceedings. Again there were three principal methods of payment:

(iv) Commercial Rates

10.129 As no Table of Fees had been prescribed as yet by regulations, commercial rates were allowable in advice and assistance and ABWOR accounts, essentially by default. That method of charging could expose the Fund to the full cost of commercial charging and thus gave little cost control provided the fee was incurred within the maximum level of authorised expenditure available to the solicitor. On the other hand, as counsel's fee was an outlay in advice and assistance and ABWOR, the outlay had to be reasonable and the only effective comparison was the level of criminal fees paid, apart from a tiny minority, from public funds.

[187] Schedule 3, Part I, Advice and Assistance (Scotland) Regulations 1996
[188] Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, as amended.

(v) Prescribed Fees

10.130 Prescribed fees, considered by Parliament to be appropriate for a day in court and individual pieces of work undertaken by counsel, followed two models at present.

10.131 Currently those prescribed fees set down in Schedule 4 of the Civil (Fees) Regulations for counsel in Court of Session cases were set at a fairly low level, subject to enhancement by the auditor. The auditor also had power to create fees for work which had not been prescribed. The aim of prescribed fees was to provide a level of cost certainty within broad limits. However in recent years the contrary had proved to be the case. Discussions were presently taking place with the Faculty of Advocates and the Executive with a view to prescribing a new Table of Fees in civil proceedings in the Court of Session and the Sheriff Court moving away from the concept of a fairly low prescribed fee capable of being enhanced to a prescribed fee set at higher levels, including a level of preparation likely to be incurred in most cases, but providing a clear structure for dealing with unusual or exceptional levels of preparatory work.

10.132 Criminal (Fees) Regulations[189] had been introduced setting down new fees for the remuneration of counsel (including solicitor advocates) providing criminal legal aid. The Regulations substituted a new Schedule 2, which Schedule provided an example, at least in cases of first instance, of moving away from the concept of the prescribed fee subject to enhancement in the individual circumstances of the case. There was also now a clear basis on which preparation would be payable referable to objectively verifiable criteria, ie the number of sheets contained in the case documentation. Where the case proceeded to trial most of the preparatory work would be subsumed within the trial fee except in cases involving an exceptional level of preparation, where the additional level of preparation would always be payable. There was a minimum level of preparation which was not separately payable and was always subsumed within the instructions. Those Tables were being reviewed and a new Table of Fees for criminal appeals was being devised with the Faculty of Advocates. The principle upon which such Regulations operated was that counsel was entitled to receive reasonable remuneration and was thereby subject to the cab-rank rule.

(vi) "90%" Fees

10.133 Counsel's fees for any work done in certain courts and tribunals was prescribed to be 90% of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid. That was the method for charging for the provision of civil legal aid in the Sheriff Court, House of Lords, the Judicial Committee of the Privy Council, Employment Appeal Tribunal, Social Security Commissioners, Lands Tribunal, Lands Court and Lands Valuation Appeal Court and for children's legal aid. Regulations did not define that further and thus created great uncertainty over levels of payment. Matters often ended up before the Auditor of Court who would decide on the level of fee to be awarded.

(e) Levels of Payment in civil legal assistance

10.134 Advice and Assistance and legal aid fees are set by the Scottish Executive by way of a Scottish statutory instrument. Party and party fees, dealt with in Part IV of this chapter,

[189] Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005

are not prescribed by Parliament. The Lord President of the Court of Session had, among his many roles, the function of making Acts of Sederunt, subordinate legislation which regulated the Tables of Fees for solicitors in the Court of Session and the Sheriff Courts so far as they related to civil business. In exercising that function, he obtained guidance from the Lord President's Advisory Committee (LPAC). The Committee made recommendations to deal with changes in the fee structure appropriate where there had been changes in procedure and recommended increases from time to time having regard to the effect of inflation and other factors. There was no nexus between the party and party fees prescribed by the Act of Sederunt and the fees prescribed by Parliament for legal aid. Historically legal aid fees were set at between 85% and 90% of judicial fees reflecting the "statutory discount" recognising the greater certainty of payment and also speed of payment attached to undertaking publicly funded work.

10.135 The difference between judicial fees and legal aid fees was now greater than the 10% to 15% in previous years. Solicitors' perception would be that the legal aid fees were too low. However, given the absence of any connection between the way in which the respective fees were set, it was not possible to identify the "reasonable fee" to be adjusted by reference to the statutory discount for legal aid purposes.

10.136 The level of judicial fees did not generally affect the Fund except at the margins, such as for example a successful claim by an unassisted party for payment from the Fund on a party and party scale of taxation. However, the perception of the profession as to the general level of legal aid fees was an issue for the Board and was affected by the general level of judicial fees. A Table showing a comparison between the various levels of fees is at annex 1 to this Part (see below).

10.137 A Table headed "Remuneration Systems in Legal Aid" is also found at annex 2 to this Part and provides a summary of the various types of legal aid payments described above[190] and the current level of fees. The Board was gradually seeking to rationalise the tests set out in each of the Fees Regulations, the feeing regimes themselves and to introduce clearer taxation rules to the various Tables of Fees to avoid unnecessary disputes and achieve where appropriate a level of consistency of approach across aid types.

(f) Payment Arrangements

10.138 The Board was committed to payment of a properly prepared account setting out fees and outlays within 30 working days of submission. To assist solicitors' cash flow, arrangements for payments to account of outlays had been extended and improved in recent years, although there were some difficulties in applying these arrangements to advice and assistance in all cases.

[190] This table is largely based on the table produced in the Strategic Review Document produced by the Scottish Executive in 2004 on the delivery of legal aid, advice and information. Counsel's fees in solemn cases have been amended here to reflect the current position.

(g) Referral to Auditor

10.139 Legal aid fees did not require to be taxed before the auditor as a matter of course. The Board's Accounts Area would assess and adjust accounts and, in the vast majority of cases, settle with solicitors and counsel.

10.140 The subordinate fees regulations for most legal aid types provided that any "question or dispute" between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund, should be referred for taxation by the Auditor[191]. That was not a joint referral but, rather, a referral by the solicitor or counsel to the Auditor.

10.141 For Court of Session, House of Lords and High Court of Justiciary proceedings the matter would be referred to the Auditor of the Court of Session.

10.142 For Sheriff and District Court proceedings (both civil and criminal) and advice and assistance accounts (including ABWOR) the disputed fees would be referred to the Auditor of that Sheriff Court, who might be the Sheriff Clerk or an Auditor separately appointed.

(h) Role of the auditor of court

10.143 The role of the auditor in legal aid cases is discussed in paragraph 10.204 of Part VI below.

(i) Option to be paid judicial expenses

10.144 Legal aid regulations allow a solicitor to opt to be paid judicial expenses rather than legal aid rates in any case where fees and outlays are recovered by virtue of an award of expenses in favour of a person who has received legal aid or where there has been an agreement as to expenses in favour of such a person. Where the solicitor so opted counsel would also be paid Judicial Expenses, after consultation with counsel.

10.145 If the account was taxed, it was to be taxed on a judicial basis as if the work done for that person were not legal aid.

10.146 The Board might pay out to the solicitor the judicial fees and outlays recovered provided that it received a request for such payment from the solicitor who, at the conclusion of the proceedings, was acting for the person in receipt of legal aid, and the solicitor had consulted with any counsel who was acting for that person at the conclusion of the proceedings.

10.147 The Board was currently developing, along with the Law Society of Scotland, a proposal by the Faculty of Advocates that similar arrangements be introduced for payment of counsel's fees at counsel's discretion.

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[191] Regulation 19 Advice and Assistance (Scotland) Regulations 1996, Regulation 12 Civil Legal Aid (Scotland) (Fees) Regulations 1989 and Regulation 11 Criminal Legal Aid (Scotland) (Fees) Regulations 1989

(j) Additional Fee/Increase in Fees

10.148 Where a party was in receipt of civil legal aid or children's legal aid (under the old system), there was provision in the Regulations for a solicitor to apply for an increase to the legal aid fees. The circumstances in which an increase in fees could be awarded and the nature of the increase would depend on when the legal aid certificate was granted, as a result of the new civil legal aid feeing regime introduced in October 2003[192].

10.149 ***For certificates pre dating 1 October 2003*** Regulation 5(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 provided that in all Court of Session proceedings (both civil and children's legal aid) an additional fee might be allowed at the discretion of the court to cover the responsibility undertaken by a solicitor in the conduct of the proceedings. There was no maximum additional fee and awards could be in excess of 100%. The Court authorised the additional fee and the Auditor of the Court of Session, on being addressed by parties, set the level of the fee.

10.150 Provision was also made for the allowance of a percentage increase in fees in Sheriff Court proceedings (both civil and children's legal aid) "of importance or requiring special preparation". The maximum percentage increase that could be granted by the Sheriff in ordinary actions was 50% and in summary cause actions 100%. The level of fee was decided by the Sheriff.

10.151 The regulation specified a number of factors to be taken into account by the Court of Session in deciding whether to allow an additional fee and the Auditor of Court in determining that fee, and also by the Sheriff in fixing the amount of percentage increase. Those factors were:-

(a) the complexity of the proceedings and the number, difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;

(c) the number and importance of the documents prepared or perused;

(d) the place and circumstances of the proceedings or in which the solicitor's work of preparation for and conduct of it has been carried out;

(e) the importance of the proceedings or the subject matter thereof to the client;

(f) the amount or value of money or property involved;

(g) the steps taken with a view to settling the proceedings, limiting the matters in dispute or limiting the scope of any hearing; and

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[192] The Civil Legal Aid (Scotland) (Fees) Amendment Regulations [S.S.I. 2003 No.178] repealed and re-enacted to include children's legal aid in S.S.I. 2004 No.281.

(h) any other fees and allowances payable to the solicitor in respect of other items in the same proceedings and otherwise charged for in the account.

10.152 The court procedure to be followed where an additional fee or increase in fee was sought was set out in Rule 7 of the Act of Sederunt (Civil Legal Aid Rules) 1987 (as amended).

10.153 ***Certificates dated on or after 1 October 2003*** Regulation 5(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 has been amended by the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2003.

10.154 An additional fee could still be sought in all Court of Session proceedings (both civil legal aid and children's legal aid) but the maximum additional fee that could now be awarded was now set at 50%. A percentage increase in fees in the Sheriff Court could now only be sought for summary cause proceedings, the maximum percentage increase in this respect remaining at 100%. The factors to be taken into account remained the same as those laid out in the unamended Civil Legal Aid (Scotland) (Fees) Regulations 1989.

10.155 There was no longer any provision for an increase in fees in Sheriff Court proceedings chargeable under the detailed fees set out in Schedule 5 to the 1989 Regulations as amended for:

- children's legal aid cases;
- adoption cases;
- fatal accident inquiries;
- summary applications;
- where party is a third party minuter;
- where party is acting as a *curator ad litem*;
- minute procedure in a closed process;
- work done under special urgency provisions which did not proceed to a grant of civil legal aid;
- drafting an account of expenses (taxation);
- conveyancing work to implement an Order of Court.

Certain other procedures had been identified and would be added to that list in the current civil review.

10.156 For all other defended civil court cases, payable under Schedule 6 to the 1989 Regulations as amended, new rules had been introduced for considering payment of an additional fee (previously known as a percentage uplift). Both the factors to be applied and the procedures had changed.

10.157 The eight factors stipulated in regulation 5(4) no longer applied and had been replaced by six clearly identifiable and objectively verifiable criteria which the Board (not the Court) would now consider before allowing any additional fee. The factors were set out in Schedule 6, Chapter III of the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2003 and were as follows:-

1. that the client's inadequate knowledge of English required the obtaining of instructions through an interpreter;

2. that the assisted person although able to attend at the solicitor's office suffered for a significant period of the case from a mental disorder within the meaning of Section 1 of the Mental Health (Scotland) Act 1984;

3. that the assisted person suffered from a physical disability which necessitated a significantly lengthier process than would normally have been encountered in the taking and obtaining of instructions;

4. that the assisted person was, for a significant period in relation to the overall duration of the case, unable to attend at the solicitor's office by reason of disability, illness or imprisonment;

5. that the nature or circumstances of the case necessitated significant attendance to its progress outwith normal office hours.

6. that the law in relation to the matter at issue was particularly complex and involved an area of law with which a solicitor engaged in general court practice would be unlikely to be familiar.

10.158 It was important that the solicitor could demonstrate in the application to the Board for an additional fee that any or all of the circumstances listed above had had a *significant effect on the conduct of the case* which justified a payment over and above the prescribed fee. The Board had sole discretion when considering whether or not to allow any uplift.

10.159 The additional fee allowable should be 10% of the fee authorised under Schedule 6, Chapter II in respect of each factor which existed, up to a maximum in any case of 40% of that fee. Only one of factors (2), (3) and (4) above might be claimed in any one case. Those factors might be revisited in the current review of the block fees set out in Schedule 6.

(k) Modification of Expenses

10.160 Where a party was in receipt of civil legal aid for the court proceedings and was found liable in expenses, section 18(2) of the Legal Aid (Scotland) Act 1986 enabled the party to apply to the Court to restrict his liability to pay the expenses to such amount as the

Court considered reasonable in all the circumstances of the case and having regard to the means of the parties and their conduct in connection with the dispute. In many cases, the court would assess the assisted person's liability as "nil". That procedure was generally referred to as "modification" and was one of the prime benefits of being an assisted person.

10.161 The court procedure to be followed where modification was sought was set out in Rule 4 of the Act of Sederunt (Civil Legal Aid Rules) 1987 (as amended).

(l) Expenses of an Unassisted Party out of the Legal Aid Fund

10.162 Section 19 of the 1986 Act made provision for the circumstances in which an unassisted party in civil proceedings might obtain a court order for payment of his expenses out of the Legal Aid Fund. Such an order would normally only be sought where the court had modified an assisted person's liability in terms of section 18(2) although an order might be sought in the absence of modification where the decree for expenses could not be enforced for some reason, perhaps because the assisted person had been sequestrated.

10.163 The main features of those statutory provisions were:

(a) an order for payment of expenses out of the Fund was competent only where the proceedings were finally decided in favour of the unassisted party;

(b) the whole or part only of the unassisted party's expenses might be awarded out of the Fund;

(c) the order might only relate to expenses attributable to any part of the proceedings for which the assisted person was in receipt of legal aid;

(d) the court had to consider making an award of expenses against the legally assisted person before awarding expenses out of the Fund;

(e) the proceedings had to be such that an order for expenses might be made;

(f) in the case of proceedings at first instance, an order might be made only if the proceedings were instituted by the assisted person and the court was satisfied that the unassisted party would suffer severe financial hardship if the award was not made;

(g) in all cases, the court had to be satisfied that it was just and equitable in all the circumstances that the award should be made out of public funds.

10.164 The court procedure to be followed for such an award from the Fund was set out in Rules 6 and 8 of the Act of Sederunt (Civil Legal Aid Rules)1987 (as amended).

10.165 ***Expenses to be assessed on party and party basis at non-legal aid rates*** If an order was made in accordance with the provisions of section 19 of the 1986 Act and Rule 6 for payment to an unassisted party of his expenses out of the Fund, those expenses were in

terms of section 20(6) to be assessed on the "party and party" (judicial) basis and included the expenses of applying for the order for payment out of the Fund. The expenses would therefore be calculated in accordance with the ordinary Judicial Table of Fees, not the legal aid tables.

(m) Civil Legal Aid – "Clawback"

10.166 It was important to note that although civil legal aid had been made available, that would not necessarily mean that all the costs of the case would be paid from the Fund. The Board could look to any property recovered or preserved by the assisted person. That was referred to as "clawback". The provisions relating to clawback were to be found in Section 4(3)(c) and 17(2B) of the 1986 Act.

10.167 Section 4(3)(c) required the Board to pay into the Fund "any sum which is to be paid in accordance with section 17 of this Act out of property recovered or preserved for any party to any proceedings who is in receipt of legal aid".

10.168 Section 17(2B) provided "Except in so far as regulations made under this section otherwise provide, where, in any proceedings, there is a net liability of the Fund on the account of any party, the amount of that liability shall be paid to the Board by that party, in priority to any other debts, out of any property (wherever situate) which is recovered or preserved for him –

(a) in the proceedings; or

(b) under any settlement to avoid them or to bring them to an end".

In addition, regulation 33 of the Civil Legal Aid (Scotland) Regulations 2002 provided for a list of exemptions from clawback. Regulation 40 provided the Board with enforcement powers.

10.169 ***Net Liability*** Section 17(2B) did not provide a definition of "net liability". To understand that phrase, it was important however to understand how the Fund worked. Section 4 of the 1986 Act explained what had to be paid into the Fund and what was paid *out of* the Fund. Section 4(2)(a) required the Board to pay the fees and outlays of solicitors and counsel properly incurred in the provision of civil legal aid in accordance with the Act and regulations made thereunder.

10.170 To offset those payments section 4(3) required certain payments to be made *into* the Fund, which included

(i) any contribution required from the assisted person, (ie a fixed sum of money determined by the Board, after consideration of the party's financial circumstances, to be paid towards the cost of the case);

(ii) any expenses recovered from the opponent;

(iii) any property recovered or preserved (to the extent of the net liability).

10.171 The "net liability" was therefore the loss to the Fund which arose when the fees and outlays paid to the solicitor and counsel exceeded any payment into the Fund by way of contribution and expenses. Once that loss had been created, section 17(2B)of the 1986 Act explained that the loss should be paid to the Board by the assisted person from any property recovered or preserved. Thus, the higher the solicitor's account and fees claimed by counsel, the higher the likely net liability.

10.172 What was not generally realised was that an assisted person, like any litigant, had to make up any shortfall in legal expenses, not covered by expenses, from their "winnings".

10.173 Where a solicitor sought an increase in fees, any increase awarded would effectively be funded from property recovered or preserved by the client, unless sufficient expenses were recovered from the opponent to offset the solicitor's additional fee. The net liability would be minimised by maximising the judicial expenses actually paid by the opponent. The higher the expenses recovered from the opponent, the lower the net liability was likely to be.

10.174 The way in which net liability was calculated could be illustrated by a simple example :

	Fees and outlays charged and paid to solicitor	£ 2,000
Less:	Contribution paid by assisted party	500
	Expenses recovered from the opponent	1,000
		1,500
	Net liability	£500

The net liability of £500 was payable from any property recovered or preserved, and in that respect the assisted person was in the same position as a privately paying litigant. That was the final accounting created by sections 4 and 17 of the 1986 Act.

10.175 The "recovery" of property involved the acquiring of property, including the benefits accruing from property. "Preservation" meant that someone had kept property which had been put at issue in the proceedings. The Board had to look objectively at what was acquired or retained by the assisted person in the proceedings, or under a settlement to avoid them, or bring them to an end. Obtaining a sum of money under a decree for payment was an example of property recovered. Successfully opposing an order for transfer of property upon divorce was an example of a case in which property might be preserved.

(n) Advice and Assistance - Source of payment of fees and outlays including "clawback"

10.176 It was important to emphasise that in advice and assistance the Fund was a source of payment of last resort. In advice and assistance (including ABWOR) accounts[193], the solicitor had to consider the hierarchy of payment of his fees and outlays :

(i) firstly, look to his client's contribution for payment of his account. If that was enough to cover the account, the solicitor could not seek payment from the Fund;

(ii) secondly, look to any expenses recovered on behalf of the client;

(iii) thirdly, look to any property recovered or preserved on behalf of the client ("clawback").

Only if there was any shortfall from the sources listed above should an account be rendered to the Board.

10.177 Even where an account was not rendered to the Board, the client had been in receipt of advice and assistance in accordance with the Act and the solicitor's account had to be charged at Advice and Assistance rates in line with the Fees Table (ie. on a detailed basis) – see Part V, paragraph 10.118). The Table of Fees was laid down in Schedule 3 to the Advice and Assistance (Scotland) Regulations 1996. The client could not be charged on a private fee paying client basis. A client might require the solicitor's account to be taxed by the Auditor of the Sheriff Court if he was dissatisfied with the solicitor's account. The Law Society was interested in developing that "safety net" arrangement and introducing a system whereby the solicitor, in certain circumstances, could opt to charge the client at a higher rate.

10.178 If the total fees and outlays amounted to less than the client's contribution, the balance had to be refunded to the client by his solicitor. Where expenses were payable to the client or property had been recovered or preserved for him, the solicitor's claim for his fees and outlays from these sources was in priority to all other debts.

10.179 Unlike civil legal aid, expenses recovered or property recovered or preserved did not require to be paid into the Legal Aid Fund. The solicitor simply deducted his fees and outlays and made over the balance to the client with an appropriate accounting. For that reason there were difficulties in making payments to account of outlays incurred by solicitor except in cases where there was no potential for recovery of expenses or property.

10.180 Property recovered or preserved was subject to the exceptions contained within Regulation 16(2) of the Advice and Assistance (Scotland) Regulations 1996. Aliment, periodical allowance and state benefits, for example, were not taken into account and a claim could be made against the Fund.

10.181 In advice and assistance cases, and again unlike civil legal aid, the Board had a discretion to waive the clawback provision. Regulation 16(2) of the 1996 Regulations

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[193] In terms of section 12 of the 1986 Act.

provided for exemptions where payment out of the property would cause "grave hardship or distress" to the client.

10.182 The Board's discretionary power also applied where it was clear that payment of the solicitor's fees and outlays out of the property could only be effected with unreasonable difficulty or after unreasonable delay, and the Board was also satisfied that the solicitor had taken all reasonable steps to obtain payment out of the property. "Clawback" could now be made from future recovery by the client or future expenses recovered on the client's behalf.

(o) Criminal Legal Aid

10.183 There were no clawback provisions in criminal legal aid due to the nature of the proceedings. No property would be recovered or preserved. If a party had a criminal legal aid certificate, he would not require to contribute in any way to the expenses of the action.

10.184 Payment of counsel's fees in all criminal cases was governed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (as amended).

10.185 Payment to solicitors for solemn and appeal cases was made on a detailed basis in accordance with Schedule 1 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, although discussions were presently taking place with the Law Society of Scotland and the Scottish Executive to introduce block Tables of Fees in solemn cases.

10.186 Payment to solicitors for most summary cases in the district court and sheriff court were made on a fixed payment basis in terms of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, except in "Excluded Proceedings" and "Exceptional Cases".

10.187 The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002 allowed the Board, on receipt of a request from a solicitor, to determine that the solicitor should not receive fixed payments but, instead, should be entitled to lodge a detailed account at the conclusion of the proceedings. The Board could only allow "exceptional status" where it was shown that an assisted person would be deprived of the right to a fair trial because of the amount of the fixed payment payable for the criminal legal assistance to be provided.

10.188 The Regulations prescribed a number of factors[194] to be taken into account by the Board in considering whether the test had been met. The main factors listed were:

- (i) the number, nature and location of witnesses;
- (ii) the number and nature of productions;
- (iii) the complexity of the law (including procedural complexity); and
- (iv) whether the assisted person, or any witness, might be unable to understand the proceedings because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.

Very few applications were made, most solicitors being content to claim the fixed payments.

[194] Regulation 4A(4)

10.189 As discussed in Part III, there was little scope for the payment of expenses in criminal cases in Scotland. Indeed, there was currently no provision to make payment of expenses recovered in a criminal case into the Fund[195]. That was not the case in England where payment of expenses or "payment from public funds" was common.

[195] Section 4(3) of the 1986 Act.

ANNEX 1 COMPARISON OF FLUCTUATION OF HOURLY RATES 1984 – 2005

	A	B	C	D		E	
YEAR	LEGAL AID: NON ADVOCACY (CHAMBER RATE)	JUDICIAL/ PARTY AND PARTY: NON ADVOCACY	LEGAL AID: ADVOCACY (COURT RATE)	JUDICIAL/ PARTY AND PARTY: ADVOCACY Block	 Detailed	GENERAL TABLE (PRIVATE CLIENT)	**COMMENTS** **The third schedule of the Legal Aid (Scotland) Act 1949 and the second schedule of the Legal Aid (Scotland) Act 1967 allowed for solicitors and counsel to be paid 85% of the rate allowed in taxation in a privately funded case[1], the 15% being referred to as the "statutory discount" to reflect certainty of payment. The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 removed the power of the Court to prescribe fees in the Scottish courts[2]. The Secretary of State commenced to prescribe tables of fees in legal aid cases. Since at least the early 1970s the "statutory discount" was 10%.**
1984	19.80	22.00	27.00		30.00	38.00	Legal aid fees (A+C) are 90% of judicial/party and party fees (B+D). The judicial advocacy rate (D) is 78.9% of the General Table (E). Legal aid chamber rate (A) is 52% of General Table (E).
1985	20.90	26.00	28.50		30.00	42.50	Judicial chamber rate (B) is increased. This coincides with the reduction of the 30 minute minimum block to 15 minutes.
1986	21.80	26.00	29.80		30.00	45.00	
1987	22.90	29.60	31.30		34.00	45.00	
1988	23.90	31.40	32.70		36.00	52.50	Judicial advocacy (D) 30 minute minimum block also reduced to 15 minutes.
1989	34.40	34.00	41.40		40.00	55.50	Fee increase (A+C) coincides with 1) reduction of chamber rate block to 15 minutes and 2) removal of posts and incidents at 12% in *detailed* fees (subsumed into the increased fee)[3].
1990	37.00	40.00	44.50		44.00	62.00	
1991	40.20	43.20	52.20		48.00	68.00	

1992	42.20	47.20	54.80	52.40	75.00	Legal aid advocacy rate is now 104.58% of the judicial rate although the latter subsumes posts and incidents. It is still, however, 93% of the judicial advocacy fee excluding posts £58.68 [£52.40 +12% posts and incidents = £58.68].
1993	42.20	54.00	54.80	59.60	80.00	
1994	42.20	55.60	54.80	62.00 61.20	80.00	

	LEGAL AID: NON ADVOCACY	JUDICIAL: NON ADVOCACY	LEGAL AID: ADVOCACY Block Detailed £45.20	JUDICIAL ADVOCACY Block Detailed	GENERAL TABLE	
1995	43.60	57.20	56.40	63.80 63.00	81.00	
1996	43.60	60.00	56.40	66.80 66.00	86.00	
1997	43.60	60.00	56.40	66.80 66.00	86.00	The legal aid rate is now 85.45% of judicial (the original 1949 discount), although legal aid rates subsume posts and incidents. Still 76.3% of the judicial rate excluding posts etc.
1998	43.60	86.00	56.40	95.60 94.40	86.00	Lord President's Advisory Committee advice to increase party and party (judicial rates) to agent and client levels (although subsuming posts and incidents in the fees). The judicial block fees continue to attract a fee in the Sheriff Court of 10% or a session fee (Court of Session) of 7½% where the Edinburgh agent is acting alone, or 10% where there is also a local agent involved. Judicial detailed fees are not subject to a process or session fee.
1999	43.60	86.00	56.40	95.60 94.40	88.50	Legal aid rates, consequentially, now drop to about 59% of the increased

								judicial rates.
2000	43.60	88.40		56.40	98.40	97.20	91.50	Court advocacy rates (D), 78.9% of the recommended level of fees in the General Table in 1984, now *exceed* private client hourly rate, sitting at 106.22% of the General Table rate.
2001	43.60	91.20		56.40	101.20	100.00	94.00	
2002	43.60	98.00		56.40	108.80	107.60	98.50	The judicial block fees remain subject to a session/process fee. Hourly rate, therefore, is now £108.80 plus 10% = £119.68. Legal aid block fees remain subject to 12% posts and incidents and process/session fee.

	LEGAL AID: NON ADVOCACY	**JUDICIAL: NON ADVOCACY**	**LEGAL AID: ADVOCACY**		**JUDICIAL ADVOCACY**		**GENERAL TABLE**	
			Block £45.20	Detailed	Block	Detailed		
2003 (Civil Reform)	52.60	110.00	76.00	68.00	122.00	120.80	110.00	The legal aid block fee is based on a unit of £19 (£76 per hour). The detailed fees reflect an increase of 21% on the existing Schedule 3 fees in post 1 October 2003 cases. The new block fees subsume 1) process fees and 2) posts and incidents. The block fees, having carried out a costing exercise on a cost neutral basis, also attracted a 21% increase. Old cases continue to be remunerated on the 2002 basis. It is a feature of the legislation that a solicitor cannot opt to lodge a detailed account or a block fee account depending on the circumstances of the case. Currently, all Court of Session cases are fee'd on a detailed basis and Sheriff Court cases are fee'd either on a detailed or block basis depending on the nature of the case. Block fees are subject to a percentage uplift in

								respect of certain objectively verifiable criteria calculated at 10% per factor to a maximum of 40% to reflect additional *time* spent on the case and likely to take the fee outwith the restriction of the blocks. No uplift is available in a case fee'd on a detailed basis. In respect of judicial fees, the solicitor always has the option whether to charge on a detailed or a block fee basis according to the circumstances of the case and judicial fees are subject to an uplift, it is understood without limit, on a range of factors including complexity, novelty and responsibility.
2004	52.60	112.80	76.00	68.00	125.20	124.00	113.00	
2005	52.60	118.20	76.00	68.00	131.20	130.00	-	The general table has been withdrawn.

NOTE

[1] The Judicial Table of Fees used to apply to (a) solicitor and client, (b) solicitor and client, third party paying and (c) party and party fees. Following amendment in 1992 the preamble to the General Regulations in the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 now states that:-

(i) the Table of Fees in this Schedule shall regulate the taxation of accounts between party and party….". There is, accordingly, no universal figure against which a legal aid fee can now be compared.

[2] The fees referred to are the dues paid to the Court Offices during litigation and do not relate to fees paid to solicitors or counsel.

[3] Block fees prescribed by Schedules 1 and 2 of the Civil Legal Aid (Scotland) Regulations 1989 still attract

(i) session/process fee of 10% and

(ii) posts and incidents at 12%

ANNEX 2 REMUNERATION SYSTEMS IN LEGAL AID

	Advice and Assistance		ABWOR		Civil and Childrens		Summary Criminal		Solemn Criminal	
	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel
Block fees			x[1]		**Sheriff Court**: 1 hour in court = £76					
Fixed payment							x[2] **District Court** = £300 per case **Sheriff Court** = £500 per case (+ £50 rural uplift)			
Hourly payment	£42.20 (Criminal) £51.00 (Civil and Children)		Criminal Advocacy £54.80 Non-Advocacy £42.20 Civil etc Advocacy £66.40 Non-Advocacy £51.00		**Sheriff Court** **Court of Session** **House of Lords** Advocacy £68.00 Non-Advocacy £52.60				Conducting trial: 1 hour = £54.80 Non-advocacy: 1 hour = £42.20	
Variable daily rate		No fees prescribed		No fees prescribed		**Sheriff Court**: No fees prescribed (Proof fees of between £600 and £1500 have been allowed by Auditors). **Court of**		Junior: 1 day trial = £210 - £647.50 Senior: 1 day trial = £325 - £720		Junior: 1 day trial = £225 - £750 Senior: 1 day trial = £410 - £900

						Session[3] Junior – 1 day at proof = £240.50 Senior – 1 day at proof =£320.80 **House of Lords** No fees prescribed				

[1] £70.00 for preliminary stages of guilty pleas, pleas to competency and referrals to ECJ and £27.40 or £45.00 for sequestration.

[2] Normally summary criminal attracts a fixed payment but certain cases are exempt from fixed payments and are paid on an hourly basis (see Point 17.4).

[3] Although daily rates are prescribed in Regulations, often counsel are paid at higher rates. Auditor of Court has been given a wide discretion to allow a higher fee.

PART VI : FUNCTIONS OF THE AUDITOR OF COURT IN RELATION TO THE TAXATION OF FEES

Introduction

10.190 As indicated in Chapter 1, one of the research objectives of the Working Group was to look into the role of the auditor of court and to provide an account of the way in which the system of taxation worked in practice both from the perspective of consumer protection and competition policy.

10.191 **Auditors of court** are independent persons of skill who are appointed by the Scottish Executive or senior judges, primarily to "tax" or officially determine the total amount of the legal fees and outlays which have been appropriately incurred by parties in a civil litigation.[196] These are described as "**judicial taxations**" since they are remitted by the court. A second form of "judicial taxation" arises when a solicitor requires to sue a client for unpaid fees, the court may – but does not necessarily require to – remit the account to the auditor of court for taxation, before granting decree. However, the auditor of court carries out a wider range of functions than these, though sometimes in a private capacity. Thus auditors also conduct "**extra judicial"** taxations, where a solicitor and client enters into a joint remit to the auditor in order that the latter could tax the solicitor's account. In the foregoing three situations the solicitor will have compiled the account or commissioned a law accountant to compile the account before sending it to the auditor. The final principal area of work[197] conducted by auditors is where they are asked by the solicitor alone to "**assess**" or fix the appropriate fee for a transaction e.g. handling an executry, in which case the file(s) are sent to the auditor to be assessed.[198] Taxations are formal processes which can involve a hearing and representations from all parties. Assessments are informal, and do not involve hearings or representations. Whilst the result of a taxation is binding on the parties, the result of an assessment is not, unless the client has agreed to this, in the knowledge of his or her right to ask for a taxation.

10.192 There is one Court of Session Auditor and many Sheriff Court Auditors throughout Scotland. The former is a solicitor appointed by the Scottish Ministers. The latter are overwhelmingly[199] Sheriff Clerks or Sheriff-Clerk Deputes who have been appointed by their Sheriff Principal to be an auditor of court. Auditors are expected to be independent, i.e. neutral and impartial as between the competing parties. Their duty is to carry out the taxation of accounts remitted to them without fear and favour. Depending on the circumstances and the type of case they will tax or assess the accounts/ files according to what is "fair and reasonable in all the circumstances", whether the case was conducted in a "reasonable manner", and whether the work in a case was done, but not, generally, whether the work was done adequately. Taxing or assessing a fee involves the use of professional judgement; in addition the various tables of fees left the auditors (and the Court of Session auditor in

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[196] The decision as to who should pay the expenses of a litigation is one for the court, if the parties have not agreed the matter as part of a settlement. The decision as to how much these expenses should amount to, is for the auditor of court.

[197] In addition, statutory tribunals and arbiters can remit accounts to auditors.

[198] Assessments can also be done by independent law accountants, either from a solicitor alone or on a joint remit from the solicitor and the client.

[199] In Edinburgh the two sheriff court auditors are solicitors, their counterpart in Glasgow is a law accountant. In all other sheriff courts the auditor is a sheriff clerk or depute.

particular) with varying degrees of discretion. Auditors are financed in differing ways. The Court of Session Auditor receives all the fees for the taxations and assessments which he conducts but from those he has to pay his and his staff's salary costs as well as all his office costs. Similarly, the independent sheriff court auditors retain all the fees for their work. However, sheriff court auditors who are serving sheriff clerks retained only the fees for their extra-judicial or assessment work, with the fees for judicial taxations going to the Treasury. The size of the fees for judicial taxations is set by Act of Sederunt and increases proportionately with the size of the account submitted (in legal aid cases, however, it is usually 4% of the account as rendered). The size of extra-judicial fees is at the discretion of the auditor but is usually 3% or 4% of the account *after taxation*. The fees for assessments are similarly at the auditor's discretion but are usually 3% or 4% of the fee arrived at by the auditor. The decision as to who should pay the auditor's fees for taxation is wholly within the discretion of the auditor. Liability for the cost of an assessment, however, lies with the submitting solicitor, unless the client has otherwise agreed. There are no published statistics indicating the number of taxations (or the breakdown thereof) or assessments conducted by each auditor.

10.193 The research work for the project involved the examination of background documents and a series of interviews with key stakeholders and those working within the taxation system.[200] A range of issues emerged from the research, not least the degree of concern felt by several stakeholders in relation to aspects of the role of the auditor, and the way in which duties in relation to taxation were carried out. While some stakeholders were broadly happy with the operation of the taxation process, others perceived the system of taxation and auditing to be insufficiently transparent, accountable, impartial, or consistent.

Appointment, skills, and training of auditors

Appointment

10.194 The evidence from the interviews suggested that the appointment process for auditors may be insufficiently transparent. While it is clear who appoints them, the process adopted and its compatibility with best practice in the modern era, is less clear. That said, the methods of appointment differ between the Court of Session and the sheriff courts and, within the sheriff courts, between the sheriff clerk auditors and independent auditors. Each of the independent auditors is highly experienced, but each was selected in a slightly different way, and no guidelines exist for requiring that their successors are selected by standard public appointment procedures. While it is true that the appointment of sheriff clerk auditors does conform to modern procedures when they were being selected *as sheriff clerks*, their appointment as auditors (by a Commission from the Sheriff Principal) follows almost automatically on their selection as Sheriff Clerk. Thus while sheriff clerk posts are generally advertised and potential candidates interviewed and formally assessed by a civil service selection board on their skills and competencies to carry out the role of sheriff clerk, there is no formal assessment of their skills and competencies to carry out the role of auditor. It

[200] Sheriff clerk auditors felt unable to participate in interviews due to an ongoing consultation by the Scottish Court Service. The absence of this group from the research represented a significant gap in terms of views and experiences, and details of the mode of operation of auditors. However, interviews were carried out with independent auditors, the Auditor of the Court of Session, a representative from the Society of Sheriff Court Auditors, Sheriff Principals, solicitors, law accountants, the Scottish Legal Aid Board, the Law Society of Scotland and the Scottish Courts Service. Former sheriff clerk auditors were also interviewed. The Society of Sheriff Court Auditors was also invited to comment on the draft research report, and its response is at annex H.

follows that there is no requirement for formal qualifications or evidence of the attainment of competency in auditing/taxation; indeed, it seems that auditing is rarely mentioned in the job specification for the position of Sheriff Clerk and that aptitude to perform the role of auditor is not explored in appointment interviews. It appears that this is because the Scottish Courts Service is responsible for the appointment of sheriff clerks but not of auditors, who are appointed by Sheriff Principals. However, the latter take it very much on trust that those who are selected as Sheriff Clerks are competent as auditors, knowing that they will have received "on-the-job" experience in their earlier career, and are perhaps unaware that competence in auditing is not explored by those appointing sheriff clerks. Likewise, depute sheriff clerks are appointed as depute auditors, again with no formal assessment of their competencies to undertake the role in taxation, and often simply on the recommendation of the sheriff clerk appointed as auditor. There is less uniformity over ceasing to be an auditor. Sometimes the Commission lapses automatically when the sheriff clerk or depute moves on, in other cases the Commission continues even after the incumbent has left the service, until it is withdrawn by the Sheriff Principal.

Skills and experience

10.195 Issues also emerged from the research interviews in relation to the training and experience of some of the "sheriff clerk" auditors. Whilst the Sheriffs Principals and the Sheriff Court Auditors' Society were happy with the experience and on-the job training of sheriff clerk auditors, other respondents were less sanguine on the matter. Many auditors were widely regarded as highly skilled and competent by those working within the system. However, a few respondents questioned whether the experience of some sheriff clerks, especially in relation to non–litigation fields afforded them the necessary skills and experience to undertake aspects of the role effectively.

10.196 Skills, experience and guidance were seen as crucial given the element of discretion built into the role of auditor (discussed below), and perceived deficiencies in skills, experience or guidance were referred to by a few respondents as contributing to a lack of consistency amongst auditors in decisions, as well as a variable quality of decision making. These perceptions seemed to arise most acutely in the area of assessments, judicial taxations where a solicitor was seeking to enforce his/ her fee, or extra judicial taxation, (especially in legal aid cases,[201] or in executries) where the role of auditor was viewed as having a higher element of discretion than in judicial taxations relating to the expenses of a litigation.[202] In addition, extra judicial taxation (and judicial taxations of non-litigation accounts) were seen as raising a range of areas of legal practice outwith the litigation field which might not be within the experience of many sheriff clerk auditors, who, while experienced in procedural matters, were not necessarily so in matters of chamber practice. The removal of the recommended Table of Fees for General Business (on which auditors were found in the researchers' interviews to rely heavily in the context of judicial taxations for non-litigation accounts, extra-judicial taxations and assessments) was considered by a number of respondents to be a retrograde development in that it removed the principal source of guidance for auditors in extra-judicial work and was viewed by some as likely to impact adversely on more inexperienced auditors. The view was also expressed by several respondents that the removal of the Table and the guidelines contained therein might not

[201] The Scottish Legal Aid Board cited an issue which had been ruled on by sheriff court auditors in three different courts – each coming to a different conclusion.

[202] However, a number of respondents commented adversely on the extent of discretion exercised by auditors in the setting of counsel's fees in the field of legally aided litigation. This was particularly felt to be true where counsel were appearing in the Court of Session.

serve the public interest well, since it would serve to increase inconsistency between auditors and because auditors might in future find it harder to conclude that an extra-judicial fee was excessive.

Training
10.197 The lack of a job description or specific skills set for all appointees was considered by a few respondents to be exacerbated by the lack of formal *training* given to auditors (this concern tended to be confined to sheriff clerks who became auditors). The absence of sheriff clerk auditors from the research meant that the issue of training for auditors could not be explored fully and the views and experiences of these auditors was absent. However, training of sheriff clerk auditors appears to be in the main 'on the job' and through shadowing and may, inevitably in some cases be rather patchy. In addition, in the case of sheriff clerk auditors, auditing is nothing like a full time job unlike independent auditors, (moreover sheriff clerk auditors may move on to new posts once they have acquired the necessary skills and experience). The interviews also suggested that auditors had little by way of continuing professional development. There are twice yearly meetings of the Sheriff Court Auditors Society where tricky issues can be raised and there is an introductory guidance pack for new auditors, although the researchers were unable to ascertain how comprehensive it was. The Society is also thought to have database of judicial decisions in taxation cases. Further, one Sheriff Principal noted that sheriff clerks have the advantage of sharing a common culture and background which aids consistency of decision-making. In keeping with this, auditors indicated that it was not uncommon for them to consult another auditor when a novel or unusual problem arose. On the other hand, however, some interviewees were of the view that auditors do not discuss what they do in their private work (extra-judicial and assessment) with each other – again however the absence of sheriff clerk auditors from the research precluded further investigation of that issue. At any rate the limited guidance available to sheriff clerk auditors was seen by several respondents from a range of backgrounds as contributing to a lack of consistency amongst auditors, especially in extra-judicial and assessment work. For them, the issue of ensuring that all auditors were fully trained and qualified for the post was seen as more problematic than the system of auditing itself.

The role of the auditor in taxation

10.198 There was clear evidence of confusion and disagreement amongst respondents as to the nature of taxation and the role and office of the auditor, and the consequences flowing from this. The system is complex, and its operation appears open to varying interpretation by those working within the system. Thus at the outset of the research, it became clear that there was considerable confusion or outright disagreement over the meaning of 'taxation', and the difference between judicial taxation, extra judicial taxation, and assessment. That was true for all kinds of respondents. One highly experienced former sheriff court auditor referred to a widespread myth in smaller towns that assessments by sheriff clerk auditors were binding on clients in the same way as taxations. He added that this confusion in his experience was not restricted to clients but extended also to solicitors.

Nature of the role
10.199 Similar confusion emerged in relation to the role of the auditor. During the course of the research it became clear that there was no clear consensus amongst respondents as to the role and status of the auditor, with views differing as to whether the role was judicial, quasi judicial, (one auditor described his role as that of an independent arbiter) or (as another interviewee suggested) administrative. Again respondents were at odds with each other as to

whether auditors were public officials,[203] but they generally viewed them as officers of the court. Given this confusion, the implications flowing from the position and status of auditor were unsurprisingly unclear (for example as to whether auditors should publish accounts, or provide written reasons for their decisions, or statistics on workloads, and the nature of the work carried out[204]). However, the majority view appeared to be that the auditor does, along with the duty to be fair and impartial, have a duty to protect the public, as indeed is suggested in the case law.[205]

10.200 In general, more concern was expressed in relation to extra-judicial taxations and assessments since they were widely regarded as outwith the control or direction of the courts, and essentially a private contract matter between auditors and solicitors. Indeed, some Sheriff Principals were of the view that this aspect of the work of auditors was not a concern for the courts. Nevertheless it was an area which troubled respondents from several backgrounds. The private nature of much extra-judicial or assessment work was highlighted by the reference by two former sheriff clerks to solicitors who sent them private assessments as "clients", and to the practice of some sheriff clerks of retaining "solicitor clients" even after they had moved from one sheriff court to another. As one or two respondents observed, such an outlook runs the risk of appearing to compromise the perceived impartiality of the system, in that an auditor may be required to adjudicate in a judicial taxation in relation to a solicitor who is essentially a paying 'client' of the auditor's in relation to extra judicial and assessment work, and one who is not. This potential conflict of interest was recognised by one or two former auditors who acknowledged a 'pressure' in this situation (however the system does provide for avoidance of conflict by allowing referral of the case to another auditor, although that option may not exist in the smaller courts). A small minority of interviewees expressed the view that it was inappropriate for auditors to carry out both judicial and extra judicial taxation, as questions of independence could be raised.

Role of the auditor in legal aid cases

10.201 The statutory referral and the basis of the referral to the auditor and the role of the auditor in legal cases raises a number of issues :

- the reference to the auditor in the event of any "question or dispute" arising from an account results in matters of fundamental interpretation of the Act and Regulations being determined by the auditor. That is not satisfactory and is not generally welcomed by auditors who, correctly, see their role as quantifying fees rather than interpreting the law.

- Auditors are experienced in dealing with judicial taxations. Where expenses are awarded to a party, it is usually on the basis that the expenses will be "as taxed". Sheriff Court auditors, usually the Sheriff Clerk, are not always conversant or experienced in dealing with the legal aid legislation or, indeed, in counsel's fees. It is quite common for a taxation to commence with the Board representative explaining to

[203] Despite the fact that a sheriff clerk is a public official *qua* his or her sheriff clerk work.
[204] There appeared to be very little in the way of official information on the volume and breakdown of work done by auditors. That said, several respondents indicated that they made formal returns as to the number of judicial taxations they undertook. It is unclear what happens to this information – it is not published in the Civil Judicial Statistics.
[205] See Lord President Clyde in *Davidson & Syme v. Booth* 1972 SLT 122 at p.127 "After all he is an officer of the court….protecting the interests of the public."

the auditor the nature and purpose of a provision in the legislation and, in the Board's view, the plain interpretation of it in the context of the wider Act and Regulations. That is not generally satisfactory.

- There is no hierarchy of Sheriff Court auditors and the decision of an individual auditor, perhaps not in any way conversant with the legal aid provisions or experienced in the level of counsel's fees could be used as a benchmark for future fee claims by counsel. Although there is access to the Sheriff by means of a Note of Objections, the courts are reluctant to interfere with an auditor's decision unless, in the extreme, it is plainly wrong.

- These circumstances combine to introduce a high element of inconsistency throughout the country. For example, different auditors may arrive at different conclusions on the same issue leading to the Board's Accounts Area having to deal in a different way with the same issue depending on the location of the solicitor. That is not helpful in seeking to run a national system.

- Decisions of auditors relating to levels of counsels' fees have had an inflationary effect on claims for payment from the legal aid Fund.

- The standard basis on which auditors charge, a percentage of the total fee claimed inclusive of VAT, may be appropriate in assessing judicial expenses on the basis of a detailed time and line account. It may be argued that the longer the account, the more work involved. In the context of statutory references to the auditor in legal aid cases, however, the arrangements can be odd. A specific issue may arise in the context of a handful of entries in the account or with regard to the interpretation of a legal aid provision as it affects certain charges. Nevertheless, the auditor is entitled to charge the fee based on the total account, which in some cases can be wholly disproportionate to the level of work involved.

Discretion and Consistency

10.202 A wide variety of different standards are *properly* applied by auditors in taxation matters. While this was not necessarily regarded as a problem in itself during interviews (it was sometimes expressed as an issue of 'knowing the rules', although lack of training and experience are relevant in that context), what was clearly highlighted was the element of discretion built into the system, and the problems which that could cause in relation to transparency and quality of decision making. The amount of discretion given to auditors was seen to vary as between judicial and extra judicial taxations and assessments, with judicial taxations relating to litigation accounts seen as involving less discretionary elements than judicial taxations of non-litigation accounts, extra judicial and assessment work. Discretion was viewed as widest in the Court of Session. In judicial taxations for non-litigation accounts and extra judicial taxations, while the Table of Fees for General Business appeared to have been very widely used as the benchmark in extra judicial work, auditors were reported as going both above and, occasionally, below it. In the absence of written reasons for decisions (unless challenged), interviewees felt that the basis of decisions was not always clear. This variability in auditors' decisions seemed to have the potential to cause problems for the system. Thus several respondents whether auditors, former auditors, law accountants or

practitioners referred to knowing solicitors who chose to send their private assessments to non-local auditors who they perceived to be more "generous" than their local counterparts.[206]

10.203 However discretion within the system *per se* was not necessarily regarded as problematic (and was often regarded as necessary), rather the potential for inconsistency in decisions was seen as high, given the concerns over skills and training, and a lack of sufficient clear guidelines to auditors to encourage consistency. The potential for inconsistency was framed both in terms of individual auditors' decisions, and decisions between different auditors. Two areas where this emerged during the research were (1) the taxing of counsel's fees in judicial and legal aid cases and (2) determining liability for the auditor's fee for a taxation. In relation to the latter for many years the rule of thumb in Court of Session cases was that if the party due to pay the account being taxed succeeded in getting 20% or more of the account taxed off, then the cost of the taxation would shift to the other side. However, the research revealed that there was no uniformity amongst sheriff court auditors on the matter. Some relied strongly on the 20% rule of thumb, others preferred to operate a tapering system whereby if 30% of the account was taxed off then 30% of the costs of the taxation would be met by the party lodging the account. Others still appeared to operate on an ad hoc basis. Thus in one case in 2004 although the auditor taxed off 45% of the account – the party paying the expenses still ended up paying for the whole cost of the taxation. It seems unlikely that such a degree of variation and its accompanying lack of transparency, is perceived by the paying parties or the public as a strength of the taxation system.

10.204 The final area of note touched on in the research relates to the potential tension between the auditor as private contractor and the auditor as an independent and impartial officer of the court. The potential conflict of interest where the auditor is asked to preside in a taxation between a solicitor who frequently instructs the auditor to do private work for him or her, and one who does not, has already been noted. Another area which one or two respondents considered raised similar issues occurs from the fact that in extra-judicial taxations the auditor's fee for taxation decreases the more he or she taxes off the account lodged. While the one or two respondents considered that this created at least a perceived potential for a conflict of interest, the Society of Sheriff Court Auditors and other respondents strongly denied that any auditor would be influenced by this anomaly.

Conclusion

10.205 The Group discussed the research findings and agreed to recommend to Scottish Ministers that the arrangements for the taxation of solicitors' and counsels' fees should be reformed and modernised in the light of the weaknesses which the research had identified in the present system; and that the views and experiences of users should be taken into account when such reforms were being considered.

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[206] Almost all of our respondents who had been or were auditors indicated that they would accept "out of town" assessments or joint remits. One who did not was the only respondent to state that he did not accept that some solicitors approached "out of town" auditors in search of more generous decisions. As against this, other auditors or former auditors indicated that they thought they had "lost" private work because their assessments were seen as insufficiently generous. It should remembered, however, that the researchers were not able to interview more than a few serving auditors.

CHAPTER 11 TITLE OF QUEEN'S COUNSEL

Issue

11. Though this issue was not expressly referred to in the Group's remit, the Group noted that the status of Queen's Counsel might have implications for the market in legal services.

Scotland

11.1 In Scotland the Queen approved the appointment of Queen's Counsel on the recommendation of the First Minister. Candidates were nominated to the First Minister by the Lord Justice General, who consulted others judges, the Dean of the Faculty of Advocates, the Lord Advocate and the President of the Law Society of Scotland before making recommendations.

11.2 The Partnership Agreement included a commitment to ensure that, in future, Queen's Counsel would be appointed in a more open and independent way. In proposing another QC competition in 2005, the Lord Justice General suggested to Ministers the appointment of an independent person to observe the appointment procedure and report to the First Minister on whether the process was conducted fairly and objectively. The First Minister agreed with this recommendation and appointed Sir Roy Cameron, the former Chief Constable of Dumfries and Galloway and of Lothian and Borders and former HM Chief Inspector of Constabulary, to act as an independent observer to the process of appointing Queen's Counsel in Scotland. The Lord President submitted his recommendations for appointments in April 2005.

11.3 At the same time, Sir Roy Cameron submitted his report to Ministers. His report concluded that the process had been conducted fairly and objectively but suggested that some further steps might be taken to adopt more open practices in future, such as improving the quality of information in assessments by (a) strengthening the guidance on the use of references and (b) providing a more specific focus for referees comments based on competencies of advocacy, legal ability and experience, and professional qualities. Sir Roy also suggested that some aspects of good practice likely to emerge from new developments in selection in public appointments might be of future interest to the application process for QCs in Scotland.

11.4 The First Minister accepted the Lord Justice General's recommendations and Her Majesty the Queen approved the appointment of 14 additional Queen's Counsel in Scotland. The new appointments were announced on 16 June 2005 and brought the total of QCs to 158. The Report was published on the Scottish Executive website and can be accessed at http://www.scotland.gov.uk/Topics/Justice/Courts/judicialinfo/qcappointments.

England and Wales

11.5 In its report **Competition in Professions** published in 2001, the OFT considered the position of the title of Queen's Counsel in England and Wales. The report questioned both the involvement of government in conferring a title that had a marked impact on fee level, and the information value to consumers of a title where the title offered no information about the barrister's specialism and, in the absence of any system of revalidation, offered no guarantee that a barrister's level of competence was sustained over time.

11.6 Further conferral of QC title was suspended in England and Wales in spring 2003, pending a process of consultation and review. The OFT response to the government consultation, issued in autumn 2003, suggested that the criterion on which to judge whether the title was in the public interest or not should be whether it was a useful kitemark by which buyers of advocacy services could better choose barristers.

11.7 In general, the OFT considered that to function effectively, a kitemark should meet the following criteria :

- appointments were made on an objective basis;
- the appointment process was fair and transparent;
- entry was subject only to candidates meeting a standard without influence of any kind of quota; and
- awards had to be revalidated from time to time, and were capable of being withdrawn.

11.8 The OFT found that the QC system in England and Wales did not meet these criteria in a number of respects. In particular, the appointment system was not sufficiently transparent to allow an assessment of the objectivity of the criteria applied or the fairness of the appointment process. Moreover, the persistence over time of the proportion of barristers who held the title suggested that some form of quota might have been in place and there was no provision to revalidate and where necessary withdraw awards. The OFT was also concerned that the QC qualification did not offer sufficient information, for example on specialisms.

11.9 The possible anti-competitive effects of the Queen's Counsel system, which restricted the badge of excellence and the higher fee rates associated with it to those who succeeded in the appointment process, were addressed by a consultation paper issued by the Department of Constitutional Affairs in July 2003[207]. The consultation was aimed at users of legal services and members of the legal profession, including all holders of the title of Queen's Counsel in England, Wales and Northern Ireland. In November 2004 the Bar Council and the Law Society announced an agreement on a new scheme for appointing Queen's Counsel in England and Wales which was based on an agreed competency framework and aimed at providing a more transparent, open, and fairer way to make such appointments. This interim scheme invited applications from summer 2005.

11.10 The Department for Constitutional Affairs (DCA) was currently carrying out a market study to consider how to improve information for users of legal services more generally. When the market study was complete, the interim scheme would be reviewed to ensure that it was compatible with any principles the Government adopted as a result of the study.

Northern Ireland

11.11 A competency framework had been agreed in relation to Northern Ireland and the professions there were working on a selection process. The framework and the selection process would be similar to those in England and Wales, with some relatively minor exceptions to allow for the small size of the consultation community in Northern Ireland and

[207] Available at www.dca.gov.uk/consult/qcfuture

to take account of cost-effectiveness considerations, eg, the purchase of supporting information technology. The scheme was currently running behind the scheme in England & Wales but, since many fewer applications were expected, was likely to make its recommendations earlier.

Competition issues

11.12 Given similarities between the award system in Scotland and that which existed in England and Wales, the OFT believed there was a case for a review of the appointment system in Scotland to consider, in particular, whether the current system acted as a kitemark that benefited users of advocates' services in Scotland, and whether the continued involvement of Scottish Ministers in the award process could be justified.

11.13 The Scottish Consumer Council agreed with the Office of Fair Trading and expressed an interest in further examination of this issue in Scotland. The Council believed that there was a need to consider whether there was any requirement for such a quality mark, whether it was in the interest of consumers and whether it distorted competition.

11.14 The Faculty of Advocates observed that :

- the status of Queen's Counsel was one recognised by the Court and the Court had an interest in the issue.

- the system had always been different in Scotland to the extent that in practice the Lord President of the Court of Session processed and determined who became Queen's Counsel rather than a Government department as was the case in England and Wales.

11.15 As regards solicitor advocates, the Group noted that solicitor advocates could apply to become Queen's Counsel in Scotland and could also be paid as junior or senior counsel.

Conclusion

11.16 It was noted that action was in hand to improve the transparency of the appointment process for Queen's Counsel in Scotland. The Group concluded that it was not practicable to cover the impact of the status of Queen's Counsel on clients and competition in the legal services market in Scotland in the current research in the timescale available, but that the issue might merit further examination. The Office of Fair Trading and the Scottish Consumer Council believed that the system for appointing QCs should also be given further consideration.

CHAPTER 12 COMPARATIVE REVIEW OF THE AVAILABILITY TO NON-LAWYERS OF RIGHTS OF AUDIENCE AND RIGHTS TO CONDUCT LITIGATION

12. One of the tasks of the Working Group was to examine the evidence from Scotland and other jurisdictions on rights of audience and rights to conduct litigation. The term 'rights of audience' was used to describe the entitlement of an individual to represent someone else in court proceedings. In that context it referred to a person providing legal counsel rather than simply appearing as a witness or expert during court proceedings.

12.1 This chapter sets out the current status in Scotland, and looks at rights of audience and rights to conduct litigation across a number of key jurisdictions. In particular, it seeks to determine the extent to which rights of audience in higher courts were available to those within the legal profession firstly, but also those outwith the profession such as paralegals, conveyancers and patent agents. The review was a desk-based exercise drawing on published literature, web-based information and contacts with key informants in the jurisdictions described. The report focused on the following jurisdictions: England and Wales, France, Germany, Sweden, Finland, Australia, New Zealand and Canada.

12.2 With the exception of Sweden and Finland (the least regulated of these) all of the jurisdictions covered by the exercise had experienced change in the structure of their legal professions in recent years, most in the late 1980s and early 1990s. Most of those changes had occurred within the legal profession itself, though in some cases the changes had impacted on other sectors such as the accounting profession and paralegals/legal assistants. This had resulted in changes to rights of audience and litigation.

12.3 In considering the comparative material on rights of audience it should be borne in mind that differences between jurisdictions in relation to rights of audience might reflect or relate to other differences between those jurisdictions, such as the rules of civil and criminal procedure and the extent to which judges were expected to investigate the case independently of parties (and were provided with the resources to do so).

Scotland

12.4 In Scotland, individuals did not instruct advocates directly, instruction usually being carried out on their behalf by an instructing solicitor. Individual litigants were permitted to conduct their own case where desired, and there were reports of more individuals representing themselves, or using lay representatives (who were not always paid for their services). In general terms however a litigant in Scotland would pay for the services of either a solicitor (in the District and Sheriff courts) or a solicitor advocate/advocate in the Supreme Courts (the Court of Session and the High Court of Justiciary).

12.5 Criminal and civil proceedings in Scotland were conducted on an adversarial basis. The parties produced factual evidence and advanced such legal arguments as they considered appropriate. During the course of proceedings the judge acted as a neutral 'umpire' determining any incidental issue which might arise and ensuring that the proceedings were conducted fairly. In most civil proceedings and in summary criminal proceedings the judge was also the decision-maker and adjudicated on the basis of the facts established in the evidence and legal submissions advanced by the parties. There were two broad reasons for restricting rights of audience to persons with appropriate qualifications and experience.

Firstly, to protect the interests of the clients, and in particular to ensure their interests were competently represented at all stage in the litigation process. Secondly, to protect the interests of the courts, and in particular to ensure that court time was used efficiently and effectively (in a situation of limited resources) by ensuring that judges were able to depend upon those appearing before them to identify the relevant issues of fact and law, to explore fully in evidence relevant issues of fact, and to refer to any relevant legal authorities.

12.6 The Scottish legal profession, prior to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, was divided strictly into solicitors and advocates. Solicitors could exercise rights of audience in the Sheriff and District courts while the Supreme Courts of Scotland (the Court of Session and High Court of Justiciary) were the exclusive territory of advocates. The introduction of 'solicitor advocates' as a consequence of the 1990 Act extended rights of audience to the supreme courts to those attaining the status of 'solicitor advocate' after undergoing the necessary examinations. Those solicitor advocates might elect to exercise rights of audience in either the Court of Session or the High Court of Justiciary or both. While such a change might have been perceived as a dramatic departure from tradition, the history of the Scots legal profession and the high level of representative work undertaken by solicitors in the lower courts meant that resistance to these changes was limited.

12.7 In addition to reforming the role of solicitors, the 1990 Act also contained provisions that allowed the extension of rights of audience and rights to conduct litigation to members of 'any professional or other body'. Such rights would become available following the submission of an application for such access to the Lord President of the Court of Session and Scottish Ministers, and on receipt of the necessary approval. These provisions were among the most controversial in the Bill, which became the 1990 Act. To secure their passage, Ministers of the day gave undertakings that the provisions would not be implemented until other reforms contained in the 1990 Act, such as the introduction of solicitor advocates in particular, had had time to bed down. The case for commencement was reviewed in 1995 and 1997, but it was decided that commencement was not a priority at that time.

12.8 Rights may be applied for by means of a scheme drawn up by the body seeking rights for its members; the scheme has to be approved by the Lord President of the Court of Session and the Scottish Ministers. Bodies are required by the statute to submit a draft scheme for the approval of the Lord President and the Scottish Ministers which :

- specifies the rights they would like (in relation to which courts, categories of proceedings and nature of business);

- describes the training requirements and code of practice which the body would impose on members seeking to exercise such rights; and

- sets out their arrangements for indemnifying members of the public, handling complaints, coping with breaches of the scheme and so on.

12.9 The Scottish Ministers are empowered to make Regulations under section 25(4) of the 1990 Act to prescribe other matters to be included in such schemes. It is for the Lord President to consider any such scheme in its entirety. Scottish Ministers are required to consider such schemes (in consultation with the Office of Fair Trading) in relation to the provision made for training, indemnity, complaints handling, and a code of practice (including any competition aspects) and to ensure that schemes would require appropriate

standards of conduct and practice. The Lord President and the Scottish Ministers are required to consult each other in considering the scheme and to take into account any written representations they receive.

12.10 Though the provisions had not been commenced in Scotland, interest had been expressed recently in applying for such rights by the Chartered Institute of Patent Agents (CIPA), the Institute of Trade Mark Attorneys (ITMA) and the Association of Commercial Attorneys. Details of grants made to CIPA and ITMA under similar provisions in England and Wales were outlined in CIPA's submission to the Working Group.

The Chartered Institute of Patent Agents (CIPA)

12.11 Both CIPA and the Association of Commercial Attorneys were interviewed as part of the research process. CIPA felt that the restrictions on rights of audience (as well as a restriction on the choice of forum) for patent agents and patent agent litigators distorted the market in Scotland. CIPA representatives argued that they could not threaten litigation in Scotland because they knew that they would have to pass the matter to a solicitor. In England and Wales, where they enjoyed rights of audience, the threat to sue carried a lot more weight. When clients did litigate, they could no longer advise them and the client had to start over with a new advisor. They argued that they operated as a profession under UK laws, except where it came to litigation. The CIPA representatives outlined how that impacted upon clients in Scotland. They thought that clients often gave up before the litigation stage in Scotland. CIPA felt that they had the technical and professional expertise in their area to provide a competitive service to clients. They noted however that in some instances they did work closely with solicitors in England and Wales. They represented a specialist branch of law. In order to qualify individuals had first to have a degree, though increasingly people had a higher degree before embarking on the 4 year training. There were then 3 levels of separate examinations to qualify as a chartered patent attorney. Since 2003 training for all new candidates seeking rights of audience had been run by Nottingham Trent University.

The Association of Commercial Attorneys

12.12 The Association of Commercial Attorneys had been lobbying for the commencement of the relevant sections of the 1990 Act in Scotland for a few years and had a membership of around 16 professionals. The Association representatives reported that other professionals were interested in joining the Association, but highlighted that there was a stumbling block to further expansion until it became clear that sections 25 to 29 would be commenced; if those provisions were commenced, the Association expected its membership to rise to between 150 and 300. The Association considered Scotland to be 14 years behind England and Wales in liberalising rights of audience and rights to conduct litigation.

12.13 Most of the Association's members came from a litigation background in the construction industry, providing arbitration and mediation services to the construction industry. However, if the dispute had to go to court, the Association's members could not represent their clients in court. Their members had no right to appear in court for action above the small claims procedure jurisdiction, so at the point where a dispute was about to go to court, the client had to instruct a solicitor, who might then instruct an advocate. The Association considered that its members had the technical and professional expertise required to provide good quality representation and would thus be able to provide choice (and better value for money) to consumers.

12.14 The Association emphasised that clients felt that key evidence was not being presented in their cases because of a lack of understanding of the technical nature of the industry. That was the reason the Association's members were employed at arbitration and mediation. Members also frequently undertook the preparation of work for the court. All members were dually qualified with an LLM (in Construction Law), together with other professional qualifications e.g. surveyors, architects, engineers. The Association had not yet established itself as a professional body and believed that it would be premature to do so until sections 25 to 29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 had been commenced. Issues around insurance, conflict of interest and training were also discussed in the course of the interview.

Competition issues

12.15 The OFT and the Scottish Consumer Council supported commencement of these provisions and considered that there was a significant potential benefit to users of legal services in Scotland in allowing appropriately regulated alternatives to the existing suppliers. Applicant bodies would be required to:

- specify the rights they were seeking on behalf of their members (including the categories of proceedings and nature of the business);
- describe the training programme and codes of practice for the members seeking such rights;
- set out their arrangements for indemnifying members of the public, handling complaints and dealing with breaches.

12.16 The Law Society of Scotland had no concerns about sections 25 to 29 of the 1990 Act being brought into force or about professional or other bodies receiving rights of audience and/or rights to conduct litigation having satisfied the requirements of Scottish Ministers and the Lord President under these sections. The Faculty of Advocates also did not oppose commencement of these provisions. Its principal area of concern was that the interests of the administration of justice in the widest sense, including not only the protection of litigants but also the interests of the Court and the interests of justice, should be adequately protected when any scheme was being considered for approval.

12.17 Non-lawyer advisers were permitted to appear in certain sheriff court proceedings. Research conducted in 1998 illustrated that some Citizen's Advice Bureaux (CABx) had advisers who were trained lay representatives. Those lay representatives appeared on behalf of clients in the small claims and heritable courts and other forums such as benefit tribunals, employment tribunals, criminal injuries compensation boards, housing benefits appeals and community care assessments. Advisers who wished to appear in employment tribunals and benefit appeals tribunals required to take a two day intensive training course provided by Citizens Advice Scotland.

12.18 As with other non-lawyer advisers, in-court advisers based within the sheriff court could represent litigants in the small claims and heritable courts and in proceedings under the Debtors (Scotland) Act 1987. In practice however, owing to the volume of clients seeking

advice, representation was only offered in certain cases where clients were unable to represent themselves.

England and Wales

12.19 The structure of the legal profession in England and Wales was very similar to that existing north of the border. Advocacy in the high courts was primarily carried out by barristers who previously enjoyed a monopoly in this area arising out of tradition rather than any statutory provision. Any individual not wishing to represent themselves in these courts would be obliged to engage a barrister to do so on their behalf. The Courts and Legal Services Act 1990 (CLSA) founded the rights of audience of English barristers in statute for the first time. The Scottish 1990 Act did not have the same effect for advocates whose rights of audience were based on ancient statute and common law.

12.20 Solicitors in England and Wales were independent lawyers who give legal advice to clients on personal and business affairs. Solicitors did not have rights of audience before the higher courts prior to CLSA and indeed were far less likely to participate in court proceedings than their Scottish counterparts. In spite of initial opposition, solicitors in England and Wales might now also qualify as solicitor advocates under CLSA, though as yet there is no evidence of their providing any real source of competition for barristers. These solicitor advocates had been granted the same rights of audience as their barrister colleagues while remaining entitled to conduct tasks that fell to them as solicitors.

12.21 The impact of the Courts and Legal Services Act 1990 within the legal profession in England and Wales had been felt beyond the limits of the legal profession itself. It had extended the scope of individuals who could conduct probate work, which could now be carried out by non-lawyers as a result of the 1990 Act, and conveyancing work that was now subject to a licensing system and could be conducted by non-lawyers working outside the legal profession as well as by paralegals and other non-lawyers working within it.

12.22 The provisions of the Courts and Legal Services Act 1990 which permitted rights of audience and rights to conduct litigation to be extended to non-lawyer members of authorised professional or other bodies had been commenced. Applications had been made for such rights by a number of bodies outwith the legal profession. Interested bodies had to apply to the Lord Chancellor and applications were assessed on the basis of the prospective training regime being offered to members, the existence of complaints handling procedures, standards of professional conduct and a number of other factors.

12.23 So far three such bodies had been granted permission to appear in the higher courts and then only subject to very specific requirements set by the Lord Chancellor as outlined above. The three bodies which had been granted these rights were the Institute of Legal Executives (ILEX), the Chartered Institute of Patent Agents (CIPA) and in April 2005 the Institute of Trade Mark Attorneys. Members of CIPA could of course only act on matters falling within their field of professional expertise such as designs, copyright, trademarks and patents. Those bodies now fell within the remit of the Legal Services Ombudsman along with solicitors, barristers and licensed conveyancers. The Lord Chancellor might grant or refuse applications and might also withdraw rights of audience from individuals/organisations where they breached specific requirements or failed to conduct themselves appropriately.

12.24 ILEX so far had 25 qualified ILEX advocates representing clients in a variety of courts and tribunals and was currently pressing for an extension of those rights to criminal proceedings and the Coroner's court in which legal executives were currently required to obtain additional authorisation. As already mentioned, the Scottish branch of the Chartered Institute of Patent Agents had also recently expressed an interest in using rights of audience which might potentially be available under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

12.25 While the CLSA attributed rights of audience to classes of people, the courts themselves might also make discretionary decisions on the grant of rights of audience. The court would only contemplate such action in very limited circumstances. Individuals described as '*McKenzie* friends' after the 1970s case in which they were first recognised had benefited from such discretion and are discussed in further detail below. Where a litigant hoped to gain assistance/representation from such an individual, he or she had to make an appeal to the court. Where the court granted rights of audience, it did so on a case by case basis only and in general the role of such individuals was restricted to giving advice and support to the litigant. Individuals continued to be able to seek alternative representation in small claims proceedings.

France

12.26 The French legal profession itself was previously split between *avocat*, *avoué, conseil juridique* and *notaire.* Since a law of 31 December 1990, the profession of *Avocat* and *Conseils juridiques* had been combined within the *"nouvelle profession d'avocat"* which did not include the *avoués, notaires* and *avocats au Conseil d'Etat et à la Cour de cassation.* There were some notable restrictions on the ability of the *avocat* to conduct proceedings in all courts however : they might not appear before the *Cour de Cassation* or indeed the *Conseil d'Etat* where the former professional split essentially still existed. Representation was restricted in those courts to an elite branch of the profession who held the status of *officiers ministeriels*. There were no geographical restrictions imposed on lawyers regarding the right of audience and the possibility to conduct a case before any court in France, providing it was done with respect for the "postulation" rules (i.e. obligation to appoint a lawyer registered in the bar of the jurisdiction involved; that lawyer would only be in charge of the procedural aspects of the case). There was no exclusivity for lawyers to represent parties before the *tribunaux d'instance* and the commercial and labour courts (i.e. *Tribunal de commerce* and *Conseil des prud'hommes*) in which the *avocat* could conduct the entire proceedings themselves (providing the postulation conditions) or indeed the individual litigant could represent themselves.

12.27 The French legal profession thus featured practice restrictions but the role of the *avocat* was not sufficiently similar to that of the UK solicitor to draw comparisons.

12.28 The French notary (*notaire*) had a monopoly over specific legal services which involved documents which had to be authenticated by deed i.e. wills, marriage, contracts, conveyancing and documents dealing with the transfer of real property. The notary was a public servant appointed by the Minister of Justice and did not have a right of audience in the courts.

Germany

12.29 The German legal profession had two branches, *Rechtsanwälte* and *Notare.* The notarial profession in Germany was split into three different categories:

- *Anwaltsnotare (or advocate notaries)* who had rights of audience and had to have practised at the bar for at least five years before they could attain the status of an advocate-notary. The opportunity to combine the professions was not open to practitioners in all of Germany's federal states (*Bundesländer*) however.

- *Amtsnotare (or state-employed notaries)* differed from the others in that they were not self employed but were instead funded by the state. *Amtsnotare* were only to be found in Baden-Württemberg.

- *Nurnotar* – this term was used to describe someone who practised only as a notary and thus did not undertake any representative tasks.

12.30 The activities of the notary were restricted to areas of voluntary non-contentious jurisdiction including some aspects of real estate law, commercial law and family law, while the powers of the *Rechtsanwalt* were more wide ranging. *Rechtsanwälte* had the right to act as counsel, defender, legal counsel, representative or attorney in any legal matter and also carried out some of the notary's functions.

12.31 It was also quite significant that the German court system operated on the basis of an inquisitorial rather than adversarial system as far as criminal, administrative and non-contentious proceedings were concerned, and thus the role of legal professionals within that system might well be subject to different considerations. However, civil proceedings in general followed the 'principle of party presentation' and were therefore adversarial. An exception was made for matrimonial, family law and child custody cases, where inquisitorial procedure applied.

12.32 Each *Rechtsanwalt* had to be admitted to/authorised by a specific court within the ordinary jurisdiction and might also apply to be admitted to the court in whose district the Magistrate's court in which he/she initially registered is located. Formerly, the *Rechtsanwalt* could only conduct his/her business in that restricted geographical area, but since 2000 the *Rechtsanwalt* could conduct business in any county/magistrates court provided that he or she was registered in one. The same did not apply to the higher regional courts however, where registration required five years practice at the Bar. At the Federal Supreme Court (*Bundesgerichtshof*) a special class of elected *Anwälte*, with a considerable amount of experience, operated. These *Rechtsanwälte beim Bundesgerichstshof* were nominated by the Federal and the regional Bars and appointed by an election committee of the Bundesgerichtshof.

12.33 The German legal system recognised a number of professions that might give legal advice without the need to seek special dispensation to do so. Those included patent lawyers, notaries, publicly appointed tax consultants, certified public accountants, public authority representatives, liquidators and cooperative auditors. These professions were selected on the basis of their similar responsibilities with regard to client confidentiality, thus enabling the *Rechtsanwalt* to ensure that his/her own client's information could be properly protected within the multi-disciplinary partnership as a whole. The German 'Kammer', which held a

position comparable to that of the Chartered Institute of Patent Agents was currently pressing – along with that organisation – for rights of audience to be granted to patent agents in relation to European patent issues. Some competition was provided in the legal services market in economic matters by 'economic jurists' *(Diplomwirtschaftsjuristen)* who held a diploma in economic law only. The Diploma qualification was offered by technical colleges and differed completely from the education of lawyers. The *Diplomwirtschaftsjurist* did not however have rights of audience in the courts. Besides these Diplomas, German Universities had started to offer a post graduate qualification of a Masters of Law following university after the completion of the first state examination. Those with a Masters did not enjoy rights of audience in the courts. The education of lawyers in Germany included 4 years university study, completion of state examinations and two years vocational training (that concluded with the second state examination).

12.34 The German legal system did feature specialist courts for issues relating to intellectual property matters such as complaints against decision of the Patent or Trademark offices. In these courts patent agents themselves had a right of audience. These agents also had a right of audience before the Federal Supreme Court where they were dealing with appeals against the orders of the patent court. Indeed, those patent courts featured patent experts as judges who, while they were not considered lay judges, were not legally qualified.

Scandinavia

12.35 On the Paterson[208] sliding scale of regulation, the Scandinavian countries were considered the least regulated – though Ireland too was scored as low on overall regulation. For example, restrictions on rights of audience were limited in Sweden to the extent that there was no requirement for a party to a case to engage legal representation under Swedish law nor was there a requirement that legal counsel had undergone any formal legal training. That was true regardless of which court of instance was involved in the proceedings in question. The court, however, might turn down counsel considered unfit for the task.

12.36 There was no such thing as the unauthorised practice of law in Sweden. It should be noted however that a Swedish legal practitioner holding him or herself out to be an advocate or attorney at law, had to be a member of the Swedish Bar Association and thus required to have passed the LL.M and to have practised law for a period of at least five years. The same criteria apply to public defenders in Sweden who also had to be members of the Swedish Bar Association.

12.37 Finland was often described as one of the world's most open markets for legal services and the Finnish legal profession was, similarly to that in Sweden, subject to very limited regulation. Legal education in Finland, however, was extensive and usually required up to seven years of study which could be undertaken at only three of the country's twenty one universities. No certificate was required for an individual to practise law, however, unless that person wished to call themselves 'advocate'.

12.38 In Denmark, legal services were not highly regulated. There was no monopoly on legal advice for lawyers. The one exclusive right of Danish lawyers was representation

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[208] Paterson I, Fink M, Ogus A (2003) Economic impact of regulation in the field of the liberal professions in different member states: regulation of professional services. European Commission, DG Competition

before the court. However, parties were free (in most types of cases) to represent themselves. The profession of 'advokat' was unified. All advocates had to hold a university law degree which were provided by two universities in Denmark.

Other European jurisdictions

12.39 In 1998 the Council of the Bars and Law Societies of the European Union undertook an exercise to examine areas of work reserved to lawyers. Although now a little dated (for example in the Scottish example solicitor advocates are now operating), this is presented at the end of the chapter. This work covered a larger number of jurisdictions than was possible during the current exercise and it clearly illustrates the variation across the European area.

Australia

12.40 While the Australian legal tradition was in general heavily based on that of the United Kingdom, each of its territories formed a separate jurisdiction and each thus employed a slightly different approach to the regulation of the legal profession. The combined title of solicitor-barrister was in use in all of Australia except New South Wales (NSW) and Queensland.

12.41 Lawyers in NSW were required to obtain a practising certificate from either the Bar Association (which would allow them to practise as a barrister) or from the Law Society Council in order to practise as a solicitor. An individual practitioner could not hold certificates issued by both bodies. Barristers were specifically prohibited from conducting the work of solicitors while solicitors might appear as advocates in court but did not wear wigs and could not identify themselves as barristers.

12.42 Restrictive practices also applied at the Bar where barristers could not appear in court without having been instructed by a solicitor. They were also prevented from forming partnerships with other barristers in much the same way as applied to barristers and advocates in the United Kingdom. The National Competition Policy Review of the Legal Profession Act 1993 (conducted by the Law Reform Commission of New South Wales) concluded that certain services could and should be extended to non-legal professionals but the responsibility for advocacy should be expressly reserved to the legally qualified.

12.43 In Victoria too, the profession was divided into solicitors and barristers though some practised as 'solicitor barristers' as outlined above. The Legal Practice Act 1996 required practitioners to join a registered professional association in order to be issued with practising certificates. In spite of the erosion of the division between the two branches of the profession there remained a separate group of lawyers who practised as barristers only and thus formed the independent Bar in the state or territory in question (that was true of all Australian states and the two mainland territories). Solicitors and barristers might act in the same circumstances as those in New South Wales although most appearance work in Victoria was conducted by barristers in spite of the fact that other legal professionals also had rights of audience. Growth in the profession of barristers in Victoria was due largely to the fact that they had become highly specialised in some areas. Individuals now also had the ability to access the Victorian Bar directly without having to initiate contact through a solicitor.

12.44 The South Australian model featured a profession that was combined. All new entrants to the profession were admitted as both solicitors and barristers and were entitled to

style themselves as one or other according to their own commercial requirements or preferences. South Australia was also considering opening up some aspects of the profession to competition from non-legal professionals.

12.45 In Tasmania a 'limited right of audience' was available to an individual who had been articled by a solicitor under the Legal Profession Act 1993. These 'articled clerks' did not in all cases need to have law degrees (they might be law students for example) but the entitlements arising from that status might be revoked by the court at any time if it was of the opinion that the appropriate standards of conduct were not being observed by an individual articled clerk. Tasmania had also revoked the reservation of conveyancing work to members of the legal profession.

12.46 The Northern Territory still subscribed to the view that representation in court should be reserved to the legal profession only, though accepted that that need not only be provided by barristers as opposed to other legal professionals.

New Zealand

12.47 Most practitioners were now admitted to the profession as both solicitors and barristers. Some practitioners however did elect to act as 'barristers sole' and thus limited their activity to representation in the courts. The New Zealand legal profession was not subject to the same 'tradition' imposed restriction as some other legal systems and so the two branches of the profession operated harmoniously in an open market.

12.48 The Lawyers and Conveyancers Bill then being considered by the House of Representatives would end the legal profession's monopoly over conveyancing matters but upheld the reservation of advocacy to legal practitioners. That was subject to existing statutory exceptions, and to specific exceptions made by the court for 'McKenzie friends' as described above in the context of England and Wales. Lay representatives were common in some specialist tribunals in New Zealand in areas such as employment, some licensing issues and proceedings under the Children, Young Persons and their Families Act 1989.

Canada

12.49 The Canadian legal profession was regulated by the Competition Act 1985. In Canada, the term 'lawyer' was used more frequently than either solicitor or barrister to describe Canadian legal professionals. It was a 'catch all' term for the roles of both solicitor and barrister as Canadian lawyers in all provinces except Quebec could provide any kind of legal service including representation at all levels.

12.50 The Canadian legal profession was experiencing the movement of some of its traditional tasks from legally qualified professionals to the paralegal profession, a trend that was likely to become more pronounced in future. As yet there were no firm plans for regulation and licensing of the paralegal profession, though questions were being raised about the manner in which that profession operated and the case for regulation. While there existed a role for the paralegal/legal assistant within the Canadian legal system, there was no lawyer/client confidentiality or privilege between a client and a paralegal/legal assistant.

12.51 A task force was established in Ontario to deliberate on the work of paralegals and 'legal assistants'. The task force considered whether or not the paralegal profession should

be subject to regulation on a similar basis to that applied to the legal profession. The task force was mandated to undertake that work in response to complaints about the manner in which some paralegals had conducted work previously. Such work included settlement of personal injury claims and other court proceedings. The task force also considered whether or not paralegals could provide a comparable and cost effective service that would deliver competition with the legal profession, but its report was inconclusive on that issue.

12.52 The purpose of proposals to increase regulation of paralegals would be to ensure that the same level of protection was afforded to members of the public who received services from paralegals or legal assistants as that which legal practitioners provided for their clients. Reform of the paralegal profession would be required in tandem with such changes. Paralegals were currently entitled to act on behalf of clients in small claims proceedings and in certain tribunals.

12.53 There appeared to have been an increase in self represented litigants in Nova Scotia Courts which studies conducted in that jurisdiction suggested to be an almost universal trend resulting from the high costs involved in engaging a lawyer.

12.54 In British Columbia the Court Agent Act allowed provincial voters to act as representatives in court in some very specific circumstances but generally a lawyer had to be engaged where the litigant did not wish to represent themselves.

12.55 Finally, as a result of its French roots, the Quebec legal profession featured notaries as well as lawyers. These notaries would usually undertake contract work relating particularly to real estate transactions and might only appear in court on non-contentious matters.

'McKenzie Friends'

12.56 This expression arose from the English case of *McKenzie v. McKenzie* 1970 3 W.L.R. 472. The term described individuals who were non-lawyers but who chose to assist the litigant in court. In most cases they would be friends or perhaps neighbours of the litigant and in previous cases 'McKenzie friends' had been drawn from advice agencies such as Citizens Advice Bureaux. Though in most cases such representatives would be granted the ability to assist, there was still a wide discretionary power on the part of the court to refuse to acknowledge such a 'friend' of the litigant and there had been no substantial increase in their number since the commencement of the Courts and Legal Services Act 1990. It was significant to note however that the failure of the litigant to attend proceedings would prevent the friend from being granted rights of audience. It should also be noted that while the individual would have the ability to quietly advise the litigant, they would only be entitled to rights of audience where the court specifically allowed it or in small claims proceedings. McKenzie friends should be distinguished from *amici curiae* or friends of the court.

Amicus Curiae

12.57 An *amicus curiae* brief could be submitted to the court in cases in which it was thought that the outcome might be affected by the interest shown by the party submitting the brief. Though the court might call upon an *amicus curiae* to give assistance in the course of proceedings, usually in the interests of the litigant, the 'friend of the court' did not have a right of audience.

Conclusions

12.58 There was variation in restrictions on rights of audience across Europe and internationally. With the exception of Sweden and Finland all of the jurisdictions covered by this exercise had experienced change in the structure of their legal professions in recent years, most in the late eighties and early nineties. Overall there had been a general extension of rights of audience in the jurisdictions examined.

12.59 There were some marked contrasts within Europe. In particular between Austria and Germany and their counterparts in Scandinavia. The UK (including Scotland) lay in the middle of the regulatory continuum on rights of audience.

12.60 The Group recognised that any extension of rights of audience would require safeguards to be in place to protect the interests of clients so that clients could be confident they were represented by a fully trained member of a well regulated professional or other body and that public protections such as professional indemnity insurance and a responsive complaints system were in place. From the perspective of the efficient discharge of court business, it was equally important that members were trained to be fully conversant with the procedure of the courts in which they intended to appear so that the work of the courts was not unduly impeded.

12.61 Subject to these considerations, the Group concluded that the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 would serve to increase choice and competition in relation to representation in court; and recommended to Scottish Ministers that it would be in the interests of the users of legal services for the provisions to be brought into force.

Table 1 : Comparison of rights of audience across key jurisdictions

Country[209]	**Profession**	**Representation before courts**	**Representation before administrative agencies**
Scotland	Solicitor / Advocate	Reserved	Not reserved
Australia	Barrister / Solicitor	Reserved	Not reserved
Denmark	Advokat	Reserved	Not reserved
Finland	Advocate and lawyer	Not reserved	Not reserved
France	Avocat	Reserved	Not reserved
Germany	Rechtanswalt	Reserved	Reserved
Sweden	Advokat	Not reserved	Not reserved
England and Wales	Solicitor and Barrister	Reserved	Not reserved
New Zealand	Solicitor / Barrister	Reserved	Not reserved

[209] In Canada there were variations across federal states.

ANNEX A

MEMBERSHIP OF THE RESEARCH WORKING GROUP ON COMPETITION IN THE LEGAL SERVICES MARKET IN SCOTLAND

Chair

Colin Imrie, Scottish Executive Justice Department, Head of Access to Justice Division (chair until August 2004)
Andrew Dickson, Scottish Executive Justice Department, Head of Access to Justice Division (chair from September 2004)

Members

Professor Robert Baldwin, London School of Economics and Political Science
Michael P Clancy OBE, Director, Law Reform, Law Society of Scotland
Chloe Clemmons, Citizens Advice Scotland
Martyn Evans, Scottish Consumer Council
Debbie Headrick, Senior Researcher, Scottish Executive
Grahame Horgan, Office of Fair Trading
John Hughes, Citizens Advice Scotland
Roy Martin QC, Dean of the Faculty of Advocates
Douglas Mill, Chief Executive, Law Society of Scotland
Lindsay Montgomery, Chief Executive, Scottish Legal Aid Board
Dr Anita Morrison, Head of Legal Studies Research Unit, Scottish Executive
Sarah O'Neill, Scottish Consumer Council
Professor Alan Paterson, Professor of Law, University of Strathclyde
Neil Ross, Grigor & Young, Elgin
Elaine Samuel, University of Edinburgh, School of Social and Political Studies
Professor Frank Stephen, Professor in Economics, University of Strathclyde (University of Manchester with effect from 1 September 2005)
Michael Walker, Maclay, Murray & Spens, Glasgow
Alan Williams, Office of Fair Trading
James Wolffe, Faculty of Advocates

Secretariat

Mike West, Scottish Executive Justice Department, Legal Services Policy Team
Alison Dewar, Scottish Executive Justice Department, Legal Services Policy Team
Carole Johnston, Scottish Executive Justice Department, Legal Services Policy Team

ANNEX B

NOTE BY THE LAW SOCIETY OF SCOTLAND: RESTRICTION ON SETTING UP IN PRACTICE – THE THREE YEAR RULE

1. Up until 1996 a solicitor could become a principal immediately on completion of the traineeship – either in a partnership or as a sole practitioner. In the late 1980s and early 1990s there was increasing evidence of concern about solicitors with little experience setting up their own practices and being unable to cope with the demands of providing an adequate service to their clients; proper risk management; and compliance with the Society's Practice Rules, particularly the Accounts Rules. This concern was demonstrated by an increasing number of complaints; claims of professional negligence; business failures; and prosecutions before the Scottish Solicitors Discipline Tribunal. The matter was also the subject of a recommendation in the Report of the Royal Commission on Legal Services in Scotland in 1980.

2. The Royal Commission believed that a restriction on practising on a solicitor's own account until the solicitor's name had been on the Roll of Solicitors for three years was an idea which safeguarded the interests of clients. In the Royal Commission's view, young solicitors should be expected to learn to accept more responsibility for their own work and relationships with clients before being allowed to take on the much heavier responsibility of partnership and the liability which that entails. The Royal Commission was also of the view that it would be wrong to allow a solicitor who was a trainee one day to become a principal the next – "A young solicitor needs time to learn about the administration of a firm's business before he assumes the responsibilities of partnership; and only limited start on this can be made while he is a trainee." (paragraph 16.56)

3. In the mid 1980s the Council set up a Competence Committee with the remit to consider and recommend means of detecting, identifying, preventing and eradicating incompetence within the solicitor branch of the legal profession in Scotland, and to recommend action to be taken to improve competence generally. One of the early recommendations of the Competence Committee was a compulsory practice management course for new principals, and Practice Rules to that effect came into force in 1989. The course was held over two days on a residential basis. However there continued to be problems arising from inexperienced practitioners and the Council of the Society accepted recommendations from the Competence Committee in respect of further measures.

4. A number of initiatives were developed to address these problems, including compulsory Continuing Professional Development (CPD) (1993); powers to the Council to inspect practices and to give advice and guidance to practices in connection with risk management as part of the Professional Indemnity Insurance Rules (1995); and restrictions on solicitors practising as principals on their own account until they have obtained three years experience as an employed solicitor (1996).

5. The Solicitors (Scotland) (Restriction on Practice) Practice Rules 1996 – as the three year rule is properly called – were passed by Council after circulation to all members of the profession and after debate at the 1996 Annual General Meeting. The Practice Rules were amended slightly in 2001 to take account of Limited Liability Partnerships and to take

account of career breaks e.g. maternity leave. The current Rules provide – in Rule 3 – that a solicitor shall not practise as a principal unless he has been employed as a solicitor for a cumulative period of three years, one year of which shall immediately precede commencing practice as a principal. The solicitor must have an unrestricted practising certificate for the period of employment.

6. The Rule does not apply if the solicitor is assumed into a partnership or incorporated practice where a partner, director or member has practiced as such for three years.

7. In today's increasingly complicated and pressurised world, there is a clear public interest in requiring solicitors to gain experience in an employed position before embarking on their own practice. Risk management is not merely a matter of technical legal knowledge – it involves experience of practice including dealing with staff and attending to administration. Solicitors increasingly specialise from an early stage in their careers. Being a sole practitioner imposes an additional burden on a solicitor as there are no other partners to share financial and managerial burdens. New and inexperienced sole practitioners may lack the resources to provide adequate working capital to run the practice.

8. Putting together all aspects of a business package to create a successful business requires a range of skills and maturity which it is difficult if not impossible to obtain at university or during a traineeship. Practical observation of a successful existing practice will provide the recently qualified solicitor with knowledge of filing systems; accounting systems; interaction with clients and members of staff; and office administration without which the new sole practitioner would be handicapped. There is also the important aspect of putting together a financial statement and business plan not only for the solicitor's own benefit but also to obtain overdraft facilities which are usually necessary at the start of any new business venture. The identification of key business objectives and how best to fund and manage them is a matter where mature judgement is important. The risk of creating problems for members of the public due to inexperience of such matters must be a factor that the Society requires to take into account in fulfilling its statutory duty to promote the interests of the public in relation to the solicitor profession.

9. The Practice Rules contain power to the Council to grant waivers in particular cases, which power has been delegated to the Professional Practice Committee. Since the current Rules came into force on 30 November 2001 nine such waivers have been sought and 7 of those granted. Factors which the Committee take into account in considering a waiver include experience of running other businesses before administration as a solicitor; circumstances such as unexpected redundancy; and experience of practising as a lawyer in another jurisdiction. In the same period approximately 1,000 new solicitors have been admitted.

ANNEX C

(a) Solicitor Advocates in Scotland : A Research Overview (Report and Legal Studies Research Findings No. 35)

1. This research made a number of observations relevant to the rule :

1.1 The research found that the short-term impact (of the introduction of solicitor advocates on the shape of the legal profession) had been limited, largely because of the relatively small numbers of solicitors who had gained extended rights of audience (at that time), but also because of the views and practices of instructing solicitors and clients of legal services and the existing ban on "mixed doubles". One impact of potential significance, however, was the effect that solicitor advocates were having on the Junior Bar. It was noted that some junior advocates had lost business to solicitor advocates and that a continuation of this trend could lead to a diminution of the Junior Bar, and in the long term, the Senior Bar. However, none of the groups in the research wished to see the Bar diminished and the fusion of the profession was not seen as likely. A more diverse and fluid legal profession was, however seen as a possibility. Overall the research suggested that there was potential for further change in the future. This, however, would depend on a number of factors such as the views of solicitors and solicitor advocates and their clients, and the prospects for "mixed doubles" in the future. (Summary, paragraph 12)

1.2 Most solicitor advocates interviewed noted a desire to work with counsel as an opportunity to learn from the best and to form the best courtroom teams (paragraph 2.15).

1.3 The ban on mixed doubles attracted a significant amount of comment from organisational clients…there was a general consensus that mixed doubles would lead to cost savings as it would remove the necessity to instruct both senior and junior counsel in a case…corporate clients were attracted to the idea of mixed doubles, seeing such a combination as the ideal courtroom team (paragraph 5.25)…the majority of solicitor advocates thought that the mixed doubles team – comprising a specialist pleader and a case speciality – would represent the best team for the client (paragraph 6.28).

1.4 The ban on mixed doubles was introduced by the Faculty of Advocates, ostensibly because of the different Codes of Conduct which govern the two branches of the legal profession. All the judges interviewed for the research were of the view that the issues of discipline and ethics and the different ways these were dealt with by the two branches of the profession remained obstacles to the introduction of mixed doubles…though several suggested that if these issues could be resolved mixed doubles might not only be possible but also effective (paragraph 6.29).

1.5 Advocates…were not all wholeheartedly in favour of the ban. Kerner reported that various members of the Faculty suggested that the ban could be rescinded if rules for such team work could be properly established and understood. And while the majority of solicitor advocates were interested in working with advocates, several advocates also expressed a willingness to work with solicitor advocates under the right conditions (paragraph 6.30).

1.6 Advocates were of the view that experienced members of the Bar had been unaffected by the introduction of solicitor advocates and that most impact had been felt by the Junior Bar…There was some concern about the long term effect of this on the Bar amongst advocates and some organisational clients. However, none of the groups included in the research wished to see the Bar diminished and advocates continued to be used and valued because of their perceived objectivity, court room skills and legal expertise (paragraph 7.10).

1.7 A lifting of the ban on mixed doubles is likely to facilitate the development of solicitor advocacy…If top advocates were invited to join law firms as solicitor advocates working as in-house counsel, talent would be further concentrated in such firms (paragraph 7.42).

1.8 It would be most unfortunate if a policy aimed at enhancing client choice ultimately resulted in its restriction…it would also be unfortunate if the potential for enhanced client choice was being hindered by obstacles which could be removed through further policy intervention (for example the removal of the ban on mixed doubles)…(paragraph 7.43).

(b) Hanlon and Jackson's study Solicitor Advocates in Scotland: The Impact on Clients (Report and Legal Studies Research Findings No. 33)

2. This research noted some specific advantages mentioned by organisational clients which include the constant availability of solicitor advocates, avoiding any last minute change of advocate, greater control over the court process and a potential cost advantage if solicitor advocates were permitted to work alongside advocates in so-called "mixed doubles" (Summary, paragraph 7).

3. The study includes some analysis relevant to the mixed doubles rule and notes that there are at least two important differences between the rules as they affect advocates and solicitor advocates :

3.1 [firstly] solicitor advocates are not bound by the so-called "cab-rank" rule according to which the advocate "is not at liberty to decline, except in very special circumstances, to act for any litigant."…the absence of a cab rank rule for solicitor advocates could have important implications for client choice should solicitor advocates develop a disproportionate share of advocacy services at the expense of the Faculty of Advocates. The Government's intention in extending rights of audience was to widen client choice…however if the Bar were considerably weakened and the best solicitor advocates working for prestigious firms only accepted instructions from wealthy clients, less wealthy clients could be disadvantaged. (paragraph 1.5)

3.2 [secondly]…whereas advocates are generally not permitted to interview or discuss a case with (or in the presence of) a potential witness, solicitor advocates are under no such prohibition, except that a solicitor advocate must not communicate with any witness once the witness has begun to give evidence. The result of this is that it is open to solicitor advocates to become more involved in the preparation of cases than advocates and the traditional demarcation between the solicitor and advocate as one of

preparation of the case by the solicitor and presentation of the case by the advocate may become blurred (paragraph 1.6).

3.3 Many corporate clients liked the idea of using "mixed doubles" where a solicitor advocate works alongside an advocate, either as the junior or senior partner…A number of clients considered the present rule against using "mixed doubles" was a restrictive practice designed to protect the Bar and commented that clients were effectively paying for the training of junior counsel (paragraph 6.16).

3.4 If "mixed doubles" were allowed…it is conceivable, possibly even likely, that solicitor advocates in the large firms would start to work as the junior partner in a case involving senior counsel. This would enable solicitor advocates to gain significant courtroom experience whilst also saving on costs to clients due to the fact that the solicitor would perform the role of both solicitor and junior advocate, thus saving on junior counsel's fees. However, in the long term such practices would undermine the Bar because many of the next generation of senior courtroom lawyers would potentially be solicitor advocates who had worked as juniors to many of today's most experienced counsel (paragraph 6.18).

3.5 Whether the "mixed doubles" rule is justified would seem to depend on whether it is believed that the Bar has a distinctive role to play (paragraph 6.19).

3.6 It would seem to the authors that if the ruling on "mixed doubles" were relaxed and the large corporate clients decided to use solicitor advocates as junior members in a solicitor advocate and counsel team, or if solicitors' firms were to reorganise so that they could accommodate large trial cases in-house, then the Junior Bar may well be undermined and the future of the Bar put in jeopardy. This in itself may not necessarily be a bad thing because professional jurisdictions are constantly under pressure and subject to change (Abbott, 1988). However, if the Bar is to weaken or even to demise in the long term, it is important that in the area of civil justice steps are taken to ensure that the next generation of experienced courtroom lawyers are not disproportionately based in the large law firms. …Access to justice and the creation of a representative judiciary require a situation wherein courtroom lawyers are not…solely tied to firms and to corporate clients because...law firms themselves are not impartial in whom they represent. Powerful clients may demand some control over who else the firm represents in a way that does not appear to exist with the Bar and this may have implications for access to justice (paragraph 6.29).

3.7 If solicitor advocates are to progress to become senior experienced courtroom lawyers they need to gain more higher court work. For this to happen it seems likely that they will need the ban on "mixed doubles" to be dropped so that they can work alongside the leading senior counsel and learn from them in the same way as junior advocates do. Such action may well damage the Junior Bar. Given that knowledgeable clients feel the present system means that they pay a high price for the Junior Bar to develop courtroom skills, however, it is hard to defend the current system on the grounds of service provision. But if the Junior Bar is damaged, then the next generation may not be as skilled as those working today. In itself this need not necessarily be a disadvantage if solicitor advocates enhance overall service provision. However, for this to occur a number of safeguards are needed. If all the successful and experienced solicitor advocates are to be found in the largest firms, because it is

only those firms that are able to reorganise to allow the solicitor advocates to spend long periods in court, then choice may be limited. (paragraph 12.25).

3.8 …in the short term choice may be widened as advocates and solicitor advocates fight it out in the market place, but if solicitor advocates are successful at the expense of the Bar (and the Junior Bar in particular) then in the long term choice may actually be limited, both for powerful organisations but also, and perhaps more severely, for individual clients in the civil area who may be left with an inadequate Junior Bar and/or small firm inexperienced solicitor advocates… (paragraph 12.27).

ANNEX D

LETTER FROM SOCIETY OF SOLICITOR ADVOCATES OF 10 SEPTEMBER 2004

The Society of Solicitor Advocates was invited to comment on the rule against mixed doubles. The Society's letter is below :

Dear Madam,

Working Group for Research into the Legal Services Market in Scotland.
Response by the Society of Solicitor Advocates in respect of "Mixed Doubles".

The Society of Solicitor Advocates ("The Society") welcomes the invitation dated 16th August 2004 from the Scottish Executive to contribute to the discussion on the above topic.

When Extended Rights of Audience – to use the formal term describing the ability of solicitors to appear in the supreme courts - came into existence in 1993, it was envisaged that the availability of representation by Solicitor Advocates would broaden the choice available to consumers of legal services in the Scottish legal services market place. There are now some 175 Solicitor Advocates able to provide clients with representation in the Supreme civil and criminal courts in Scotland. It is understood that, in England and Wales, there are in excess of 1,000 Solicitor Advocates.

The Society believes that consumers of legal services in Scotland are entitled to the widest possible choice of options as regards representation, on every occasion when it becomes necessary for individuals or corporations to assert or defend claims in the civil courts, or to defend allegations of criminal conduct in the criminal courts. The Society is concerned that the existence of the so-called "Mixed Doubles Rule" prevents the attainment of that objective. According to this rule, all members of the Faculty of Advocates are currently prohibited from appearing in court with a Solicitor Advocate where both represent the interests of the same client.

The "Mixed Doubles Rule" is in fact a reference to a Ruling issued to members of the Faculty of Advocates by the then Dean of Faculty shortly after the first Solicitor Advocates began to use their Extended Rights of Audience. The Ruling is understood to have arisen from a perceived lack of independence on the part of solicitors from their clients. The Society is not aware of there being any evidence, throughout the duration of the period during which Extended Rights of Audience have been sought and exercised, demonstrating that Solicitor Advocates are less 'independent' than members of Faculty in their dealings before the court.

The Society submits that one of the keys to the effectiveness of representation in any court, as well as being one of the commodities most valued by any consumer of legal services, is continuity of representation. With any case, but particularly in relation to matters of legal and/or factual complexity, the involvement of the same legal representative from the inception of procedure until its eventual conclusion brings a number of benefits. Outright knowledge of the complexities of law attending a particular claim or prosecution is of course very important. However, frequently a tactical advantage accrues because the consumer's legal representative has developed over time an intimate knowledge of the facts and

procedure with a particular dispute or prosecution. In the case of Solicitor Advocates dealing with civil matters this is an especially important factor.

By their very nature, civil claims in the higher courts entail complex legal pleadings and a multiplicity of legal issues. Civil procedure is not yet, despite the best efforts of the Scottish Court Service, particularly swift. In the Court of Session, for example, most civil claims last for 18 months or more. A new fast-track procedure was introduced in April 2004 for personal injury claims, but there is a precedent which suggests that fast-track procedures become victims of their own success. Even in the Commercial Court, which was established in 1994 in response to the concerns of business that litigation procedures were too slow, the present best estimate is that procedures can often last in excess of one year. As a consequence, in the course of any litigation a considerable amount of accumulated knowledge arises. This knowledge comprises familiarity with the facts, the law, and the procedure that has arisen to date. In addition, an ongoing awareness is formed as to the strengths, weaknesses, or tactics, affecting the client's opponent. The climax of this accumulated knowledge is the Proof (or the Trial in criminal terminology).

The relevance of the foregoing paragraph is that, according to the "Mixed Doubles" rule, a client may be deprived of the effective services of the Solicitor Advocate who has represented the client for a significant period, when those services would matter most. Simply put, the "Mixed Doubles" rule prevents a Solicitor Advocate from appearing side-by side with a member of Faculty, in court, at the final Proof or Trial where a decision has been taken to employ for example Senior Counsel at the Proof or Trial, usually due to the complexity, speciality, or high value involved in the case.

Additionally, the opinion of a member of Faculty (often though by no means exclusively the opinion of Senior Counsel) may be sought prior to or at the outset of litigation. Members of Faculty and Solicitor Advocates frequently work side by side throughout the entire pre-trial history of a case, and sometimes for significant periods before litigation itself. However, when the day in court materialises, the Solicitor Advocate cannot take his or her place at the bar of the court alongside the same member of Faculty as a representative, being instead relegated by the "Mixed Doubles Rule" to the row of seating behind the member of Faculty, in the same role as a solicitor not possessing Extended Rights of Audience. This is so notwithstanding the Solicitor Advocate may well have conducted all the preceding hearings, some of which may have been complicated or involved difficult issues of law, prior to the actual trial. In Commercial Court for example, a system of judicial conferencing and case management exists. Individual judges are allocated to each litigation and the many Solicitor Advocates practising in this forum typically will have appeared many times before the same judge as the case progresses.

The practical result of the "Mixed Doubles Rule" for the consumer of legal services - the client - who has hitherto employed a Solicitor Advocate to conduct a litigation is that he will require to engage Junior Counsel in substitution for the Solicitor Advocate to provide support services to Senior Counsel, where Senior Counsel is to lead at the at the Proof or Trial. The Society would acknowledge that on some occasions, Senior Counsel would not require a junior. This does not answer the criticism that no good reason exists why the Solicitor Advocate who has handled the case from day one may not appear at the bar to present the case to the presiding Judge, alongside Senior Counsel or indeed any member of Faculty.

A variation of the foregoing difficulty which will arise (albeit this is less common) where the Solicitor Advocate has dealt with the case throughout, but during final preparation feels it appropriate to seek the support of a junior member of Faculty at the eventual civil proof or criminal trial. Once again, the "Mixed Doubles Rule" deprives the client of the choice of engaging a junior member of Faculty to support the Solicitor Advocate. This presents the Solicitor Advocate with a difficult situation. Having arrived at the view that the assistance of a junior would be beneficial to the effective presentation of the client's case, and finding himself being unable in practice to source that support, the Solicitor Advocate may have to withdraw and pass the case to either another Solicitor Advocate - or a member of Faculty - very late in the day.

Accordingly, as a general proposition, the Society of Solicitor Advocates maintains that the continued existence of the "Mixed Doubles Rule" operates to distort and limit the choices for Scotland's consumers of legal services. If the rule were abolished there is no doubt in the mind of the Society that many clients would elect to have their Solicitor Advocate play a proactive role in preparation and presentation of evidence at proof or trial alongside a member of Faculty.

The current position is of course the same for 'Procedure Roll' hearings, which are complex legal presentations not involving evidence that can nevertheless result in (for example) the outright dismissal of a case. The same may be said of appearances in the appeal courts, i.e. the Inner House, House of Lords, or Judicial Committee of the Privy Council. On none of these very important occasions, applying the "Mixed Doubles Rule", may a Solicitor Advocate appear alongside counsel to present arguments to the court.

The inability of a Solicitor Advocate ultimately to appear in court as set out above can be difficult to explain to a client and ordinarily it will fall to the Solicitor Advocate to attempt that explanation. Looking at client management issues more broadly however, and mindful of the reasoning understood to have prompted the introduction of the "Mixed Doubles Rule", the Society would say this. In a situation where there are members of the two branches of the legal profession working together, it is obviously important that the relationship between them, and the relationship with the client is properly managed. However both the Solicitor Advocate, and the member of Faculty are subject to stringent obligations of confidence and independence, and that should not be compromised. Ultimately it is the interests of the client that will determine how the relationship is managed.

Some general, secondary, observations may now also be made. First, Solicitor Advocates in England and Wales do not, it is understood, have to operate under any such rule and the Society of Solicitor Advocates has been informed by its English counterpart that "Mixed Doubles" operate in the English higher courts without difficulty.

Second, the representation of litigants at proof or trial either in the civil or criminal courts is a trade best learned from participation as part of the presenting team. Watching experienced hands at work is not a substitute for active involvement in case preparation and hands-on presentation. Because Solicitor Advocates are precluded from appearing in court in the same case, with Senior Counsel, Solicitor Advocates are currently mere spectators at the final curtain, deprived of the opportunity to learn from experienced Seniors in a way that *is* available to members of the junior Bar.

Finally, it may be worthy of note that the membership of the Society of Solicitor Advocates includes three experienced solicitors who have also practised in New Zealand, a country in which there exists a "fused" legal profession where all solicitors enjoy rights of audience from the District Court right up to the level of the Judicial Committee of the Privy Council. Notwithstanding this, New Zealand operates a separate and highly successful Bar. Both limbs of the profession appear to thrive in this environment and clients appreciate the ability to have their solicitor appear in court at every stage of the case together with Junior or Senior Counsel. Indeed, such choices are made and implemented on a daily basis in that jurisdiction.

The Society feels strongly that the removal of the "Mixed Doubles Rule" is overdue. Its removal would extend the choice of representation for consumers of legal services. This was what was envisaged when Extended Rights of Audience were first sought. The Society trusts that this letter is a helpful contribution to the debate. It is also grateful for the suggestion of a meeting to discuss matters, and would be happy to participate further.

Yours sincerely

Paul R Motion
Secretary
Society of Solicitor Advocates

ANNEX E

Review of Multi-disciplinary Practices

Introduction

1. There is recent evidence of increasing support for the relaxation or removal of restrictions on MDPs. At a European level, the 2004 report by the European Commission on Competition in Professional Services recognised the possibility of justifications for regulating business structures in markets where there is strong need to protect practitioners' independence or personal liability, though the possibility of alternative mechanisms for protecting independence and ethical standards was raised as an option which would be less restrictive of competition.

2. This survey looks at the position of MDPs within jurisdictions worldwide. Mainly theoretical in nature, it summarises the key arguments in literature put forward to justify removal of prohibitions on MDPs, and also the arguments put forward by those wishing to maintain prohibition. Models of MDPs are discussed, and a brief jurisdictional comparison is undertaken. Very little empirical evidence on the functioning of MDPs in jurisdictions where such business structures are permissible has been uncovered to date – while the development of MDPs is relatively recent in most jurisdictions, which may account for the lack of evidence, in some (e.g. Germany) MDPs have been permissible for many years. Further work may be needed in due course to assess the extent of evidence on operation in the context of different jurisdictions.

Terms

3. There are a number of definitions of multidisciplinary practices, including the definition in section 65 of the Solicitors (Scotland) Act 1980[210]. Clementi (2004) defines an MDP as *'a business structure having as Managers at least one lawyer and one non-legal professional, which provides legal services to the public, as well as the services of another profession'.* For the purposes of this paper, that adopted by the American Bar Association Commission on Multi Disciplinary Practice is chosen as a working definition (ABA 2000), i.e.:

> *' a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client (s) other than the multidisciplinary practice itself or that holds itself out to the public as providing non legal, as well as legal, services'* [211]

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[210] "multi-disciplinary practice" means a body corporate or a partnership

- (a) having as one of its directors or, as the case may be, partners, a solicitor or an incorporated practice; and
- (b) which offers services, including professional services such as are provided by individual solicitors, to the public; and
- (c) where that solicitor or incorporated practice carries out, or supervises the carrying out of, any such professional services as may lawfully be carried out only by a solicitor;

[211] Norwood and Paterson describe this working definition as one which 'is comprehensive enough to include many models of multidisciplinary practice' (Norwood and Paterson (2002) at 342

4. There is a distinction between 'multidisciplinary practice' and 'multidisciplinary partnership'. The former describes the activities of the professional services firm; the latter describes the legal relationship between the members of the firm (Daly 2000). MDPs should also be distinguished from the situation where a number of professions may have in house solicitors on their staff. For example, this is common in accountancy firms and banks.

5. Further, it is important to distinguish between *Multi Disciplinary Practices* and *Legal Disciplinary Practices*. LDPs are law practices bringing together lawyers from different branches of the legal profession – for example solicitors and barristers – providing legal services to third parties. MDPs are practices bringing together lawyers and other professionals (e.g. accountants, surveyors etc) to provide legal and other professional services to third parties (Clementi 2004).

Arguments for and against MDPs

'The reality is that MDPS do exist today; are likely to stay, and are likely to continue to grow' (Norwood and Paterson 2002 at 354)

6. Literature on the topic of MDPs in the UK context is relatively sparse in comparison to that in relation to the USA, despite the fact that debate over MDPs has been evident for the past 2 decades - MDPs were the subject of consideration by both the Royal Commission on Legal Services in England and Wales and in Scotland in 1979 and 1980.

7. Paterson, in 2001, found that *'almost to a scholar, the American writers have been accepting of the inevitability of MDPs'* (Paterson 2001 at 161)[212]. Pressures for allowing MDPs have come from a variety of sources: some solicitors see MDPs as business opportunities or at least a way in which to challenge the threat from informal or de facto MDPs already in existence (in particular, accountancy-led MDPs) (Deards 2001). The 'Big 5' accounting firms have had a key role in the lobby for change. The global move towards increased competition and removal of restrictive practices has prompted regulatory bodies worldwide to express support for MDPs – OFT in the UK, for example, supports MDPs and sees prohibition as a restriction on competition.

8. Client pressure for change is harder to establish. Literature suggests that actual client demand for the services of MDPs is to a large extent untested (Deards 2001) and that any opinion surveys which have been done have been inconclusive (Paterson 2001). The Law Society of Scotland in 2000 noted that *'what evidence there is suggests that there is no great demand from consumers for MDPs'* (Law Society of Scotland 2000). A more recent review by the Society (Law Society 2004) refers to a lack of empirical evidence demonstrating existence of demand for MDPs.

Potential benefits of MDPs

9. Nonetheless MDPs are seen as providing numerous potential benefits to clients. The benefits of MDPs to clients are seen as, in part, summed up in the simple notion that

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[212] However, the Enron case has increased the voice of opposition to MDPs in the USA. The American Bar Association has recognised growing opposition to MDPs. 'In a post-Enron environment, in relation to the role of an accountant acting specifically as an auditor, there is a very obvious and fundamental conflict of duty, compared with the duty of a solicitor' (Law Society of Scotland 2004).

'Legal problems in a complex society often require the knowledge and skills of more diverse professionals. Multi-professional offices, staffed by a variety of different experts…facilitate the dispute resolution process. Someone with a problem could come to the office and get help from the professional or team of professionals best suited to deal with the problem. Like a supermarket, the multi professional office could provide one-stop shopping' (Muneke 2001 in Norwood and Paterson 2002 at 341)

10. However, a variety of other benefits of MDPs are argued. In literature, the same benefits and drawbacks of MDPs are generally highlighted. This paper does not rehearse these in great depth; LCD (2002) usefully summarises key advantages and disadvantages of MDPs (many were discussed in the Lord Chancellor's Advisory Committee on Legal Education and Conduct Report of July 1999 on Multi-Disciplinary Practice) – key advantages are seen to be:

10.1 MDPs free up potential for **greater choice** for customers. By allowing for increased specialisation and the development of innovative types of practice which could provide better, more integrated ways to meet customer needs including one-stop-shops;

10.2 MDPs provide potential for **lower prices** for customers. Through innovation, economies of scope, better use of resources, reduced costs of co-ordination and duplication between firms including accommodation and overheads;

10.3 MDPs provide potential for **increased quality** of services. By attracting investment of outside capital and attracting and retaining good non-solicitors/other professionals into the market by offering the status of partnerships and directorships allowing them to participate. One-stop-shops may also make it easier for customers to have complaints addressed. [213]

11. MDPs are seen as business structures allowing more innovative and efficient means of delivering legal services to clients who are now looking for more flexibility – commercial transactions are becoming increasingly complex, and it is argued that the nature of legal problems faced by many large commercial organisations nowadays can no longer be simply classified as legal problems and business problems. As lines between legal and non-legal areas become increasingly less clear a combination of legal solutions, or a 'holistic' service, may be appropriate and beneficial for many clients (Paterson 2001, Dixon 2003).

12. For the *lawyers and other professionals* working within a MDP, a key benefit is seen to be cost sharing and economies of scale. A further benefit is seen as improved capacity to retain clients through regular contact resulting from the provision of a range of services. Members may also benefit from a growth in skills and knowledge; MDPs are seen as having the potential to improve career development with beneficial effects on the quality of staff and accordingly client service (Deards 2001).

[213] LCD 2002

Potential drawbacks of MDPs

13. LCD (2002) summarise the key potential drawbacks of MDPs as follows:

13.1 Possible **reduction in choice**. If the most profitable commercial practices gravitate to MDPs this could drive out other local firms from that market, thereby reducing competition and provision; or if commercial pressures were to lead firms to 'bundle' different services this could discourage customers from shopping around for the individual components they require;

13.2 Potential **loss of, or perception of a loss of, professional independence and a threat to professional standards**. MDPs may involve risk to solicitors' ability to give 'fearless advice' to clients where in business with non-solicitors due to absence of privilege over information divulged to non-lawyers. A perception of loss of professional standing could inhibit solicitors ability to compete in the market and especially on the international stage;

13.3 Potential for **conflicts of interest**. If the number of independent firms providing each individual service is seriously reduced, customers may find it more difficult to engage with service providers who do not have a conflict of interest.

14. However the key concerns in relation to MDPs centre on *potential threats to professionalism and the core values of the legal profession* due to greater commercial or other pressures on solicitors working within MDPs*, and regulatory reach*. Paterson and Norwood (2002) usefully summarise the 5 key concerns typically flagged in relation to potential threats:

14.1 Partnerships with non lawyers are seen as undermining the collegial nature of the legal profession and its core values – in particular competence, independence, confidentiality, loyalty (in the conflict of interests context) and access to justice. The possibility of MDPs being controlled by non-lawyer partners is seen as a matter for concern.

14.2 As MDPs will involve a variety of professions with different codes of ethics (and less onerous than those followed by the legal profession) it is seen as likely that non-lawyer controlled MDPs which provide legal services will offer less protection to clients without the clients being aware of this.

14.3 In the context of MDPs involving accountancy firms, there is the now well known fundamental conflict between the accountancy firm's auditing duty of public disclosure and the lawyer members duty of non disclosure.

14.4 MDPs may enhance choice for clients through diverse providers – however they may also create conflicts of interest whilst restricting client choice as the lawyer members maybe more likely to refer clients to non lawyer professionals within the MDP rather than referring them to the best independent adviser.

14.5 MDPs as a concept create regulatory challenges which to date most competition authorities have failed to address. Clementi (2004) raises the question of

how a legal services regulator can exercise power over those members of MDPs who are not lawyers or not supervised by lawyers, pointing out that with MDPs the regulatory focus is diffused, since different professions would have potentially differing codes of practice.

15. The issue of legal professional privilege (LPP) is key in relation to the ethical concerns about MDPs. The difficulty in relation to MDPs would be lack of clarity for clients as to whether LPP applied only in legal matters discussed with a legal professional, or whether it applied to all members of an MDP. One option would be that 'Chinese Walls' would have to separate different departments clearly within an MDP - questions would arise however as to the operational viability of MDPs in this situation.

16. The Working Party of the Law Society of Scotland on Multi-Disciplinary Practices in Scotland concluded that *'the existing prohibition on MDPs arises from the nature of the Solicitor profession'* (Law Society of Scotland 2000). The Working Party saw 'very substantial risks' to the maintenance of the 4 underpinning principles of independence, conflict of interest, confidentiality, and privilege, should MDPs be allowed. Further, they doubted that the public protections given by the legal profession in relation to indemnity (Law Society Master Policy Scheme); Fraud (Guarantee Fund); Financial Probity (Client Account); and Complaints (Scottish Legal Services Ombudsman) would be taken on by non lawyer members of MDPs. In 2004 the Law Society of Scotland once more reiterated strong opposition to the creation of MDPs, stating the view that

> *'the total restriction in both management control and ownership is the best mechanism for securing the public interest'* (Law Society of Scotland 2004; p34)

17. While recognising potential for benefits outlines above, the Law Society of Scotland saw as key disadvantages:

- MDPs would give rise to an increased risk of conflicts of interest;
- MDPs would lead to conflicts between ethical duties and commercial interests which would be against the public interest;
- MDPs would undermine the operation of essential public protections offered by the legal profession unless required to provide equal protections;
- The conduct of non-solicitor members would not be subject to effective regulation;
- The likelihood of confusion on the part of consumers as to the nature of the MDP and the qualifications of the individuals in it.

18. The view of the Law Society of Scotland is that MDPs would result in:

- A diminution in the independence of advice;
- A reduction in the consumer safeguards which firms could offer in comparison to solicitor only partnerships;
- Restriction in choice and accessibility;
- Erosion of the obligation of confidentiality and legal professional privilege; and
- Difficulty in enforcing discipline and complaints. (Law Society of Scotland 2004, page 33)

Models of MDP

19. The concerns in relation to the need to protect public interest, and preserve legal professional ethics, necessitate discussion of the various models of MDP. Literature shows that a variety of models for MDPs exist, though in depth discussion of the variety of models is outwith the scope of this general overview paper. For the purposes of discussion however models in literature, and models advanced by the Law Society of England and Wales and the Clementi review are described briefly.

20. Key issues in relation to the ethical viability of MDPs for lawyers are the **management and control relationships** among the MDP professionals. Depending on the model adopted, non lawyer professionals could be involved in both ownership and management of an MDP, with an interest in promoting commercial services other than law, and bound by different professional rules to those within which legal professionals will operate.

21. Norwood and Paterson describe the 4 types of model for management and control of an MDP, drawn from jurisdictional experience and from published literature (Norwood and Paterson 2002):

Model 1: The lawyer or lawyers in a partnership act as leaders of a multi disciplinary team, the members of which are employees of the partnership, report to the lawyer partners, and are managed by the partnership.

Model 2: The spin off or ancillary business owned by the lawyer or law firm which can do work related to the practice of law and even channel profits back into the law firm.

Model 3: the full partnership or agreement between professionals from different disciplines – the fully integrated MDP, and the subject of most global debate. This model is seen as causing major regulatory difficulties. The more formal relationship in this model brings up issues of fee sharing, potential control of lawyers by non lawyers and the resultant loss of professional independence. As can be seen below, full blown partnerships between lawyers and non lawyers to offer legal services remain prohibited in most countries (Norwood and Paterson 2002). In those countries where such models are allowed, MDPs must provide services subject to the practice rules of the legal profession (Norwood and Paterson 2002).

Model 4: Collaboratives of independent professionals, with professionals within one body referring on clients in need of the services of another body. These can take many forms – some involve more formal arrangements which may be contractual in nature, others are loosely formed teams of professionals working in a cooperative relationship for the benefit of a client.

Law Society models

22. A number of models for MDPs have been considered by the Law Society of England and Wales[214] (Deards 2001). These fall into 2 categories: those offering full Law Society regulation, and full client protection; and those not offering client protection.

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[214] In addition to the models of 'Legal Practice Plus' and 'Linked Partnerships'

Models offering full regulation and protection

A partnership in which all partners are solicitors or registered with the Law Society and /or a recognised body (incorporated practice in Scotland) in which all directors and shareholders are solicitors or registered with the Law Society.

23. Under this model MDPs could offer any services, but all Practice Rules would apply to the solicitor members and to any legal work. Issues arise however in relation to who should control the MDP – solicitors or other professionals. This is seen as depending on what work MDPs are permitted to carry out – in particular would an MDP controlled by non lawyers be able to provide legal services in areas reserved to solicitors. A further issue is whether the non-solicitors would be required to be members of approved professions, with more compatible regulatory and ethical cultures.

A recognised body (incorporated practice) which undertakes only 'solicitor-type' work and in which non-lawyers may not be directors or hold a majority of the shares

24. Only legal services may be provided under this model, and non lawyers could only have a limited management role (although they could share in the profits).

25. The advantage of all 3 models is seen as being that the Law Society would regulate all owners and the full Practice Rules would apply to the solicitors and the legal work. Non solicitors would be regulated by the Law Society (requiring legislation). However, the extent to which these models are realistic is seen as 'highly debatable' (Deards 2001).

Models not offering full client protection

26. Here, alternatives are the *non lawyer owned model,* and the *mixed ownership model.* The *non lawyer model* is seen as having simplicity as a key advantage, as it would be similar in nature to the current position with regard to employed solicitors. Practice Rules would apply to solicitors, although the Compensation Fund would only apply in the case of a solicitor member's dishonesty. The business would require indemnity insurance for solicitor members, and would have to be held out primarily as that of some other profession, although the solicitors could provide unreserved legal services. Under the *mixed ownership model* a more complex relationship would exist. The business would have to be held out primarily as that of another profession but solicitors could carry out unreserved legal services. Clients would not be guaranteed all the client protections afforded under the first type of model[215].

Clementi models

27. The Clementi review set outs four possible options for alternative business structures:

- **LDP1** brings together lawyers from different professional bodies (barristers, solicitors, conveyancers, legal executives, trade mark attorneys, patent agents) to work together on an equal footing to provide legal services to third parties; non-legal professionals might help in the management of such practices, but they would not be able to provide services to third parties. The practice would be owned by those who managed it.

[215] The OFT favours a mixed ownership model as most likely to maximise benefits to users of legal services.

- **LDP2** is similar to LDP1, except that this option would allow for a practice owned not exclusively by its managers but also by third parties such as an automobile association or a supermarket.
- **MDP1** allows the development of practices that would bring together lawyers and other professionals such as accountants and surveyors. It could therefore offer a one stop shop to clients who require the services of more that one professional. Those who managed the firm would also own it.
- **MDP2** is similar to MDP1 except that this option would allow for a practice owned not exclusively by its managers but also by third parties such as an automobile association or a supermarket.

28. If lawyers are in control of the management of the business, the regulatory reach will be relatively direct. Alternatively, Clementi talks of the option of 'ring fences' around lawyer members as a protection from interference with the core values of the legal profession by non lawyer members– however the issue remains of how binding any such agreements would be.

29. The *Wouters*, case, which was concerned with a challenge on competition law grounds to a prohibition on MDPs, must be considered in this context. In *Wouters* the Court drew attention to certain key duties of the legal profession, namely "the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy". It is of interest that the judgement in the case of *Wouters* has been recognised by the European Commission in drafting a proposed Directive on Services in the Internal Market (http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0002en03.pdf), Article 30 of which reads :

Multidisciplinary activities

1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities. However, the following providers may be made subject to such requirements:

(a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession;

(b) providers of certification, accreditation, technical monitoring, test or trial services in so far as is justified in order to ensure their independence and impartiality.

2. Where multidisciplinary activities are authorised, Member States shall ensure the following:

(a) that conflicts of interest and incompatibilities between certain activities are prevented;

(b) that the independence and impartiality required for certain activities is secured;

(c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.

3. Member States shall ensure that providers supply the recipient, at his request, with information on their multidisciplinary activities and partnerships and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services.

4. In the report referred to in Article 41, Member States shall indicate which providers are subject to the requirements laid down in paragraph 1, the content of those requirements and the reasons for which they consider them to be justified.

Jurisdictional practice in relation to MDPs

30. Despite the concerns voiced in relation to MDPs, more liberal polices in relation to MDPs can be seen in some jurisdictions, although these appear to be in the minority. The international picture regarding the position of MDPs within jurisdictions is varied, and changes constantly. The more liberal policies of Australia and Canada, for example, can be contrasted to the position in Europe where more restrictive attitudes are evident – at least at a formal level (Law Society, 2000). Norwood and Paterson (2002) ascribe the 'pragmatic motivations' propelling jurisdictions who have allowed the 'fully integrated' MDP as a combination of a fear that market forces and the growing scrutiny of restrictive practices by governments would ultimately 'force' MDPs onto the legal profession, thus lawyers should alter regulations to allow their development now, while in a position to control shape and content of any regulations (Norwood and Paterson, at page 350).

31. Some European countries have never viewed the MDP as a problem. In Germany accountants and lawyers have formed partnerships to provide tax advice for over a decade, and multidisciplinary partnerships are permitted in many other countries. But the major common-law jurisdictions, US, UK and the Commonwealth, have tended to be against the principle of having law firms controlled by non-lawyers and there has also generally been a prohibition on lawyers sharing fees with non-lawyers. This has inhibited the creation of MDPs in many jurisdictions[216].

32. The focus of this analysis is jurisdictional comparison across Europe, though details of the position in Australia, Canada, and the USA have also been included.

European comparisons

33. The annex to this paper sets out national situations regarding multidisciplinary partnerships, based on information given by national delegates of the Council of the Bars and Law Societies of the European Union (CCBE). This is based on information as at 2000. The table shows that, as at 2000, *cooperation without restriction* was allowed only in Germany (with chartered accountants, tax advisers, auditors, and patent agents – there is a strict prohibition against cooperation with financial advisers); Italy (with notaries, chartered accountants, and tax advisers); and the Netherlands (with notaries, tax advisers and patent agents*).*[217] However, in all 3 jurisdictions there are controls – MDPs are prohibited from offering legal services where the MDP is controlled by a *non lawyer professional.* Various

[216] http://www.eurolegal.org/webresources/multilaw.htm

[217] Cooperation with notaries where no separate profession has been ignored for the purposes of this analysis

measures preserve specific obligations of each profession – in Italy accountants are subject to the same confidentiality rules as lawyers, in Germany cooperation with other professionals is only allowed if the member of the other profession is subject to the same specific obligations as lawyers and regulated by a professional body. In the Netherlands freedom and independence in the exercise of the profession of lawyer are preserved.

34. In other jurisdictions, limited cooperation is allowed with certain members of other professions, but subject to a variety of forbidden forms of cooperation – commonly there are prohibitions against sharing benefits and losses, and a prohibition against lawyers employed by non-lawyers providing legal services. In a minority there is a strict interdiction of cooperation with all professions.

35. At the time of writing no evidence on models of MDP adopted in those jurisdictions where they are permitted was available. Further work will be necessary to explore the availability of evidence on whether potential benefits have been realised, and what drawbacks if any there have been. At this stage, there appears to be a dearth of empirical evidence on the operation of MDPs.

Australia

36. The principle that lawyers should be able to share fees and enter into partnerships with non-lawyers is supported by the Law Council of Australia. However, only New South Wales has passed legislation to facilitate the establishment of MDPs. Section 48G of the amended Legal Profession Act 1998[218] (amended 2002) permits solicitors to enter into partnerships with non lawyers, despite anything to the contrary in the Solicitor's Rules. Barristers may practise in MDPs, subject to Barristers Rules. (Dixon 2003). Both are subject however to Regulations governing MDPs. Under the Act, profits and receipts can be shared between lawyer and non lawyer partners; non lawyers can also conduct legal services (Dixon 2003).

37. MDPs are subject to the same obligations and requirements of any legal partnership. Only the legal practitioners are subject to the complaints system, although the disciplinary tribunal can order that *any* person is not fit and proper to be a partner.

38. New South Wales Solicitors Rules provide that lawyer partners of the MDP must ensure that:

- The NSW lawyers have the responsibility and authority for the management of the legal practice and delivery of legal services in NSW;
- The MDP provides the legal services and conducts the legal practice in compliance with the Legal Profession Act and subordinate legislation and rules;
- The MDP provides the legal services and conducts the legal practice in conformity with general legal requirements, ethical and professional standards in relation to areas such as privilege, duties to disclose, and conflict of interest;
- The MDP provides the legal services and conducts the legal practice in a way that ensures that the lawyers' ethical and professional duties are not affected by other members;

[218] amended with respect to MDPs in 2002 by the Legal Profession Amendment (National Competition Policy Review) Act 2002

- The services offered are accurately and fairly represented to clients and potential clients and the qualifications of the persons providing the services are disclosed.

39. However, the MDP concept has not had the positive response anticipated at the time of reform – as at 2002 only around 26 reasonably small law firms had established a MDP in New South Wales. Large firms are seen as waiting for international developments (Dixon 2003). The view is that these larger firms are sceptical of the MDP developments, and would tend to merge only with very large global top tier firms (Dixon 2003). The low response is seen as partly due to uncertainty over client uptake and demand, and also concern over the issues of conflict and different professional ethics.

USA

40. The American Bar Association and the US Securities and Exchange Commission both oppose MDPs (Dixon 2003). However, literature suggests that in practice there are many 'de facto' MDPs with accountancy firms employing many lawyers (the lawyers however do not practise law in its strict sense, rather they provide 'consulting services') or different professional sharing premises and services (Dixon 2003). Some legal firms have formed subsidiaries or affiliates to provide non-legal services for clients. In Washington DC, MDPs are permitted[219] and can be controlled by non lawyers. Lawyers may form partnerships and share fees with non-lawyers but the business must have as its sole purpose the provision of legal services, and non-lawyers must abide by lawyer's rules of professional conduct. The lawyers in the MDP must undertake responsibility for non-lawyers as if they were lawyers (Deards 2001). A model MDP was operating in 2000 (Law Society of Scotland 2000).

41. The ABA formed a Commission on Multi-Disciplinary Practices to examine whether MDPs should be permitted which inclined toward the establishment of MDPs, though with safeguards to preserve the profession's independence. However in 2000 the ABA maintained its opposition to the sharing of fees between lawyers and non lawyers, and the control or ownership of legal practices by non-lawyers (Dixon 2003).

42. The Enron case has strengthened opposition to MDPs in the USA and is seen as illustrating why MDPs are not in the best interest of the client or the public, due to conflicting loyalties within the MDP. The collapse of Enron and other financial scandals re-awakened interest in issues such as the need to protect the public by ensuring the independence of auditors and in the dangers of the multi-disciplinary practice in relation to conflicts of interest and confidentiality. The US Securities and Exchange Commission has been particularly vocal about the dangers of auditors having ties with the provision of consultancy services - including legal services.

Canada

43. The Canadian Bar Association has approved establishment of MDPs as being in the public interest – MDPs are already allowed in Upper Canada. Although the CBA Code of Conduct prohibits sharing of fees between lawyers and non-lawyers, and most provinces have adopted this approach, there have been exceptions to the rule. Ontario has allowed MDPs since 1999 provided they are effectively controlled by lawyers; the primary service is legal

[219] Position as at 2000

service, and the firm's professional indemnity insurance policy covers the non lawyers (Deards 2001).

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ANNEX F

LAW SOCIETY OF SCOTLAND PRACTICE GUIDANCE ON FORM OF ACCOUNTS AND TAXATION

1 *Accounts - preparation and presentation*

(a) The form in which a Solicitor presents an account is a matter for the Solicitor's personal preference but if the person liable to pay requires details, the Solicitor must give a narrative or summary sufficient to indicate the nature and the extent of the work done. If a breakdown is requested the Solicitor should give such information as can readily be derived from the records, such as the total recorded time spent, the number and length of meetings, the number of letters and of telephone calls. No charge may be made for preparing the note of fee or for the provision of such information. However if having been given such information the party paying insists on a fully itemised account the cost of preparing that may be charged to them.

(b) If the paying party is still dissatisfied the Solicitor must inform them of the availability of taxation by an Auditor and the procedure. If the payer requests a taxation without a fully itemised account the Solicitor may have such an account prepared at his own expense. That full account may be submitted for taxation even if it is for a greater amount than the original note of fee.

(c) A Solicitor may submit the file to an Auditor of Court or a Law Accountant for assessment of the fee, but it is stressed that a unilateral reference of this kind does not constitute a taxation. Such an assessment of a fee must never be represented as a taxation or as having any official status. The fee for such a reference is not chargeable to the party paying unless that has been included in the terms of business intimated to the client at the outset. If the note of fee is disputed, the Solicitor must advise of the right to taxation as above, although the fee note should be taxed by a different Auditor from the one who prepared it.

2. *Taxation*

(a) Remit

The essence of taxation is that it proceeds upon either a remit by the Court or a joint reference by both the Solicitor and the party paying, including non contentious cases in (c) below.

(b) Disputed Accounts

When the party paying, whether client or third party, requires that the Solicitor's account be taxed, the Solicitor cannot refuse to concur in the reference unless the Solicitor and client have entered into a written fee charging agreement in which the actual fee has been agreed as opposed to the basis on which the fee is to be charged. The Solicitor must forthwith submit the file and all relevant information including a note of fee or detailed account to the Auditor. It is for the Auditor to determine the procedure to be followed. In normal cases this will be a diet of taxation which should be intimated to the client by the Solicitor. Evidence of such intimation, which may be by ordinary first class post, may be required if the client does not appear at the diet. If either of the parties wishes to make written submissions, the Auditor will ensure that each party is fully aware of the other's representations.

(c) Non Contentious Cases

Taxation is necessary by law and in practice in certain circumstances. The accounts of a Solicitor acting for:

- an administrator of a company under the Insolvency Acts;
- a liquidator appointed by the Court;
- a creditor's voluntary liquidator;
- a trustee in bankruptcy;
- a judicial factor;
- curators of all kinds; and
- must be taxed.

A Solicitor who acts:

- as an administrator of a client's funds under a Power of Attorney where the granter is incapable;
- in a representative capacity e.g. a sole executor

should have a fee note prepared or taxed by an Auditor of Court. A certificate by an Auditor is appropriate in these cases.

A Solicitor who is a co-executor with an unqualified person must not make a unilateral reference to the Auditor for taxation. Such a reference needs the concurrence of the other executor. The Auditor may require intimation of the taxation to any other party with an interest in the residue of the estate.

(d) *Style of Remit*

A formal remit may be in the following form-

(place) (date). 1, AB as Executor of the late CD and we, Messrs E & F. Solicitors to the - Executor, hereby request the Auditor of the (Sheriff Court of .... /Court of Session) to tax the remuneration due and payable to the Solicitors for their whole work and responsibility in connection with (matter).

Signed: AB, E & F

This, however, is not essential; all the Auditor requires is to be satisfied that the client is concurring in the request for taxation and accepting that it will be binding. It is often in practice a matter of agreement reached at an early meeting between Solicitor and client. Any reasonable record of such an agreement having been reached will be sufficient for the Auditor.

ANNEX G

LAW SOCIETY OF SCOTLAND COST OF TIME SURVEY : QUESTIONNAIRE FOR 2005 SURVEY

Do **NOT** detach this page.

Law Society Reference Number | | | | |

(The reference number is **essential** for the return to you of the Analysis of your questionnaire)

Statistician's Reference Number (this should be blank) | | | | |

IF YOU DETACH THIS PAGE WE CANNOT ANALYSE YOUR RETURN

– **Guidance Notes (Please read carefully)**

1. This questionnaire is **strictly confidential** and is analysed on behalf of the Law Society by Dr. John Pollock of Pollock & Galbraith, Consulting Actuaries. Each firm is identified by a code number only. **Dr Pollock does not know the names of participating firms and the Society does not see the completed questionnaires.**

2. It is very important that monetary amounts should be given in whole pounds – **do not include pence.** Please write all figures as far to the right as possible in the appropriate boxes and do not include commas. For example, if your answer is £123,456 it should be given as:

£			1	2	3	4	5	6

3. To participate in the prize draw please return your questionnaire to Dr Pollock, ideally by **31 August 2005**. Later returns will however still be analysed and entitle participants to a free copy of the full report.

4. The analysis of your return will be sent (marked Strictly Private and Confidential) to the Designated Cash Room Partner. If you would like it to be returned to a specific individual, please give the name of the person below:

……………………………………………………………………

In recent years an increasing number of firms have been willing to disclose their identity to the statistician analysing the questionnaire. This is helpful, in that it speeds up the process in the event of a query about your return. It is particularly important if you are an Incorporated Practice trading as a Limited Company. If you are willing to provide a contact telephone number (and a contact name if different from above) please enter it below. In these circumstances Dr Pollock will then be able to identify your firm but, as before, the Society still does not see the completed questionnaire. Naturally Dr Pollock will respect confidentiality in these circumstances.

……………………………………………………………………

…………………………………………………………………...

5. The completed questionnaire should be returned, using the enclosed reply paid label, to:

Dr John Pollock
Messrs Pollock & Galbraith
Consulting Actuaries
Stirling Business Centre
Wellgreen Place
Stirling
FK8 2DZ

If you have a query relating to your questionnaire, you may seek guidance from Dr Pollock by telephoning: 01786 473591 (fax: 01786 448983, e-mail: john@pollock-galbraith.co.uk). If you have concerns over confidentiality there is no need to identify your firm when asking questions.

6. The individual report which will be returned to contributing firms contains summary statistics on accounting information and importantly provides indicative hourly cost rates per category of fee earner. It follows the methodology as detailed in the booklet 'Cost of Time – An explanation of the Cost of Time' available from the Society (and reproduced in The Scottish Law Directory Fees Supplement). It is important to stress the limitations of the exercise. In particular, the rates produced may not be representative for a particular firm for a number of reasons:

- Chargeable hours may differ from those incorporated
- Assumed earnings for each profit-sharing Partner may differ from those incorporated
- Cost allocations may differ from those incorporated

Dr Pollock would be pleased to perform additional analyses using different parameters if required. As an example, in recent years certain firms have requested additional calculations incorporating different base notional earnings figures for each profit-sharing partner in addition to the standard figures. This year the hourly cost rates for fee earners are derived from notional earnings for profit-sharing Partners (excluding return on capital and pension provision) of £59,500 p.a. This figure is the median level of profitability (excluding return on capital and pension provision) from the 2004 survey. The notional earnings figure is no longer set by the remuneration committee itself, as in previous years.

1. General Information

1.1 Where is your firm (or your principal office) situated?

Please tick the appropriate box:

City of Edinburgh	☐
City of Glasgow	☐
Cities of Aberdeen, Dundee or Perth	☐
Elsewhere	☐

1.2 How many profit-sharing partners are there in your firm?

For the purposes of the Survey each partner must be classified as ***either*** *"profit-sharing" or "salaried" - but* ***not*** *both.*

In some cases, it may be that a particular partner's remuneration is received partly as a salary and partly as a share of profits. If the greater part of his or her remuneration is paid as a salary, such a partner should be regarded as "salaried" and excluded from this question. Alternatively, if the greater part of his or her remuneration is paid as a share of profits, they should be regarded as "profit-sharing" and included in this question.

Include an appropriate fraction for part-time partners.

Number of profit-sharing Partners:	**A** At the end of the most recently ended accounting year for which accounts are available	**B** At the beginning of the current financial year
Aged 35 or more	☐	☐
Aged 34 or less	☐	☐

For many firms the answers to A and B above will be the same. However, for firms where the partnership structure has changed the answers may differ.

1.3 How many people* do you employ as:

Include an appropriate fraction for part-time employees. If any answer is nil, insert a zero.

Secretaries:	☐
Receptionists and other Support:	☐

Staff: [ ]

Cash Room and other account Staff: [ ]

*Include only employees who are **NOT** fee-earners. Details of employees who are fee-earners (i.e.. Salaried partners, qualified assistants and associates, trainees, unqualified assistants and consultants) should be included in your answers in Section 6 below.*

2. For the most recently ended year for which accounts are available...

2.1 What is the year-end for the most recently ended year for which accounts are available?

Enter the date numerically using two digits for both the day and the month. For example, the 30th April 2004 should be shown as:

3	0	0	4	2	0	0	4
Day		*Month*		*Year*			

Day		Month		Year			

2.2 Expenditure and fee income **(If any answer is nil, insert a zero in the right-hand box)**:

(A) What was the total expenditure of the firm?

£ [ ][ ][ ][ ][ ][ ][ ]

Include remuneration of salaried partners and depreciation

(B) How much is included in (A) above for rental of office premises?
If nil, insert 0 in the right hand box.

.

£ [ ][ ][ ][ ][ ][ ][ ]

(C) How much is included in (A) for staff salaries (including remuneration of **salaried** partners), employer's NIC, and employer's contributions for staff pensions?

£ [ ][ ][ ][ ][ ][ ][ ]

(D) What was the firm's total fee income?

Include all income except bank interest and income derived from investments.

£ ☐☐☐☐☐☐☐

(E) What was the firm's **OTHER** income? (i.e. the items excluded from (D) above).

£ ☐☐☐☐☐☐☐

(F) How much is included in (D) above as fee income from Court and allied work? **If necessary give an estimated figure.**

"Court and allied work" should include not only litigation but also debt recovery, adjustment of reparation claims out of Court, and all work normally dealt with by a Court department.

£ ☐☐☐☐☐☐☐

If this answer was an estimate please tick this box

Estimate ☐

(G) How much is included in (D) above as fee income from the Legal Aid fund? **If necessary give an estimated figure.**

£ ☐☐☐☐☐☐☐

If this answer was an estimate please tick this box

Estimate ☐

(H) How many members of staff are provided with a car as part of their remuneration package?

☐☐☐

2.3 Balance Sheet at end of year:

(A) What was the total of the Partners' capital and current accounts (excluding any provision for taxation)?

£ ☐☐☐☐☐☐☐

Does this figure fairly reflect the value of "work in progress" and the moveable equipment of the firm?

Please tick the appropriate box

Yes ☐ No ☐

(B) What was the **gross** book value of office premises owned by the firm – i.e. **before** deduction of any mortgage? If nil insert 0.

£ ☐☐☐☐☐☐☐

(C) What was the total amount of the outlays outstanding on behalf of clients?

£ ☐☐☐☐☐☐☐

(D) What was the firm's bank balance/overdraft? Exclude any amounts in respect of fixed-term or secured loans.

If the balance was **overdrawn**, please give the amount overdrawn here

£ ☐☐☐☐☐☐☐

If the balance was in **credit**, please give the credit balance here

£ ☐☐☐☐☐☐☐

(E) What percentage of the total assets in (A) were represented by debtors (i.e. fees and commissions owed to the firm)?

☐☐☐

3. For the current financial year …

3.1 What will the year-end be?

☐☐☐☐☐☐☐☐

Day Mon th Year

3.2 Estimated <u>salary</u> and <u>rent</u> expenditure (for a 12 month period to current year end). This is a question of particular importance.

(A) Please estimate the total amount to be paid in <u>staff salaries</u> (including remuneration of salaried Partners), employer's NIC, and employer's contributions for staff pensions

Include an allowance for any anticipated salary increases which will be made during the year. It is important to estimate this figure carefully.

£ ☐☐☐☐☐☐☐

If this figure is less than 2.2 (C) please provide a brief explanation.

(B) Please give a **realistic** annual commercial rent for your offices

£ ☐☐☐☐☐☐☐

If you do not actually pay such rental it is ESSENTIAL that you provide an estimated figure.

4. Have you participated in the survey recently?

4.1 Has your firm* taken part in this Survey recently?

Please tick the appropriate box

Survey		
2004 Survey	Participated	☐
	Did not Participate	☐
2003 Survey	Participated	☐
	Did not Participate	☐
2002 Survey	Participated	☐
	Did not Participate	☐

*Or, if your firm has merged, at least one of the "pre-merger" firms.

- **5. Time**

5.1 Time recording

How many minutes comprise the minimum unit of time, when, in order to assist fee-charging, your firm notes the time spent on work for clients?

Minute
s ☐☐

Do you maintain time records which enable you to know **accurately** the total number of **CHARGEABLE** hours per annum worked by each fee earner? *Chargeable time is time spent directly on work for clients for which a charge will be made.*

Please tick the appropriate box.

Yes ☐

No ☐

If "yes", please answer question 5.2.

If "no", do **NOT** answer 5.2. Proceed directly to question 6.

5.2 Please answer this question **ONLY** if you maintain time records from which you can give accurate answers to [A]: IF YOU HAVE ANY DOUBT PLEASE JUST PROCEED TO QUESTION 6

	A Average number of **chargeable** hours per annum for a full-time fee-earner **(including overtime)**	B Percentage of time in column A which relates to overtime
A profit-sharing partner	☐☐☐☐	☐☐
A salaried partner	☐☐☐☐	☐☐
An associate	☐☐☐☐	☐☐

A qualified assistant	☐☐☐☐	☐☐
A trainee	☐☐☐☐	☐☐
An unqualified assistant	☐☐☐☐	☐☐

*Answer this question **only** if you maintain accurate time records - **do not estimate for column A**. If you are able to give accurate answers for column A, you may estimate for column B. **Leave blank** your answer for any category for which you have no full-time fee earners or cannot give an accurate answer.*

- **6. Salaries of employed fee-earners**

This section relates to currently employed **fee-earners**, (i.e. salaried partners, associates, qualified assistants, trainees, unqualified assistants, and consultants) whose time is spent directly on work for clients.

If for a particular category you have no fee-earners, please indicate this by ticking the appropriate box at the top of the category. It is ESSENTIAL that you do this.

For all categories **except for salaried partners** you need to detail the **total** salary of individuals within the category and the **total** full time equivalent number of full time employees.

e.g. If the total earnings for all qualified assistants was £200,000 and there were 9 full time qualified assistants, 1 qualified assistant working 50% of full time, 1 qualified assistant working 2 full days per week and 1 qualified assistant working 3 full days per week the entries on the questionnaire would be:

Total Annual Salaries		£200,000	
Total full time equivalent staff	10.5		(i.e. 9 + 0.5 + 0.4 + 0.6)

6.1 Salaried Partners

If none, please tick

☐

Reference	Current Annual Salary	Percentage of normal full-time Hours worked (if part-time)
1	£	
2	£	
3	£	
4	£	
5	£	
6	£	
7	£	
8	£	
9	£	
10	£	

If your firm has more than ten salaried partners in this category, photocopy this page and attach extra sheet(s) to the questionnaire.

6.2 Associates

If none, please tick

☐

Total Annual Salaries — £ ☐☐☐☐☐☐☐

Total Full Time Equivalent Staff — ☐☐☐

6.3 Qualified Assistants

If none, please tick

☐

Total Annual Salaries — £ ☐☐☐☐☐☐☐

Total Full Time Equivalent Staff — ☐☐☐

6.4 Trainees

If none, please tick

☐

Total Annual Salaries — £ ☐☐☐☐☐☐☐

Total Full Time Equivalent Staff — ☐☐☐

6.5 Unqualified Assistants

If none, please tick

☐

	Total Annual Salaries	Total Full Time Equivalent Staff
	£	

6.6 Consultants

Include only those Consultants who are actually fee-earners for the firm. Do not include Consultants whose contribution to the work of the firm is purely nominal.

If none, please tick

☐

	Total Annual Salaries	Total Full Time Equivalent Staff
	£	

ANNEX H

THE SOCIETY OF SHERIFF COURT AUDITORS

SHERIFF COURT HOUSE
6 WEST BELL STREET
DUNDEE
DD1 9AD

TEL: 01382 318200 FAX: 01382 318222 E-Mail: rmcmillan@scotcourts.gov.uk DX DD33

Mike West
Scottish Executive Justice Department
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Your Ref: LGG/1/33

Our Ref:

Date: 2 November 2005

Dear Mr West

Auditor of Court Research Paper

Thank you for your letter of 7 October requesting comments from The Society of Sheriff Court Auditors on the research paper (on the functions of auditors of court) prepared for the Research Working Group on the legal services market in Scotland.

On behalf of the Council of the Society of Sheriff Court Auditors, I would make the following comments on your research paper. For ease of reference I do so using the numbering as set out in your paper.

1. For clarification (Footnote 1) we would point out that auditors only tax judicial accounts when parties *cannot* agree. The majority of accounts are agreed without taxation.

2. The issue of "whether the work was done adequately" is not a matter for the auditor. In judicial audits the court has determined liability. In non-judicial situations, if a party feels that is an issue, he can refuse to pay, force the agent to sue for payment and, in defending, raise issues of competence, adequacy and non-performance. The court can then decide before remitting to the auditor to decide on the level of fees at taxation.

3. Your paper alludes to concerns expressed by some stakeholders about the role of the auditor, and the way in which duties in relation to taxation are carried out. The Society disagrees that the system is "insufficiently transparent, accountable, impartial or consistent".

4. The Society view is that the process for appointment of auditors is transparent. A Sheriff Clerk auditor is appointed by the Sheriff Principal upon his being appointed to the role of Sheriff Clerk. Your paper states that the Sheriffs Principal takes it ***very much on trust*** that Sheriff Clerks will be competent as auditors, but it is the Society's view that the Sheriffs Principals' experience of this system of appointment has served them well for a very long time. This is borne out by the absence of any complaints about auditors and how they perform their duties. The Society is unaware of any auditor having his commission revoked.

   We would suggest that the words "if ever" in line 16 of this paragraph should be deleted to reflect the correct position that auditing has been mentioned in job specifications for the position of Sheriff Clerk.

5. We note that many auditors are widely regarded as highly skilled and competent by those using the system, but also that a few respondents questioned the skill and experience of some Sheriff Clerk auditors in relation to some areas of taxation. While, initially, some auditors may be inexperienced in some areas, they receive assistance from the many highly skilled auditors who are part of the network that is The Society of Sheriff Court Auditors.

6. We note the concerns of a few respondents about the lack of consistency among auditors. Consistency should not be confused with getting the same decision at every taxation. At taxation, an auditor will consider each case on its own merits. He will hear submissions from each party and come to a decision on disputed matters on the basis of arguments advanced. Where a party is dissatisfied with a decision made, objections can be taken to a sheriff who will rule on the matter. Where this has been done in the past, such decisions are intimated to auditors by the Society. The paper does not inform whether the Legal Aid Board tested their concerns in this way.

   The Society would agree that the timing of the withdrawal of the Table of Fees for General Business was unhelpful, but note this has been dealt with by the introduction of the Law Society of Scotland's Guidance on the Solicitors (Scotland) (Client Communication) Practice Rules 2005, from 1 August 2005.

7. The Society considers that this paragraph is unfairly critical of the training given to Sheriff Clerk auditors. New auditors are trained by senior auditors of court and receive written guidance from the Society on judicial audits, fee assessment and case law. In addition there is a very strong network of auditors who readily share their knowledge and experience and provide support and advice. It is unfair to describe this training as patchy as it is readily available.

   The Society is unclear as to what the few respondents mean by *formal training.* However, the Society could design a formal training course if this is what is meant.

   It is quite wrong to state that auditors do not discuss extra-judicial taxations and assessments with each other. This happens regularly across the country.

8. The former Law Society of Scotland Table of Fees for General Business made it clear (Chapter 2 – Para 1c) that "an assessment by the auditor should never be represented as a

taxation or as having any official status". A reference to this provision was included on Certificates of Assessments issued by auditors, and the Society cannot understand why there should have been any confusion among solicitors about this.

9. No comment.

10. The Auditor of Court is an independent officer of court, who has an equal duty to the person liable to pay legal fees and the person entitled to those fees, when carrying out a taxation, or an assessment of fees. He has taken an oath to that effect. This duty is to ensure that the fee set by him is fair and reasonable to both sides, having regard to any appropriate Table of Fees. It follows, therefore, that it is the Society's view that it is quite wrong for any auditor of court to refer to solicitors submitting taxations/assessments to him, as his clients.

11. The Society is of the view that auditors can only work within the system that presently exists, and discretion is a large part of this. There are adequate mechanisms in place to address the concerns of those interviewees about lack of clarity/variability of auditor decisions. An auditor, when requested, will give oral or written reasons, and objections can be taken against his decision.

    On the question of solicitors choosing to send assessments to non-local auditors, it is the Society's understanding that solicitors should only use their local auditor, where practicable.

12. In our view this paragraph, and the examples cited in it, are irrelevant in relations to skills, guidance and lack of training given to auditors. Counsel, unlike solicitors, do not have prescribed fees for non-criminal legal aid work, or for any judicial work. There is no prescribed method of reducing auditors' fees to reflect success or lack of success at the taxation diet. Accordingly, auditors require to rule on the basis of the merits of individual cases. If it is thought there are problems in these areas, the Society feel that prescribed rules/rates should be introduced.

13. On the points contained in this paragraph, The Society does not consider there is a conflict of interest or that there need be any potential tension and our comments in Response 10 above are relevant to these issues.

Yours sincerely

Mr Roland McMillan
Secretary

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