**THE LEGAL SERVICES ACT 2007**

# RESPONSE TO THE LEGAL SERVICES BOARD'S DISCUSSION PAPER "WIDER ACCESS, BETTER VALUE, STRONG PROTECTION" ON DEVELOPING A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES


**BY THE WORKING GROUP ON BEHALF OF THE GENERAL MANAGEMENT COMMITTEE OF THE BAR COUNCIL**

**This paper is the response of the Working Group commissioned by the General Management Committee of the Bar Council to the discussion paper "Wider Access, Better Value, Strong Protection" of 14 May 2009 from the Legal Services Board ("LSB"). Membership of the Working Group is set out at Schedule 1.**

**Contents**

## A. Introduction and Executive Summary

1. In principle, the Working Group welcomes the introduction of ABS and the liberalisation of the legal services market as providing opportunities for innovative responses to changes in demands for the provision of such services. However, it is less optimistic than the LSB as to the possible consequences of such changes. It considers that risks as well as benefits may result from the changes. In particular, there may well be a tension between, on the one hand, liberalisation of the market, promoting competition and encouraging innovation and, on the other hand, improving access to justice, understood as referring to the ability of citizens to pursue a legal remedy or to defend themselves against criminal charges or civil claims where legal representation ought to be available to them.

2. For this reason, the Working Group advocates a pragmatic and proportionate approach to the liberalisation of the market, rather than a "big bang" approach. This is so that regulation can be evidence-based. This will better enable the licensing regime to learn from and adapt to changes in the market as they occur, rather than potentially being forced to play "catch up". Such an approach will benefit both regulators and providers of legal services, whilst, more importantly, ensuring that the public interest is properly protected. A free-standing note on the public interest in the provision of a specialist referral Bar is at Annex 1 to this response.

3. The details of such an approach are developed below in the individual responses to the questions posed in the LSB's thoughtful and wide-ranging discussion paper. This is preceded by three general comments on the LSB's own approach as set out in that paper.

## B. General Comments: the LSB's approach

4. Three aspects of the overall approach that the LSB takes in its Discussion Paper call for comment.

5. First, the LSB sees the liberalisation of the market for legal services by the introduction of a regime which permits legal services to be provided through ABS as something which will necessarily achieve the regulatory objectives of the Legal Services Act 2007 and, in particular, bring benefits to consumers. So, at the outset of its Paper the LSB states that it regards itself as committed to driving the agenda for the introduction of ABS forward because it *potentially* offers considerable benefits to consumers, whilst simultaneously acknowledging that it is difficult to predict how the market will develop (paragraph 1.4). This same tension between a belief in the potential benefits from the liberalisation of the market for legal services, but a lack of any real evidence as to how the market might change and the effect this might have on consumers runs throughout the paper (see Section 4 and questions 5 and 6 in particular).

6. The faith in the benefits which will flow from the liberalisation of the market for services leads to:

(i) the LSB's statement that:

"we have moved beyond the debate about whether to open up the market to ABS. This was settled when the Legal Services Act 2007 ... was passed by Parliament. Instead, this paper set out plans for *when* and *how* the market will be opened".

(ii) a tight timetable for the issue of the first ABS licence in mid-2011, with regulators applying to become licensing authorities in mid-2010;

(iii) no distinction being drawn for the purpose of introducing the regime for the licensing of ABS between different sorts of ABS. The LSB takes the view that the new regime should be introduced for all ABS, whether lawyer-owned ABS providing only legal services, or multi-disciplinary practices (MDPs).

7. The Working Group considers that there is no proper evidential basis for the assumption that the liberalisation of the market for legal services by permitting such services to be delivered through ABS will automatically further the regulatory objectives of the Act. Liberalisation *may* achieve some or all of those objectives, but this is not inevitable, particularly given that the market for legal services is unlike the market for ordinary consumer goods or services: consumers lack knowledge and understanding of the service offered; they have difficulty in judging whether the service is good or poor; they are not usually repeat consumers so do not learn from mistakes; the service is often of great significance to consumers (e.g. crime, divorce and other family disputes, business disputes, house purchase, wills, etc) hence there is a real need to protect consumers; consumers have difficulty in comparing the price of services offered in anything but the case of the simplest, standardised service (e.g. conveyancing). The analogy, therefore, that the LSB draws between the provision of legal services and the provision of retail opticians' services (at paragraph 4.5) is not apt.

8. Secondly, at the heart of the LSB's Paper is a conflation between 'access to legal services' (which market liberalisation may be intended to achieve) and 'access to justice' (which is one of the regulatory objectives specified in s. 1(1)(c) of the Legal Services Act 2007). By 'access to justice' we refer to the ability of citizens to pursue a legal remedy or defend themselves against criminal charges or civil claims where legal representation ought to be available to them.

9. Market liberalisation (with a view to promoting access to legal services) may run counter to 'access to justice' if it results in the reduction in rural or local law firms or the reduction in numbers of self-employed barristers. Market liberalisation may also run counter to the further regulatory objective of promoting and maintaining adherence to professional principles (section 1(1)(h) of the Act) if it compromises the quality of legal services because of economic incentives for achieving greater output at lower prices. Those professional principles include acting with independence and integrity (section 1(3)(a)), maintaining proper standards of work (section 1(3)(b)) and acting in the best interests of the lawyer's clients (section 1(3)(c)).

10. More particularly, the introduction of new business entities requires (on the LSB's analysis) a different regulatory approach. This is one that seeks to regulate outcomes not processes, entities not individuals and in the case of MDPs, regulates the entity only in relation to the provision of reserved legal services. Such "lighter" regulation increases systemic risk, and in particular may be at the expense of the quality of the justice that is provided. Again, therefore, 'access to justice' may be compromised by increasing access to legal services.

11. Indeed, it is clear from the LSB Paper that its promotion of access to legal services may be at the expense of promoting access to justice. Thus, at paragraph 7.6 the LSB states that it "would be concerned if [access to justice] led to unnecessary restrictions on market entry, or undue regulatory burdens, being placed uniquely on ABS, which might otherwise strengthen competition, increase consumer choice and enhance access to legal services". In other words, the LSB here privileges the promotion of competition and market liberalisation over access to justice, notwithstanding recent failures of liberalised markets.

12. The Working Group therefore takes issue with the statement of the LSB that the question whether the market will be opened to all types of ABS has been settled by the Act and that the questions which now remain are when and how the market will be opened. The Legal Services Act 2007 has provided a structure whereby the market can be opened up to all ABS but it has left the task of determining whether and how this should be done to the LSB. Section 3(2) of the Act states that:

> "The Board must, so far as is reasonably practicable, act in a way
> (a) which is compatible with the regulatory objectives; and
> (b) which the Board considers most appropriate for the purpose of meeting those objectives."

So, the Board must consider the question whether permitting ABS, or different sorts of ABS, will indeed promote all of the regulatory objectives, not simply assume that this is the case.

13. Thirdly, given that there is difficulty in predicting quite what the impact will be of the liberalisation of the market for legal services by permitting ABS, and a concern that it will be at the expense of access to justice, the Working Group is in favour of a more gradualist approach than that adopted by the LSB, one that proceeds in stages rather than as a "big bang". The Working Group considers the timetable proposed by the LSB to be too tight. Regulatory bodies need time to consider the successes and problems brought about by the introduction of LDPs, and whether in the light of this they wish to be authorised to license ABS; and, if so, what sort of ABS and what scheme of regulation is needed to mitigate any risks arising from such new structures for delivering legal services and how it can best achieve the regulatory objectives.

14. In particular, the Working Group considers that any initial regime for ABS should exclude MDPs in the first place. This follows the approach of the Clementi Report[1] which identified a number of regulatory issues peculiar to MDPs which would need to be resolved before they were permitted. The Report concluded that it would be a good start to get lawyers working together in LDPs, and to assess regulatory consequences of that, before proceeding with full-blooded MDPs. The Working Group agrees.

15. The failure of the LSB's Paper to adopt such a measured approach also results in its approaching the regulatory objectives at a very high level of generality. It seeks to deal with all potential ABS without in any way differentiating between them. This is evident in particular in section 5 of the LSB Paper in discussing the risks to the regulatory objectives posed by ABS.

16. The Working Group therefore considers that the LSB's discussion of the regulatory objectives and managing the risks posed to those objectives by the introduction of ABS is at too high a level of abstraction to be of practical utility. One of the difficulties posed by the Act for the LSB (and approved regulators) is that no guidance is given as to the relative weight of the different regulatory objectives or which should take priority when there is a conflict between them. This criticism was levelled at the Clementi proposals, which form the basis of the regulatory objectives in the Act. The answer given was that it was for the Regulator, operating a risk-based approach to regulation, to judge the relative importance of each consideration on a case-by-case basis. [2] The Act leaves the function of balancing the regulatory objectives to the Board by requiring it to act in a way it considers most appropriate for the purpose of meeting the regulatory objectives.

[1] The Report of the Review and Regulatory Framework for Legal Services in England and Wales
[2] See para A 19 of the Clementi Report.

17. The Working Group considers that the balancing exercise cannot be done at such a high level of generality. It needs to be focussed more specifically on particular types of ABS or particular aspects of the ABS structure. So, for example, the Group considers that different problems are raised by MDPs; and that as far as LDPs are concerned different issues are raised by the question of lawyers from different professional backgrounds working together; and non-legal ownership or management of such LDPs.

18. This is not to say that the Working Group is opposed to the introduction of new business structures in the legal services market. Indeed, it can see potential benefits in their introduction for the Bar, which may enable it to compete more effectively with other legal services providers and so bring benefits to consumers.

19. But the Working Group does not regard the introduction of new business structures as necessarily being an unalloyed benefit. It can identify increased risks and disadvantages for consumers as well. In general terms, therefore, it favours an evidence-based, incrementalist approach to their introduction, one that pays due attention to and caters for both the different legal service activities that they may undertake and the different management and ownership structures that they may adopt.

## C. Answers to Specific Questions

### (1) Section 3: Timeline

***Question 1:*** *What are your views on whether the LSB's objective of a mid-2011 start date for ABS licensing is both desirable and achievable?*

20. The Working Group considers that the answer to the question of whether the LSB's objective of a mid-2011 start date for ABS licensing is both desirable and achievable depends on the nature and type of ABS that the LSB wishes to see licensed by that date. As the LSB will be aware, there is a considerable range of potential ABS - models range from existing LDPs with a non-lawyer manager, through to ABS owned 100% externally by non-lawyers, to MDPs, to floated companies and beyond. These different models pose different regulatory issues, some more complex than others, and different levels of risk for the consumer, some greater than others.

21. The Working Group considers that it will be feasible and desirable to license the more straightforward ABS by mid-2011, such as LDPs predominantly owned by lawyers but with non-lawyer managers, where the risks are *de minimis*. However, it believes, for reasons already set out in Section B above, that an incrementalist approach should be adopted in relation to the more complex structures. This is particularly the case as regards MDPs. This is to enable the increased risks for the consumer that may follow from such structures to be identified properly, the licensing regime to be "road-tested", and evidence-based assessments made.

***Question 2:*** *How do we ensure momentum is maintained across the sector towards opening the market?*

22. Momentum will only be maintained if the LSB is able to bring its stakeholders along with it. This will require that it seeks consensus where possible, and at a pace that is steady, but practical and sensible having due regard to the changes

that are required. In this respect, for example, the Working Group notes that although the LSB has proposed the establishment of a "high-level, cross-stakeholder ABS Implementation Group" (paragraph 3.6), it omitted from that group the Bar Council. The Working Group also understands that only one representative per stakeholder is permitted to attend and that representative is not permitted to nominate an alternate. Momentum will not be maintained if the Approved Regulators of legal services are not invited to participate fully in and engage with the process of regulatory reform.

***Question 3:*** *What are your views on whether the LSB should be prepared to license ABS directly in 2011 if necessary to ensure that consumers have access to new ways of delivering legal services?*

23. Although this Working Group advocates pragmatic caution and care, with regard to certain models of ABS, it is not opposed in principle to their introduction. It understands that the BSB is of the same view. This is not therefore a situation where existing regulators are unwilling to embrace new ways of delivering legal services. The only circumstance that the Working Group can envisage that the LSB might consider it necessary to itself license ABS in 2011 - other than where there is no competent or potentially competent regulator with the result that the LSB is properly "the licensor of last resort" - is if it proceeds at too fast a pace, with a 'big bang', one that existing regulators regard as being imprudent. This of itself suggests that the LSB should not in fact be prepared to license ABS directly in 2011, other than where it is "the licensor of last resort" in the circumstance mentioned above.

***Question 4:*** *How should the LSB comply with the requirement for appropriate organisational and financial separation of its licensing activities from its other activities?*

24. The Working Group refers to its answer to Question 3. Subject to this, the Working Group proposes to respond to the issues raised by this question in the context of the further consultation referred to at paragraph 3.17 of the LSB's Paper.

## (2) Section 4: The benefits of opening the market

***Question 5:*** *How do you expect the legal services market to respond and change as a result of opening the market to ABS?*

25. The Working Group notes and regrets the absence of any recent economic evidence as to the effect that opening the legal services market to ABS will have. This needs to be remedied by the LSB.[3] The "expectations" of the Working Group and other stakeholders are no substitute for proper economic analysis. The Working Group's expectations therefore are based on anecdote and speculation. Consequently, they are as likely to be wrong as right. The only thing which is certain is that the market will respond in unforeseen ways. This by itself compels a cautious regulatory approach.

26. Opening markets necessarily creates risks and uncertainties as well as potential benefits. In particular, opening the legal services market *may* result in adverse consequences for the regulatory objectives required by the Act, and in particular for access to justice. We highlight below some of these possible consequences. These are not set out as grounds for opposition to opening the market. Rather, they are an attempt to identify some of the risks that the Working Group believes that it is the duty and role of any regulatory regime to prevent.

*(i) The self-employed Bar*

[3] We have asked a number of overseas jurisdictions to comment on this response to the LSB's discussion paper and, when we receive the replies, we will collate them and pass them to the LSB.

27. The public benefits of the self-employed referral Bar are set out in Annex 1 to this paper. Self-employed barristers are dependent on solicitors referring work to them. Permitting barristers to practise in LDPs or MDPs carries with it a real danger of reducing the amount of work which is referred to the Bar. This is because LDPs and MDPs are likely to seek to retain work within the firm rather than using the services of a self-employed barrister. The effect is likely to be most marked on younger practitioners who have not yet had an opportunity to establish themselves and acquire a reputation. A firm choosing between its own in-house advocate and a barrister outside the firm is likely to prefer its own. If this were a conscious quality and value driven decision made rationally in the interests of the client, it is supportable. However, if it is simply the default response generated by the vertical integration of the advocacy service, offering no benefit to the client, then it is cannot be said to be in the interests of justice, of access to justice, or of the client.

28. Vertical integration may also have a more insidious impact on access to legal services. If the supply of work to the Bar diminishes this will cause the Bar to shrink in size. If this shrinkage is serious, there may come a point where the choice of self-employed barristers is reduced in a way which adversely affects the public's choice of advocate. The LSB acknowledges this argument at paragraph 5.7 of the Paper, but does not put forward any proposals to meet the potential problem.

29. The Working Group considers that the risk of ABS preferring their own in-house advocacy (or other specialist service currently offered by the Bar) can be mitigated - although not eliminated - by imposing on the individuals and/or the ABS regulatory requirements designed to ensure that they do not engage in anti-competitive practices vis-a-vis the Bar. In particular, this may be achieved by imposing not only a regulatory obligation to put the client's interests first in the

choice of advocate/ specialist, but also imposing a requirement that the reasons for the choice in any given instance are recorded in writing. This is to ensure that the obligation is observed in practice. This suggestion is advanced in particular in response to the LSB's specific request at paragraph 5.8 of its Paper for a policy proposal to mitigate the adverse consequences for the self-employed Bar of the provision of what the LSB styles an "end-to-end" service by an ABS. Given the litigator's duty to advise the client as to choice of advocate, it is clear that no form of "tying-in" of advocacy services should be permitted, and this should therefore be made the subject of an express prohibition.

*(ii) Geographical scope and diversity*

30. The "commoditisation" of legal services *may* bring benefits for the consumer in terms of reducing the cost of legal services. This may be as a result of the development of new technologies, and in particular the increasing use of telephone and web-based services, resulting in economies of scale and indeed reductions in costs bases (for example because it becomes practicable to provide legal advice from outside the jurisdiction). It may also be the result of businesses being able to use existing infrastructures to diversify into the provision of other services (as supermarkets now also provide financial services). There is, however, no guarantee that these benefits will ensue: economies of scale have their limits and "commoditised" legal services have their own dangers: see, for example, the collapse of the personal injury litigation specialists "Claims Direct" in 2002 and the problems relating to the legal services provided in connection with claims under the coalminers' compensation scheme.

31. Further, these benefits may be at the expense of geographical and ethnic diversity. In this regard it is unlawful for the LSB as a public authority, as we are

sure that it is aware, to carry out any act that constitutes discrimination.[4] It is also under a two-fold statutory duty[5] to have proportionate regard to the need (1) to eliminate race discrimination and (2) to promote equality of opportunity and good relations between persons of different racial groups. Any departure from these duties must be on a basis that is "clear and cogent"[6], in other words that is capable of justification.[7]

32. In this context, the SRA has noted:

a. "There is the possibility of negative impacts for some sections of the community if, for example, the development of ABS led to a reduction in the geographical spread of law firms";[8]

b. "As far as the legal profession is concerned, the concentration of BME solicitors in small firms means that there would be a disproportionate impact upon BME solicitors if the introduction of ABS were to lead to a reduction in small firms".[9]

33. The Working Group agrees with these comments. The LSB has itself acknowledged the existence of both possibilities: see paragraphs 4.19 and 5.5 of the Paper. However, neither is seen as producing any significant regulatory consequences. Thus, the LSB has commented (paragraph 7.6) that "It is likely to be difficult to reasonably conclude that an application from a single licensable body – even a very large retail brand for instance – would reduce access to justice for consumers as a whole, whether in a given geographical area or more widely. So we would be concerned if this condition led to unnecessary restrictions on

[4] Race Relations Act 1976, s. 19B.
[5] *Kaur & Shah v LB Ealing* [2008] EWHC 2062, para 15 (Moses LJ).
[6] *R (Munjaz) v Mersey Plan NHS Trust* [2006] 2 AC 148.
[7] *Kaur & Shah v LB Ealing* [2008] EWHC 2062, para 22 (Moses LJ).
[8] SRA, "Regulating alternative business structures", 1 June 2009, paraD.1.
[9] SRA, "Regulating alternative business structures", 1 June 2009, para D.3.

market entry ..." Likewise, so far as diversity is concerned, the LSB only comments that it will "need to monitor the equality and diversity implications of ABS" (paragraph 4.19).

34. In the Working Group's view, liberalisation of the market should not be at the expense of either geographical or ethnic diversity. If the grant of a licence were to prejudice either, in the Working Group's view this would adversely affect the regulatory objective of improving access to justice As a result, the Working Group considers that it should be a *positive* requirement of the grant of a licence that it will not adversely affect either geographical or ethnic diversity. This would also accord with the LSB's statutory duties (as set out above) not to carry out any act that constitutes discrimination and to promote equality of opportunity.

35. The discussion in this section may reflect a difference in approach to regulation between the Working Group and the LSB. The Working Group considers that the object of regulation is not to promote a liberalised legal services market for its own sake, in the belief that this will produce benefits for consumers. Rather, it is positively to ensure that a liberalised market operates in the interests of, and is subject to, wider public goods or benefits (such as access to justice), and not at their potential expense. These public goods require positive identification so that regulation can ensure that they are achieved.

*(iii) Conflicts of interest*

36. The introduction of ABS will permit an influx of new capital to the legal services market. This *may* enable legal service providers to expand and improve the provision of services. That influx may take different forms:

a. It may result in new, external owners with no interest in the provision of services itself, but only in the economic return that ownership brings ("Model 1").

b. It may result in external owners with a material interest in the legal services provided: for example cross-selling insurance products and other financial services ("Model 2");

c. It may result in new owners (in an MDP) who supply "complementary" services who share fees ("Model 3").

37. All three of the above forms may produce commercial conflicts of interest that are adverse to the consumer. The degree of risk, however, will vary dependent on the nature of the interest. In the case of Model 1, the conflict will be between the external owners' wish to maximise their return on their investment and the interests of the client. That may (in theory) at least be solved by ensuring that the lawyer's duty to the client is paramount and prevails over the duty to shareholders. In the case of Model 2 the risk of conflict is greater because the lawyer potentially has a positive duty to the owner to cross-sell its products and the cross-selling (depending on the nature of the service or product) will not itself necessarily be a regulated activity. In the case of Model 3 the risk is greater yet because of the direct economic incentive for internal referrals of other services and the fact that different regulators may be involved regulating the different services provided i.e. there may be a regulatory conflict. See also by analogy the conflicts that arose in accountancy firms as a result of providing both auditing and consultancy services, which, following the Enron scandal, resulted in limits being imposed on the additional services that auditors can provide their clients.

38. These conflicts of interest will need to be managed differently because of the different levels and types of risk. The Working Group therefore considers that

the LSB's comment that "we should not assume that the risks in relation to ABS are substantially different from those already found within legal practices" (paragraph 5.13 of the Paper) to be wrong: the Working Group considers that the risks may be substantially increased by the introduction of new business structures (depending on what they are). It is for this reason (amongst others) that the Working Group advocates that a step-by-step approach is adopted towards the liberalisation of the market so that the effectiveness of regulation can be judged first. In particular, it is the Working Group's view that the introduction of MDPs for this and other reasons (discussed further below) should be deferred.

*(iv) "Business interruption"*

39. Another consequence of the introduction of new risk capital and greater flexibility in accessing capital is an increased risk of withdrawal of capital in times of diminishing returns in the legal services market. That in turn raises the possibility of interruptions in the supply of legal services to the detriment of consumers and an increased risk of individual firms failing.

40. As a consequence, the regulatory regime will need to introduce additional safeguards against the risk not only of economic failure but also the withdrawal of capital. This may involve imposing – in the interests of access to justice – restrictions on the withdrawal of capital. The LSB, however, appears only to have considered the possibility of a firm failing: see paragraph 5.10 of the Paper.

*(v) Conclusion*

41. The liberalisation of the market in legal services creates opportunities for innovation. These are to be welcomed. But with innovation and change comes risk. The two are but different sides of the same coin. The Working Group considers that it is the duty of the regulator to promote public goods (including access to justice) so as to ensure that the innovation and change does not operate

adversely to the public interest. This is not simply a question of the regulator reserving to itself the power to intervene where the market fails. Rather it involves a positive duty on the regulator via its licensing regime to set the public interest goals that the liberalised market should serve.

***Question 6:*** *In what ways might consumers of all types – including private individuals, small businesses and large companies – benefit from new providers and ways of delivering legal services?*

42. In the absence of any up-to-date impact analysis, it is difficult to say with any degree of confidence what benefits consumers might derive from new providers and ways of delivering services. The Working Group has (in its answer to Question 5 above) speculated on what the outcome might be. However, it considers that new providers are likely to bring with them new problems and difficulties that may be adverse to the interests of consumers of legal services as well as bringing benefits. Some of these have also been identified above.

***Question 7:*** *What opportunities and challenges might arise for law firms, individual lawyers, in-house lawyers and non-lawyer employees of law firms as a result of ABS?*

43. See answer to Question 6 above.

***Question 8:*** *What impact do you think ABS could have on the diversity of the legal profession?*

44. As set out at in the answer to Question 5 above, the Working Group considers that the introduction of ABS is likely to reduce diversity in the legal profession unless it is made a requirement of licensing a new ABS that its potential (negative) impact on diversity is taken into account.

***Question 9:*** *What are the educational and developmental implications of ABS and what actions need to be taken to address them?*

45. This question has been asked in the context of considering the implications that the introduction of ABS may have for the training and education of lawyers: see paragraph 4.20 of the Paper. At this stage, the Working Group is not able to identify these: it is too early to say. However, the Working Group considers that the introduction of ABS may also have implications for the training of non-lawyers who are either managers of ABS or who are members of MDPs. In particular, such persons will need to understand and appreciate the paramount duty of lawyers to their clients at the expense even of their firm's interests. The Working Group considers that the LSB should make it a licensing condition that non-lawyer managers undergo training in this regard in order to ensure that they do not seek to place their lawyer colleagues in a conflict of interest.

***Question 10:*** *Could fewer restrictions on the management, ownership and financing of legal firms change the impact upon the legal services sector of future economic downturns?*

46. Although the Working Group notes the LSB's view (at paragraph 4.21 of its Paper) that "better management, greater flexibility in accessing capital, and more scope to offer combinations of legal and non-legal services, could enhance the capacity of firms to adapt and survive sharp fluctuations in demand for some types of legal work", the Working Group has not yet seen any evidence that this is the case. Indeed, it suspects that the contrary might be so: the provision of outside capital by investors interested in economic returns (such as equity capital firms) and the diversification into the provision of non-legal services (in the case of MDPs) could in fact result in greater risk and vulnerability to changes in the economic cycle. See, by analogy, the risks to which demutualised building societies have been exposed. The Working Group, therefore, considers that the liberalisation of the legal services market could in fact materially add to the risk of economic failure.

47. It agrees with the LSB (at paragraph 5.10 of the Paper) that the challenge of the regulatory regime is to ensure that sufficiently robust arrangements are in place. It considers, however, that those robust arrangements should deal not only with the *consequences* of failure but should operate to diminish the risk of failure. For example, as suggested above, the LSB could consider imposing restrictions on the withdrawal of capital by outsider investors in ABS to ensure that they adopt a longer-term commitment to such entities. In other words, a preventative approach should be adopted.

**(3) Section 5: Managing the risks**

***Question 11:*** *What are the key risks to the regulatory objectives associated with opening the market to ABS and how are they best mitigated?*

48. The Working Group has already set out in response to Question 5 some of the risks that are associated with opening the market to ABS – a potential decline in the Bar resulting in a decline in consumer choice in the provision of advocacy services; a reduction in geographical and ethnic diversity adversely affecting access to justice; increased risks of commercial conflicts of interest, potentially affecting adversely the legal service provided; and possibly greater economic instability in the provision of legal services. It has also suggested above some of the ways in which such risks can be mitigated.

49. However, it considers that the greatest risk that may flow from the "commoditisation" of legal services and the increased risk of commercial conflicts (because of the increased importance of economic returns), is a decline in professional principles and a loss in values and ethos. This is the greatest risk because once a particular culture or ethos is lost, which is principally characterised in the case of legal services by the recognition that the primary duties of the lawyer are to the client and to the Court, it is difficult to recreate it by means of regulatory rules. In this respect the Working Group has observed

the decline in a "public service" ethos in other professions and occupations, and the problems that this has posed (for example in railways, GPs' "after hours" cover, and Parliament). It also acknowledges the LSB's commitment (as expressed at paragraph 5.11 of the Paper) to a regime where lawyers "adhere to the professional principles".

50. In the light of this, the Working Group considers that this risk is best mitigated by allowing only the lowest-risk ABS in the first instance i.e. ones that are predominantly lawyer-run and ones where the providers of outside capital do not have a material interest in the way that the ABS is operated (as might insurers, for example). Once the operation of these ABS is observed and lessons learnt from their introduction, it would then be possible to introduce other forms of ABS with the benefit of that knowledge and practical experience.

51. In this respect the Working Group agrees with the LSB that "more clarity and consensus is needed regarding the nature and scale of any risks" (paragraph 5.4 of the Paper) and that restrictions should be "evidence-based" (paragraph 5.3). However, it draws from this a different conclusion, namely that in order to achieve this clarity and consensus a step-by step approach should be adopted, rather than inferring from the lack of clarity that all ABS should be treated equally "in the absence of a compelling case for further restriction" (paragraph 5.3). That is because, in the opinion of the Working Group, there is no necessary connection between liberalised markets and access to justice. Rather, it is the object of regulation to ensure that the former is not at the expense of the latter, and to adopt a *precautionary* approach in the absence of sufficient evidence.

52. In addition to the adoption of this gradualist approach, the Working Group considers that regulation of entities should not be at the expense of the lawyer's individual responsibility to put the interests of the client first. Indeed, given the additional, commercial pressures that there are likely to be on the individual

lawyer, the Working Group considers that the duty of the individual lawyer to the client should in fact be given even greater prominence. In particular, it needs to be made clear that, even in cases of ambiguity, the lawyer is under a professional duty to adopt the course that is *most* in the client's interests. Although the Working Group acknowledges that there will be a need to move towards entity regulation, it suggests that this should not be at the expense of an individual lawyer's "core" duties. We return to this concern in the context of responding to the Questions asked in relation to Section 6.

53. Finally, the Working Group considers that the regulation of non-lawyers should be no less rigorous than the current regulation of lawyers. In particular, it will be necessary to ensure that their interests are subordinated to the interests of the clients of the legal service providers and to the Court. We have touched upon this issue in our response to Question 9 above. We again return to this issue where considering the entry requirements for applicants for licences and to the "fit and proper" person test.

***Question 12:*** *Are there particular types of business structure or model which you consider to present a particular risk to the regulatory objectives?*

54. The answer to this is "yes". As identified above, the Working Group considers that business models where commercial pressures are likely to be strongest and regulatory control weakest pose a particular risk to regulatory objectives. There are two in particular. The first is where the owners of the ABS may have a material interest in the ways in which the ABS provides its legal services, for example, where the owners are claims management companies, third party funders or certain kinds of financial providers (such as lenders and mortgage providers). The second is where the ABS is an MDP, and there are both potential conflicts of interest between the different services providers (for example with

auditors over the handling of privileged information) and between different regulators (for example, the SRA and the ICA). In addition, in general terms, the Working Group considers that the more non-lawyers involved in the management of the business, the greater the risk of conflicts.

55. The LSB asks for views about how a strong career structure for those who wish to specialise in advocacy can be maintained and how the accessibility of specialist advocacy can be maintained in a market open to ABS (see paragraph 5.9). The Group considers that is difficult to design specific regulatory measures which foster these objectives (other than those mentioned in paragraph 55 above). This in turn reinforces the Group's view that the LSB should adopt a gradualist approach to the introduction of ABS coupled with careful monitoring of their impact on access to specialist advocacy services and the career structure of those providing such services.

***Question 13:*** *What conflicts of interests do you think might arise in relation to ABS and how should they be managed?*

56. The Working Group has already identified potential conflicts of interest and how they should be managed in its response to Questions 5 and 11 above.

**(4) Section 6: Risk-based regulation of entities**

***Question 14:*** *How should licensing authorities approach entity-based regulation and what are the main differences from the traditional focus on regulating individuals?*

57. The Working Group agrees that the advent of ABS will require regulators to regulate entities but considers that such regulation should not be regarded as in any way a substitute for the regulation of individuals. The regulation of the entity and the individual lawyer working within it will need to be

complementary. Regulation of the entity should focus on whether any constraints are to be placed on the identity of those managing, controlling or owning the entity (a majority of authorised lawyers, or not?) and their fitness to do so. It will also need to address the following: whether minimum standards of financial soundness need to be imposed; audit and publicity for financial and other information concerning the entity; the internal management structure; and internal systems for managing risks (of conflicts, dishonesty, pressure to put profit-maximisation rather than the interests of the client first etc, standards of professional competence, handling of client money).

58. Although the Working Group recognises that the continued regulation of individuals raises difficult questions of proportionality, it is of the view that the regulation of individual lawyers should not diminish in significance simply because the entity is regulated: it remains necessary to ensure integrity, competence, continuing education and strong professional values (e.g. duty to the court paramount; duty to the client overriding duties to the firm). In particular, it will remain necessary to ensure that the individual lawyer has a personal responsibility to act in the best interests of the client.

59. The Working Group attaches particular significance to the individual regulation of advocates. This is because by its nature advocacy is a very individual matter. The advocate takes ultimate responsibility for the way in which a case is presented and argued in Court. The regulatory system therefore needs to impose clear standards on such advocates relating to their paramount duty to the Court and their clients' best interests, coupled with suitable education and training on these issues.

**Question 15:** *Do you agree with our view that licensing authorities should take a risk-based approach to regulation of ABS, and if so, how might this work in practice?*

60. The Working Group understands a risk-based approach to regulation to be one which seeks to identify and analyse the nature and extent of risks posed by different sorts of ABS and then to tailor regulation to eliminate or minimise those particular risks.

61. The Group has concerns about such an approach. This is because it necessarily involves a recognition that from time-to-time the regulated entity will make mistakes which – provided it has proper risk-based systems in operation – will not result in any adverse regulatory consequences. Although as a result the entity has the benefit of less restrictive regulation, which may enable it to be more competitive, this is potentially at the expense of delivery to the consumer of the service that is required. As the Paper notes at paragraph 6.13, the move to principles based regulation in financial markets has been criticised because it has become clear that a number of very large firms did not comply with the FSA's Principles of Business. The Paper then discounts this on the basis that systemic risks are more important in the financial services market. However, in the legal services market, the consequences of poor service for the individual consumer may in fact be greater than mere financial loss – it may involve criminal conviction, loss of freedom or deportation. Given this, it is suggested that tolerance of risk should in fact be even less in the provision of legal services than in the provision of financial services.

62. Moreover, the FSA is operating in a very different landscape against the background of many years of very complicated, detailed regulation. The outcomes mode of regulation appears to be a reaction to and a means of cutting through regulation which has become incomprehensible and unmanageable in its complexity, density and detail.

63. In any event, the Working Group would also expect the licensing authority to analyse the particular risks posed by an individual ABS applying for a licence in

determining whether to grant that licence (and if so, whether it should be subject to particular conditions).

**Question 16:** *What is your preferred balance in regulating ABS between a focus on high level principles and outcomes and a more prescriptive approach?*

64. The Group does not consider that this question can be answered in the abstract. Whether there should be a focus on high level principles or a more prescriptive detailed approach must depend on precisely what sort of ABS is being regulated, the risks, and the regulatory objective. An outcomes-based approach may be suitable for some regulatory risks in relation to some ABS; whereas a more detailed prescriptive approach will be a better method of regulation for other regulatory risks. In particular, the Working Group is of the view that, as a general rule, the greater the number of non-lawyers, at least in the first instance, the greater the degree of prescription. That said, pragmatism and, in time, experience should be the guides to the appropriate mode of regulation.

**Question 17:** *What are the advantages and disadvantages of a requirement on ABS to have a majority of lawyer managers?*

65. The main advantage of a requirement that ABS have a majority of lawyer managers is that it reduces the possibility of commercial pressures being imposed by non-lawyers on lawyers which may conflict with the lawyers' duties to put clients' interests first. Scope for such conflict may be heightened if the non-lawyer majority have a material interest in the legal services provided by the ABS (e.g. cross-selling insurance products or other financial services) or supply complementary services (auditing, estate agency etc) (see Models 2 and 3 in paragraph 36 above).

66. It is for this reason that the Working Group has proposed that in the first instance only ABS with a majority of lawyer managers should be permitted. If, nonetheless, a majority of non-lawyer managers are to be permitted the Group suggests that this is limited in the first instance to ABS which resemble current solicitors' practices (i.e. pure legal services and no cross-selling) and that the LSB waits to see if problems arise in relation to these sorts of entity before permitting more complicated ABS and MDPs.

**Question 18:** *What are your views about how licensing authorities should determine whether a person is a "fit and proper person" to carry out their duties as a HoLP or a HoFA?*

67. Although the HofLP must be an authorised person in relation to one or more of the ABS's licensed activities, this is not sufficient in itself to ensure that the HofLP is appropriately qualified and suitable to carry out the important tasks accorded to him under the Act. Where an ABS is licensed to carry on more than one reserved legal activity, the HofLP should be required to be authorised and have significant experience in the main proposed activity.

68. The Group agrees with the suggestion in paragraph 6.19 of the Paper that the HofLP and the HofFA should be different people. It would be potentially dangerous to allow one individual to combine both functions, not only because the functions of each are distinct and may well call for different skills, but also because it concentrates too much responsibility and power within a firm in the hands of one person.

69. As regards the test for what constitutes a "fit and proper person" in relation to both the HofLP and the HofFA, this should not be defined negatively to mean simply someone with no past criminal convictions or previous misconduct in business activities (as suggested in paragraph 6.24 of the Paper in relation to non-lawyer managers). The licensing authority should retain a broad discretion to determine what constitutes a fit and proper person and should be prepared to

apply the test in a much more positive fashion to ensure that the background of individuals, their financial soundness and track record as lawyers or managers suggest their competence and suitability for the position in question as well as their honesty and integrity. Competence is more difficult to judge if the individual comes from a business background where no professional qualifications are required, but this fact, in the Working Group's view, does not justify not having a positive test .

**Question 19:** *What is the right balance between rejecting "higher-risk" licensing applications and developing systems to monitor compliance by higher risk licensed bodies?*

70. This is a question which cannot be answered in the abstract but must be left to individual licensing bodies to work out on a case-by-case basis. Until the new regulatory system is up and running and licensing bodies have built up experience in operating it, the LSB should encourage bodies to adopt a cautious approach to licensing any ABS which poses higher risks to the consumer. Indeed, in the Working Group's view, "higher-risk" licensing applications should be rejected initially until systems for monitoring compliance for lower-risk ABS are in place and their operation found to be satisfactory.

**Question 20:** *How should regulators ensure a level playing field between regulated legal practices and licensed bodies?*

71. The Group agrees that the LSB should require regulators to ensure insofar as possible a level playing field between regulated legal practices and licensed bodies. However, the question as to how regulators should achieve this objective cannot be answered in the abstract but requires to be worked out on a case-by-case basis in relation to different sorts of ABS and regulated practices.

72. In particular, the greater the risk of the ABS, the greater the regulation that will initially be required, as the LSB recognises at paragraph 6.32 of its Paper. However, this differential in regulation can be minimised if, in the first instance, only ABS which are majority lawyer-owned or which are modelled on existing

solicitors' practices are first licensed; and higher-risk ABS are licensed when the established regulatory regime is operating effectively. This will better enable evidence of the risks associated with different types of firm to be gathered and so also enable regulators to adopt differential regulatory approaches that properly reflect these differences in risk. If a "big bang" approach to regulation is adopted, the danger is that regulators will in fact be operating without relevant evidence and so differential regulation will be encouraged (perhaps unnecessarily).

**(5) Section 7: Specific regulatory issues**

**Question 21:** *How should licensing authorities approach the access to justice condition, and do you agree that it is unlikely that many licences should be rejected on the basis of the condition?*

73. See above at paragraphs 8, 30-35.

74. The Group disagrees with the LSB suggestion that the access to justice objective will usually be a positive reason for granting a licence rather than turning it down (paragraph 7.3); or that it is unlikely that the access to justice provision on its own should lead to the rejection of applications for ABS licences (paragraph 7.6). The LSB's approach arises from its assumption that the liberalisation of the market will lead to greater access to justice but as already pointed out this is no more than an assumption and confuses access to legal services with access to justice.

75. The Group consider that some mechanism needs to be put in place to ensure that licensing authorities do indeed consider the impact of the grant of licences on access to justice. It may be difficult to do this in relation to every application for a licence because the licensing of one ABS is very unlikely on its own to have an effect on access to justice. Rather, access to justice may be (adversely) affected if the structure of the current market for legal services is radically altered by the advent of many ABS. Therefore some system needs to be developed (within the confines of the Legal Services Act 2007) whereby the LSB and licensing

authorities are required to consider the structural impact of the grant of licences on access to justice. Such consideration might be more appropriate on, say, an annual basis rather than on the application of each individual ABS.

76. We have already made the suggestion that in relation to geographical and ethnic diversity there should be a positive duty put on licensing authorities to ensure that these are not adversely affected by the grant of a licence (see paragraph 14).

**Question 22:** *How should licensing authorities give effect to indemnification and compensation arrangements for ABS?*

77. Indemnification and compensation requirements should be comparable to and no less stringent than those currently in place in relation to solicitors and barristers.

**Question 23:** *How should complaints handling in relation to legal services provided by ABS be regulated?*

78. The system for complaints handling in relation to ABS should be no less robust than that currently required by regulators for non-ABS legal practices.

**Question 24:** *How should licensing authorities approach the "fit to own" test and how critical is it in mitigating the risk to the regulatory objective of promoting lawyers' adherence to their professional principles?*

79. The Group agrees that the regulatory structure will need to ensure that the beneficial owners are identified; and the test of "fit to own" should be applied more rigorously to proposed holders of a controlling interest than a material interest. In addition to the statutory criteria of the person's probity and financial position, and whether the person is disqualified from a management position within the firm and the person's associates, the licensing authority should retain a discretion to refuse approval where the applicant is considered unsuitable on some other public interest ground. The licensing authorities' discretion should not be confined to the statutory criteria as these may prove too narrow to ensure

that owners are suitable and will not apply undue pressure to lawyers in carrying out their duties to the court and clients.

**Question 25:** *Are there any particular risks to the regulatory objectives that could arise from ABS offering non-reserved legal services?*

80. Consumers cannot be expected to know or understand the relevance of the distinction between reserved and non-reserved legal services. If they are dealing with an ABS which has been licensed by a regulatory authority, they are likely to assume that all aspects of its work are subject to regulation. It is therefore our view that where an ABS provides non-reserved legal services regulation should extend to these activities. In this respect the Group agrees with the SRA's views[10]. Furthermore, ABS should not be permitted to hive-off unreserved legal services to a separate but related unregulated body, whilst providing reserved services through the regulated ABS. If the ABS and the unregulated body share similar names and identities, consumers are once again likely to be confused if they find that it is only the ABS which is regulated but not the associated unregulated body.

**(6) Section 8: Special bodies**

**Question 26:** *What are the risks to the consumer associated with the delivery of legal services by special bodies and which more general risks are less relevant to these bodies?*

81. The very broad range of bodies falling within the category of special bodies means it is impossible to generalise about the risks to consumers associated with the delivery of legal services by these bodies. The risks associated with special bodies need to be analysed separately according to the nature of the body and its clients. The contribution made by Citizens Advice Bureaux and Law Centres to the goal of improving access to justice is significant and care should be taken to

[10] See SRA, Regulating alternative business structures, Legal Services Act: New forms of practice and regulation at paras A1 to A5

ensure that the new regulatory regime does not impose requirements on these bodies which are difficult and burdensome for them to fulfil.

**Question 27:** *Is it in the consumer interest to require special bodies to seek a licence, and if so, what broad approach should licensing authorities take to their regulation?*

82. See the answer to question 26 above.

**Question 28***: Are there any other issues that you would like to raise in respect of ABS that has not been covered by previous questions?*

83. No.

**12 August 2009**

## Schedule 1

## Membership of the Working Group

| | |
|---|---|
| David Anderson | Business Development Manager, St John's Building, Manchester |
| Charanjit Batt | Queen Elizabeth Building (Young Bar Committee - family practitioner) |
| Richard Brent | 3 Verulam Buildings (Commercial practitioner) |
| Desmond Browne QC | 5 Raymond Buildings (Chairman of the Bar Council - media practitioner) |
| Stephen Collier | General Health Care Group Ltd (Former Co-Chair of the Employed Bar – general counsel) |
| Nicholas Green QC | Brick Court (Vice-Chair of the Bar Council, Chair of the Policy and Advisory Group - commercial, competition and regulatory practitioner) |
| Christopher Hancock QC | 20 Essex Street (Chair of the Commercial Bar Association - commercial practitioner) |
| Mark Hatcher | Director, Representation and Policy - Bar Council |
| David Hobart | Chief Executive Officer - Bar Council |
| Nicholas Lavender QC | Serle Court (Chair Professional Practice Committee - commercial practitioner) |
| Alexander Learmonth | New Square Chambers (Chair of the Young Bar Committee - commercial and chancery practitioner) |
| Tom Little | 9 Gough Square (Former Chair of the Young Bar Committee, Secretary to the Criminal Bar Association - criminal practitioner) |
| Professor Stephen Mayson | Legal Sector Academic and legal practice consultant |
| Paul Mendelle QC | 25 Bedford Row (Vice-Chair of the Criminal Bar Association - criminal practitioner) |
| Andrew Mitchell QC | 33 Chancery Lane (Treasurer of the Bar Council - criminal practitioner) |
| Philip Moor QC | 1 Hare Court (Former Chair of Family Law Bar Association - family practitioner) |
| Michael Patchett-Joyce | Outer Temple Chambers (Co-Chair of European Committee and Vice-Chair of the International Committee - commercial practitioner) |
| Mary Stokes | Erskine Chambers (Chancery and company practitioner) |
| Robin Tolson QC | Outer Temple Chambers (Leader of the Western Circuit - family practitioner) |
| Bob Young | Europe Economics (Economist) |

It can be seen from the membership of the working group that it comprises a cross-section of barristers in call, specialisms and sectors (publicly and privately funded).

**Annex 1**

## The Public Interest in a Profession of Specialist Referral Advocates

1. The efficient and effective conduct of trials depends to a large extent on the observance by advocates of high standards of ability and integrity. Inefficiency and incompetence (or worse) in the conduct of trials (a) lead to waste and delay, as trials are prolonged unnecessarily and may have to be aborted, with the consequent need for re-trials; (b) increase unnecessarily the distress caused by the legal process to parties, witnesses and victims; and (c) also lead to unfair results, with the innocent being unjustly convicted or the guilty wrongly acquitted, which can only be put right (if at all) after a lengthy appeal process.[11]

2. There is therefore a public interest in maintaining standards of advocacy. As explained below, one of the things which helps to keep standards of advocacy high is the existence of a profession of specialist, referral advocates.

### The Advocate's Role

[11] The 1989 Green Paper on The Work and Organisation of the Legal Profession put the matter as follows (in para. 5.3):

*"An inexperienced or incompetent advocate who cannot present a case properly is not only unlikely to be able to do justice to his or her client's own case, but is also likely to waste the time of the court and may by his failure bring about injustice. The ensuing delay, additional expense and inconvenience can affect not only the case in question but also other cases waiting their turn to be heard; and indeed the state of the law generally."*

3. The following features of the advocate's role, which are often overlooked, help to explain why the observance of high standards by the advocate has such an important impact on the efficiency and effectiveness of the trial process:

(1) The advocate presenting a case in Court is personally responsible for the conduct of the case. His responsibility cannot be delegated. He has to be ready with an appropriate response to searching questions from the judge, unexpected evidence from witnesses or any of the countless variety of unexpected developments and ethical dilemmas which can occur in the course of even the most seemingly routine of trials.

(2) The advocate has the ability to exercise a significant influence on the conduct of the trial. The advocate has a discretion as to, for example, how to present his client's case, which witnesses to call and what lines of questioning to follow with the witnesses. The exercise of this discretion can have a significant effect on the length of the trial and the burden placed not only on the parties and the Court but also on witnesses and victims. The Judge necessarily trusts the advocate to exercise this discretion properly and responsibly.

(3) The advocate has a duty to the Court which, when it applies, overrides his duty to promote his client's case.[12] This means that he

[12] The advocate's duty to the Court is recognised by section 27(2A) of the Courts and Legal Services Act 1990, which provides that:

has to be astute to identify and act on circumstances where that duty is brought into play. Those circumstances often call for fine judgments to be made as to whether the point has been reached where the advocate's duty to do all he properly can to advance his client's interests has to give way to his duty to the Court.

(4) The advocate develops the skills needed to perform his role well through regular practice and a broad range of experience.[13]

**The Advocate's Duty to the Court**

4. There is an essential conflict between the interests of litigants and the interests of the Court. Whereas the Court seeks to achieve a just result from a fair and efficient process, litigants seek a result favourable to themselves, whether or not that is just, and often without regard to the (un)fairness or (in)efficiency of the process necessary to achieve that result. A litigant will often perceive advantage to himself from protracting proceedings, obfuscating issues and keeping evidence from the Court. His advocate must do all he properly can to promote his

---

*court* *court*

3. The distinguished Irish jurist, Judge John D Cooke, a Judge and President of the First Chamber of the Court of First Instance of the European Communities, in a speech (*Competition Authorities: Do they understand the Bar?*, a paper presented at the Irish Bar Council – ABA Conference in Dublin on 30 June 2005) which addressed the differences between the common law system and an inquisitorial system, pointed out that these differences have important implications as regards the role of the advocate, including that:

'*... it means that the advocacy service is in itself a specialised skill requiring full-time application and not merely an incidental episode in the overall conduct of litigation, most of which takes place on paper*".

client's interests, but must draw the line when asked to do something which would be a breach of his duty to the Court.

5. The advocate's duty to the Court can arise in a number of different situations. The principles are set out in the *Code of Conduct of the Bar of England and Wales*, but experience shows that their application in practice requires difficult judgments to be made on the spot, often by an advocate facing competing pressures from his client and the Judge (and possibly others). For example, the advocate:

(1) must not pursue bad arguments, which would merely serve to waste the Court's time;

(2) must not engage in irrelevant questioning of witnesses, which would cause both delay and often the unnecessary harassment of witnesses;

(3) must not make irrelevant or unfounded aspersions as to the conduct of witnesses or third parties, which would cause unnecessary distress and harassment;

(4) must give witnesses an opportunity to answer any allegation which may be made against them;

(5) must cease to act for a client who refuses to disclose relevant documents, since non-disclosure could cause injustice to the opposing party;

(6) must inform the Judge of relevant cases or statutes (e.g., as to sentencing powers) rather than allowing his client to take an unfair advantage from any inadvertence on the part of the Judge, which might otherwise have to be corrected (if at all) on appeal;

(7) must draw to the Judge's attention any errors in the Judge's summing up to the jury, or any other procedural irregularity, so that they can (if possible) be corrected, and any appeal and possible re-trial prevented; and

(8) must not mislead the Court but must exercise integrity in all his dealings with the Court.

6. In all of these respects, the advocate has a duty to promote a fair and efficient trial process and that duty may conflict with the interests of his client. The Judge necessarily relies on the advocate to perform this duty.[14] The efficient and effective conduct of trials depends on the advocate's ability to recognise and perform his duty to the Court and his integrity in doing so, often over the protests of his client.[15]

---

[14] Lord Hoffmann acknowledged this when he said, in *Arthur J.S. Hall & Co. v. Simons* [2002] 1 A.C. 615, at p. 692:

*"I have no doubt that the advocate's duty to the court is extremely important in the English system of justice…The substantial orality of the English system of trial and appellate procedure means that the judges rely heavily upon the advocates appearing before them for a fair presentation of the facts and adequate instruction in the law. They trust the lawyers who appear before them; the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced."*

[15] Judge Cooke explained the public interest in high standards of advocacy as follows:

**The Specialist, Referral Advocate**

7. It follows that there is a strong public interest in the development and maintenance of high standards of ability and integrity in advocates. Given that advocacy is a skill which requires regular practice and a broad range of experience, high standards will only be developed and maintained if a sufficient number of individuals practise in such a way as to ensure that they are regularly acting as advocates, rather than as occasional advocates with a broader practice. In other words, the public interest requires there to be a profession of specialist advocates.

8. If these are to be truly specialist advocates, they need to devote themselves exclusively to the presentation of cases and not to spend their time on other tasks, such as the routine and preparatory work (e.g., conducting correspondence, interviewing witnesses etc.) which makes up the conduct of litigation. Advocates may practise as members of a litigation firm or as employees of a larger organisation, but they will only be specialist advocates if the firm or organisation is so arranged as to ensure that the separate functions of advocacy and litigation are performed by different individuals. In a firm or organisation which was not so organised, advocacy would necessarily form only part of any individual's practice, which would inhibit the development of the advocate's skills.

---

" *... the court itself has a practical interest in the availability of these skills in the presentation of cases before it because it saves time and avoids unnecessary procedural disputes. A court can rely upon the papers in an application being in order because it is so informed by an advocate who not only knows whether they are or not but who is bound by his independent standing to give that assurance only when it is correct to do so*".

9. Practice as a referral advocate also serves to increase the development of the individual's advocacy skills, both because it ensures that the individual practises only as an advocate (instructed by other lawyers who are able to judge his abilities as an advocate) and because it enables the advocate to gain a broader range of experience than would otherwise be possible. For example, a self-employed referral advocate can act regularly for both the prosecution and the defence in criminal cases, unlike an individual employed by a prosecuting authority or by a defence firm of solicitors. Most referral advocates receive briefs from a wide range of sources, giving them a much greater breadth of experience that they could achieve if they practised within a single firm or organisation. This greater breadth of experience gives the advocate a greater ability to see issues and problems from both sides and therefore a greater ability to judge not only what is in his client's best interests but also what is fair and appropriate in the interests of the proper conduct of the case.[16]

10. Practice as a self-employed referral advocate tends also to insulate the advocate from other, competing pressures which may distract the individual from his duty to the Court. A member of a firm or organisation owes duties to that firm or organisation, whose interests may from time to time conflict with the advocate's duty to his client or to the Court. For example, the firm or organisation may have an interest in securing a favourable result for an important or regular client, which the advocate must ignore. A referral advocate does not face the same pressure to

[16] This is also important when it comes to the appointment of Judges. It is undesirable for Judges to have only a one-sided experience as, say, prosecutors of defenders. This is confirmed by experience overseas, especially in the United States.

promote this interest as would an advocate who was a member of the firm or organisation.

11. For all of these reasons, therefore, there is a significant public interest in maintaining the existence of a strong and independent profession of specialist, referral advocates, without which the conduct of trials would tend to become less efficient and effective, leading to waste and delay, as well as unnecessary distress for parties, witnesses and victims and a much greater risk of miscarriages of justice.

**The Risks of Unfair Competition**

12. At present, the self-employed Bar provides a strong and independent body of specialist advocates which serves the public interest in the manner referred to above. However, it should not be assumed that this will always be the case. On the contrary, recent developments demonstrate how changes in the legal services market could bring about a significant reduction in the self-employed Bar, to an extent which would be contrary to the public interest.

13. A number of recent changes have led to a huge reduction in the number of cases being referred to the self-employed Bar, especially in the field of criminal and family work. These include the following:

    (1) The policy adopted by the Crown Prosecution Service of using in-house advocates to conduct an ever increasing proportion of prosecutions has significantly reduced the amount of prosecution

work available to the self-employed Bar. Although the CPS has sought to justify this new policy on cost grounds, the figures produced do not include all overhead, accommodation, or administration costs.

(2) New fixed fee rates introduced by the Legal Services Commission for criminal litigation have provided a commercial incentive for many firms of solicitors to provide more advocacy in-house. The resulting huge increase in the use of solicitors' in-house advocates raises questions as to whether the best interests of the client are truly being served.

(3) In some cases, litigation solicitors ask for referral fees in return for instructing advocates, despite the fact that this creates a clear conflict of interest for the solicitor advising his client on choice of advocate. The Bar's Code of Conduct rightly prohibits the payment of such fees, but the Solicitors' Regulatory Authority are understood not to be enforcing the equivalent prohibition on solicitors paying such fees.

14. A common feature of the above developments is that, while they are generating a significant commercial pressure for advocates to leave the self-employed Bar, this is not as a result of any ability of the members of the self-employed Bar to compete fairly on price or quality. Rather, these recent developments are skewing the market for advocacy services in a way which puts at risk the very survival of the self-employed Bar in the relevant areas of work, and thereby threatens to undermine the public

interest referred to above. The risks here cannot be understated, as the unwarranted commercial pressure on advocates to leave the self-employed Bar is considerable and has already had a marked effect on the self-employed Bar in the fields of criminal and family work.

15. Any entry by ABS into the market for advocacy services would have to be carefully scrutinised to guard against similar risks to the continued existence of a strong and independent profession of specialist, referral advocates.