MINUTES OF CONVOCATION

Thursday, 24th February, 2005
9:00 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Alexander, Backhouse, Banack, Bobesich, Bourque, Campion, Carpenter-Gunn, Caskey, Cass, Chahbar, Cherniak, Copeland, Curtis, Dickson, Doyle, Dray, Eber, Feinstein, Finkelstein, Furlong, Gold, Gotlib, Gottlieb, Harris, Heintzman, Hunter, Krishna, Lawrence, MacKenzie, Manes, Murphy, Murray, O'Donnell, Pattillo, Pawlitza, Potter, Ross, St. Lewis, Sandler, Silverstein, Simpson, Swaye, Topp (by telephone), Wardlaw, Warkentin and Wright.

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Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer congratulated former Treasurer Arthur Scace who has been named a member of the Order of Canada.

Marion Boyd will conduct an Information Session on Committee Day in March on her recent report to the Attorney General and Minister Responsible for Women's Issues entitled, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion."

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REPORT OF THE INTER-JURISDICTIONAL MOBILITY COMMITTEE

Item for Information

- Final Report of Sir David Clementi's Review of the Regulatory Framework for Legal Services in England and Wales

Report to Convocation
February 24, 2005

Inter-Jurisdictional Mobility Committee

Purpose of the Report: Decision *(in camera)*
Information

Committee Members
Derry Millar (Chair)
Vern Krishna (Vice-Chair)
Constance Backhouse
John Campion
Neil Finkelstein
George Hunter
Laurie Pawlitza
Heather Ross
Bonnie Warkentin

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

THE REPORT

Terms of Reference

2. The Committee met on January 25, 2005. The members who attended were Derry Millar (Chair), Constance Backhouse, John Campion, Laurie Pawlitza and Bonnie Warkentin. Staff member Sophia Sperdakos also attended.

3. The Committee is reporting on the following matters:

Policy – For Decision

- Memorandum of Understanding with the Barreau du Quebec (in camera)

Information

- Final Report of Sir David Clementi's Review of the Regulatory Framework for Legal Services in England and Wales

INFORMATION

REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES – FINAL REPORT (CLEMENTI REVIEW)

14. In May 2004 the Law Society made a submission respecting Sir David Clementi's interim report on the Review of the Regulatory Framework for Legal Services in England and Wales. Sir David Clementi's final report was released in December 2004. The complete report is set out at Appendix 2 for Convocation's information.

15. The Report recommends fundamental change to the way in which legal services are regulated in England and Wales. As summarized in the report the key recommendations include:

The establishment of a new regulatory framework

i. Introduction of the Legal Services Board, a new legal regulator to provide consistent oversight of the front-line bodies such as the Law Society and Bar Council.

ii. The Legal Services Board to have statutory objectives to include promotion of the public and consumer interest.

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

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

The establishment of new complaints systems

v. The Office for Legal Complaints, a single independent body to handle consumer complaints in respect of all members of front-line bodies subject to oversight by the Legal Services Board. This should provide a complaints system which is easy to access and independent in dealing with consumer complaints.

The establishment of alternative business structures

vi. Legal Disciplinary Practices, law practices which bring together lawyers from different professional bodies, for example solicitors and barristers working together on equal footing, and permit non-lawyers to be involved in management and ownership. The safeguards to be proposed by the Legal Services Board should include a 'fit to own' test. Such practices should encourage new capital and new ideas in promoting cost-effective consumer friendly services.

Appendix 2

REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES

FINAL REPORT

SIR DAVID CLEMENTI

DECEMBER 2004

Review of the Regulatory Framework for Legal Services in England and Wales

Contents

FOREWORD

To the Secretary of State for Constitutional Affairs

1. I have pleasure in submitting my Review of the Regulatory Framework for Legal Services in England and Wales.

2. I was appointed on 24th July 2003 and the Terms of Reference for the Review are:-

> *"To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector. To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.*
>
> *To make recommendations by 31 December 2004."*

3. This Review follows closely the order of the issues raised in the Consultation Paper that I published in March 2004.[1] That paper raised a number of questions, and behind it lay three particular concerns:-

i) a concern about the current regulatory framework In its report published in July 2003 entitled 'Competition and regulation in the legal services market' the Department for Constitutional Affairs concluded that the current regulatory framework was *"outdated, inflexible, over-complex and insufficiently accountable or transparent".* Nothing that I learnt during the 18 month period of my Review has caused me to doubt the broad validity of the Government's conclusion. The current system is flawed. In part the failings arise because the governance structures of the main front-line professional bodies are inappropriate for the regulatory tasks they face. A further cause is the over-complex and inconsistent system of oversight regulatory arrangements for existing front-line regulatory bodies: the Law Society is overseen in many of its functions by the Master of the Rolls; much of the Bar Council's work and that of the Council for Licensed Conveyancers and the Institute of Legal Executives by the Department for Constitutional Affairs; the Office of the Immigration Services Commissioner by the Home Office; the Chartered Institute of Patent Agents by the Department of Trade and Industry; and the Faculty Office[2] by the Archbishop of Canterbury. There are no clear objectives and principles which underlie this regulatory system; and the system has insufficient regard to the interests of consumers. Reforms have been piecemeal, often adding to the list of inconsistencies. The complexity and lack of consistency has caused some to refer to the current system as a maze.[3]

ii) a concern about current complaints systems There is considerable concern about how consumer complaints are dealt with. The concern arises at a number of levels: at an operating level, there is an issue about the efficiency with which the systems are run; at an oversight level, there is a concern about the overlapping powers

[1] Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation *Paper*, 8th March 2004

[2] The Faculty Office is the front-line Regulator for notaries.

[3] Ann Abraham, in the Annual Report of the Legal Services Ombudsman 2001/02 entitled: The Regulatory Maze

of the oversight bodies; and at a level of principle, there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of the responses to the Consultation Paper expressed dissatisfaction with the current arrangements.

iii) a concern about the restrictive nature of current business structures The business structures through which legal services are delivered to the public have changed little over a considerable period. The most easily recognisable structure is the high street solicitor, practicing either on his own or in partnership with other solicitors. But business practices have changed. In particular the skills necessary to run a modern legal practice have developed; but whilst those with finance or IT skills may sit on the management committee of a legal firm, they are not permitted to be principals in the business. There is concern also about whether the restrictive practices of the main legal professional bodies can still be justified, in particular those which prevent different types of lawyers working together on an equal footing. There is pressure for change from those who represent consumer interests, but also from many in the legal profession, particularly the Law Society who have made a strong case for liberalisation of law practices.

4. There is a relationship between the concerns set out above. For example, one of the difficulties which stands in the way of new business structures is that the current framework does not easily allow regulation of such structures. In the past, the Government has declared itself in favour of new business structures; and, as noted, one of the aims of this Review has been to propose an appropriate regulatory framework.

5. The Terms of Reference include the word 'independent' twice. I infer that the first reference calls for independence of the legal profession from outside influences, particularly from Government; and that the second reference calls for a regulatory framework which is independent in representing the public and consumer interest of those being regulated. Replies to the Consultation Paper from representatives of the legal profession have drawn my attention most often to the first reference. I judge that both are important.

6. In line with the Terms of Reference the Review seeks a regulatory approach to encourage competition. The grain of Government legislation over the years has been in the direction of encouraging greater competition between different types of lawyer. The Administration of Justice Act 1985 permitted licensed conveyancers to compete with solicitors in the conveyancing market. The Courts and Legal Services Act 1990 enabled solicitors to acquire rights of audience in higher courts, previously the preserve of members of the Bar; and since then two other professional bodies have been allowed to grant limited rights of audience to their members. Today there are around 2000 solicitors with higher court rights; and a significant amount of advocacy, primarily in the lower courts but increasingly in the higher courts, is done by solicitors. At the same time there are a large number of barristers, such as those who advise on tax or conveyancing issues, whose job is similar to many solicitors. The cultures of the Bar Council and Law Society are markedly different; but whilst they may remain separate professional bodies they cannot be regarded as separate professions.

7. Against this background, a number of observers have wondered whether I might recommend that there should be fusion between the Bar Council and the Law Society. There would be advantage in such a move in areas such as education, and it would ease some of the existing regulatory and competition issues. But I do not make such a recommendation in this Review, because I regard issues of mergers between overlapping professional bodies, or for

that matter de-mergers within existing professional bodies, as ones for the bodies themselves and their members. The regulatory framework needs to be able to accommodate either merger or de-merger. It needs to recognise too that, whilst the Bar Council and Law Society account for a significant part of the legal services industry, there are other bodies that the system needs to accommodate, in particular the Institute of Legal Executives, the Office of the Immigration Services Commissioner, the Council for Licensed Conveyancers, the Chartered Institute of Patent Agents, the Institute of Trade Mark Attorneys and the Faculty Office. I note that the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys co-operate on a variety of issues; they submitted a joint response to the Consultation Paper and it cannot be ruled out that at some point they might choose to merge their organisations.

8. If this Review favours greater competition between lawyers, it also seeks to permit competition between different types of economic units: for example, between sole practitioners, lawyers working in chambers, unlimited partnerships, limited liability partnerships and companies. There are advantages and disadvantages in each type of economic unit. I do not believe that the public and consumer interest are always better served by one type of economic unit as against another. The Review favours a regulatory framework which permits a high degree of choice: choice both for the consumer in where he goes for legal services, and for the lawyer in the type of economic unit he works for.

9. In this debate it is important to distinguish between facilitative and mandatory proposals. The key recommendations in this Review in the area of business structures are intended to be facilitative. Whilst I accept that sole practitioner status, when combined with the chambers system, has merit as a way to provide advocacy services, and I accept also that the partnership model adopted by many solicitors has significant strengths, I do not accept that other structures for the provision of legal services should not be permitted.

10. Whilst it is plain that there is competition between lawyers within the current system, and the proposals in this Review are intended to increase this, I have learnt that certain lawyers dislike being described as part of an industry. They see a conflict between lawyers as professionals and lawyers as business people. The idea that there is a major conflict is in my view misplaced. Access to justice requires not only that the legal advice given is sound, but also the presence of the business skills necessary to provide a cost-effective service in a consumer-friendly way. In the Consumers' Association's summary[4] of a survey of those dissatisfied with legal services it comments: *"The biggest cause of dissatisfaction was delay. According to one respondent 'it would have been quicker to do a course in conveyancing'. Cost also ranked highly: 'We feel that we were misled as to costs from the very start.' "* Research shows that complaints arise as much from poor business service as from poor legal advice. If certain lawyers continue to reject the notion that they are in business, such complaints will continue until they are indeed out of business.

11. The issue of costs is an important one: high quality legal services are important to society, but of limited value if available only to the very rich or those paid for by the State. In developing business systems to minimize costs whilst maintaining high standards, there is no reason why lawyers should not work alongside those with other skills, for example in finance or IT; and the Review makes recommendations designed to facilitate this. In proposing reforms designed to encourage cost-effective practices, there is no suggestion of diminution in standards, either in the quality of legal advice provided or in the ethical standards of practitioners.

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[4] *Regulating Legal Services, Point of Law* Campaign Briefing, Which? October 2004

12. The current regulatory regime incorporates some strands of regulation which are based around professional bodies, and some which are based around particular services. Whilst it would be intellectually tidy to move strongly towards either a professionally based regulatory system, or one which is service based, it would come at a price and some degree of hybridity is likely to remain. The change in regulatory emphasis which is proposed in this Review is a shift in emphasis towards regulation of the economic unit and away from regulation of individual lawyers. This is particularly relevant for the regulation of new business practices which bring together lawyers from different backgrounds; but it also has relevance for some existing legal practices, where regulatory emphasis needs to be on practice management and systems as much as on individuals.

13. In the Department for Constitutional Affairs' statement dated 26th May 2004[5] on the issue of QCs, the Government proposed an interim arrangement for the appointment of QCs. It also proposed a long-term market study to assess how *"to help consumers choose the best legal services for themselves".* The Government's statement went on to say: *"The interim scheme will then be reviewed to see if it is consistent with the Clementi recommendations and any results of the market study."* This Review has not inquired into the QC system; but it does propose a regulatory framework in which the Regulator is likely to take an interest in how the system operates. Given the objectives of the Regulator discussed in Chapter A, the Regulator is likely to want to understand what the 'kitemark' is awarded for; the fairness of the system, recently amended, under which candidates are selected; why, in a profession which stresses the importance of independence, the kitemark is finally bestowed by the State rather than the profession itself; and whether the system as a whole operates in the public interest.

14. The issues which this Review has inquired into are raised using the same chapter headings from A to F as in the Consultation Paper.

15. Chapter A proposes that the first step in defining the regulatory regime should be to make clear what the objectives of the regime are. The Chapter proposes six primary objectives for the regime. These would be the objectives against which the Regulator must determine the appropriate regulatory action; and against which it would be held accountable. The Chapter also looks at legal precepts or principles, such as a lawyer's duty to the client, which should be incorporated within the regulatory arrangements.

16. Chapter B addresses the key architectural issues around the design of a regulatory system which meets the Terms of Reference; and it looks at the arguments around the different models set out in the Consultation Paper. It also looks at the costs of different models. The Chapter concludes that regulatory functions are best dealt with by a model based on what the Consultation Paper referred to as Model B+. This model provides for the setting up of an oversight regulator, the Legal Services Board (LSB), vested with regulatory powers which it would delegate to recognised front-line bodies, where it was satisfied as to their competence and that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, had been made. The Chapter discusses the current governance arrangements of the Law Society and the Bar Council and concludes that they are inappropriate for the regulatory tasks they face.

17. Chapter C concentrates on complaints mechanisms. It examines the problems which exist with the current system and possible solutions. The Chapter concludes that for reasons of

[5] DCA press release, 26th May 2004

independence, simplicity, consistency and flexibility a single independent complaints body for all consumer complaints should be adopted. The Office for Legal Complaints (OLC) would be independent in dealing with individual complaints but would need to work closely with the LSB to ensure that regulatory oversight served to minimize complaints at source. The OLC would be part of a single regulatory framework, with the LSB at its head.

18. Issues about professional conduct, including disciplinary action, would be handed down to the front-line bodies. The Chapter's overall conclusion is that the disciplinary systems of the front-line regulators work reasonably well and could be left, subject to a small number of changes, broadly as they are.

19. Chapter D focuses on the governance and accountability issues around the LSB. It proposes a Board of between 12 and 16 members with both Chairman and Chief Executive being non-lawyers. It makes proposals for how such appointments should be made. It sets out arrangements for consultation with relevant parties and explains how the LSB might be accountable to Parliament, to Ministers, to the public and to practitioners. It comments on the process for appeal from decisions of the Regulator; and it looks at how the regulatory system might be funded.

20. Chapter E raises issues of definition and regulatory gaps. The Chapter includes a broad definition of the 'outer circle' of legal services; and then sets out a definition of the 'inner circle' of reserved legal services which may be carried out only by those authorised to do so. It discusses the asymmetry which arises in respect of outer circle services, which come within the regulated net if provided by practitioners such as solicitors, but are unregulated if provided by practitioners outside a front-line body. It proposes that the determination of how widely the regulatory net should be cast should rest with Government, and suggests criteria which would be employed in the relevant cost/benefit analysis accompanying any change.

21. Chapter F looks at issues around the permission of alternative business practices. Legal Disciplinary Practices (LDPs) are law practices which bring together lawyers from different bodies to provide legal services to third parties. The Chapter proposes that non-lawyers should be permitted to become principals or 'Managers' of such practices, subject to the principle that lawyers should be in a majority by number in the management group. It also proposes that outside ownership should be permitted, subject to a 'fit to own' test and also to a number of safeguards built around the identity of those who manage the practice and the management systems they employ. Within England and Wales outside ownership is already permitted in respect of legal practices which provide licensed conveyancing services; it is proposed that it should, subject to safeguards, now be permitted in other areas of the legal services market.

22. In the regulation of LDPs, Chapter F proposes that the focus of the regulatory system should be upon the economic unit, rather than the individual lawyer. Recognised front-line regulatory bodies would apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements that the recognised body had in place.

23. Chapter F also looks at Multi-Disciplinary Practices (MDPs). These are practices which bring together lawyers and other professionals to provide legal and other services to third parties. There are considerable issues in connection with such practices, in particular that of regulatory reach since the LSB would have no jurisdiction beyond the legal sector. The setting up of a regulatory system for LDPs would represent a major step towards MDPs, if at some

subsequent moment it were determined that there were appropriate safeguards to permit such practices.

24. Taken together the proposals set out in Chapters A to F form my recommendations for a new framework. I believe this framework would represent a considerable advance on the *"outdated, inflexible, over-complex and insufficiently accountable or transparent"* regime which currently exists. The establishment of the LSB as a single oversight regulatory body, separate from Government Departments where many of the oversight functions currently sit, and the split in front-line bodies between their regulatory and representative functions, should provide a framework independent of Government in which to promote competition and innovation, including in the area of alternative business structures. By giving the LSB clear regulatory objectives, by requiring it to consult in respect of any major decision and by insisting that it reports to, among others, Parliament, it should be a transparent and accountable Regulator. By giving the LSB powers over all existing front-line bodies and powers to recognise new bodies, the system should be able to be consistent, comprehensive and flexible. In a number of ways, in particular through the LSB as a regulator which counts consumer protection among its statutory objectives and through the OLC as a single complaints body independent of the existing professional bodies, the new system should better serve both the public and the consumer interest. The analysis of costs suggests that the OLC, as a single complaints body, might yield some savings compared with the current system with its many complaints handling and oversight bodies. Taken together the LSB and OLC should not impose on the system any materially greater burden of cost than the current arrangements.

Research and survey work

25. In reaching these views I have taken into account a significant amount of research and survey work which has been published about the operation of the legal services sector. I regard some of these as particularly relevant: for example, the research work set out in the Scoping Study[6] which preceded this Review, published by the Department for Constitutional Affairs in July 2003, and the survey published in summary form[7] by the Consumers' Association in July and in October 2004.

26. This Review has commissioned two pieces of research. The first, carried out by MORI, is being published[8] concurrently with this Review. The second relates to the cost implications of the different regulatory models covered by this Review. In June 2004 I appointed Ernst & Young to carry out work in this area. Their Report is contained in Appendix 3.

Process

27. A word about the process I have followed in reaching my recommendations. As noted above, I was appointed on 24th July 2003. On 8th March 2004 I published the Consultation Paper and interested parties were asked to reply by 4th June. During the 12 week consultation period the Regulatory Review team held a number of meetings in England and Wales: in Bangor, Birmingham, Bristol, Cardiff, Exeter, Leeds, Lincoln, London, Manchester, Newcastle and Norwich. In addition we attended many meetings organised by other bodies, a number of

[6] Annex B to *Competition and regulation in the legal services market* CP (R2) 07/02 DCA, July 2003
[7] op. cit. and *Which?* July 2004
[8] On our website www.legal-services-review.org.uk

them organised by the Law Society in regional centres and two helpfully arranged by the senior judiciary.

28. I have received 265 responses to the Consultation Paper. They have come from a variety of sources: existing bodies and individuals with regulatory functions; organisations who speak for the consumer; lawyers; academics; and members of the public. Collectively they have provided a significant amount of evidence that I have used in forming my recommendations. I would like to thank those who took the trouble to contribute to the debate, and particularly those who are not themselves in the legal services sector. A list of respondents is contained in Appendix 1.

29. I have used the period since 4th June to follow-up on a number of points with key interested parties. These have included the Law Society and the Bar Council and I should add that I have received courtesy and co-operation from both bodies.

30. I have also had the opportunity to discuss the issues at length with the Advisory Panel that I announced on 8th March 2004. The members of the Panel are: Stephen Locke, Baroness Neuberger DBE, Neil Rickman, Edward Walker-Arnott, Graham Ward CBE and Robert Webb QC. I would like to thank them for their considerable help over the last few months. As I indicated at the time of announcement, I remain solely responsible for the recommendations.

31. I am also very grateful to the team who worked with me on the Review, and particularly the Secretary, Sheila Spicer, who worked ceaselessly to ensure that the Report was delivered on time. No doubt some will argue that we have missed points; but I believe that, thanks to the efforts of the team, the key high level points on which Ministers will need to reach decisions have been thought through after proper consultation and with due care.

What happens next?

32. What happens next is a matter for Ministers. Whilst some lawyers will continue to argue that the current system ‘ain’t broke’, I believe there is strong evidence of the need for major reform: (i) to the regulatory framework which, as described in the Government’s own Scoping Study, is flawed; (ii) to the complaints system which needs change to benefit the consumer; and (iii) to the types of business structures permitted to provide legal services to the consumer, which have changed little over a significant period. It is for Ministers to determine whether they wish to press ahead with reform.

33. Reform will not be easy. Whilst there is pressure for change, from consumer groups and also from many lawyers, reform will be resisted by other lawyers who are comfortable with the system as it is. Lawyers who are opposed to the reforms in this Review will either argue that I am mistaken and have failed to understand the special characteristics that set the law apart, or call for further research and consultation, kicking reform into the long grass. Changes will require significant political commitment, partly to meet the expected criticism from some lawyers and partly because reform will need primary legislation, which requires scarce Parliamentary time.

34. I hope that Ministers, and subsequently Parliament, will conclude that reform is necessary. In my view it is long overdue.

Sir David Clementi
December 2004

CHAPTER A – THE OBJECTIVES AND PRINCIPLES OF A REGULATORY FRAMEWORK FOR LEGAL SERVICES

Introduction

1. The Consultation Paper sought to explore the possible objectives of a regulatory regime for legal services and to consider some of the principles which lie behind the provision of those services by lawyers. In terms of the operation of the regulatory framework, the Consultation Paper also considered whether regulatory authorities should use their resources where the risks to those established objectives and principles were greatest.

2. A decision to regulate a market arises from the decision that leaving the activity unchecked could lead to undesirable consequences and that the benefits that will flow from regulation will outweigh the costs of that regulation. Because any regulatory system will involve the application of rules giving guidance as to acceptable standards of conduct within the area being regulated, it should lead to an increase in trust and confidence in institutions and the sector generally. And allied to the issue of trust and confidence, regulation can also lead to greater certainty of outcome for both consumers and providers. But beyond simply engendering confidence in the market, regulation has an important role to play in protecting the consumer, ensuring there are no unjustifiable restrictions on competition, that appropriate standards of education, training and conduct are maintained, and that there are appropriate redress mechanisms.

Objectives of the Regulator

3. The Consultation Paper proposed that the first step in defining the regulatory regime should be to make clear what the objectives of the regime should be. This is critical for those charged with regulatory responsibility, since the objectives represent the criteria against which they must determine the appropriate regulatory action; and against which they will be held accountable. Objectives also need to be clear to those being regulated and other interested parties.

4. In general I favour a short clear list of objectives, much along the lines of those which direct the work of the Financial Services Authority (FSA). In the case of the FSA, the four primary objectives can be summarised as:-

- maintaining confidence in the UK financial system;
- promoting public understanding of the financial system;
- securing the right degree of protection for consumers; and
- helping to reduce financial crime.

5. The Regulator will need appropriate objectives, whether it is a direct Regulator under Model A as the FSA is; or if it follows Model B, or some variant, where it acts as an oversight regulator.

6. Almost all respondents appeared to support the view that the Regulator of legal services should operate to a set of clearly defined objectives.

7. The Consultation Paper identified six possible key objectives for any Regulator of legal services:-

i. Maintaining the rule of law – The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. A predictable and proportionate legal system with fair, transparent, and effective judicial institutions is essential to the protection of both citizens and commerce against any arbitrary use of state authority and unlawful acts of both organisations and individuals.

The Consultation Paper suggested that those charged with regulating legal service providers should have an important part to play in ensuring the rule of law by creating conditions necessary for its delivery.

ii. Access to justice – The Consultation Paper also suggested that a Regulator of legal services should have the objective of improving access to justice for all. Access to justice has a geographic dimension (and issues such as rural access are discussed in the context of LDPs in Chapter F), but it is critically also an issue about access for those who are disadvantaged and in particular those who cannot afford to pursue their legal rights. The Regulator will be concerned that access is proportionate; it cannot be provided for all issues irrespective of cost. Thus it would be expected that the Regulator would want to work closely with other bodies, such as the 'not-for-profit' sector providers and the Legal Services Commission.

iii. Protection and promotion of consumer interests – Given the asymmetry of information which exists in the provision of legal services between provider and consumer, the Regulator has a duty both to protect and to further the interests of the consumer. The consumer's principal interests include higher quality and lower prices. In part this includes the giving of choice to an informed consumer. In this way the ultimate choice of whether to accept a risk is made by the consumer.

The Consultation Paper suggested that the Regulator of legal services should have a twin duty in respect of consumers: first to ensure that consumers have sufficient information about the standards of the services provided so that they are able to take informed decisions about these services; and second, given that consumers may not always be 'informed', to have powers to act in the market, for example, to prohibit oppressive marketing practices, raise or set standards, develop information/awareness programmes, resolve disputes and protect vulnerable groups.

iv. Promotion of competition – The Terms of Reference refer to a regulatory framework that would best promote competition. The Consultation Paper acknowledged that one of the trends in recent years had been the increased

emphasis on competition. It noted that, specifically within the legal services industry, the Government had encouraged competition between lawyers from different professional bodies. Against this background, the Consultation Paper proposed that any Regulator of legal services should have as an objective the prevention of unjustified restrictions on the supply of, and encourage competition in, the provision of legal services and the promotion of choice in both the number and type of providers, subject to the proper safeguard of consumers' interests.

v. Encouragement of a confident, strong and effective legal profession – The Consultation Paper suggested that a regulatory objective of maintaining a strong and effective legal profession (including setting appropriate entry standards and supporting new entrants to the market) would help to ensure access to justice, the maintenance of a healthy supplier base for publicly funded work and continued support for *pro bono* initiatives, thereby serving the public interest. It would also underpin the international efforts of our legal sector.

vi. Promoting public understanding of the citizen's legal rights – Drawing on the financial services industry as an example, the Consultation Paper suggested that any new legal services Regulator should maintain the professional obligation on lawyers to set out for clients their rights and the consequences of different options. It questioned whether the Regulator should have a wider duty, in conjunction with the industry, to improve consumer knowledge of some of the most commonly used parts of the law, for example, around buying a house.

8. In terms of the appropriateness of the six objectives set out above, most respondents to the Consultation Paper felt that those identified were broadly the right ones. Some respondents took the view that the objectives did not fully cover all of the key issues. They proposed minor changes to the regulatory objectives set out in the Consultation Paper. In most cases these sought to expand on, or give additional emphasis to, existing parts of the text which supported each objective. Where additional objectives were put forward by respondents they were for the most part either subsets of the objectives set out above, or the result of a combination of some or all of those objectives. However, a number of comments provided insights which merit particular consideration.

9. The Bar Council commented, in connection with the six objectives:-

"….whilst this is an admirable list of policy considerations to which any regulator of legal services should have regard, it seems to us that it does not directly state what we would understand to be the basic purposes of regulation – namely, to seek to ensure that members of a professional body (or other providers of a relevant service) are (a) suitably qualified and (b) observe appropriate ethical standards."

10. My view is that this is a rather profession centric view of *the "basic purposes of regulation".* Nevertheless it is an important point; and it might be that the drafting of the objective of a 'confident, strong and effective legal profession' should specifically refer to the need for those covered by the regulatory framework to be suitably qualified and in particular to the need for high ethical standards. Other respondents, such as the First Division Association (the association representing senior civil servants, including members of the Government Legal Service) also referred to the adoption of standards:-

> *"By "standards" we mean two elements - Firstly, proper professional competence, which goes beyond entry standards, which is the element mentioned in the Paper. There are also continuing professional development obligations on legal practitioners, as there are in many professions."*

Proper professional competence, including continuing professional development, should be an important part of the new regulatory framework. This Review, and in particular Chapter F, has much to say about greater competition between lawyers and liberalisation of the way in which they conduct business; but none of this is intended to lower the standard of legal advice provided or the ethical professional standards of practitioners.

11. In contrast to the Bar Council's view, the Consumers' Association in its response raises concern about singling out a 'strong and effective legal profession' as a specific objective:-

> *"In our view a 'strong and effective profession' is one that successfully exerts power and influence with decision-makers. The interests of the profession do not always coincide with the public interest. A strong and effective legal profession may or may not ensure a healthy supplier base for publicly funded work. The detailed objectives set out within that paragraph are more usefully brought within access to justice and competition."*

Whilst it is possible to see a strong legal profession as a sub-set of access to justice, I continue to see it as an objective in its own right, not least because, beyond our own borders, the profession in England and Wales has a significant international standing. English law and English lawyers are often chosen for international transactions; and the regulatory framework should seek to enhance this standing and certainly not to damage it.

12. The Law Society welcomed the introduction of the specific objective of 'promoting public understanding of the citizen's legal rights', and commented in its response to the Consultation Paper that:-

> *"This has not, hitherto, formally been regarded as a regulatory responsibility of the Law Society, although the Society has been increasingly active in this field."*

13. The National Consumer Council (NCC) also welcomed the specific objective but argued in its response that the objective did not go far enough:-

> *"The objective to promote public understanding of citizens' legal rights does not go far enough because it fails to distinguish between consumer information and consumer education. The notion of consumer education is concerned with knowledge, understanding, values, skills and attitudes, and is necessary to obtain the most from information and advice. With the combination of information, education, advice and redress in place, consumers may become empowered rather than just informed. Empowered consumers also have the confidence to make their voices heard – a really important dimension. So, for the objective concerning consumer considerations, we would rather the emphasis was put on empowering consumers, which helps them become the enablers of competitive markets."*

In general I agree with this point. The regulatory system should be concerned with education, advice and redress as well as information. But in the precise drafting it will be important not to impose upon the framework more than it could possibly deliver. In particular, education about

legal rights and processes presupposes basic educational standards for those reaching adulthood, an important issue but one beyond the reach of the legal regulator.

14. As already mentioned, a number of respondents have proposed minor changes to the regulatory objectives set out in the Consultation Paper and to the text which supports each objective. However, it has not been the intention of this Chapter to draft precisely the necessary objectives. The precise wording of statutory objectives would be subject to detailed analysis by Parliamentary draftsmen, and subsequent examination by Parliament itself. Whilst I do not believe it sensible to attempt that detailed analysis here, I do believe that the six objectives set out in this Chapter can provide the core around which a regulatory framework for legal services can be built.

Professional Principles/Precepts

15. The Consultation Paper recognised that, as well as setting regulatory objectives, any regulatory framework for legal services would need to ensure that the professional codes and standards to which lawyers operated were consistent with certain professional principles and precepts. The Consultation Paper identified the following key principles and precepts:-

- Independence – Lawyers have a duty to act with independence in the interests of justice;
- Integrity – The codes of conduct maintained by the main legal professional bodies generally require their members to act with integrity towards clients, the courts, lawyers and others, to maintain high standards of professional conduct and professional service, and not to bring the profession into disrepute;
- The duty to act in the best interests of the client – The codes of conduct of the main legal professional bodies generally require their members to act in the best interests of the client, except where it would be unlawful to do so or where the interests of justice would be compromised; and
- Confidentiality – The codes of conduct of the legal professional bodies generally require lawyers to keep clients' affairs confidential. Communications between a client and his lawyer may be subject to Legal Professional Privilege (i.e. certain communications between a client and legal adviser in the context of obtaining legal advice or assistance are protected from disclosure, even in legal proceedings).

Whilst these principles and precepts should be contained within professional codes applicable to lawyers, some might also be included in legislation governing the legal profession, as they are at present. For example, sections 27 and 28 of the Courts and Legal Services Act 1990[9] place on those exercising litigation and advocacy rights a duty to the court to act with independence in the interests of justice.

16. As with the objectives of the Regulator, most respondents acknowledged the existence and importance of precepts and principles in the provision of legal services, and that those identified in the Consultation Paper were broadly the right ones. There were some suggested additions.

[9] As amended by section 42 of the Access to Justice Act 1999

17. The General Council of the Bar suggested that there should be included, an additional principle that a lawyer should not discriminate in the provision of his or her services (e.g. in respect of gender, ethnic origin, beliefs or opinions about the nature of the client). There is merit in this suggestion; however, I take the view that issues of discrimination are generally provided for in law. As such it is not clear that a specific principle is necessary or appropriate. If the principle of non-discrimination were to be included, it could be argued that other principles of human rights, or principles such as freedom of information, should be specifically referred to.

Risk Weighting of Objectives and Principles

18. A number of respondents noted that the Consultation Paper did not attempt to rank either the regulatory objectives or legal principles/precepts in order of their importance, with some respondents taking the view that there were aspects which merited a particular weighting. For example, some lawyers emphasised the independence and integrity of lawyers:-

> *"…. from our perspective perhaps the key objective is the need to maintain the independence and integrity of the legal profession and to balance this correctly with serving the public interest."* Allen & Overy.

19. I appreciate that respondents are likely to place a different weighting on each of the principles, or objectives, depending on their own perspective. However, I consider that it should be for the Regulator, operating a risk based approach to regulation, to judge the relative importance of each consideration on a case by case basis. A risk based approach is one under which regulatory objectives or principles become a central consideration in determining how regulatory powers and resources are used.

20. Most respondents supported the concept of a risk based approach to regulation as discussed in the Consultation Paper. Some questioned how any new Regulator might discharge its duties on the basis of risk; others put forward suggestions, for example that regulatory efforts should be concentrated in certain sectors (such as where services are provided to the public rather than commercial institutions). Precisely how any new Regulator should discharge its regulatory functions on the basis of risk would be for it to determine, against the risks which it perceived at the time to its statutory objectives and to the principles and precepts of the profession. It would be wrong to try to constrain the Regulator here in making what may be fine judgements, which would vary depending on the circumstances; and accordingly I make no proposals about the ranking of objectives.

Conclusion

21. I conclude that the first step in defining the regulatory regime should be to make clear what the objectives of the regime are. The Chapter proposes six primary objectives of the regime. These would be the objectives against which the Regulator must determine the appropriate regulatory action; and against which it would be held accountable. I consider that the legal precepts or principles, discussed in this Chapter, should be incorporated within the regulatory arrangements.

CHAPTER B – REGULATORY MODELS

Introduction

1. This Chapter looks at the strengths and weaknesses of different models for the regulation of legal services. It also looks at what powers should rest with each party in the regulatory structure.

2. The regulatory system was described in the Scoping Study annexed to the Government's report published in July 2003 entitled 'Competition and regulation in the legal services market'. Some of the bodies described in the Scoping Study are front-line regulators, some are oversight or superregulators.

3. Among the front-line practitioner bodies, five combine regulatory and representative functions: the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys.

4. Among the oversight regulators, the Secretary of State has significant powers over many areas of practice and rules. In particular, under the Courts and Legal Services Act 1990 as amended, he has the right to approve (following proper consultation with the judiciary, the competition authorities and an advisory panel) applications from professional bodies seeking to become authorised to grant rights of audience or rights to conduct litigation to their members. Currently four professional bodies are authorised to grant general or limited rights to their members:-

- the Bar Council;
- the Law Society;
- the Institute of Legal Executives; and
- the Chartered Institute of Patent Agents.

The Secretary of State has the power to 'call-in' rules relating to the grant or exercise of rights to conduct litigation and rights of audience if he considers that they are unduly restrictive. He also has powers (under the Administration of Justice Act 1985 as amended) concerning the rules made by the Council for Licensed Conveyancers. The Master of the Rolls has broad regulatory oversight powers over the Law Society, including the right of admission to the Roll.

5. The Consultation Paper set out two main regulatory models. The first, referred to as Model A, involves stripping out all regulatory functions from the front-line practitioner bodies. All these functions would be vested in, and carried out by, a Legal Services Authority (LSA), which would interface directly with the providers of legal services. Model B gives responsibility for the regulatory functions to front-line practitioner bodies, but creates a Legal Services Board (LSB), which provides consistent oversight in respect of all the bodies.

6. The Consultation Paper made clear that these two Models are polarized constructs and on either model there could be a number of variants. The variants arise because it is possible to take a different view about each of the regulatory functions; it is not necessary that all should be given to the new regulator, under Model A, or all given to front-line practitioner bodies, subject to oversight, as envisaged under Model B. One important variant, labelled as B+, would be to

require each of the front-line bodies to separate their regulatory functions from their representative functions.

7. The Paper identified five core functions of regulation:-

- entry standards and training;
- rule making;
- monitoring and enforcement;
- complaints; and
- discipline.

As in the Consultation Paper, this Chapter deals with the first three functions. Chapter C deals with complaints and discipline.

8. The key functions of a body with representative powers would include representation in areas such as rates of pay for legal work, practising rights internationally, policy issues for government and other interested parties, information services for members and information for prospective members and clients.

9. Against this background the Chapter takes the issues in the following order:-

- paragraphs 10 to 25 examine the case for bodies splitting their regulatory and representative functions;
- paragraphs 26 to 32 look at the advantages and disadvantages of Model A and Model B+;
- paragraphs 33 to 40 look at governance issues for front-line bodies with regulatory powers, concentrating on the Bar Council and the Law Society;
- paragraphs 41 to 52 look at the position of other front-line regulatory bodies;
- paragraphs 53 to 60 look at issues around the powers of the Legal Services Board, and the application of international law to the regulation of legal services;
- paragraphs 61 to 69 examine the issue of costs in respect of different regulatory models; and
- paragraphs 70 and 71 set out broad conclusions.

Regulatory and representative functions

10. As noted above five of the legal professional bodies (the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys) combine both regulatory and representative functions. The Consultation Paper made clear that one of the central issues of this Review is to explore whether this hybridity meets the Terms of Reference.

11. The distinction between regulatory and representative functions of a professional body is not a theoretical concept incapable of being applied in practice. Under the Access to Justice Act 1999 professional bodies are required to distinguish between the two functions and to break them out separately in the annual practising certificate fee, and they have done so.

12. In determining whether regulatory and representative functions need to be separated, I judge that four aspects of the Terms of Reference have particular relevance:-

(i) that the regulatory arrangement chosen should promote the public and consumer interest;
(ii) that it should promote competition;
(iii) that it should promote innovation; and
(iv) that the regulatory arrangement should be transparent.

Each of these is dealt with in turn.

13. The first consideration relates to the public and consumer interest. The majority of respondents to the Consultation Paper argued that on these grounds the regulatory and representative roles of professional bodies should be split. For example the Council for Licensed Conveyancers stated in their response to the Consultation Paper: *"It is difficult to understand how one body can effectively both regulate a profession and also represent and lobby for its interests without prejudice to either its regulatory or representative functions."* There is a conflict of interest between the two roles which should be tackled.

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. It is hard to conclude that the decision by the leadership of the Law Society in the mid 1990s to restrict funds to its complaints handling operation was anything other than a body placing its representative interests ahead of its regulatory responsibilities, to the detriment of the public and consumer interest.

14. Even where a body does place the public interest ahead of that of its members, there remains an issue of perception. For example, it may be that each of the restrictive practices to be found in the practice rules within the Law Society or at the Bar has operated in the public interest. But, perhaps because many senior lawyers have been conditioned by the system that they grew up with, there is a perception that the issues have not historically been addressed with the vigour and independence to be expected of a regulatory body.

15. Just as there can be criticism that professional bodies give insufficient weight to the public interest, so there can be criticism from members of professional bodies that their respective bodies give insufficient attention to representative needs. For example, many high street solicitors have argued in the past that the Law Society has not represented their interests sufficiently in areas of the law which have been opened up to competition.

16. There has also historically been criticism from employed barristers and non-practising barristers that the Bar Council has not given sufficient weight to regulatory issues which affect them. Professional bodies carrying out regulatory functions in the public interest should deal with their members in an even-handed way. But on the basis of the evidence collected in this Review, I formed the view that the Bar Council places the interests of the employed Bar second. Indeed this position was in part acknowledged by the then Chairman of the Bar who wrote in the Bar Council's Annual Report published in April 2003 that *"it is no longer acceptable, in the twenty-first century, for the employed Bar to be treated as second-class citizens".*

17. In terms of the public interest, the potential conflict between regulatory and representative issues is most clear in those issues which deal with the negotiation of fees for

lawyers. Both the Law Society and the Bar Council have fought hard in recent years on behalf of their members in connection with rates for legal aid work. It is reasonable that a representative body should use its influence in the interests of its members to raise remuneration levels funded by the State; but the function of representing members in such matters sits uneasily with the regulatory responsibility to act in the public interest.

18. The Terms of Reference require that the regulatory framework should promote competition. It is, however, particularly difficult for professional bodies who combine both regulatory and representative roles to deal with competition issues. Regulatory bodies should be expected to encourage open competition, subject to maintaining quality standards; representative bodies have a legitimate right to fight their corner, warning that the public may suffer if the market is opened too widely. This is a difficult set of conflicting issues for one body to balance. The dual role caused difficulty for the Law Society in its consideration of the extension of conveyancing rights beyond its own monopoly in this area. It also caused difficulty for the Bar Council which fought hard to protect the monopoly rights of its members in higher courts, and to prevent their extension to solicitors, under the Courts and Legal Services Act 1990.

19. In addition to competition, the Terms of Reference refer to the regulatory system encouraging innovation. The Law Society has sought to carry through reforms to its practice rules. But it has been clear that, in some cases where change has been proposed by the leadership, it has been held back by the difficulty of getting it through its large representative Council. The Bar Council has argued that it regularly reviews its own practices and makes changes where it considers it appropriate. But there is little evidence that the Bar has been a force for innovation in customs and practice. It fought hard against the extension of higher court rights to solicitors, referred to above. It did introduce changes to the rules on direct access under the 'Bar Direct' proposals; but the more recent proposed change to direct access, set out in the Kentridge Report[10], was not a proactive step by the Bar, but a reactive response to the Office of Fair Trading's challenge in its report 'Competition in professions'.[11]

20. There is a further complication, and one which touches upon transparency, in connection with the Bar. It is that the Bar Council shares regulatory responsibility in respect of some functions with the Inns of Court. These shared regulatory functions include education, entry standards and disciplinary issues. The four Inns (Middle, Inner, Gray's, Lincoln's) have responsibilities for training students, for the granting of scholarships and for admission (individuals must be called to the Bar by one of the four Inns) and they also have an important role in the disciplinary process.

21. The Inns are run by benchers, new benchers being elected by existing ones from among the distinguished members of their respective Inn. Under an Agreement reached in 1987, updated in August 2001[12], the Inns agreed *"to accept and to implement the general policies laid down from time to time by the Bar Council"* subject to certain conditions. The document states that the Agreement has no force in law and that any Inn may cancel the understanding with months notice. The Agreement followed the report written by Lord Rawlinson dealing with uncertainties in the relationship between the Bar Council and the Inns.

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[10] Report of the Committee to the Bar Council, under the chairmanship of Sir Sydney Kentridge QC, 18 January6 2002

[11] *Competition in professions*, A report by the Director General of Fair Trading, March 2001

[12] Introduction and Constitutions of the General Council of the Bar and of the Council of the Inns of Court and of the Inns of Court and the Bar Educational Trust, 31 August 2001

22. The Agreement, including the right of cancellation, has allowed some to argue that the Inns have real power, underlined by the fact that at the head of each Inn is often a senior judge (this year there are three Court of Appeal judges and one retired Law Lord) with precedence over the barristers who run the Bar Council; and that this position of strength is further underlined by the fact that, through their property interests, the Inns have wealth and contribute significantly to the Bar Council's finances. By contrast others argue that, whatever may be said in the Agreement and whatever may be the financial arrangements, regulatory power has now irreversibly transferred to the Bar Council. The truth probably rests somewhere in between. The Agreement contains a complex formula for dealing with deadlock between the parties. This has never been used and in practice it appears that matters of particular concern to the Inns, for example the issue of deferral of call, proceed in a consensual manner, often at the speed of the slowest. A key body, and at the centre of determining the consensus between the Bar Council and the four Inns, appears to be the Council of the Inns of Court. A number of people at the Bar, and almost everybody outside the Bar, seem to be unaware of the existence of this important body.

23. In my discussions with the Bar Council and with the Inns there was a recognition from some that the Agreement should be revisited. As things stand, it would be hard for any Reviewer to conclude that it is clear where regulatory authority, and hence responsibility, lies as between the Bar Council and the Inns.

24. As noted, my Terms of Reference include a requirement to propose a framework that promotes the public and consumer interest, promotes competition, promotes innovation and is transparent. The framework needs to meet these criteria, and be seen clearly to do so. For the reasons set out above, I do not believe that the current combination of regulatory and representative powers, in particular within the Law Society and the Bar Council, permit a framework that gets close to meeting this requirement. I do not believe that the combination of functions results in the public interest being consistently placed first. I do not believe that the combination provides the right incentives to encourage competition. I do not believe that it provides a framework for promoting innovation. Finally, I do not believe that at the Bar the arrangements between the Bar Council and the Inns are satisfactory, and they are plainly not transparent.

25. A key recommendation of this Review is that the regulatory and representative functions of front-line regulatory bodies should be clearly split.

The relative advantages of Model A and Model B+ 26.

26. The Consultation Paper argued that a split between regulatory and representative functions could be achieved in a number of different ways. Model A provides the clearest split since all regulatory functions are removed to the Legal Services Authority. Model B+ leaves the front-line regulatory functions at practitioner body level, subject to consistent oversight by the Legal Services Board, but requires the bodies to split their regulatory arm from their representative arm, with separate governance arrangements.

27. The broad arguments for Model A are that:-

(a) the principle that the regulatory framework should be independent of

those being regulated is better achieved by Model A since it removes one of the self-regulatory elements within the framework;

(b) the creation of a single regulator simplifies the system, involving far fewer regulatory bodies. In turn this is likely to lead to clearer lines of responsibility and greater accountability for the objectives of the regulatory system set out in Chapter A;

(c) a single regulator provides a clear forum for dealing with any conflicts in objectives within the regulatory regime. It is better that resolution of such conflicts rests within one accountable body, rather than in separate bodies where deadlock may arise;

(d) a single regulator is likely to give rise to greater consistency, providing a single coherent system of authorisation, supervision and investigation. This arises in part because Model A takes a more service driven approach to regulation. It would be possible to divide the rule-making body so that it was able to make rules for different services such as, for example, advocacy, conveyancing and immigration; and this might lead to a more even 'playing field' and in turn to increased competition. Such a shift to service driven regulation, away from professionally driven regulation, might be accompanied by a more consumer driven approach, one that emphasised the need to satisfy the consumer rather than sustain the standing of the professional provider;

(e) a single regulator should permit significant flexibility in the system. New services to regulate would not require new bodies to deal with them, as the decision in 1999 to regulate immigration services led to the creation of the Office of the Immigration Services Commissioner. Similarly it would make it easier to regulate Legal Disciplinary Practices which bring together lawyers from different professional backgrounds; and

(f) a single regulator should facilitate more consistency in training and entry standards, permitting common training between different legal service providers and making it easier to transfer between them.

28. Many of the strengths of Model A can be preserved within Model B+. Model B+ rationalises the oversight function that is currently disparately held by, among others, the Secretary of State for Constitutional Affairs and the Master of the Rolls into one regulatory Board. That Board will have clear objectives against which it will be held accountable; and the front-line regulators to whom regulatory functions may be delegated will act in support, being part of one regulatory system.

29. The specific arguments for Model B+ are that:-

(a) leaving day-to-day regulatory rule-making and oversight as far as possible at the practitioner level is more likely to increase the commitment of practitioners to high standards; such commitment is important, particularly in the area of professional conduct rules, where rules of behaviour and ethical standards should be seen as an aid to raise standards, not as a constraint to be circumvented;

(b) whilst the principle that the legal profession should be independent of Government can be met under Model A, it is more clearly demonstrated in Model B+, where front-line regulatory powers can be exercised at practitioner level. It is a point stressed in most submissions from lawyers, but by others as well;

(c) the consistency promoted by Model A can also be achieved in Model B+, with the LSB setting minimum standards to which front-line regulators would need to adhere in order to be recognised to carry out regulatory functions. Contrary to the argument in paragraph 27(d) above, precise uniformity in standards that a single regulator might lead to may not always be in the public interest or lead to greater competition. Some degree of choice in the type of provider, and the regulatory rules under which they operate, is to be welcomed, subject to a minimum standard being met. It is a point that is made in the submission of the Council for Licensed Conveyancers who argue that not all providers of this reserved service need follow the same rules. The Bar Council makes a similar point in its submission: that the need for consistency in the regulatory regime should not be equated with uniformity, the requirement that an identical set of rules should apply to all lawyers. The Office of Fair Trading also draws attention to the possibility of regulatory choice and competition which Model B+ allows for, putting the LSB *"in a position to both encourage such competition, but also to step in if it appeared that such competition was weakening regulation to the point where this was endangering consumer protection"*;

(d) whilst, as noted in paragraph 27(e), Model A provides significant flexibility in respect of new services, Model B+ does provide a degree of flexibility for an oversight regulator. The LSB could be empowered in respect of such new services: (i) to authorise new bodies to regulate their members offering these services; and (ii) to allow existing bodies to take on regulation of these services. As noted in paragraph 54 below, the LSB would have power to regulate direct, although the intention is that it should be an oversight regulator; and

(e) putting all regulatory functions into one body guarantees that it would become a large organisation; it runs the risk that it might become a large and unwieldy organisation. Model B+, which leaves much of the work with front-line bodies, is less vulnerable to this.

30. A further argument in favour of Model B+ is that the practical transitional arrangements would be much easier to organise than for Model A. Only a small number of jobs involved in oversight functions would need to move to the new oversight regulator; the great majority of positions would remain as they are, in the front-line regulatory bodies. The risk of losing regulatory expertise during any transitional period would be much reduced.

31. It could be argued that the B+ proposal is reminiscent of the financial services industry before the Financial Services and Markets Act 2000 (FSMA), with a large number of front-line regulatory organisations (some under the oversight regime of the Securities and Investments Board) overlapping in their responsibilities; and that this is a discredited model. It should be recognised, however, that the backgrounds of the financial services industry and of the legal services industry are quite different. In the financial services industry the big players had no real history of self-regulation: prior to the FSMA the banks were regulated by the Bank of England and the insurance companies by the Department of Trade and Industry (and for a few years by HM Treasury). For these large players the issue of regulatory independence did not arise. It should be recognised also that wider issues about systemic stability, which can be addressed more easily in a Model A framework with a single regulator, do not arise to anything like the same degree in the legal services as in the financial services industry.

32. In judging the strength of the arguments between different models, it is clear that a B+ model would build on the current system to a greater extent than Model A. It is true that, if one

started from scratch, with no history of professional bodies with strong roots, one might conclude that Model A should be preferred for its clarity and flexibility. But even those who are critical of what they see as the self-serving nature of the current professionally based arrangements would recognise strengths. The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally. These strengths would suggest that the failings of the system, identified in the Scoping Study and covered in this Review, should be tackled by reform starting from where we are, rather than from scratch.

Governance issues for front-line regulatory bodies

33. If regulatory functions, subject to oversight, were to be given to front-line bodies along the lines of Model B+, there would remain the issue of how the split between regulatory and representative functions should be achieved and appropriate governance arrangements. Currently both the Law Society and the Bar Council fall well short of good governance practice for a regulatory body. Regulatory bodies should have lay involvement in their decision making functions. The Law Society has some lay involvement in certain sub- committees; and its main Council of 105 includes 5 lay members. The Bar Council again has some lay involvement in sub-committees, but the Council itself, with around 120 members, has no lay content. The size and make up of both the Law Society Council and the Bar Council are representative in nature. They are inappropriate for a decision making regulatory body.

34. There is a further governance difficulty that both bodies face in their regulatory role and it is the requirement that their Chairman should change on an annual basis, in office long enough for the incumbent to want to ensure that no damage is sustained ‘during his watch’ but not long enough to see through difficult change. Such a short term of office might be appropriate for a representative role, but not for a senior regulatory position. Nobody could seriously suggest that the Chairman of the FSA, or the President of the General Medical Council, should change annually. It may be that it would be more difficult to find suitable candidates, but this is an issue that the professional bodies must face if they wish to retain serious involvement in regulatory matters.

35. A key question, asked in the Consultation Paper, is how a separation under Model B+ might be achieved. There are two broad options. One possibility would be institutional separation to create separate bodies for regulation and representation, similar to the split within the medical profession between the General Medical Council and the British Medical Association. The other option would be to ring-fence the regulatory function from the representative function within a single body.

36. The argument in favour of separate institutions is that it makes the split transparent. Against this it would add to the number of bodies which form part of the legal system and is likely to increase costs. Whilst it would be expected that ring-fencing, within a single institution, of regulatory functions away from representative functions would require separate executive and policy teams, it would be possible for a number of common services to be provided under a single senior administrative officer.

37. The Bar Council’s response to this specific issue, and to the broader issue of its governance arrangements, is that there is scope for reform. In a letter to me of 21st September 2004 the Chairman of the Bar Council states:-

"We do consider that there is scope for achieving greater transparency and independence of our regulatory functions and that, in particular, the role of the Inns, the role of lay people and some ring-fencing could be considered."

38. The Law Society's response has gone beyond recognition of the scope for reform to consideration of some of the detail. It argues in its response to the Consultation Paper that:-

"The Society also agrees that, in order to retain public confidence, regulatory and representational functions must be – and must be seen to be – clearly separated in any governing body's work."

Last year the Law Society set up a Governance Review Group chaired by Baroness Prashar, First Civil Service Commissioner. Key points of the interim report[13] included the proposals that:-

(i) to deliver greater effectiveness, integrity and transparency, the governance of the Society's regulatory and representative functions should be clearly separated;

(ii) there should be a new Regulatory Board responsible for the Society's regulatory functions;

(iii) to be effective, the Regulatory Board should have 15 to 20 members;

(iv) to deliver better public accountability, half of the Regulatory Board should be independent members;

(v) to deliver fairness and inclusiveness, all members of the Regulatory Board should be appointed on merit through a transparent and independent procedure; and

(vi) the Chair (who could be either a solicitor or independent member) should be elected by and from the Regulatory Board.

39. The Law Society has considered these interim proposals and in principle accepted the case for ring-fencing its regulatory from its representative functions; but it has not agreed on the details of how it might be implemented. The recommendation of this Review is that it should be a statutory requirement for a front-line regulatory body to separate out its regulatory and representative functions, but that in regard to detailed governance arrangements the body would need to satisfy criteria laid down by the LSB. There needs to be consistency of criteria, which would not necessarily require uniformity of structure. The recommendations of the interim report by the Governance Review Group represent a good check-list of criteria which the LSB might take into account. In addition to requiring a body to take steps to ensure that the regulatory functions are kept separate from, and not subject to, the representative body, the report calls, as noted above:-

- for a much smaller Regulatory Board;
- for half of the members to be independent; and
- for members to be selected through an independent process based on merit.

[13] Governance Review Group: Interim Report to the Law Society's Main Board and Council, May 2004

Where the LSB was not satisfied that the governance arrangements for a front-line regulator were sufficient, it should be empowered to call for further measures, including the right finally to insist upon institutional separation. If the LSB is to remain an oversight regulator, and have only a small staff itself, it needs to have confidence that the underlying regulatory boards are satisfactorily constituted. The powers of the LSB are discussed further in paragraphs 53 to 60.

40. The B+ Model described above relates to the regulation of members that each front-line body admits to membership. It cannot automatically extend to regulation of others. The question of who should regulate Legal Disciplinary Practices, which are legal practices that bring together lawyers admitted by different bodies, as well as permitting as principals others who are not lawyers at all, is discussed in Chapter F.

Other front-line regulatory bodies

41. The arguments above relate primarily to the position of the Law Society and the Bar Council. The regulatory model chosen needs also to accommodate other bodies with front-line regulatory responsibilities.

42. The Institute of Legal Executives (ILEX) carries out both regulatory and representative functions. However, most of its members work for solicitors' firms and are, in practice, regulated by the Law Society. The LSB would need to be satisfied that the representative functions of ILEX did not influence the regulatory side.

43. The Chartered Institute of Patent Agents (CIPA) carries out both regulatory and representative functions and would need to take the necessary steps to satisfy the LSB that a proper separation had been made. The broad activity of patent work is an unreserved activity[14] and is not the preserve of members of the Institute. However, CIPA is a recognised body under the Courts and Legal Services Act 1990 and is able to grant to its members rights of audience in court and rights to litigate. It is this part of Institute members' work which brings it within the regulatory net (see Chapter E).

44. A degree of oversight of CIPA's work is provided by the Patent Office, which is an agency under the Department of Trade and Industry. In particular the Patent Office has oversight of qualifying examinations. It is proposed that oversight powers should move to the LSB, removing the Patent Office from a regulatory role, although it would be expected that the LSB and CIPA would wish to consult with the Patent Office in respect of relevant changes to regulatory arrangements.

45. The position of the Institute of Trade Mark Attorneys (ITMA) is broadly similar to CIPA, except that it is not at present a recognised body under the Courts and Legal Services Act 1990. However it has applied for such recognised body status. In principle Ministers have approved the application and it remains subject to an Order in Council to be laid and debated in Parliament over the next few weeks. If Parliamentary approval is obtained, this would place ITMA on the same footing as CIPA.

46. The Council for Licensed Conveyancers is solely a regulatory body, and there should be no difficulty in it fitting into a Model B+ framework. In its response, as already noted, the Council argues strongly that there needs to be clear separation between regulatory and representative functions; and it argues also for improved oversight arrangements.

[14] Copyright Designs and Patents Act 1988

47. The Notarial Profession also already distinguishes between regulatory and representative functions. It is distinctive amongst legal providers in England and Wales because the profession is primarily concerned with documents which are to take effect abroad and not in this country. Front-line regulatory powers are exercised by the Master of the Faculties through the Faculty Office. Under ecclesiastical law[15], the Master of the Faculties is also Dean of the Arches and Auditor[16], and this joint role must be held by one person, who must be a senior lawyer and a member of the Church of England. Under the Ecclesiastical Licences Act 1533 the Archbishop of Canterbury is effectively the oversight regulator. The Faculty Office's response to the Consultation Paper noted that I had found the system *"somewhat anachronistic"*.[17]

48. The majority of notaries are also solicitors and it would be better in my view if the oversight function of this secular legal activity moved from the Archbishop to the LSB. In its response to the Consultation Paper, the Faculty Office argues that this might be difficult since the international recognition of notaries in England and Wales rests in part on the independence of the Archbishop. But the LSB will also need to be able to demonstrate independence from Government (as discussed in Chapter D). It should be emphasised that the proposed changes relate solely to the secular legal activities of concern to the Master of the Faculties.

49. The position of the Immigration Services Commissioner (ISC) is complicated by two issues. The first is that the ISC is both a front-line regulator and an oversight regulator. The ISC has told me that approximately 80% of his resources are spent on direct regulatory functions and 20% on oversight functions. The second issue is that his jurisdiction covers not only England and Wales but also Scotland and Northern Ireland.

50. The ISC directly regulates those immigration advisers and immigration service providers who are not members of designated professional bodies (DPBs) and decides if they are 'fit and competent'. The ISC has oversight powers in respect of DPBs (where members provide similar services). The professional bodies designated by the Immigration and Asylum Act 1999 are: the Law Societies of England and Wales, of Scotland, and of Northern Ireland; the Bars of England and Wales, and of Northern Ireland; the Faculty of Advocates in Scotland; and ILEX. The ISC reports annually to the Secretary of State at the Home Office. He keeps under review the list of DPBs and must notify the Secretary of State at the Home Office if he considers that a body is failing to provide effective regulation in this field.

51. So far as England and Wales are concerned, it is proposed that the dual role of the ISC should cease, and the oversight function in respect of the designated bodies within England and Wales (the Law Society, the Bar Council and ILEX) moved to the LSB. This would leave the ISC as a frontline regulatory body, in turn answering to the LSB. In respect of England and Wales he would no longer report directly to the Secretary of State at the Home Office, although the ISC and the LSB would want to consult carefully with the Home Office in respect of any proposed changes in rules or standards.

52. In respect of Northern Ireland and Scotland, in the absence of any further change, the ISC would remain as he is, retaining his dual role. I would regard this as an unsatisfactory position but issues in respect of these jurisdictions are outside my remit.

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[15] Ecclesiastical Jurisdiction Measure 1963, s.13(i)
[16] Dean of the Arches and Auditor has no regulatory responsibilities for notaries.
[17] In Scotland the link between notaries and the Church ceased in 1560.

Powers of the Legal Services Board and the application of international law to the regulation of the legal profession

53. Under the Courts and Legal Services Act 1990, the Secretary of State has powers to authorise bodies who wish to grant rights of audience or rights to conduct litigation, or to revoke such designation. He also has power over the rule-making process in relation to those two areas; authorised front-line bodies have to submit such rules or changes thereto to him for approval, and he can also 'call-in' any such rules that he believes to be unduly restrictive.

54. The recommendation in this Review is that these oversight powers of recognition and 'call-in', presently held by Government, should be vested in the Legal Services Board. In addition, and to provide the LSB with the maximum regulatory flexibility, I consider that these powers, which currently include only certain practice rules, should be extended to include all rules of those bodies regulated by the LSB. Indeed, as far as is practicable, I recommend that all regulatory powers be vested in the LSB, with the LSB required to delegate day-to-day regulatory operations (subject to its oversight) to recognised front-line bodies, where such bodies satisfy the LSB that they are competent to handle regulatory functions and have set appropriate governance arrangements to deal with such functions without conflict. The LSB would retain the right to carry out regulatory functions direct, in the absence of a recognised front-line body. But it is intended that as far as possible the LSB should be a small oversight body, so delegation should be expected, subject to the LSB's satisfaction about competence and governance arrangements as set out above.

55. As noted, it is recommended that the LSB, consistent with the delegation of day-to-day regulatory matters to front-line recognised regulatory bodies, would have the power to approve rule changes by recognised front-line bodies, and the power of 'call-in' in respect of existing rules. It would exercise its powers against the stated objectives of the regulatory regime discussed in Chapter A. This would include a public interest test and a competition test.

56. It is for consideration whether, as suggested by the Office of Fair Trading in their response, the LSB should have an obligation to seek competition advice from the OFT when exercising its powers to approve professional rules or applications from professional bodies to be recognised *"for the purposes of qualifying and supervising members to provide services"*. I would favour such an obligation on the LSB; and it would mirror the current obligation within the Courts and Legal Services Act on the Secretary of State to consult when exercising his powers in this area.

57. I recommend against primary legislation vesting regulatory powers direct with front-line practitioner bodies. In the first place it could introduce significant inflexibility. The Law Society's regulatory powers derive primarily from statute, and this has created problems, including the inability to introduce the liberalisation reforms within the 'Legal Practice Plus' proposals, because of the inflexibility of the statutory framework. It might also inhibit mergers and de-mergers of front-line bodies if they take their regulatory powers from statute. Further, vesting the regulatory powers in the LSB makes clear that the front-line bodies take their regulatory powers from the Board; and it reduces the prospect of regulatory deadlock. These arrangements would give the LSB significant powers as an oversight regulator; but its powers would be circumscribed by transparency and accountability arrangements to be expected of a regulator, as discussed in Chapter D; and there would remain the safety net of judicial review.

58. The arrangements set out in this Chapter would require primary legislation, not least because the current arrangements are in large part statutory and would have to be repealed.

Any new arrangements would need to be consistent with European Community law. Additionally they ought to take into account what the United Nations has said about the role of lawyers; and also take into account standards and conventions in other international jurisdictions, particularly within the European Community. These issues are important, self-evidently because the proposed regulatory system would need to be consistent with any applicable international law, but also because any arrangements which ignored international standards and conventions might affect the ability of lawyers in England and Wales to continue to compete successfully overseas. The latter point is particularly stressed in the submission from the City of London Law Society.

59. European Community law does not mandate required structures for the regulation of lawyers. The Bar Council draws attention to a resolution of the European Parliament which supports self-regulation as having a necessary role to play in the regulation of the liberal professions. But recent case law of the European Court of Justice if anything confirms that Member States retain the power to regulate the legal profession to a very considerable degree, even down to setting fee rates. In Case C-35/99 *Arduino*, the Court confirmed that the Italian system for regulating the legal profession was not an agreement between undertakings – which would fall within Article 81 of the Treaty which prohibits agreements which appreciably restrict competition –but a state measure, given that the Government retained substantial decisionmaking power and controls. Although the Italian Government was bound under Article 3(1)(g) of the Treaty not to introduce measures which would unduly distort competition, it was entitled to take proportionate measures for regulating the profession in the public interest, including setting fee levels for the Italian Bar. There was no suggestion that Government intervention of this kind infringed Community principles. Commissioner Monti, commenting on that judgment in a speech to the Bundesanwaltskammer in March 2003, said:-

> *"The Arduino judgment clarifies that Member States have the right to regulate a profession. This is no surprise as in the absence of harmonisation at the European level, Member States have the primary responsibility for defining the framework in which professions operate. It went on to say that Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control."*

60. I have looked carefully at what the United Nations basic principles say about the role of lawyers. I have also looked at how the legal profession is organised in a number of different European states. The legal advice I have received on these and related issues is set out in Appendix 2. The conclusion I draw is that none of these considerations would prevent a Model B+ arrangement and practice of the type I propose, established under UK primary legislation. EU law recognises that law societies and bar associations may be subject to oversight. International bodies should welcome a model where the oversight function would come from an Independent Regulator with clear objectives, rather than as at present a model where much of the oversight rests with Government Departments. The analysis does not suggest that a Model A arrangement is precluded either. But the detailed governance arrangements for a Legal Services Authority, its relationship with the professions and its independence from Government, would require further consideration.

Costs

61. The Consultation Paper commented that the issue of costs would be an important one to look at before reaching a conclusion on the preferred model for a regulatory framework. A number of respondents said that Model A would be more expensive. They provided no data to support this assertion. Ernst & Young were commissioned to report on the costs of the current system and on the possible costs of the changes discussed in this Review. Their Report is set out in Appendix 3.

62. The Ernst & Young Report indicates that the cost of the regulatory system for 2003/04 was of the order of £81 million (up from approximately £69 million in the previous year). The total revenue of the industry is estimated to be over £18 billion[18] (the legal aid budget itself is £2.0 billion) and, based on this estimate, the rough cost of the regulatory system is well below 1%. It is recognised that this is the external cost, and that the full cost would need to include the internal costs which practitioners bear in areas such as compliance.

63. The total estimated system cost of around £81 million in 2003/04 may be broken down between, on the one hand, the regulatory costs of entry standards and training, rule making, and monitoring and enforcement, and on the other, the costs of complaints and discipline. Consistent with paragraph 7 this Chapter deals with the first three functions (in total £46 million); Chapter C deals with complaints and discipline (in total £35 million).

64. The cost attributable to the first three regulatory functions of £46 million is an estimate, and subject to a number of points. Of these, one of the most important is that members of professional bodies, in particular the Law Society and Bar Council, and their sub-committees, give much of their time free. This is not included in the above costs. A further complication arises from judging the time cost of oversight regulators such as the Master of the Rolls and Government Ministers.

65. Of the cost of the first three regulatory functions, the largest constituent part is unsurprisingly the Law Society. The Bar Council is the next largest element. In reaching a judgment about the optimal structure, however, it is the aggregate cost of the system that matters, rather than the cost of any individual part. The Bar Council in its submission refers to the cost effectiveness of their system. But, of course, they are regulating a branch of the legal profession which is primarily dealing with referred work. It is not the cost of their system which is critical to reaching conclusions, but the total cost of the regulatory framework.

66. The Ernst & Young Report attempts to judge how the costs might look if either Model A or Model B+ were adopted. The key assumptions on which the estimates have been based are set out in their Report and it should be recognised that there is a significant element of judgment in the analysis. In practice a good deal would depend upon how the regulatory body chose to interpret its role under either model.

67. The broad estimate of the costs of Model A is around £47 million, similar to the cost of the current system. In the case of Model A it has been assumed that costs would rise, if regulatory functions were moved to a single regulator, from less uncosted practitioner time. Against this, there would be certain economies through collapsing various front-line regulators into one body.

[18] External survey data: ONS 2002, EUROMONITOR 2004

68. The broad estimate of the costs of Model B+ is around £50.5 million. The main additional cost is that of the new Legal Services Board, estimated at around £4.5 million. The Board needs to have the resources to deal with its oversight functions in an efficient manner. It is a point made by the Council for Licensed Conveyancers who write:-

> "*Changes to statutory rules proposed by the current regulators have been delayed because of the lack of clear guidelines and procedures for their approval by the DCA. Whatever model is adopted the processes for the future scrutiny and amendment of Rules must be both speedy and efficient."*

Relative to the current system, some savings would arise under Model B+ from bringing existing oversight regulators together. The additional cost of Model B+ would be less if a higher cost were attributed in the costing of the current system to the time of Ministers and the Master of the Rolls.

69. On the assumptions set out in the Report, the costs of Model B+ would be more than those of Model A. But the transitional costs and risks of moving to Model A, referred to in paragraph 30 above, are likely to be greater. Overall I do not believe, notwithstanding the element of estimate this exercise has involved, that the issue of differential cost should be a key determining factor in the choice between Model A and Model B+.

Conclusion

70. I conclude that regulatory functions (other than complaints and discipline which are the subject of Chapter C) are best dealt with by what the Consultation Paper referred to as Model B+. It provides for the setting up of an oversight regulator, the Legal Services Board, and separation of regulatory from representative functions within the front-line regulatory bodies. I believe that this builds on the existing system. There are good arguments for preferring this arrangement, and the discussion on international issues suggests nothing that is incompatible with international law and practice. I think that the issues around costs are not decisive in the choice of regulatory models.

71. I conclude that the way to give effect to the proposals is to vest regulatory powers with the Legal Services Board, with powers to delegate to front-line regulators where it is satisfied as to competence and satisfied also that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, have been made. At present the governance arrangements made by the Law Society and the Bar Council (together with the Inns) are inappropriate for their regulatory functions.

CHAPTER C – COMPLAINTS AND DISCIPLINE

Introduction

1. The Consultation Paper set out the broad arrangements of the two main legal front-line regulatory bodies in England and Wales (the Law Society and the Bar Council) to deal with complaints and disciplinary matters. It argued that, in respect of complaints, the high level choice rests between (i) taking responsibility away from the front-line bodies to a single independent consumer complaints body; or (ii) leaving consumer complaints with the frontline regulatory bodies subject to oversight, akin to the system which exists at present. Similarly, in respect of discipline, the high level choice lies between having a single disciplinary system

covering all lawyers, or leaving the disciplinary arrangements largely as they are, with front-line bodies dealing separately with their own members. From responses to the Consultation Paper, the major focus of attention, particularly in the case of those representing consumers, was on the manner in which lawyers deal with complaints and provide redress to consumers, not on the manner in which lawyers deal with disciplinary issues.

2. This Chapter takes the issues in respect of complaints in the following order:-

- paragraphs 4 to 15 summarise the existing complaints handling arrangements;
- paragraphs 16 to 33 set out issues with the existing complaints handling and oversight arrangements;
- paragraphs 34 to 46 deal with possible reforms to the complaints handling and oversight arrangements;
- paragraphs 47 to 56 set out the duties and powers of the Office for Legal Complaints (OLC) and the protocol for delegating matters to the front-line bodies;
- paragraphs 57 and 58 deal with issues around the classification of complaints;
- paragraphs 59 to 63 deal with practitioners' 'in-house' complaints handling arrangements;
- paragraphs 64 to 66 consider possible governance arrangements for the OLC and its relationship with the LSB;
- paragraphs 67 to 69 set out the costs associated with complaints systems; and
- paragraphs 70 and 71 deal with the funding of the complaints systems.

3. The Chapter then turns to disciplinary issues and deals with them in the following order:-

- paragraphs 72 to 78 describe the existing disciplinary arrangements;
- paragraphs 79 to 82 set out issues with the current system;
- paragraphs 83 and 84 deal with possible changes to the system; and
- paragraphs 85 to 87 deal with costs and funding associated with disciplinary arrangements.

Finally, paragraphs 88 and 89 set out the broad conclusions of this Chapter.

COMPLAINTS

Existing complaints handling and oversight arrangements

4. The Law Society is responsible for regulating the conduct of solicitors and for handling consumer complaints. Until recently both functions were carried out by the Society's Office for the Supervision of Solicitors (OSS). However, following a recent reorganisation the OSS has ceased to exist. It has been replaced by a new Consumer Complaints Service (CCS) which deals with all consumer complaints, and by the Compliance Directorate which deals with disciplinary matters.

5. The CCS is independent of the rest of the Society in the handling of individual complaints. However, it is funded and managed by the Law Society, and the Law Society Council has historically been involved in policy issues around classification of complaints, organisation and funding.

6. Solicitors are required by Rule 15 of the Solicitors' Practice Rules[19] and by the Law Society's Guide to Professional Conduct of Solicitors to have in place 'in-house' complaints handling procedures[20] which must be followed before a complaint is made to the CCS. These require solicitors to advise their clients how to make known any concerns they have about the service provided. Solicitors are then required to investigate the complaint within the practice, and at the conclusion of the review to provide a response to the client in writing. A client who is not satisfied must be provided with information about the CCS and its role.

7. There are three broad categories into which complaints may be divided. These categories remain, but the new Law Society operational system leans towards a functional split in case management, between cases where redress may be due and those which relate to conduct matters. The three categories are:-

- Inadequate professional service (IPS) - e.g. not carrying out a client's instructions, or allowing unreasonable delays. If the CCS upholds a complaint, it can provide redress by reducing a solicitor's bill, ordering a solicitor to pay compensation to a client of up to £5,000, or telling a solicitor to correct a mistake and pay the costs involved.

- Professional misconduct - e.g. not keeping a client's business confidential or failing to pay money over to a client when due. These issues may often amount to IPS and so redress may be provided where appropriate. If a complaint does not contain an element of IPS, redress cannot be awarded. Wherever professional misconduct is found, whether or not it amounts to IPS, the Law Society can discipline a solicitor by issuing a reprimand. The Law Society can place conditions on a solicitor's practising certificate. Serious cases may be referred to the Solicitors Disciplinary Tribunal.

- Negligence is a legal concept and cases of negligence are likely to include instances of either inadequate service and/or misconduct. The Law Society will not usually become involved in claims of negligence made against a solicitor, unless there are also elements of IPS (and the loss is within the CCS's redress limit of £5,000) or professional misconduct. Instead, a client who considers his solicitor has been negligent will be advised to make a claim against the solicitor. Advice may be offered through a panel of solicitors' firms willing to act on behalf of claimants. Claims will normally be dealt with by the solicitor's professional indemnity insurer. In cases where any claim is rejected, a client will normally have to go to court in order to pursue the claim.

8. The Bar Council is responsible for handling complaints against barristers and requires chambers to have a formal complaints procedure. Barristers are required to deal with complaints promptly, courteously and in a way which addresses the issues raised, and Heads of Chambers have a duty to ensure compliance with these rules.

9. If a complaint is not resolved at practitioner level, complainants may make a formal complaint to the Bar's Complaints Commissioner, who is not a lawyer. The Commissioner may dismiss a matter where he considers it outside the Bar's remit (in which case it is not counted as a formal complaint), or where he considers it to be unfounded. The Commissioner may also attempt to broker a conciliation.

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[19] Solicitors' Practice Rules 1990
[20] Law Society Guide to Professional Conduct of Solicitors, section 13.07

10. The Bar Council categorises elements of complaints into the same three broad headings:-

- Inadequate professional service – the Bar can require a barrister to apologise to a client, to repay fees and/or to pay compensation of up to £5,000.

- Professional misconduct – e.g. a serious error or misbehaviour which may well involve some element of dishonesty or serious incompetence. The Bar Council cannot award compensation to the client but it can take disciplinary action against the barrister concerned.

- Negligence – like the Law Society, the Bar Council will not generally consider negligence claims, except in some cases containing an element of inadequate professional service. For claims of over £5,000 the Bar may advise complainants to pursue their claim through the courts.

11. The Bar can deal with a barrister for both misconduct and inadequate professional service in respect of the same complaint.

12. If the Bar's Complaints Commissioner considers a complaint may be justified, he will refer it to the Professional Conduct and Complaints Committee (PCC) of the Bar Council. The Bar Council itself also raises a number of complaints against barristers for breach of practising rules (e.g. failure to comply with continuing education or insurance requirements). Such complaints are referred direct to the PCC and are not considered by the Commissioner. When sitting, the PCC comprises around 18 barristers and two members of the Bar Council's panel of lay representatives. The PCC cannot dismiss a complaint unless the lay members agree.

13. If the complaint involves only inadequate professional service, the PCC will refer the case to an Adjudication Panel (chaired by the Commissioner, with two barristers and one lay member). The Panel determines whether the complaint is founded and decides what the penalty should be, including any compensation to the complainant.

14. Other professional/regulatory bodies - the Consultation Paper also explained that other providers of legal services, such as legal executives and licensed conveyancers, have complaints procedures which follow broadly similar principles.

15. Oversight - there are two important oversight arrangements:-

- The Legal Services Ombudsman (LSO), established by the Government in 1990, cannot be a qualified lawyer and is completely independent of the legal profession. The function of the LSO is to investigate the handling of individual complaints about solicitors, barristers, patent agents, legal executives and licensed conveyancers by their respective front-line bodies
  where a referral is made to her. The LSO has the power to recommend or order that compensation for loss, distress or inconvenience is paid to the complainant by the practitioner and/or by the front-line body. There is no maximum limit on the compensation the LSO can award. The LSO may also recommend that the front-line body reconsider the complaint, or that it exercise its powers in relation to the lawyer complained about – forexample, the power to discipline a lawyer. The LSO has the power to investigate the original complaint but to date this has been used

infrequently. The LSO can also make recommendations to the front-line body about its arrangements for handling complaints. The services of the LSO are free to consumers.

- In February 2004, the Secretary of State for Constitutional Affairs formally appointed the existing LSO to act also as independent Legal Services Complaints Commissioner (LSCC)[21]. For the present, the LSCC's powers have been limited to oversight of the handling of complaints about solicitors by the Law Society. However, it is open to the Secretary of State to extend the powers of the LSCC to include other bodies should he consider them to be handling complaints unsatisfactorily. The LSCC has the power to set targets for the handling of complaints, make recommendations about the complaints system, and require the Law Society to submit a plan for improved complaints handling. The LSCC can impose a penalty on the Law Society for failure to perform in respect of complaints handling.

Issues in connection with the existing complaints handling and oversight arrangements

16. There are a number of issues which arise from the manner in which complaints are dealt with by the existing front-line and oversight bodies. These issues concern:-

(i) the record of complaints handling by the front-line bodies;
(ii) the level of confidence in the independence of the current system;
(iii) the consistency and clarity of redress arrangements for consumers in respect of front-line bodies with overlapping activities; and
(iv) the overlaps in the current oversight regime.

Each is dealt with in turn.

17. The record of complaints handling against solicitors has been the subject of much criticism over recent years. In particular, several recent annual reports of the LSO have been critical of deficiencies in the system. In the main, concerns have centred around the issues of substantial delay in dealing with complaints, and questionable quality in terms of the outcome. This was initially attributed to poor management of the complaints handling process, and inadequate resourcing.

18. The Law Society was set various complaints handling targets by the Department for Constitutional Affairs. Between January 2003 and November 2004 these included a range of targets: 60% of its investigations to be closed within 3 months, 75% within 6 months, 85% within 12 months, 97% within 18 months and the remaining 3% within 21 months. It was also set a target linked to the quality of case handling. However, there were concerns that it was failing to achieve these targets. In particular, the LSO's Report April- September 2003 stated:-

"The targets for the speed and quality with which the OSS is expected to complete its work have been established by the Department for Constitutional Affairs and were reduced for the current year to reflect

[21] Section 51 of the Access to Justice Act 1999 provided for the appointment of a Legal Services Complaints Commissioner.

> *serious problems that the OSS was experiencing in recruiting staff and delivering new IT systems. Even with these reductions, the statistics ….. show that the OSS is currently falling well short of its agreed targets."*[22]

19. In her most recent report[23] the LSO noted that, with the reorganisation of the CCS, there has been some improvement in terms of quantity of the cases dealt with, although concerns about the quality of handling remain.

20. In November 2004, the LSCC set a range of new targets for the Law Society requiring them to close at least 55% of complaints within 3 months, 75% of complaints within 6 months, 85% of complaints within 9 months, 92% of complaints within 12 months, and 98% of complaints within 18 months. The LSCC also required that all complaints over 18 months should be referred to the Law Society's Compliance Board. In addition, the LSCC has set targets aimed at improving customer satisfaction and the quality of decisions made by the CCS.

21. It is difficult to draw a direct comparison between the Bar Council and the Law Society in terms of volume of complaints, predominantly because of the nature of the services provided, and because the Bar is primarily a 'referral' branch of the profession, so that the majority of consumers access their barrister through a solicitor. Of those who do complain to the Bar Council, over 1 in 3, and an increasing number over the last 4 years, argue that their complaint has been dealt with unfairly and appeal to the LSO. This is a much higher level of appeal from the front-line body up to the oversight body than is the case for solicitors. It raises general issues about how the complaint is dealt with and how the decision is communicated to the complainant. Against this it should be recognised that, given the adversarial nature of much of the Bar's business, there will be winners and losers. Further, the Bar Council fairly makes the point that most appeals are without success.

22. The Kentridge Report[24] acknowledged that as the Bar moves towards permitting a wider level of direct access (with clients accessing barristers' services without first instructing a solicitor) this is likely to have an impact on the number of complaints and the complexity of case handling:-

> *"We also think it likely that there would be an increase in the number of complaints made against barristers, whether justified or not, not least because lay clients who instruct barristers directly will not have the assistance of a solicitor to help them judge whether a barrister's conduct has been appropriate. There is also a risk that they may not have understood the limitations of the services which barristers are able to provide."*

23. The introduction of new forms of legal practices (e.g. Legal Disciplinary Practices dealt with in Chapter F) may also add to the complexity of complaints handling if barristers join these entities in significant numbers.

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[22] *Breaking the Cycle,* The Office of the Legal Services Ombudsman, Interim Report, April to September 2003, published in November 2003

[23] *In Whose Interest?* - Annual Report of the Legal Services Ombudsman for England and Wales 2003/2004

[24] op. cit.

24. There are also concerns about the independence of complaints handling systems operated by the front-line regulatory bodies. Many of the responses to the Consultation Paper from members of the public or organizations representing them indicated that this was contributing to a lack of public confidence in the legal professions:-

> *"We believe that consumer confidence in lawyers' ability to deal with complaints against their fellow professionals has been irreversibly undermined".* Legal Action Group.

25. The lack of independence adds to the feeling held by many consumers that they are at a particular disadvantage in raising a complaint against a lawyer. While a clear split between the regulatory and representative functions of the front-line bodies, as envisaged in Chapter B, might reduce public concerns about the lack of independence in complaints handling by those bodies, it is unlikely to remove those concerns completely. The LSO's response to the Consultation Paper commented:-

> *"It is clear from the contact that the Ombudsman's Office has had with many thousands of customers of legal services, that very many continue to feel disenfranchised by the legal process itself and disadvantaged in any attempt that they might make to pursue a complaint about a lawyer. In an age in which it is often claimed that consumers are more confident and better informed than ever, I suspect that (despite anecdotes to the contrary) this is much less the case in the area of legal services than in other service sectors. I therefore urge the development of new systems and structures that are characterised by a commitment to transparency, accessibility and inclusivity."*

26. Whilst the introduction of the CCS appears to have made some initial improvement in the speed of handling of complaints, it is no more independent than its predecessor, the OSS, and appears unlikely to command any greater public confidence in the independence of its decisions.

27. There is a further issue which results from the existing arrangements and it is that they have the potential to create inconsistency and a lack of clarity about the avenues for redress in the mind of the consumer, most noticeably where a complaint is made about both a solicitor and a barrister, or where there is uncertainty in the mind of the consumer as to where a fault actually lies:-

> *"…there is a confusion in the mind of the user of service between the responsibility of the barrister and the solicitor in any individual matter…"* Immigration Services Commissioner.

> *"It can be extremely difficult for consumers who are not regular users of legal services to know exactly where things have gone wrong. For example in a court, the circumstances giving rise to the complaint may be the result of acts or omissions by the barrister or instructing solicitors. Consumers are not generally well equipped to decide where duties of one professional end and another begin."* Consumers' Association.

28. The LSO sees significantly fewer complaints generated by members of the other front-line bodies. In part this is a reflection of the smaller size of these other bodies within the legal services sector. Nevertheless these other bodies do give rise to issues that need to be

addressed. One of these is the overlap which exists between complaints systems for providers of legal services, such as ILEX members, and the CCS system where the work is being carried out by an individual under the supervision of a solicitor. There is a potential confusion for the consumer in that complaints may be handled either by the individual's own front-line body, or by the CCS, with different processes and the possibility of a different outcome.

29. The picture is further complicated because the extent to which other frontline bodies fall within the jurisdiction of the LSO is not consistent. In some cases, the LSO is empowered to consider complaints generated as a result of only some of the services that may be provided by a practitioner. For example, in the case of patent agents, the LSO only deals with complaints about advocacy services provided by members of CIPA.

30. With respect to the oversight bodies for complaints that are outlined in paragraph 15, the overlaps and fragmented oversight arrangements which are discussed in relation to the other regulatory functions in Chapter B are also a feature of the arrangements in this area.

31. The recent appointment of the LSCC with powers over a particular body impacts on the pre-existing powers of the LSO. The LSCC is taking over the target setting and monitoring/analysis of the CCS currently done within the Department for Constitutional Affairs, but with the new power to fine for failure. It is difficult from the outside to understand why it was considered that the LSCC's powers could not be given to the LSO, but that a new post could be held concurrently by the same person. In the enabling legislation for each, in many places the wording for the LSO and the LSCC is identical and the two offices are mirror images in many respects. The Explanatory Notes to the Access to Justice Act 1999[25] in respect of the LSCC explain that the sections *"largely mirror the provisions for the post of Legal Services Ombudsman…so that the two posts could be combined, if considered appropriate"*. However, the two offices are not being combined or even co-located – the LSO operates from Manchester and the LSCC's office is in Leeds. In September 2003, when announcing the appointment of the LSCC, the Secretary of State for Constitutional Affairs said that the current LSO would be appointed as an interim measure to act as LSCC for the Law Society pending consideration of this Review's findings.[26]

32. In addition to the LSO and the LSCC, the Secretary of State at the Department for Constitutional Affairs, the Master of the Rolls, the Financial Services Authority, the Patent Office and the Immigration Services Commissioner are all providers of varying degrees of external oversight of complaints. But the landscape also includes the Law Society's Independent Commissioner, appointed by the Master of the Rolls, who acts as auditor of the Law Society's complaints handling operation with no front-line case investigation role. The Bar's Complaints Commissioner is not an oversight regulator but a front-line complaints handler, appointed by the Bar Council.

33. Having regard to my Terms of Reference, I do not believe that the current system delivers sufficient independence from the legal practitioner, nor that it provides appropriate levels of consistency and clarity. The current system is not well suited to offer flexibility, either to accommodate new legal providers being brought within the net (as discussed in Chapter E) or to permit alternative business structures where lawyers from different backgrounds may work together (as discussed in Chapter F). The present oversight arrangements are confused.

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[25] Paragraph 197

[26] DCA press release, Friday 26th September 2003

Possible reforms to the complaints handling and oversight arrangements

34. In respect of roles of front-line and oversight regulators there are a number of solutions. As noted in paragraph 1, the high level choice rests between (i) taking responsibility away from the front-line bodies to a single independent consumer complaints body; or (ii) leaving consumer complaints with the front-line bodies subject to oversight, a system similar to that which exists at present. There is a third option (iii) of having a single point of entry, with all consumer complaints being passed down to the front-line bodies to deal with them. This would essentially be a 'post office' role, although there is a possible variant under which complaints may be sifted into different categories or types of complaints.

35. I do not favour either variant of option (iii) as I see a 'post office' role for consumer complaints, with no power to deal with the substance of complaints, as adding an additional layer to the process, and delivering little added value.

36. In terms of option (ii), if this were to be followed there would be a benefit in bringing some rationalisation to the oversight function. But this would, in my view, not deal sufficiently with the issues of independence and consumer confidence that come from leaving complaints handling with front-line bodies, or with the issues of simplicity and consistency.

37. I conclude that a single independent complaints handling body for all consumer complaints is the best way forward. It would sweep up the complaints handling units of the front-line bodies and the main oversight bodies. Such an arrangement would have the benefit of:-

- providing a system which is independent of the legal profession;
- providing a single system with one point of entry for all consumer complaints, making the system simpler for consumers;
- bringing greater consistency and clarity of process; and
- bringing greater flexibility, in particular making it easier to accommodate alternative business structures.

It would also enable the collection of data which could be used as a valuable source of information on which to make informed decisions about where to target efforts to improve service delivery across front-line bodies.

38. The argument for an independent complaints handling body is supported by the LSO who commented in her response to the Consultation Paper:-

> *"Whatever the balance of the arguments surrounding the retention by the professional bodies of complaints handling, the idea itself has lost any legitimacy - consumer culture has moved on. I am convinced that an independent overarching regulator and an independent complaints handling office would be the minimum acceptable outcome of any reform following the present review."*

39. The National Consumer Council also agrees that a single system for complaints is the best way to provide a fair and consistent complaints handling system:-

> *"We have a strong preference for a uniform complaints organisation,*

independent of the professional bodies……having a single gateway would improve access to the complaints system."

40. The Consumers' Association also prefers a single complaints handling body and comments in its response to the Consultation Paper that:-

"The attraction of a uniform complaint-handling organisation is the simplicity for consumers of a one-stop shop."

41. It is important that the creation of a single complaints handling authority is not seen as an opportunity for front-line bodies to wash their hands of complaints. It is to be expected that the new arrangements will involve frontline bodies and create mechanisms to enable the regulator and practitioners themselves to learn from complaints, so that they can act as an upward driver on quality standards. In addition practitioners will have an incentive to take a close interest since the system will be funded, as it is primarily at present, by practitioners.

42. Some have argued that any change from the existing arrangements should be made only where an existing system can be demonstrated to have failed and where there is evidence that any new system would result in complaints being handled more efficiently, speedily or satisfactorily. In terms of existing arrangements, the Bar Council in particular has argued that it should not have change imposed on it because of the failure of others.

43. But the arguments for a single independent complaints system made by the LSO, the National Consumer Council and the Consumers' Association go well beyond the failures of the Law Society. I believe that the single complaints system should cover complaints against all lawyers and conclude that it would be wrong that an exception should be made for the Bar.

44. If an exception were to be made it would create an exception to:-

- the objective that a consumer complaints system should have a high degree of independence from the relevant front-line body;
- the objective of simplicity, important for consumers who seek clarity of system and particularly where there is uncertainty about whether the complaint is against an instructing solicitor or a barrister;
- the objective of consistency, important at a time when the Bar is taking some steps towards permitting greater direct access; and
- the objective of flexibility, in making it easier to provide for new forms of business structure where, for example, barristers and solicitors may work together.

45. The Legal Services Ombudsman in her response comments on the issue of exceptions as follows:-

"The removal of complaints handling from the professional bodies is likely to generate a measure of resentment from those whose record of complaints handling is satisfactory. There now exists an understandable feeling that the 'good' are in danger of being penalised for the failures of the relatively poor. Whilst I can appreciate this reaction, I consider it misconceived. For reasons of accessibility and consistency, it would be inappropriate to create a system in which some complainants were able to approach a new independent complaints-handling organisation, whilst

others were required to complain to the appropriate professional body. As importantly, any new regime should not be perceived as a penalty for failure but rather as an attempt to bring regulation (including complaints handling) into line with prevailing assumptions about consumer redress…"

46. I conclude that a single independent complaints organisation, covering all the front-line regulatory bodies, should be formed. Provisionally I refer to it as the Office for Legal Complaints (OLC). While independent in handling complaints, the OLC should come under the general supervision of the LSB, with the LSB having the power of appointment to, and dismissal from, the complaints body (see paragraphs 64 to 66 below). The OLC should ensure that front-line regulatory bodies are engaged in the complaints handling process by developing feedback loops to enable the profession to learn from complaints, so that they can act as an upward driver on quality standards.

Duties and powers of the Office for Legal Complaints and protocol for delegating matters to the front-line bodies

47. The creation of the OLC would provide a single system, which is free to consumers. The system would cover all consumer complaints against providers of legal services regulated by the Legal Services Board.

48. Whilst the OLC should have responsibility for dealing with individual complaints, it should also have a more strategic role (in conjunction with the Legal Services Board) for example in the setting of targets for the handling of 'in-house' complaints by practitioners. It should also have the responsibility of overseeing the appropriateness of the indemnity insurance schemes and compensation fund arrangements operated by the front-line bodies, with particular emphasis on ensuring these provide satisfactory protection for consumers.

49. The aim of the OLC should be to provide quick and fair redress to consumers in whatever form may be appropriate, without undue reference to classification issues discussed further in paragraphs 57 and 58. I therefore propose that once a complaint has been received, the OLC should first attempt to mediate the complaint between the complainant and the practitioner. Where this fails the OLC should have the power to investigate a complaint further. In doing this, the OLC should have the power to require the practitioner complained about to provide any information or documents that may be required to assist the OLC in its investigation of the complaint.

50. The OLC will determine a complaint by reference to what is, in its opinion, fair and reasonable in all the circumstances of the case. It should have the power to award redress to the consumer, and this might include the power to:-

- require a lawyer to make an apology to a complainant;
- order a reduction in fees;
- require that work be re-done and faults remedied; and
- make an order for redress up to a limit to be prescribed by the LSB.

51. Subject to any right of appeal available, orders made by the OLC and accepted by the complainant should be binding on the practitioner. In circumstances where the practitioner refuses to meet the terms of a binding order issued by the OLC, it may be appropriate for a

financial award made by the OLC to be capable of enforcement, as if it were a court judgment, and to report the matter to the front-line body concerned.

52. When considering a complaint, should the OLC reach the view that there may have been some element of professional misconduct by the practitioner, it should refer that aspect of the complaint to the front-line body concerned. The handing-down by the OLC of conduct matters to the front-line body will require close liaison between the parties. As is discussed later in this Chapter, the prosecution of conduct matters relating to practitioners will rest with the relevant front-line body. But, where there were novel or contentious considerations or matters which raised issues about the wider public interest, I consider there should be a reserve right to prosecute the conduct complaint in front of the appropriate tribunal of the front-line body. It is for consideration whether this reserve right should be exercised by the OLC, who would already be familiar with the case, or with the LSB, who would have oversight responsibility in respect of matters of policy.

53. In general it is unsatisfactory to delay the provision of redress to a complainant (where the OLC considers such redress may be warranted) pending the outcome of any disciplinary hearing, which may take considerable time. I therefore consider that the OLC should, where it considers the circumstances of the case merit, provide appropriate redress to the complainant in parallel with its referral of the matter to the front-line body concerned for further investigation of the conduct issue and possible disciplinary action. The granting of redress should not be permitted to prejudice the determination of any related misconduct case.

54. In relation to the possibility of appeals against a decision of the OLC, there are various options, including a right of review by a panel, full rights of appeal or no rights of appeal. I do not express a recommendation as to which should be selected. I recognise that, overall, the system of complaints handling and appeal would have to safeguard the rights of both complainants and practitioners to a fair process. However, given that an objective in creating the OLC is to provide quick and appropriate redress from an independent body with the minimum of formality, I hope that a fair process can be achieved without the introduction of elaborate appeals mechanisms, which may prolong the uncertainty of outcome for all parties.

55. The OLC should also maintain regular dialogue with the front-line bodies and the LSB in relation to the passing down of general statistical information on the profile of complaints. This will help to highlight important learning messages which need to be passed down to Practitioners.

56. The OLC should also engage with other major stakeholders (e.g. consumer groups), in order to ensure that consumers are appropriately informed about the complaints handling process. The OLC should publish an Annual Report, setting out its performance in terms of complaints handling and that of the front-line bodies.

Classification of complaints

57. As explained earlier in the Chapter, front-line bodies make a distinction between different elements of complaints and classify them into the three main headings:-

(i) inadequate professional service;
(ii) professional misconduct; and
(iii) negligence.

However, consumers generally make no such distinction and simply seek redress for what they see as injustice. The previous section set out a system designed to provide quick and fair redress to consumers, in whatever form may be appropriate without undue reference to classification issues. The fact that current complaints handling systems cannot generally provide this redress in cases of professional misconduct or negligence is frustrating to many consumers. For example, many consumers are likely to find it hard to understand that a complaints handling authority could not provide compensation for a serious case of professional misconduct, but does have powers to award up to £5,000 for the less serious matter of inadequate professional service. To advise a complainant that they need to pursue their case for redress in the courts, with the associated need to engage another solicitor, is unsatisfactory.

58. Whilst the consumer may not be concerned with the classification of the complaint, the system proposed cannot wholly by-pass the issue since the practitioner is likely to be concerned. Negligence is a legal concept and the practitioner has rights, including under the European Convention on Human Rights and the Human Rights Act 1998. So whilst it might be appropriate for the OLC to be in a position to make an award against the practitioner without undue reference to matters of classification, it should not be able to do so without limit. Further, the level of award that could be imposed by the OLC without reference to the courts would be of concern to insurers. The level would need to be set in a proportionate manner, with regard to the conflicting pressures; and it is proposed that it should be set from time to time by the LSB, after due consultation with the OLC and other interested parties, such as the front-line bodies and insurers. High value cases will still have to go in front of the courts, if they cannot be resolved by other means (e.g. mediation).

In-house complaints handling

59. There are also questions about the way in which rules that govern the complaints handling process are interpreted prior to formal referral of a complaint to the OLC. For example, Rule 15 of the Solicitors' Practice Rules[27] requires that solicitors should have in-house complaints handling arrangements. However, there is some evidence that this rule has not been applied in a consistent way by members of the profession:-

> *"This Rule passed by the Law Society required firms to have their own complaints mechanisms and improve the information that they provide to clients on accepting instructions. The rule was either derided or misunderstood by a sizeable proportion of the profession. Resistance took various forms including non-compliance and a grudging compliance, through prolix and incomprehensible client care letters which perverted the aims of clarity and good communication."*[28]

60. There has been much debate about the current requirement for lawyers to have in-house complaints arrangements which clients must exhaust before they take their case to the various existing complaints authorities.

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[27] op. cit.

[28] *Self-regulation and the market for legal services*, Professor Moorhead, Cardiff Centre for Ethics, Law and Society, Cardiff University, 2004

61. On the one hand it is right that lawyers should have the opportunity to resolve a complaint before the matter escalates, creating unnecessary stress and cost for all concerned. In their response to the Consultation Paper, the Better Regulation Task Force underlined the desirability of an effective inhouse complaints handling procedure at practitioner level. Many responsible lawyers will not only want to do this, but they will also want to learn from complaints and regard them as a valuable means of gathering consumer information which might help them to improve their service delivery. Conversely, there are accounts of consumers who are deterred from making a complaint because currently they have little choice but to pursue their complaint with a lawyer, who may have been the cause of considerable distress to them. This situation may be exacerbated in the case of sole practitioners or smaller firms where a distinct complaints handling wing does not, because of their small size, exist.

62. Taking these considerations into account, and because resolution of a complaint at the local level is likely to be quicker, cheaper, and less onerous for all concerned, I favour an approach under which lawyers would be required to have an 'in-house' complaints handling system which conforms to clear standards prescribed by the Regulator, and that consumers should be required to complain to their lawyer in the first instance. However, I consider there are two instances in which a consumer should be able to take their complaint to the OLC before conclusion of the in-house procedure:-

- if they do not receive an initial acknowledgement within a short period of making a complaint (the period to be specified by the OLC); or
- if it has not been possible to resolve the complaint with their lawyer after a reasonable period from the complaint being made (again the period to be specified by the OLC).

63. In addition, I am sympathetic to the argument that in cases where there is evidence of a difficult and possibly acrimonious relationship between a consumer and a lawyer over an extended period, the complainant should be permitted to take their complaint direct to the OLC. However, I would not wish to see this as 'opening the gates' in relation to any more general direct access to the complaints authority.

Possible governance arrangements for the OLC and its relationship with the LSB

64. The primary issue to be addressed is whether the single complaints body should be a self-standing body with its own statutory objectives or, although separately staffed and branded, part of the LSB framework. The argument in favour of it being self-standing is that its focus would be, and clearly seen to be, on resolving complaints in the public interest. The argument against is that this objective is plainly encompassed within the objectives of the LSB itself, discussed in Chapter A. If the LSB had no level of oversight over how complaints were handled, it could not meet the regulatory objectives set for it. In meeting the objective of 'Protection and promotion of consumer interests' set out in Chapter A there would be two regulatory bodies; and whilst it might be clear that the handling of individual complaints fell to the OLC, systemic failures by lawyers or their front-line regulatory bodies which generated consumer complaints might fall to both the LSB and the OLC.

65. My view is that it would be better to develop one regulatory system: a framework with the LSB at its head which incorporates the OLC. The LSB would have oversight powers over the OLC in respect of systemic and policy issues, but would have no rights in respect of individual complaints. The Financial Ombudsman Service (FOS) represents a precedent in this regard.

Whilst it has a separate board, its overall functions and its budget are subject to oversight by the FSA, which appoints the members of the FOS board. This degree of oversight should aid co-operation and avoid duplication. Nevertheless, I am aware that the Government, in its N2+2 Review within the financial services industry, is looking at the relationship between regulator and complaints body, and there may be lessons from that review which should inform the debate in respect of the legal services industry.

66. Subject to any lessons learned from the N2+2 Review, I consider that the OLC should have a board structure, the chair of which should be a nonlawyer. The board should have a lay majority, but should include members of the legal professions regulated by the LSB. All appointments should be based on merit following a 'Nolan' procedure.

Costs associated with the various complaints systems

67. The costs relating to complaints systems are set out in the Ernst & Young Report in Appendix 3. The current system costs approximately £29 million to run. The main cost rests with the Law Society's complaints handling body. However, the figure also picks up the relevant costs of the other front-line regulators and of the oversight regulators.

68. The Ernst & Young Report estimates that the cost of a new single complaints body, the OLC, would be approximately £23 million. Whilst there would be costs of transition to the new body, there would be significant savings from the elimination of the complaints handling activities of a considerable number of bodies.

69. Notwithstanding these potential savings, the decision to recommend a single independent complaints handling system is not driven by costs but by the other advantages, for example in demonstrable independence and clarity, that the OLC would introduce.

Funding the complaints system

70. It is usual for the cost of a complaints system to be borne by the providers of the service (and not the public purse). A regulatory framework will have to be funded sufficiently to enable it to function properly, but without imposing an undue burden on those required to fund it. The cost of dealing with complaints about providers of services is likely to be passed back to the consumer by the provider by way of increased fees or charges. In the legal services sector, the cost is collected through the practising certificate or annual fees. The CCS has partially introduced a 'polluter pays' system, in which costs are charged at the end of the complaints process if fault is found. The cost of the LSO is currently funded by the Government through the Department for Constitutional Affairs' budget. The LSCC will be paid for primarily by the professions over which it has oversight.

71. I take the view that the cost of any new complaints handling system for the legal sector should not be borne by the taxpayer. The cost should be funded in part by means of a general levy across the front-line regulatory bodies, and in part by payments from those against whom a complaint has been upheld – the 'polluter pays' principle. The precise levels will need to be determined by the OLC, in discussion with the LSB, and following proper consultation.

DISCIPLINE
Existing disciplinary arrangements

72. Law Society - The Solicitors Disciplinary Tribunal (SDT) is constituted under Section 46 of the Solicitors Act 1974. It is independent of, but funded by, the Law Society (with the Exception of lay members who are paid for by the Department for Constitutional Affairs). The Master of the Rolls appoints the SDT members.

73. The SDT's principal function is to hear allegations against solicitors of unbefitting conduct or other breaches of their conduct rules. It is open to anyone to make an application to the SDT, although most applications are made by the Law Society, usually following investigation by its Compliance Directorate. Other than in exceptional circumstances, hearings of the SDT are held in public and take place before three members - two solicitors and one lay person. The Tribunal usually pronounces its order immediately. Its findings are published about eight weeks later, and these are documents of public record. The SDT can suspend a solicitor for a fixed or indefinite period, reprimand a solicitor, fine a solicitor (fines are payable to HM Treasury), and ban a solicitor's employee from working in a law practice without the consent of the Law Society. Appeal from a decision of the SDT lies to the High Court.

74. The Master of the Rolls - As noted in Chapter B, the Master of the Rolls has a wide variety of functions pertaining to the legal profession, and the Law Society in particular. In relation to disciplinary matters he hears appeals from practitioners on the imposition by the Law Society of conditions on their practising certificates. Such conditions may be that the solicitor cannot practise a certain area of law, or only in supervised practice.

75. Bar Council - If a complaint about a barrister involves professional misconduct, the Professional Conduct Committee can refer the complaint to:-

- an informal hearing;
- a summary procedure panel; or
- a disciplinary tribunal of the four Inns of Court.

76. Each of the above has a mixture of barrister and lay representation. For the most serious disciplinary cases barristers will appear before a disciplinary tribunal of the four Inns of Court. This Tribunal is chaired by a judge with two barristers and two members of a panel of lay representatives. Barristers can appeal from the Disciplinary Tribunal to the 'visitors'[29], who are High Court Judges appointed by the Lord Chief Justice.

77. Other legal service providers - There are similar disciplinary tribunals in place to hear and determine cases against other authorised legal practitioners, e.g. legal executives and licensed conveyancers. While there is some variation in the way these tribunals are structured and operate, each nevertheless acts in a similar way to the SDT and the Inns of Court disciplinary tribunals, by seeking to maintain the principles of independence, impartiality and fairness. In general, the tribunals established to hear and determine cases against members of the legal professional bodies are directly funded by the bodies concerned.

[29] Hearings Before the Visitors Rules 2002

Issues with the current system

79. Most responses to the Consultation Paper emphasised the need for continued independence in the various systems, both from the front-line bodies and the Government. Most took the view that such a degree of independence was vital in order to command the confidence in the system of both the professions and the public. Although many felt satisfied with the existing arrangements, there were some concerns about funding arrangements. It was felt by some that the various disciplinary tribunals should not be funded directly by the professional bodies in respect of whose members they are making a determination, in order to achieve both real and perceived independence.

80. There are also issues about the degree of transparency in respect of some of the systems in operation, and about the absence of consistency. Concern was expressed about both the constitution of, and final outcome from, the spectrum of tribunals:-

> *"There should be coherence on penalties and enforcement as well as standards and consistency of investigations…"* Immigration Services Commissioner.

81. One further area for consideration lies in the system operated by the Inns of Court, in which the judiciary plays an important role in the disciplinary process for those barristers who appear before them. The argument put to me for the involvement of the judiciary is the experience judges bring in determining matters relating to advocacy. But no similar arrangement in respect of matters of court work exists for members of the Law Society, or other legal professional bodies whose members are entitled to exercise a right of audience.

82. A further issue relates to the role of the Master of the Rolls. Notwithstanding his judicial seniority, the appeals by solicitors he is required to hear, referred to in paragraph 74, are often of relatively minor significance.

Possible changes to the system

83. Some respondents suggested there should be a single disciplinary authority for all lawyers, and argued that this might reduce costs and bring more consistency. Others have argued that the existing arrangements operate efficiently and effectively and that no changes should be made.

84. While the creation of a single disciplinary tribunal for all lawyers would encourage consistency and mean that over time greater efficiency in determination of disciplinary cases might result, the benefits would largely be at the margin. There were few major concerns raised in respect of the existing disciplinary arrangements. This is, perhaps, unsurprising given that arrangements need to be subject to ECHR considerations; and that if there were material deficiencies these would already have been subject to legal challenge. My view is that it would be reasonable to maintain the existing disciplinary arrangements, but to consider modest changes intended to address some of the issues raised above:-

- Involvement of the judiciary in disciplinary arrangements – At paragraph 81 above, I noted that members of the judiciary do sit on disciplinary tribunals convened by the Inns of Court, but not on tribunals in respect of other legal professional bodies dealing with matters of court

work. The extent to which the judiciary is involved in such matters, and the application of the principle that judicial involvement should be evenhanded in respect of lawyers where their work impacts on the operation of the courts, is an issue for the judiciary to consider.

- Appeals to the Master of the Rolls – In order to remove the anomaly of the Master of the Rolls considering cases against disciplinary decisions taken by the Law Society, referred to in paragraph 82, I propose that any such appeals should be made instead to the High Court.
- Review of tribunal powers – In order to ensure the consistency and continued appropriateness of their powers, each disciplinary tribunal should be required to review its powers and to provide a report annually to the LSB, including statistical information on the number of cases dealt with and the outcomes. It should be open to the LSB or the Tribunal concerned to recommend to the Secretary of State for Constitutional Affairs any variation in the powers of any Tribunal, or the modification of any other arrangements or procedures they may consider appropriate. The Secretary of State should have the ability to amend such powers or arrangements of any of the disciplinary tribunals, by means of secondary legislation.

Cost and funding of the disciplinary system

85. The changes to the existing disciplinary arrangements proposed above should have no material effect on the costs of these arrangements, the total cost of which as set out in the Ernst & Young Report amounts to approximately £6 million.

86. Questions have arisen about whether the current system of funding the SDT should change, in order to establish its administrative as well as its decision making independence from the Law Society. One possibility would be that SDT costs could be covered by a direct charge by the SDT on Law Society members, rather than through the Law Society itself. Under the proposed arrangements in this Review, one further suggestion to ensure appropriate funding and enhance independence is that the LSB should fund the disciplinary tribunals from the amounts it levies on the front-line regulators for the cost of regulation.

87. I am not, however, convinced that such changes are necessary. The funding of tribunals would come from the regulatory arm of the front-line body. The LSB would have powers of oversight over the disciplinary arrangements made by the front-line bodies. Where it was not satisfied that sufficient arrangements had been put in place, or that sufficient resources had been made available, by the respective bodies to ensure propriety and independence, it would have powers to call for changes.

Conclusion

88. This Chapter has covered the working of the complaints systems within the legal services sector. For reasons of independence, simplicity, consistency and flexibility, I conclude that a single independent complaints handling body for all consumer complaints is the best way forward. This should be no more expensive than the current system and might be cheaper. The proposed Office for Legal Complaints would form part of the single LSB framework, and would cover all front-line regulatory bodies covered by the LSB.

89. Issues about professional conduct, including possible disciplinary action, would be handed down to the front-line bodies. There is a case for dealing with such disciplinary matters in a uniform manner, with a single disciplinary tribunal system. But the Chapter's overall conclusion is that the existing disciplinary system works reasonably well and should, subject to only a few changes, be left broadly as it is.

CHAPTER D – GOVERNANCE, ACCOUNTABILITY AND OTHER RELATED ISSUES

Introduction

1. This Chapter turns to detailed issues about the regulatory framework; and in particular deals with issues of governance and accountability of the Regulator.

2. The issues dealt with are those raised in the Consultation Paper:-

- Paragraphs 3 to 5 deal with whether the Regulator should be a board or an individual;
- Paragraphs 6 to 9 deal with board structure and composition of the Regulator;
- Paragraphs 10 to 17 deal with the appointment process;
- Paragraphs 18 to 20 raise issues about the independence and qualification of the Regulator;
- Paragraphs 21 to 25 examine the manner in which the Regulator should be held accountable;
- Paragraphs 26 to 30 deal with the Regulator's duty to consult;
- Paragraphs 31 to 33 comment on the process for appeal from decisions of the Regulator;
- Paragraphs 34 to 37 discuss funding issues;
- Paragraphs 38 to 41 examine the relationship between the Law Officers and the regulatory system; and
- Paragraph 42 sets out the broad conclusions.

The Regulator: board or individual

3. The Consultation Paper acknowledged that a regulator may be either an individual or a board. When the utility regulators were first set up in the 1980s, single regulators were common, but the trend now is towards a board.

4. There are good reasons for believing it would be better to vest the powers of the Regulator in a board, rather than in one individual. A board provides a source of expertise and opinion. It provides an opportunity to bring together individuals from different backgrounds, including both those who are suppliers and consumers of legal services. Importantly, it reduces the personalization of issues, which could be a distraction.

5. The vast majority of respondents supported the idea that the regulator of legal services should be a board. The balance of this Chapter assumes that the regulator will be a board, the Legal Services Board, with the broad objectives and powers described in Chapters A and B.

Board structure and composition

6. The LSB will be an important policy making body and needs to be small enough to be effective. It might number between 12 and 16 members.

7. The Consultation Paper commented that the Board might be *"headed by a Chairman and, if thought appropriate, a Chief Executive…"*. The Chairman's role, likely to be part-time, would be to run the Board, responsible for policy decisions; the Chief Executive's role, almost certainly full-time, would be to run the operations of the Regulator and to implement policy. It would be possible to combine the two roles in one individual, but in general best practice would be for the two roles to be kept separate, and I would favour this.

8. The Chief Executive should be on the Board; and the Board might include a small number of other senior employees of the Regulator. But the majority of the Board should be non-executive. The non-executives should be drawn from a variety of backgrounds, including practitioners. To meet the Terms of Reference that the Regulator should have independence from those being regulated, it is proposed that the majority of the Board should be non-lawyers.

9. All non-executives should be appointed on merit, on the Board to assist the LSB to meet its objectives, not to represent any particular interest. To include representatives would cut across the principle, set out in Chapter B, of separation of regulatory from representative functions. Nevertheless, within the practitioner element of the Board, care should be taken to ensure that the mix of skills and expertise appointed reflected the diversity of activities carried out within the legal services sector.

Appointment process and tenure

10. The Consultation Paper made clear that there are a variety of different precedents for the appointment of directors to regulatory boards. This variety was reflected in the responses.

11. As regards the appointment of the Chairman and the Chief Executive, I judge the main choice to lie between appointment by the Secretary of State for Constitutional Affairs and appointment by the judiciary. There are conflicting pressures. On the one hand, the LSB will need to demonstrate that in the performance of its duties under statute the Board has been free from political influence; and this might suggest appointment other than by the Secretary of State. On the other hand, the Secretary of State will remain the Minister responsible to Parliament for the conduct of the legal services sector and will have a significant interest in the performance of the Regulator; so it is not obvious that he should be excluded from the process.

12. Given the need for independence, and the objective of the rule of law, it seems right that the judiciary should be involved in the appointment; but that it should be solely their appointment would imply that they had primary responsibility for the regulatory system and its performance.

13. The proposal of this Review is that the appointment of the Chairman and Chief Executive should be made by the Secretary of State in consultation with a senior member of the judiciary. Given his historic involvement in regulatory matters within the legal sector I would propose the Master of the Rolls. The appointments would be made in accordance with 'Nolan'[30] principles and it would be expected that the Master of the Rolls himself, or a senior judge appointed by him, would sit on the selection panel.

[30] In the case of ministerial appointments, detailed guidance is given in the Commissioner for Public Appointments Code of Practice for Ministerial Appointments to Public Bodies, December 2003, the principles of which are derived from the Committee on Standards in Public Life (the Nolan Committee)

14. All other appointments to the Board should be made by a Nominations Committee of the Board chaired by the Chairman, operating in accordance with 'Nolan' principles. If a Senior Independent Director is to be appointed, the appointment should be by the Board itself from among its lay members.

15. With regard to tenure, there is a balance to be struck between having directors in post long enough to understand the issues and make a full contribution, and not so long as to become a fixed part of the framework and to lose independence. The proposal is that non-executives should have a fixed appointment period, with the possibility of one renewal. The same principle should apply to the Chairman and Chief Executive. The precise period of tenure will be for the legislators to determine.

16. All respondents who touched on the issue commented on the importance of the directors being free of the fear of removal without cause. Nevertheless there will be exceptional circumstances in which, to maintain public confidence, a director should lose office. This power should be vested in the Board, not the Secretary of State. This power should be carefully circumscribed, but might include cases where the Board was satisfied that the director was incapable of performing his duties by reason of physical or mental health.

17. The circumstances in which a director should automatically lose office could include conviction of a serious criminal offence, bankruptcy or disqualification as a company director or as a charity trustee.

Independence and qualification of the Chairman and Chief Executive

18. The Chairman and Chief Executive must have the skills, qualities and experience that such senior public appointments require. The difficult issue revolves around whether such appointments should be made solely from among those with direct experience of the legal profession, for example a judge, or whether such appointments should come from outside the profession.

19. There are coherent arguments in each direction. Some argue that knowledge of how the industry actually works requires that the Chairman and Chief Executive should come from within the profession. Others argue that the over-riding need to demonstrate independence requires that the candidates should come from without.

20. There are a number of lawyers with a high degree of objectivity about the strengths and weaknesses of the current system for providing legal services. There is, therefore, an argument that statute should not preclude these candidates. Such a degree of objectivity is not, however, a universal characteristic of lawyers. On balance I conclude that the arguments about independence require that the Chairman and Chief Executive should be nonlawyers. It is of note that the Bar Council also conclude that these posts should be filled by non-lawyers:-

> *"…we favour a requirement that a majority of the members of the Regulatory Board, including both the key positions of Chairman and the Chief Executive, must be non-lawyers."*

Accountability mechanisms

21. Under any transparent regulatory system Parliament, Ministers, public interest groups and the industry itself have the right to know how the LSB is discharging its functions, and be in a position to judge its performance.

22. Through the legislative process it will be for Parliament to determine finally the duties and objectives of the LSB; and the LSB would be accountable to Parliament. The appropriate Select Committee (currently the Constitutional Affairs Committee) could scrutinise the LSB's work and call upon members of the Board to be available for questioning and to account for its performance. It is clear that the LSB will need to publish an Annual Report; this might be laid in Parliament and publicly available.

23. The LSB should consult regularly with Ministers, but would need to retain its independence. The Secretary of State will share with the LSB the latter's concern for access to justice and proper rule of law. But there will be a number of issues on which there may not be an identity of interest; in particular the Government is a major purchaser of legal services and there may be occasions when resource considerations conflict with the requirements for regulatory decision making in the public interest.

24. The LSB should consider ways in which communication with consumers, and groups who represent them, may be increased. Plainly consultation (dealt with in the next section) on important policy matters will be important. As noted, the LSB will need to publish an Annual Report. It should consider, as other regulators have, an Annual Meeting open to the public and possibly a series of meetings around the country. As proposed in Chapter A, the LSB will have a duty in the area of 'promoting public understanding of the citizen's legal rights' and will need, therefore, to consider carefully how it communicates with its wider audience in this area. It would in any event make sense for the LSB to have a Consumer Panel, broadly similar to that which the Financial Services Authority (FSA) has.

25. The LSB will also need to maintain its relationships with those being regulated. As already noted, the Board is likely to contain a number of members drawn from the legal services sector, but their purpose on the Board is to contribute to all the activities of the Board, not to serve as a conduit for discussion with front-line bodies. As with other regulators (for example the FSA and its Practitioner Panel) the LSB will want to consider arrangements under which it maintains constant dialogue with those who represent the legal services sector.

The Regulator's duty to consult

26. Good practice indicates that a regulator should carry out appropriate consultation before exercising some or all of its powers. Under the current system there is a widespread duty to consult, and on occasions to obtain the concurrence of designated parties.

27. In exercising his powers under the Courts and Legal Services Act 1990 to grant or revoke authorisation of a body, or approve rule changes in respect of rights of audience and rights to conduct litigation, the Secretary of State must consult the designated judges (namely the Lord Chief Justice, Master of the Rolls, President of the Family Division and Vice-Chancellor). There is also a requirement to consult the OFT and the Legal Services Consultative Panel in certain cases. Under section 28 of the Solicitors Act 1974 as amended the Master of the Rolls may make regulations concerning matters such as admission and practising certificates with the concurrence of the Secretary of State and the Lord Chief Justice. Under

section 31 the Council of the Law Society may make rules in relation to professional practice, conduct and discipline of solicitors with the concurrence of the Master of the Rolls.

28. The duty on any regulator to publish proposals and consult during a minimum consultation period is, as noted, good practice, but it is recommended that for the Legal Services Board this requirement should be set out in statute.

29. Consultation with the senior judiciary would be important and the judges will want to consider how best they might deal with such matters efficiently.

30. In general the LSB will not be involved with matters of court practice and procedure, which are largely matters for the Rules Committee. But there will be certain issues which are directly related to the operation of the courts and which will be of special interest to the judiciary. In particular, as discussed in Chapter B, this would include the power to authorise bodies to grant rights of audience and rights to conduct litigation to their members. In such areas it would be difficult for changes to be made and to be effective unless they had the backing of the judiciary. It is for consideration, therefore, whether in those matters directly affecting the operation of the courts it would be right that the requirement on the LSB should move from consultation with the judiciary to concurrence.

Appeals process

31. The issue of appeals will need considerable attention once the broad outline of arrangements has been agreed. The precise nature of the appeal mechanism must depend upon the type of regulatory decision.

32. Where the decision by the LSB related to the exercise of its powers in regulatory areas such as practice rules then, in the ordinary way, such decisions would be subject to judicial review.

33. The regulatory model proposed involves the LSB in oversight functions of front-line recognised bodies, not the direct regulation of firms or individuals. To the extent that the LSB were to be involved in such matters, the overall procedure, including any appeal, would need to be ECHR compliant.

Funding issues

34. Chapter B set out an estimate of costs for the proposed regulatory system. The recognised bodies would, as at present, cover their own costs through a levy upon their members. They would also have the right to levy fees upon legal practices (such as are described in Chapter F) which come under their regulatory auspices.

35. The issue arises as to how the LSB should be paid for. At present a substantial part of the oversight function is paid for by the State: judicial oversight falls to the taxpayer, as does the cost of the oversight function carried out by Government departments. The arguments in favour of the Government contributing to the cost of oversight functions, beyond the fact that it does already, are:-

- that the LSB, in pursuit of its objectives set out in Chapter A such as ‘access to justice’, has a wider role in the public interest than the oversight of practitioners in the legal sector; and

- that an element of payment by other than the bodies being regulated confirms that the regulator is independent of the regulatee.

36. There is an interesting precedent in the proposed funding of the Financial Reporting Council. Its funding is to be split, two thirds falling to the private sector and one third to Government. How the split should be made between the private sector and Government for the LSB would need to be covered in statute and would, therefore, be the subject of Parliamentary scrutiny.

37. There remains the issue of how the proportion to be raised from the recognised bodies should be split among them. There are various ways in which the levy could be calculated, including by size of front-line body (having regard to either numbers of members or turnover), or by regulatory resources required (having regard to the risks to regulatory objectives). It should be expected that, like the FSA, the LSB would consult on how it intended to raise the levy and have the power to change it over time.

Law Officers and the regulatory regime

38. The Law Officers in England and Wales are the Attorney General and the Solicitor General. They are the chief legal advisers to the Government and in certain cases represent the Government in court. They also carry ministerial responsibility. The Attorney General, in his role as Government Minister, is responsible for the Treasury Solicitor's Department, HM Crown Prosecution Service Inspectorate, Customs and Excise Prosecutions Office and the Legal Secretariat to the Law Officers.

39. The Attorney General and the Solicitor General are ex officio members of the Bar Council. They attend meetings of the Bar Council and the Attorney General usually chairs the Annual General Meeting.

40. The Government's own Scoping Study, which preceded this Review, named the Law Officers as one of the regulatory authorities. In fact it is not evident that the Law Officers have either regulatory duties or representative interests in respect of any professional body. But the fact that they are members of one such body could cause confusion. Whilst the Law Officers plainly need to be practising lawyers and closely in touch with many parts of the profession, it would be better if they had no formal link to any body with regulatory functions.

41. The Bar Council reaches a broadly similar conclusion in its response:-

> *"In any new regulatory structure there will be no need, in our view, for any formal relationship between the Law Officers, the Regulator and professional bodies with advocacy rights. The perceived independence of the Regulator and the professional bodies concerned would be enhanced by the absence of such a relationship."*

Conclusion

42. his Chapter has examined governance options which might be suitable or the LSB. I conclude that the most appropriate arrangements would be for he LSB to be governed by a Board, led by a part-time Chairman and a fulltime Chief Executive and consisting of between 12 and 16 members. For reasons of independence, I conclude that the Chairman and Chief Executive should be non-lawyers and that there should be a lay majority on the Board. The

appointment of the Chairman and Chief Executive should be fixed term, on merit and made by the Secretary of State for Constitutional Affairs, in consultation with the judiciary, following a 'Nolan' type process. The LSB should be held accountable to Parliament and the public. It should consult widely before making major decisions; such decisions might be subject to appeal in defined circumstances. The LSB should be funded through a mix of Government and practitioner input. The Law Officers should not have a role in the regulatory framework.

CHAPTER E – REGULATORY GAPS

Introduction

1. Chapter E of the Consultation Paper raised issues of gaps and anomalies in regulated legal services. Currently, part of the existing definition of legal services for regulatory purposes is set by reference to the type of service itself, and part by reference to the type of provider. The Consultation Paper raised questions about the mechanism and criteria for broadening or narrowing this definition. It asked whether the determination of legal services for the purposes of regulation should rest with Government (as it does within the financial services industry). It then looked at how the need for a flexible framework fitted with the different proposed models.

2. The Scoping Study[31] carried out for the Department for Constitutional Affairs described the landscape of regulation for legal services and drew attention to a number of gaps and overlaps. For example, some service providers are doubly regulated (such as solicitors providing non-incidental financial advice, regulated both by the Law Society and the Financial Services Authority). There is a mix of provider and service based regulation: everything done by a solicitor is regulated by virtue of his professional status, whereas service regulation has developed in areas such as immigration. Some services, such as general legal advice, are regulated if provided by, for example, a solicitor or barrister, but are otherwise unregulated. There are only six areas which are regulated by virtue of their being reserved to those who are appropriately qualified. There are a number of services which most people would regard as legal services which are not reserved and can be provided by anyone who cares to do so. The consumer may, therefore, buy such services from providers who are regulated by virtue of their professional status, or from unregulated providers. The following table sets this out:-

Reserved	Unreserved
Probate	General legal advice
Immigration	Will drafting
Conveyancing	Employment advice
Notarial functions	Claims assessment and management
Rights to litigate	
Rights of audience	

3. The Consultation Paper did not set out to look at each service individually to determine whether or not it should be regulated; but it took as its starting point where the regulatory net currently falls. It took the view that it is for Government to decide which types of legal services should be regulated, as these are public policy decisions. The task set out in the Terms of Reference is to find the most suitable framework.

[31] op. cit.

4. The Consultation Paper pointed to the inflexibility of the current framework, which does not allow services to move easily into or out of regulation. Currently, where it becomes apparent that a legal service needs to be regulated, primary legislation has to be introduced in order to cover the whole service area, since the service providers, who are not members of the designated or authorised professional bodies, have to be brought into the net. The Consultation Paper indicated that a future framework would have to be sufficiently flexible to be able both to bring in new services and to deregulate where necessary, with as little disruption as possible. It said that there was a need for a framework that could encompass new areas with a degree of consistency.

5. This Chapter takes the issues in the following order:-

- paragraphs 6 to 13 set out a definition of legal services (the 'outer circle');
- paragraphs 14 to 16 set out a definition of reserved legal services (the 'inner circle');
- paragraphs 17 and 18 refer to the not-for-profit sector;
- paragraphs 19 to 26 discuss the asymmetry of regulation and regulatory gaps;
- paragraphs 27 to 33 set out how changes to the inner circle might be determined;
- paragraphs 34 to 37 deal with the role of the Regulator; and paragraph 38 sets out conclusions.

Definition of legal services (the 'outer circle')

6. As the Consultation Paper made clear, it is difficult to prescribe the boundaries of any industry and, consequently, questions will always arise at the margins, particularly as new activities develop. However, in the context of this Review, a definition of legal services is desirable for two reasons. First, it will be important to the successful working of any new regulatory framework that the range of services for which the Regulator is statutorily responsible should be as clear as is possible - the Regulator should not be permitted to extend its powers beyond this, nor should Government require it to take responsibility for services outside the defined range. Secondly, the concept of the Legal Disciplinary Practice, discussed in Chapter F, would benefit from as clear a definition as is possible of what constitutes a legal service.

7. There have been many attempted definitions of legal services. Reporting in 1979, the Royal Commission on Legal Services chaired by Sir Henry Benson stated that:-

> *"A legal service may be described as any service which a lawyer performs for his client and for which professional responsibility rests on him...Services which are "legal", in the sense that a lawyer would perform them in the ordinary course of practice, may also be performed by nonlawyers."*[32]

8. Crucially, however, this leaves open the interpretation of the *"ordinary course of practice"* which, for the purposes of enforcing the Solicitors' Practice Rules, the Law Society determines on a case-by-case basis. It does not appear that there has ever been a comprehensive statement of what can be done properly within a solicitor's practice, and the list of prohibited activities no longer appears in the Guide to Professional Conduct, in recognition of the fact that matters that may be considered unacceptable have changed over time.

[32] The Royal Commission on Legal Services (the Benson Report) (Cmnd 7648), 1979

9. Many have noted the difficulties in attempting to frame a precise definition of 'legal services'. In 1988, the Marre Committee said:-

> *" 'Legal services' is not a phrase which is susceptible of a precise definition. Following the broad approach of the Benson Commission, (paragraph 2.2) we have taken it to include any service which might be available to help people to deal with legal problems regardless of whether payment is to be made from public or private funds. The phrase includes both criminal and civil legal services and also includes legal advice, legal assistance (for example in conveyancing and in the making of wills) and legal representation."*[33]

10. The Lord Chancellor's Department agreed in its 1989 Green Paper:-

> *"A comprehensive definition of what is meant by legal services is very difficult to frame, but, broadly speaking, legal services are concerned with the advice, assistance and representation required by a person in connection with his rights, duties and liabilities."*[34]

11. It is right to acknowledge that a precise definition is not possible; it needs some flexibility, given the need to accommodate the inevitable change which occurs over time in the boundaries of what is considered to be 'legal'. For example, methods of alternative dispute resolution continue to grow in popularity and new areas of law develop through statute and case law. The LCD Green Paper recognised that legal services "*may of course change over the years with the prevailing values of society, the legislative will of Parliament and the decisions of the courts".*

12. Internationally, the World Trade Organisation and the United Nations advocate a broad definition of legal services which includes advisory and representation services as well as all the activities relating to the administration of justice.

13. One definition that commends itself to me and which captures a broad definition of legal services is:-

> '1. Advice and assistance in relation to the operation or exercise of legal rights and the performance of legal obligations; and
> 2. Advice and assistance in relation to all forms of resolution of legal disputes.'

This would include services funded publicly as well as privately, civil and criminal, contentious and non-contentious matters. This type of broad definition may be said to create an outer circle of legal services.

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[33] *A Time for Change* Report of the Committee on the Future of the Legal Profession (The Marre Committee), 1988

[34] *The Work and Organisation of the Legal Profession,* LCD Cm 570, 1989

Definition of reserved legal services (the 'inner circle') and of regulated legal services

14. The definition of reserved legal services is relatively straightforward since those areas are contained in statute. The areas currently reserved to those who are appropriately qualified are set out in paragraph 2 above. These areas could be termed the inner circle of legal services. In order to provide such services, a practitioner must be certified by a regulatory body which has itself been authorised so to do. A 'lawyer' could therefore be defined as any duly certified member of such a body.[35]

15. The definition of regulated services is more complex. It includes all inner circle services, plus those in the wider, outer circle which a lawyer is allowed to undertake in a professional capacity.

16. There are also other services, such as financial, which a lawyer may be able to provide in the course of his business, either through direct regulation by another regulator, for example the FSA, or through an exemption regime.

The not-for-profit sector

17. In considering where the regulatory net should fall, there is a question of whether the legal services provided by the 'not-for-profit' sector would be included.

18. My intention is that those who are employed for the purposes of operating in this area should be liable to come within the regulatory net. Those who provide advice and assistance on a voluntary basis should either be brought within the net by dint of their pre-existing status as legal professionals; under supervision arrangements whereby a qualified person takes responsibility for the quality of the work done; or by dint of the regulation that surrounds the operational unit in which they work, for example through the Citizens Advice Bureaux network. Some have expressed concern about the burden of regulation in this sector - the Advice Services Alliance refer to *"the growing, and sometimes disproportionate, burden of regulation on small voluntary sector agencies."* They point out that they are often highly regulated in other ways, for example by the Legal Services Commission and/or Charity Commission. Whilst it is to be hoped that the consistency that the new Regulator will seek to achieve may assist in the rationalisation of these disparate arrangements, and that the regulatory touch will be light, to suggest that the not-for-profit area should not be covered by regulation would leave vulnerable those most likely to be disadvantaged by lack of knowledge of the law and legal services.

Asymmetry of regulation and regulatory gaps

19. There are two main strands of asymmetry of regulation. The first is that a provider, such as a solicitor, who is authorised to provide one or more of the reserved, or inner circle, services will also be regulated in the provision of the unreserved or outer circle services. However, these services can also be provided by an unauthorised individual, and in this case would not be subject to regulation at all. There can, therefore, be an asymmetry in the regulatory reach as regards individuals providing the same legal service.

20. The second asymmetry is that the rules set by front-line regulatory bodies may be different, even for the same reserved service, e.g. the rules pertaining to conveyancing are

[35] This definition is wider than the definition of 'lawyer' in various EU Directives, e.g. the Mutual Recognition and Establishment Directive (98/5/EC) and Services Directive (77/249/EEC)

different as between Law Society members and members of the Council for Licensed Conveyancers.

21. These arrangements may create significant anomalies between lawyers regulated by different front-line bodies, and between lawyers and nonlawyers, in terms of both consumer protection and the regulatory burden. There have been calls for such discrepancies to be removed.

22. The first asymmetry, relating to regulatory reach, could be reduced by broadening the scope of the inner circle to bring a wider group of services within it, i.e. to widen the perimeter of the inner circle to bring it closer, if not aligned, to that of the outer circle. It may be considered that increasing the number of reserved services may be unjustified and anti-competitive, making the delivery of such services too burdensome for the practitioner and, therefore, restricting their availability to the consumer. As is mentioned at paragraph 30 the inclusion of any further services within the reserved inner circle would require a detailed cost/benefit analysis.

23. A further way to limit the asymmetry of regulatory reach would be to limit the ambit of regulation purely to the reserved services. On this basis a solicitor would only be under a regulatory obligation when providing, for example, litigation services and not in providing will writing or general legal advice which are unreserved. But this would be to undermine one of the main principles on which the leading professional bodies operate – that all services provided by their members are done to the same high standard of care and concern for the client. In short, it would be a dilution of professionalism and of the brand, and would be likely to add to confusion for consumers.

24. The second type of asymmetry, that regulatory rules do not fall evenly on all lawyers, was referred to in Chapter B; and one possible solution requires the setting of a minimum consistent standard across the service type. However front-line regulatory bodies would be free to impose additional standards if they wished. This would permit competition between front-line regulatory bodies, whilst preventing erosion of important consumer protections.

25. Increased consumer education, leading to a heightened awareness from the consumers' perspective when using legal services, is a further way of reducing the effect of these asymmetries. Subject to the public interest consideration of securing probity in the legal system, where customers are well informed the availability of providers regulated in different ways expands consumer choice: buyers can choose a more expensive service with regulatory protection or a cheaper service with limited protection.

26. As regards the deregulation of services which were previously reserved, in the main there has only been the opening up of a reserved service to competition through the potential for delivery by other authorised providers; and this may continue to be the pattern in the future. However, one consequence of such liberalisation could be to create uncertainty about regulatory reach. The initial proposals for the liberalisation of the delivery of certain probate services did create uncertainty. Issues raised included the regulatory responsibility for new providers and the jurisdiction of the complaints bodies. Such issues in themselves should not act as an inhibitor to change, but the Regulator will need to ensure that the regulatory framework provides the appropriate levels of consumer protection and avoids uncertainty of regulation.

Determining changes to the 'inner circle' of legal services

27. Some had hoped that the Review would look in detail at currently unreserved services. To look in the necessary detail at each area would not be possible within the time frame of this Review, nor would it be a complete solution, since new 'gaps' will emerge over time.

28. The Consultation Paper proposed that it is for Government to decide which types of legal services should be regulated. Almost all respondents agreed. Of those respondents who did not agree, some suggested that the power should lie with Parliament and some suggested that it should lie with the Regulator. In my view, it would be for Parliament to enact the primary legislation, setting out the broad framework, and for Government to propose the precise areas of reserved services through secondary legislation. To be too prescriptive about the areas of reserved services in primary legislation would reduce the flexibility of the model. These are public policy decisions for Government, albeit it must be expected that the Regulator would have a need and a right to make its views known. Government would have to assess the impact of any proposal, as it does today, and undertake a detailed analysis of costs and benefits in order to determine where the public interest lay. The risk to the individual consumer would need to be weighed against such wider public interest concerns as proportionate access to justice.

29. This type of analysis may involve considerable work, as it did for the Blackwell Committee[36]. This committee, commissioned by the Department for Constitutional Affairs and chaired by Brian Blackwell CBE, looked at some length in 1999/2000 at the activities of non-legally qualified claims assessors and employment advisers.

30. It is envisaged that, whenever Government identifies a new field in the legal services market that might be regulated or de-regulated, a process of consultation with stakeholders and the public would take place. A cost/benefit analysis is a way of ascertaining whether the risk is such that a change to the regulation of the legal service or provider is required. This approach has been endorsed by the Better Regulation Task Force which advocates a flexible, risk-based approach to regulation. It states:-

> *"The level of risk involved in any activity should determine the level of protection necessary*."[37]
> "*Trade-offs between the costs and benefits of regulation need to be assessed, and citizens allowed, within reason, to make their own judgements about the risks in question."*[38]

31. The Consultation Paper set out some of the points to be considered in weighing the advantages and disadvantages of whether a service should be reserved or unreserved:-

- provision of information: reserved services may help bridge the asymmetry of information in cases where there is an informed provider and uninformed consumer;
- improved quality: the service may be of poor quality if not regulated;

[36] The Report of the Lord Chancellor's Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers, February 2000
[37] *Alternatives to State Regulation*, Better Regulation Task Force, July 2000
[38] *Principles of Good Regulation*, Better Regulation Task Force, October 2004

- a level playing field: its absence may drive people out of business because of the burden of regulatory cost and distortions in competition. A level playing field would require that the regulatory burden falls evenly on persons who provide the services, whether they are qualified or not;
- cost: in principle, regulation provides some protection for the consumer against failure – but regulation has a cost. That cost is likely to be passed on to the end consumer of the service provided;
- choice: the difficulty for the consumer lies in making an informed choice, knowing what level of service, in terms of value and quality, he might obtain and whether or not he is protected in any way against a failure in that service. Regulated services should offer greater protection to the consumer, for which they may choose to pay;
- access: consumer friendly services, run as commercial concerns, may provide easier and cheaper access to justice to some consumers than might the conventional high street solicitor's firm; and
- a competitive market: regulation may be seen as an unnecessary restriction in the provision of services in the market place.

32. Further considerations have been suggested, including:-

- proportionality: the ease of extending regulation and the avoidance of regulatory duplication;
- the maintenance of trust and confidence: an appropriate level of consumer protection (including appropriate redress mechanisms) and certainty of outcome; and
- the cost and ability to apply appropriate standards of education, training and conduct.

33. Bodies outside of the regulatory net may perceive benefits of being able to say that they and their practitioner members are regulated, seeking to attract to themselves the status attached to a 'professional' body and the ability to provide clients with added levels of assurance about the quality of service. It might be argued that providers of such legal services should not be refused entry to the regulatory net, if they meet the minimum standards and pay the relevant costs. However, it is important to recognise that regulation does not constitute a guarantee: it should be acknowledged that no framework can regulate against all risks. Equally, it should be recognised that the cost of regulation ultimately falls to the consumer and would divert regulatory resources. Regulation should be in place primarily to protect consumers of legal services, not to enhance the standing of providers. So a desire to be regulated on the part of practitioners should be met by the same careful cost/benefit analysis.

The Regulator's role

34. The Regulator will have a place in determining what services should be within or without the regulatory net. The Regulator should be enabled to advise the Government of areas where problems surface: for example, where complaints come to the Board about unreserved services or providers. The Regulator may come into contact with activities conducted on the fringes of regulation, with intermediaries who act as channels, and with 'rogue' operators. The Regulator's experience and expertise will be of value to the Government in reaching policy decisions about such activities.

35. For those who are deemed to be within the regulatory net, the Regulator would retain the right to carry out regulatory functions direct if necessary, although, as Chapter B makes clear, it

is intended where possible that these functions should be delegated to a front-line body recognised for these purposes.

36. I see the Regulator as also having a role in looking beyond the regulated area to the boundaries of the legal services industry, viewing the extent of activity within the whole field to assess how it is working. It would be able to observe legal service activities in the field and detect problem points. In addition there are organisations which are not legal service providers but which do crucially impact on whether, when and how legal services are provided. Legal expense insurers are an obvious example. The Regulator's knowledge of the field would support any advice given to the Government when it was considering regulating a new service type. The Regulator could be available for consultation by those in legal services areas who were unregulated but who might move towards regulated status. Further, it would have an educational role, for example in encouraging information supply to the consumer.

37. As well as supervisory powers over those regulated, the extent to which the Regulator should have powers, enabling it to pursue those who operate in regulated areas without the necessary licence, is for further discussion.

Conclusion

38. I conclude that, within the appropriate legislative framework, it is for Government to decide which legal services should be reserved, after appropriate consultation, in particular with the Regulator. Whereas there should not be a gap in regulation once it is determined that something is within the regulatory net, there are asymmetries in the regulatory system of which the Regulator should take note. Any changes to the regulatory net to deal with such matters should be subject to careful cost/benefit analysis. The Regulator's role will be to oversee those who are within the regulatory net, but it should also have a wider public interest role to look beyond the regulated area to the boundaries of the legal services industry and those non-legal bodies which interact with it.

CHAPTER F – ALTERNATIVE BUSINESS STRUCTURES

Introduction

1. In its report published in July 2003[39], the Government expressed its support for the principle of enabling legal services to be provided through alternative business structures. It said

"The Government supports in principle enabling legal services to be provided through alternative business structures. Such new structures would provide an opportunity for increased investment and therefore enhanced development and innovation, for improved efficiency and lower costs.… The Government accepts in principle that new business entities such as multi-disciplinary partnerships and corporate bodies should be allowed to provide legal services."

2. In its response to the Consultation Paper the Office of Fair Trading identified the most significant restrictions which affect the types of alternative business structures able to offer legal services. These restrictions are contained within the rules of the main professional bodies. They are:-

[39] *Competition and regulation in the legal services market*, CP(R2) 07/02 DCA, July 2003

(a) rules that prohibit partnership between barristers and between barristers and other professionals (both lawyers and non-lawyers); employed barristers may work for firms of solicitors, but may not without re-qualification become partners;
(b) rules that prohibit solicitors from entering partnership with members of other professions (both lawyers and non-lawyers); and
(c) rules that prevent, with a small number of exceptions, solicitors in the employment of businesses or organisations not owned by solicitors (e.g. banks or insurance companies) from providing services to third parties.

3. Although not the subject of this Review, it should be noted that selfemployed barristers cannot in general deal direct with the public, but must do so through instructing solicitors.

4. The product of the above rules is that there is little variation in the type of business structure that the consumer can access. As noted, he cannot (except in limited circumstances) access a barrister direct. The most easily recognisable organisational form which dominates the provision of legal services to consumers is the high street solicitors' firm, owned and managed by solicitors. (Throughout this Chapter we use the term 'Manager' to refer to a partner, principal or director of a firm.)

5. A key exception to the practice rules arises in the not-for-profit sector where, subject to certain conditions, solicitors (and those whom they supervise), barristers and other legally qualified (and unqualified) personnel employed by a Law Centre may work together and are permitted to deal directly with members of the public.

6. At the heart of this Review has been a distinction between Legal Disciplinary Practices (LDPs) and Multi-Disciplinary Practices (MDPs).

7. LDPs are law practices which permit lawyers from different professional bodies, for example solicitors and barristers, to work together on an equal footing to provide legal services to third parties. They may permit others (e.g. HR professionals, accountants) to be Managers, but these others are there to enhance the services of the law practice, not to provide other services to the public. The concept seeks to sweep away most of the current restrictions on the business forms that lawyers may practise under.

8. MDPs are practices which bring together lawyers and other professionals (e.g. accountants, chartered surveyors) to provide legal and other professional services to third parties. They do not solely provide legal services; indeed legal services might be a small part of their work.

9. In the case of both LDPs and MDPs it would be possible to permit a split between those who own the practice and those who manage it.

10. Thus under the heading of 'Alternative Business Structures' there is a matrix of possibilities:-

	Managers and owners the same	Managers and owners different
LDPs	A Practice solely offering legal services, owned by its Managers	A Practice solely offering legal services, not exclusively owned by its Managers.
MDPs	A Practice offering legal and other services, owned by its Managers.	A Practice offering legal and other services, not exclusively owned by its Managers.

11. In its response to the Consultation Paper the Law Society favours, subject to conditions, lifting the restriction on solicitors entering partnerships with other lawyers and non-lawyers (rule (b) in paragraph 2 above). It also proposes to remove the rule that prevents solicitors, in the employment of businesses or organisations not owned by solicitors, from providing services to third parties (rule (c) in paragraph 2). As regards rule (a) in paragraph 2, the Bar Council has indicated that it is prepared to permit barristers to enter partnership with other lawyers, subject to regulation by a recognised body other than itself; but continues to argue that it will not permit partnerships among barristers under its direct regulatory auspices.

12. Against this background the Chapter takes the issues in the following order:-

- paragraphs 13 to 22 look at the demand for LDPs;
- paragraphs 23 to 34 examine the issues for LDPs where management and ownership are in the same hands;
- paragraphs 35 to 61 examine the further issues which arise for LDPs where outside ownership is to be permitted;
- paragraphs 62 to 73 look at how and by which bodies LDPs would be regulated;
- paragraphs 74 to 83 look at the reasons given for the Bar Council's continuing ban on partnership under its regulatory auspices;
- paragraphs 84 to 86 look at the demand for MDPs;
- paragraphs 87 to 100 examine the particular regulatory issues which arise for MDPs; and
- paragraphs 101 to 104 set out broad conclusions.

Demand for LDPs

13. Demand for legal service provision through an LDP could come from two sources: the consumer and the provider. The absence of an articulated consumer demand, in the context of a market where restrictive practices operate as a barrier to innovative forms of service delivery, would not in itself be a persuasive argument that other forms of service delivery should not be permitted.

14. The private client, as distinct from the large corporate client, is unlikely to appreciate the differences in training, competencies and regulation between different categories of what they perceive to be 'lawyers'. This is not surprising given that the purchase of legal services by such consumers is infrequent and that the consumer's prime concern is usually about outcomes – e.g. a successful conveyancing transaction – rather than the means of its delivery. Nonetheless, customers generally are interested in low prices and an efficient service, and

where the nature of the services is better understood, as in the conveyancing market, customers do 'shop around'. Providers react to competitive pressures by quoting competitively for the work.

15. Recent research provides some background to the concerns which consumers have about how traditional legal firms operate. Research carried out by MORI[40] shows that lawyers are not universally seen as customer focused, approachable or easy to comprehend. Other work[41] shows that inertia, through a feeling that 'nothing can be done', combined with a lack of knowledge about how civil law could help, act as barriers to people purchasing legal services. The Law Society's submission to the Consultation Paper comments, based on research they have carried out, that whilst cost was important *"Consumers were, in fact, more concerned about the perceived unapproachability of solicitors and their apparent attitudes to their customers".*

16. A survey carried out for the Consumers' Association[42] shows a perceived lack of client care by lawyers. The main reasons for dissatisfaction were, in descending order: excessive delays, not carrying out services with reasonable skill, making mistakes, failing to return phone calls or to reply to letters and unprofessional behaviour. While the Consumers' Association themselves point out that their survey is not taken from a representative sample of the population (or lawyers' clients), it does provide a useful snapshot of some important concerns consumers have. It is of note that these concerns relate as much to the quality of business service that is provided, as to the quality of the legal advice itself.

17. Moving to the supply side, there are various sources of potential provider interest.

18. Many firms of solicitors rely on people who are not qualified solicitors to take forward the business of providing legal services. People such as IT experts, HR specialists, and accountants play a key role in the success of the business, but solicitor practices cannot reward such key people with partnership and have instead to resort to 'ways around' the problem.

19. In addition, many Managers wish to work with legal professionals with complementary skills. It is hard to understand why someone who specializes in advocacy, e.g. a lawyer who is a barrister, should not be permitted to work together as an equal principal with someone who is expert at conducting litigation, e.g. a lawyer who is a solicitor, both lawyers acting to provide an integrated service for the client.

20. Further, as the Law Society point out in their response, there are many in the legal profession who feel excluded from the partnership role in a traditional law practice. This may include people who are unable or unwilling to risk capital to put up their partnership stake; people from ethnic minorities who may feel they do not 'fit' into the partnership role within a traditional practice; and people who due to family or care commitments feel that they cannot undertake a traditional partnership role in terms of work commitments. Yet others, who are employed lawyers, may wish to play a more client facing role or just have a wider career structure. An LDP model with non-lawyer owners would broaden access to capital and lessen the need for practitioners to put in equity capital, and might enable varied work styles to suit a broader range of people wishing to work in the profession.

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[40] Research study conducted by MORI, commissioned by this Review

[41] *Causes of Action: Civil Law and Social Justice*, Legal Services Research Centre, November 2003

[42] *Which?* July 2004

21. The flexibility afforded through having a range of legal skills available under one roof can be seen in the not-for-profit (NFP) sector. In the NFP sector, Citizens' Advice Bureaux and Law Centres have lawyers drawn from different branches of the legal profession working together under one roof to provide legal advice and services to their client base. The precise division of labour between the different professionals is a function of the expertise of the practitioners and the most efficient way of meeting the client need.

22. In the commercial sector too, firms such as the RAC have publicly articulated their wish to offer the general public an alternative way of accessing legal services. Unlike most high street solicitors, companies such as these have nationally known brand names to protect, which may be a powerful incentive to operate in a proper manner.

Issues which arise in LDPs where Managers and owners are the same

23. As noted, the basic principle of an LDP is that it is a law practice which brings together barristers, solicitors and other lawyers on an equal footing. Such new legal practices should provide advantages; and many respondents, both from the consumer and provider side, expressed themselves in favour in broad principle. It would widen the skills base that the legal firm could offer its clients by having under one roof, as equal principals, lawyers from a range of legal professional disciplines. It would provide greater choice for lawyers in the types of business structures they could work for. It would permit lawyers to invite into Manager status other professionals who were not lawyers. It ought also to provide a further business structure (alongside barristers' chambers and government service) where young barristers could get proper experience, both as regards pupillage and beyond, in order to become fully qualified.

24. The issues to be addressed in connection with such practices arise from:-

(i) the proposal that lawyers with different professional qualifications should work together as equals;
(ii) questions of how a regulator might expect LDPs to be managed; and
(iii) the proposal that among the Managers of an LDP might be individuals who are not lawyers at all.

Each is considered in turn.

25. Arising from the proposal that lawyers with <u>different professional qualifications</u> should be permitted to work together as equals, the first and most important issue is to ensure that there is a high level of ethical standards within the legal practice. There should be a Code of Professional Practice for the LDP, agreed with the Regulator of LDPs, to which all lawyers in the practice would need to adhere. It is difficult to see why this should be a significant difficulty since, whilst each professional body frames the relevant provisions differently, the responsibilities of lawyers to outside parties is fairly uniform. All lawyers with rights of audience and rights to litigate have a duty to the court which is over-riding. In general all lawyers have a duty to their client, and a duty to put the client's interests ahead of their own. A single entity-wide arrangement to cover matters such as legal professional privilege should also be obtainable through appropriate regulatory arrangements (setout later in paragraphs 62 to 73). Such ethical principles should be at the heart of an LDP.

26. One notable exception to the uniformity of lawyers in ethical matters is the position of notaries, since they have a particular duty to the validity of the transaction itself. However, many notaries presently manage individually to practise as both a notary and a solicitor, so there can be no suggestion that these two branches of the legal profession cannot co-exist.

27. A second set of issues relates to management responsibilities. In the management of an LDP, irrespective of its legal form, it must be expected that there would be some characteristics of a corporate structure. There would need to be a shift in emphasis towards regulation of the economic unit, beyond regulation of the individual practitioner. Thus it is proposed that there should be a 'Head of Legal Practice' (HOLP), nominated to the regulatory authorities and with overall responsibility for the conduct of the legal business in accordance with the regulatory rules. This person must be a qualified lawyer and able to satisfy the Regulator that he is competent to oversee all of the areas that the LDP will cover. The Regulator would look first to that nominated person to ensure that the standard of care in the legal practice conformed with the relevant rules. In particular, the responsibility for ensuring that legal services are provided only by those qualified to do so would rest with him. By 'competence' is not necessarily meant specialist expertise. The proposal is that the HOLP should be able to satisfy the Regulator that he has the necessary qualifications and experience to discharge the regulatory responsibilities required of him. In this context I would judge a solicitor to be properly qualified to act as the HOLP in respect of lawyers with higher court rights, even if he himself did not have such rights.

28. It is also proposed that an LDP must have a senior Manager acting as 'Head of Finance and Administration' (HOFA), nominated to the Regulator. The nominated person would be responsible both for the production of appropriate accounts for the legal practice and for the proper separation and management of client monies. This person might be a lawyer, but would not need to be. Many large and medium sized solicitors' practices are already organised in this fashion, and for others who chose LDP status I do not believe that the changes would be difficult to implement. In a small practice, there should be no reason why one person who was suitably qualified could not act as both HOLP and HOFA.

29. The nomination of one person to be primarily responsible for finance and administration, including client monies, would not obviate the responsibility of all Managers for such issues, any more than the presence of a finance director on the Board of a plc removes responsibility from other directors for the accounts of the company. But it does recognise the business reality that one person among the management team must lead in this important area.

30. A third set of issues arises through the presence among the Managers of an LDP of individuals who are not lawyers. The Bar Council argues in its submission that non-lawyers should not be permitted to become Managers, *"that it would be wrong in principle, and would give rise to risks to the public, if individuals were permitted to exercise a significant degree of control over the conduct of a legal practice who are not subject to the professional duties which should underpin the practice of law."* Most other respondents, however, took a different view, agreeing that some liberalisation in this area was sensible. As the definition of an LDP in paragraph 7 above makes clear, the role of the non-lawyer Manager is to enhance the services of the law practice, not to provide other professional services to the public. Non-lawyer Managers might, therefore, be expected to sign a Code of Practice agreed with the Regulator of LDPs, which would include a similar commitment to act in the best interest of clients to that which binds lawyer Managers. The presence of non-lawyer Managers reflects the fact that, whilst legal skills should lie at the heart of a modern practice, they are not sufficient; to provide an effective service other skills are necessary and they include financial expertise, as discussed above, and also HR and IT expertise. As was noted in the Consultation Paper, in many legal

practices professionals with these skills already sit on the Executive Committee of their firms, with significant control over the conduct of the practice. Similarly in Law Centres non-lawyers with other skills do exercise a significant degree of control over the practice to the benefit of the public. These examples suggest that different legal professionals are able to work together with non-lawyers, without compromising their professional standards.

31. As noted, the HOLP and HOFA would be nominated individuals and would need to satisfy the LDP Regulator that they had the necessary competence to fulfil these roles. All other Managers, lawyers and non-lawyers, would need to register with the LDP Regulator. It would be expected that the LDP Regulator would focus its regulatory attention upon the competence of the HOLP and HOFA and the management systems that they employed. It is of note that in New South Wales, where the framework permits Incorporated Legal Practices of a form similar to LDPs, the regulatory framework requires practices to be able to demonstrate compliance with 'appropriate management systems', and the regulatory authority has published a paper which includes a checklist of systems that a practice should have.

32. Whilst I conclude that non-lawyers should be permitted to be Managers of LDPs, the essence of an LDP is to be a legal practice. The proposal, therefore, is that there should be a limit on the level of non-lawyers among the Management group. The limit might be set by the Regulator but the recommendation in this Review is that 'lawyers should be in a majority by number in the management group'[43], signed up to certain regulatory standards by dint of their professional qualification. The hallmark of a legal practice lies not just in the fact that it provides legal services; it also lies in the ethos of the practice fostered by professionals sharing a common set of values. Having lawyers in a majority in the management group is a more certain way of ensuring that the fundamental attributes of the profession are maintained. It would be onerous for a single person such as the HOLP to define the culture of a firm or be expected to bear the entire weight of upholding the legal ethics of the practice.

33. It would be for the Regulator to determine the definition of a lawyer for the purposes of applying the principle in the above paragraph. My starting point would be lawyers authorised to carry out reserved services, as discussed in Chapter E.[44]

34. It is recognised that the majority requirement may militate against sole practitioners turning themselves into an LDP in certain circumstances (e.g. taking one non-lawyer into partnership), but it would not be detrimental to their current position.

Issues which arise in LDPs where Managers and owners are different

35. There would be considerable benefit in permitting outside owners of legal practices. In general economic terms, new capital from outside the industry would be permitted which should increase capacity and exert a downward pressure on prices. In a business sense, new investors might bring not just new investment but also fresh ideas about how legal services might be provided in consumer friendly ways. Such new businesses might better address some of the consumer concerns referred to in paragraphs 15 and 16 above.

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[43] It is of note that the equivalent of LDPs in New South Wales requires only that one member of the management team is a qualified lawyer.

[44] The Regulator would need to determine which foreign lawyers it would permit to be included within the lawyer-majority for LDPs. For EU lawyers, it would need to have regard to the relevant EU directives.

36. There are, however, a number of issues that arise where management and ownership are split. They relate to:-

(i) concerns about inappropriate owners;
(ii) concerns that outside owners would bring unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties;
(iii) concerns that new owners would cherry-pick the best business;
(iv) as an extension of the argument about cherry picking, concerns that LDPs could jeopardise access to legal services in rural areas;
(v) concerns that new owners would have conflicts of interest;
(vi) issues about whether some restrictions might be placed on the nature and extent of the owners' interest in the LDP; and
(vii) concerns that there is no precedent for such outside ownership.

Each issue is addressed in turn.

37. Opening up ownership brings the risk of inappropriate owners of a legal practice. A few have given short answers as to why only lawyers should be 'fit to own' a legal practice; this has been to refer to whoever they regard as the villain of the moment or, in default, 'Robert Maxwell Legal'. There is a point to be addressed on the issue of 'fit to own'. But the short answer is an insufficient one, just as the words 'South Sea Bubble' would not have been a sufficient reason for our forefathers to have prevented all new public share offers.

38. In judging these risks, it is important to remember that such risks already exist. As the RAC point out in their response to the Consultation Paper: *"This is attested to on a regular basis in the reports of the Solicitors Disciplinary Tribunal which list the names of those who have been struck from the Roll for malpractice and criminal behaviour."*

39. The consequences of widening the net of ownership do not all lead to greater risk. It is probable that many outside shareholders would bring business practices which might provide higher standards than exist in some practitioner owned firms. They might insist on high levels of internal controls with checks and balances, for example in connection with clients' monies, that a small practitioner owned firm would find difficult to replicate. Many will already be familiar with the types of 'appropriate management systems' that the LDP Regulator is likely to insist upon.

40. Nevertheless the issue of ownership remains one that should be addressed, just as it does with any other business which has, as for example a bank does, an important fiduciary relationship with a client, including handling of his monies. It is, therefore, proposed that for prospective outside owners there should be a 'fit to own' test.[45] The precise provision would rest with the Regulator itself, but it might be expected to have regard to: (a) honesty, integrity and reputation; (b) competence and capability; and (c) financial soundness. The Regulator would be entitled to look at the business plan of the prospective owner and to understand what type of practice it wished to run and why. The Regulator would also have the right in a group context to look beyond the immediate shareholder, for example to the ultimate beneficial owner.

[45] As noted in paragraph 32 non-lawyer Managers may only be in a minority by number in the management group. If a non-lawyer Manager were to hold a disproportionate share of the economic interest in the LDP, the Regulator should have the power to treat him as an outside owner, in particular in respect of the 'fit to own' test.

41. The second concern around permitting outside ownership is that outside owners, even if they were to pass the test of 'fit to own', might bring unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties. It is a point raised at length in the submission of the Solicitor Sole Practitioners Group. It is also a point made by the Bar Council who argue that there is:-

> *"…the conflict that would inevitably arise between the commercial interests of the owners and the ethical duties on which the practice of law is based. An owner of a law firm who was not a lawyer and therefore not subject to those duties would be perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession."*

42. It is not clear, however, that the Bar Council's argument is correct. The LDP would have a number of characteristics which provide proper safeguards:-

- the Head of Legal Practice must be a qualified lawyer, competent to oversee the areas in which the LDP will practise;
- the Head of Finance and Administration must be competent in the areas which are central to practice management, particularly handling clients' monies;
- both the HOLP and HOFA would be nominated individuals and subject to a competence test; they could not be removed without the consent of the Regulator;
- qualified lawyers would be in a majority by number in the management group in the legal practice;
- qualified lawyers would continue to have the same professional duty to their client and to the court as at present; all Managers must adhere to a Code of Practice agreed with the LDP Regulator;
- as discussed in paragraphs 53 and 54 below, the outside owner could have no adverse interest in the legal outcome of individual client matters dealt with by the firm, and would have no right to interfere in any client case, or have access to client files or information.

In short the LDP is a regulated entity, a number of protections would exist and the outside owner[46] would not be *"perfectly entitled to pursue his own financial interests, even in circumstances where those conflicted with the best interests of clients of the firm or with other core values of the legal profession."*

43. In order to ensure these safeguards are followed and clearly visible, it would be appropriate, as suggested by the Law Society in their submission, to require that the LDP, registered with the LDP Regulator, be a ring-fenced legal entity. It is also proposed that all owners should covenant with the Regulator to indemnify any loss of client monies incurred by clients of the practice.

44. It should be noted that the safeguards referred to above may change over time, in the light of experience. It would, therefore, be inappropriate for the safeguards to be enshrined in statute; rather the statute should propose that they are set out by the LSB, having regard to the need to protect the consumer interest and other objectives referred to in Chapter A.

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[46] For the position of a non-lawyer Manager who has an economic interest in the business see previous footnote.

45. A further argument made against permitting outside capital into LDPs is that such owners would seek to 'cherry-pick' the best pieces of business, to the detriment of the existing high street solicitor and possibly access to justice. The argument ignores the fact that it is the right of existing legal practices to determine which areas of the law they wish to practise in; and many have become specialist. It should be recognised, also, that 'cherries' generally grow where there are restrictions to free trade, either in terms of who may do a certain type of business or ease of access of capital. For many years the most typical piece of legal work, the 'cherry' for most high street lawyers, was conveyancing. The practice of minimum fixed fees was removed in 1973, and the Law Society monopoly was removed by the setting up of the Council for Licensed Conveyancers, under the Administration of Justice Act 1985. In general it should be expected that the admission of new capital will increase competition and reduce the cost of legal services, to the benefit of the objective of access to justice.

46. An extension of the cherry-picking argument arises in the context of rural practices. Some responses have expressed concerns that the advent of LDPs could jeopardise access to legal services in rural areas by further reducing the numbers of generalist providers in such areas. In respect of the latter, it is felt that this would add to a trend of perceived rural deprivation of services generally as banks, shops, post offices and other service providers decide to withdraw from such areas.

47. The argument is that such small practices, many of which make only a modest profit, are only able to offer legal aid and other low margin work through the cross-subsidy received from general practice work such as conveyancing, probate, personal injury and small litigation. There is a social value in retaining such practices, because they offer a legal aid service to clients in rural areas who might otherwise have to travel long distances to obtain a similar service.

48. Against this are several arguments. The first is that, whilst services such as legal aid are important, their costs should be transparent. There is no clear reason why they should be subsidised by the users of other services.

49. The second is that concerns about new practices often ignore the benefits that new service providers could bring. These benefits are not only that they can bring about lower costs; it is also that through longer opening hours, sophisticated telephony and advanced customer care skills, they may be able to offer consumers better access to certain other types of legal services. As noted in Chapter A, the issue of access to justice is not just an issue of physical proximity; it is arguably even more an issue of cost. In general, measures which reduce cost are to be welcomed.

50. Moreover, a small solicitor practice with a good reputation and loyal following need not necessarily fear losing its customers to new entrants if the service they offer is superior. The research referred to in paragraphs 15 and 16 above, as well as feedback received in the course of the Review, shows that among the factors which put customers off include unapproachability and perceived aloofness.

51. Finally, unlike services such as banks, chemists and post offices, legal services are not ones which consumers use on a frequent basis; and some of the work may not need face to face meetings.

52. The balance of argument does not persuade me that new entrants willing to compete with existing providers on cost and service quality should be permitted, as they currently are,

where the new capital is provided by lawyers, but prohibited where the capital might come from non-lawyers. If there is an issue about rural access, I believe:-

- it is independent of the issue of who provides the new capital; and
- it would be a matter for Government to address openly, in consultation with the Regulator and the legal services industry.

53. A further concern relates to possible conflicts of interest. A lawyer in an LDP must be in a position to assure his client that he approaches any instructions with an independent mind and no conflict of interest. He must approach any fresh instructions with 'clean hands'. The lawyer may well feel that he is able to do this, but where the owner has an interest in the issue there will be a suspicion (where the lawyer follows his professional duty it would be an unwarranted suspicion) that the lawyer may be influenced by this. It is, therefore, proposed that an LDP may not take instructions on a case where the owner has an adverse interest in the matter. Thus, if a bank ere to own an LDP, that LDP could not act for a client on any matter in which the bank had an interest, for example advising a client on loan documentation to which the bank was a party. In this context, by 'interest' is meant a direct interest in the legal outcome of the matter being dealt with, rather than the economic one of an owner wishing to provide a satisfactory, rewarding service.

54. It should not be permissible for the owner, under the terms of the LDP's regulatory conditions, to interfere in any client case or to have access to any individual client files or client information. What the owner does have a right to seek, from the money he invests in the business, is a proper profit. But then lawyers are not uninterested in such matters either. The notion that for lawyers, unlike businessmen, making money is merely a happy by-product of doing their professional duty has limited resonance with the public. Indeed a firm such as the RAC fairly argues that they have a client reputation to protect; and a failure of client care on their part, such as over-charging, would attract far more attention than one by a high street lawyer.

55. Even if it is accepted in broad principle that outside ownership is to be permitted, there remains the question of whether some restrictions should exist, either on the percentage of the capital which might be owned individually or in aggregate by outsiders, or in connection with conditions to be placed over capital rights.

56. With regard to percentage ownership there is a precedent within the accountancy profession. Under EU 8th Company Law Directive outside owners may not own in excess of 49 per cent of the capital of an audit practice. The Bar Council has proposed that outside ownership should be restricted to no more than 30 per cent of the capital. Both of these limits are restrictions on the aggregate level of shareholding to be held by outsiders.

57. One way to permit access of capital, but restrict control, would be a capital structure which permitted Managers to own voting shares, with outside providers of capital restricted to non-voting shares. In general I do not favour such capital arrangements, which place restrictions on free capital access. I do not believe that such restrictions are necessary given the safeguards already referred to in paragraph 42. If the Regulator considered that further safeguards should be introduced to provide assurances that a legal practice operated to a high ethical standard, with proper client care, it would be better to introduce additional checks on how the practice operated, rather than an artificial restriction on capital. As this Chapter makes clear, whilst there would be a 'fit to own' test for owners, the LDP would be a regulated ring-fenced

practice and the regulatory systems would concentrate primarily on who managed the practice and how they managed it.

58. The final issue to be addressed under the heading of LDPs having outside ownership is the suggestion that it should be resisted since such a step is without precedent. Even if correct it would be a poor argument; in fact it is incorrect and there are precedents. The Bar Council notes that it *"is not aware of any jurisdiction in which the ownership of legal practices by investors who are not lawyers is permitted"*. One jurisdiction in which it is permitted is New South Wales, and the introduction of model federal law provisions in April 2004 has enabled other states to follow suit. Incorporated Legal Practices may be owned by non-lawyers and a number are. The regulatory system concentrates, as already noted, on who manages the practice and the requirement for 'appropriate management systems'.

59. It should be noted that a further jurisdiction in which outside ownership of certain legal practices is permitted is England and Wales. The Council for Licensed Conveyancers, whose members carry out probably the most common form of regulated legal service, does permit outside investors to own practices within its regulatory area. The practices are regulated by the Council and managed by legal practitioners who are qualified to do the work and who must be in a majority in the management group. Managers and owners must covenant with the Regulator to indemnify losses of client monies by the practice. I have seen no evidence that outside owners have interfered unreasonably. I have seen no evidence that the public has suffered. Indeed it is arguable that, while the market share of licensed conveyancers remains low, they have provided choice and played a useful role in keeping costs down in this important area of the legal services market.

60. The proposal in this Review is that liberalisation measures, similar to those which the Government introduced many years ago in respect of conveyancing, should now be introduced for other areas of the legal services market, subject as noted to appropriate safeguards.

61. The key features of a Legal Disciplinary Practice are summarised in the following box:-

Legal Disciplinary Practices (LDPs)

- LDPs are law practices which permit lawyers from different professional bodies to be Managers in firms that provide legal services for third parties.
- Non-lawyers are permitted to be Managers of LDPs. Their role is to enhance the provision of legal services, not to provide other services to the public.
- Outside owners are permitted. They must be cleared by the regulatory authorities as 'fit to own'.
- Outside owners must provide an indemnity in respect of any loss of client monies.
- Lawyers must represent a majority by number of the Managers of the LDP.
- Among the Managers of the LDP must be a nominated lawyer (Head of Legal Practice), responsible for service standards in the provision of legal services; and a nominated appropriately experienced Manager responsible for finance and administration (Head of Finance and Administration).

- An LDP cannot take instructions on a case from a client where an outside owner has an adverse interest in the legal outcome.
- Outside owners cannot interfere in individual client cases or have access to client files or other information about individual cases.

The issues around what body should regulate LDPs

62. Chapter B looked at regulation by front-line recognised bodies in respect of their membership. It proposed a B+ model, with an oversight regulator, the Legal Services Board (LSB), delegating regulatory powers to recognized front-line bodies where the Board was satisfied as to the competence of the underlying body and that appropriate governance arrangements were in place.

63. The issue raised in this section is how that system could be extended to regulation of LDPs, where Managers might come from more than one recognised body, or might not be members of the legal profession itself.

64. In discussing the regulatory body for LDPs it should be recognised that, for certain types of LDPs, the additional work required might not be significant. The Law Society fairly points out in its submission that it does already regulate large solicitor firms where a number of the key management team are not lawyers. In the case of the Council for Licensed Conveyancers (CLC), it does already regulate firms where a minority of Managers need not be lawyers and, as noted, outside ownership is permitted.

65. It is clear that, in the terms of this Review, the CLC is already a regulator of a type of LDP, one which is conveyancer oriented. Other types of LDPs with skills in different areas of the law could exist. Thus the recommendation of this Review is that regulation of LDPs should not be the preserve of any one body. It would be open to recognised front-line bodies to apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements the recognised body had in place. The authorisation of the recognised body as an LDP regulator would state in which legal service areas an LDP licensed by it could engage.

66. To take an example of the principle set out in the previous paragraph, it is not difficult to envisage that, under a B+ model, the CLC would be judged competent by the LSB to regulate a practice where three conveyancers and a barrister intended to work together in partnership to provide conveyancing services. But where it might be intended that the practice wished to engage in designated legal services beyond conveyancing, it is less obvious that the CLC should be permitted to regulate such an LDP. If the CLC did wish to regulate such a practice (and in discussion with me the CLC has indicated that it believes it does have the infrastructure and skills to regulate practices beyond those involved purely in conveyancing) it would need in its application to the LSB to demonstrate its competence and that it had appropriate governance arrangements; and it would be for the LSB, after proper consultation, to determine the merit of the application.

67. It is clear that there is a distinction between the application by a front-line recognised body to the LSB for authorisation to regulate LDPs in specified areas ('application A') and the application by a prospective LDP to a recognised body for a licence to practise in nominated legal service areas ('application B').

68. Prospective LDPs may face a choice if they elect to practise in a particular area where more than one recognised body has been authorised by the LSB. Prospective LDPs are likely to make their choice of recognised body to act as LDP regulator based on regulatory cost, branding, and the potential to expand their business area.

69. Provided that the services to be offered by the prospective LDP fell within the competency of the recognised body acting as LDP regulator, there are as noted in this Chapter a number of conditions that the LDP would need to meet and they include: (i) satisfaction that the Head of Legal Practice is qualified to oversee the range of services offered by the LDP; and (ii) evidence that lawyers form the majority by number of Managers in the LDP. Condition (i) is competence based and designed to ensure that the key regulatory point of contact has the necessary competence to uphold the legal services standards of the firm; condition (ii) is designed to ensure that a majority are committed through qualification to the ethical standards to be expected of a law practice.

70. The following diagram illustrates the proposals.

(see diagram in Convocation Report)

71. It will be evident that the proposals in this Chapter shift the balance of regulation significantly towards regulation of the economic unit, beyond regulation of the individual practitioner. The proposed regulatory system focuses principally on who runs the practice and how. This is not intended to lessen the responsibility of each individual lawyer to meet the high standards to be expected of his profession. But it recognises the business reality that, in a practice of any size, the Regulator would be particularly interested in the competence of the senior Managers who ran the firm and the management systems they employed.

72. It follows that the prime focus of each recognised body, authorised to act as the front-line regulator of LDPs, would be upon the practice itself; and that it would be best if each lawyer Manager, irrespective of the branch of the legal profession he came from, were subject to the same recognised body as his lead Regulator. The lawyer Manager would remain a member of the front- line body whose examinations he took; but would submit to lead regulation by reference to the economic unit he worked for. This principle of 'lead regulation by reference to economic unit, residual regulation by reference to professional qualification' is not a new one. A form of this principle exists in a number of areas: for example, many solicitors work for banks; their lead regulator is the FSA, but they remain members of the Law Society, subject to the general rules of ethical behaviour to be expected of members of that body.

73. The proposals above, outlining a framework for regulation of LDPs, are designed to be facilitative for lawyers wishing to practise in new ways. The issue arises, however, as to whether the principle of 'lead regulation by reference to economic unit, residual regulation by reference to professional qualification' could at some stage be available to lawyers practising in their current ways. If the new arrangements set out above were operating satisfactorily, this extension of the principle to existing structures could be contemplated. A number of solicitor advocates, operating as sole practitioners, have indicated that they might wish to have as their

lead regulator the Bar Council. Adopting the same principle, it is possible that a set of chambers, wishing to operate outside the practice restrictions imposed by the Bar Council, for example in the matter of direct access, might wish to choose a different regulator competent in advocacy. There should be no objection in principle to these arrangements. Lawyers would have to submit to the practice rules of the lead regulator; the LSB would as indicated in Chapter B wish to ensure that minimum acceptable standards were adhered to so that there was no regulatory 'race to the bottom'; a single complaints system as set out in Chapter C would ensure that dissatisfied clients were not confused by the arrangements.

The Bar and the right to practise in partnership

74. Before proceeding from the issue of LDPs to that of MDPs, one further issue arises in connection with liberalisation of the way in which legal services are provided. The historic prohibition at the Bar, noted in paragraph 2, is that barristers may not enter partnerships with other barristers or with solicitors; they may work for firms of solicitors but may not without re-qualification become partners. As noted in paragraph 11, the Bar Council now proposes, in its response to the Consultation Paper, that barristers should be permitted to enter into partnership with other barristers and solicitors in LDPs outside its regulatory net; but it continues to argue that it is against the public interest that partnerships of barristers should be permitted under its regulatory auspices.

75. A consequence of the prohibition of partnership for those who join the Bar is that the first few years can be difficult. Giving evidence[47] before the House of Commons' Constitutional Affairs Committee in March 2004, the Chairman of the Bar Council described the position as follows: "*The trade-off of a career at the Bar is that you have rotten years at the beginning and maybe do not make it at all and leave. We have a big shakeout around the age of 30 because of competition. The trade-off is that you think that after that you have always historically had the prospect of a good income…..*"

76. The point at issue on partnerships concerns facilitative measures, not compulsion. The Chairman of the Bar Council, in an article he wrote earlier this year[48], set out arguments in favour of prohibition and concluded: "*That is why we oppose suggestions that we should be forced into partnerships.*" As far as I am aware, nobody has ever suggested that there should be an insistence on partnership; the issue is about the Bar's prohibition. I accept that sole practitioner status, when combined with the chambers system in which most barristers operate, has merit as a way to provide advocacy services. The issue is about whether the Bar should refuse to permit other ways of providing such services under its regulatory net.

77. The Bar's justification of the restriction on partnership was set out in a report prepared by a committee chaired by Sir Sydney Kentridge QC, in response to the OFT's 'Competition in professions'[49] document. The report argued that the rule ensured the widest availability of barristers' services to the public in three ways: it served to minimise costs in the provision of barristers' services; it enabled the Bar to maintain the cab-rank principle; and it promoted competition and choice by maximising the number of competing undertakings.

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[47] Minutes of Evidence taken before Constitutional Affairs Committee; Civil Legal Aid: Adequacy of Provision, HC 391-iii, 23 March 2004 [Question 185]
[48] *Legal Week*, 8th January 2004
[49] op. cit.

78. The argument in connection with the minimisation of costs is that "*barristers providing services as individuals in general charge less for their services than do solicitors operating in partnerships*"[50]. Presumably this arises for a number of reasons: solicitors carry out different duties, they need different back office systems to handle client papers; they need different premises to meet clients. It is not obvious that the higher cost arises because they have formed a partnership, which is the point at issue. In any event, even if correct, it is not a reason to ban partnership. That one type of economic unit had higher costs than another would not be a reason to prohibit it; it might be a reason why it would be less successful.

79. The argument in connection with the cab-rank rule is that it would be difficult to apply if barristers were in partnership. Some including the OFT have argued that a limited form of cab-rank rule could be applied to a partnership. But to judge the Bar's argument it is important to understand the manner in which the rule currently operates.

80. It should be recognised that the badge 'cab-rank rule' can mislead. The price of taking taxis is regulated; their availability or not is clearly shown. Neither of these conditions applies to barristers. For some years the fee rates in publicly funded areas such as crime and family law were 'deemed' as proper following negotiation between the Bar and those responsible for the legal aid services. This had the effect of requiring barristers to accept work at such fee rates. But recently the rate has become 'undeemed', leaving the issue of rates in those areas as well as others to the individual barrister. With regard to the availability of a barrister, as noted, this is often not clear. As was commented in a barrister's response, being busy is *"often a flexible concept and any reasonably successful barrister will be able credibly to assert that his current professional and private commitments preclude him or her taking on a case that is unattractive to him or her – until the next interesting case comes along which they would rather do."*[51]

81. Even if there were no issues about fee levels or availability, the rule does not ensure the right to representation often claimed. The barrister is required to accept a brief from a solicitor. In the restricted cases where the client can approach the barrister direct, the Kentridge Report states that the rule is not to apply. Thus for the public the rule would amount to: 'if you can hail a solicitor, you can hail a barrister'. The rule would be stronger if it were allied to wide direct access to barristers by clients.

82. The further argument against partnership in the Kentridge Report related to the importance of competition; and the claim by the Bar that permitting partnerships would restrict choice. It is not obvious that many barristers, operating as specialist referral advocates, would wish to form partnerships. In particular it seems unlikely that barristers in highly specialised areas (where the reduction in choice might be important) would form partnerships, given that conflict of interest issues would likely cut their work flow. The Office of Fair Trading comments:-

> *"The total ban fails to discriminate between partnerships that may increase competition and choice and those that may not. On the other hand, prohibiting partnerships restricts choice: the barrister's choice to adapt his business structure in the way that best meets his needs and those of his client is restricted."*

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[50] op. cit.
[51] Response submitted by David Wolfe of Matrix Chambers, June 2004

In general competition and consumer choice is advanced by removing restraints on trade and by encouraging the maximum latitude in the types of economic units in which those with rights of audience can operate. As the OFT points out, competition rules exist to prevent concentration where it works against the public interest.

83. The burden of proof rests with those who seek to justify the restrictive practice. My conclusion is that the arguments made in the Kentridge Report have force, but rather less force than is claimed; and I am not convinced that they amount to a conclusive case for preventing under the Bar's regulatory auspices other types of business structures. The issue set out in this section rests with the OFT and I encourage them to continue their review of this area, begun in their report 'Competition in professions'[52]. In due course it would become an area of interest for the LSB, since its proposed objectives include promotion of competition. It is true that the development of Legal Disciplinary Practices can work its way round the refusal of the Bar Council to permit partnerships within its regulatory net. But, given the significance of the Bar, its continuing dominant position in High Court advocacy and its attitude to those barristers who pursue legal careers outside the self-employed Bar, a greater choice of business structures would be easier to achieve if the restrictive practice were removed.

Demand for MDPs

84. MDPs are practices which bring together lawyers and other professionals to provide legal and other services to third parties. Thus, for example, a lawyer and an accountant could be in practice together to provide legal and accounting services to their clients. Interest in MDPs could come from two sources: consumers and providers. The not-for-profit sector demonstrates that many consumers have a set of related legal and non-legal needs which require a holistic solution. Academic studies such as Professor Hazel Genn's 'Paths to Justice'[53] also support this. Some voluntary sector agencies combine legal and non-legal services for the benefit of their clients. For example the charity, Shelter, offers legal advice as well as advice on housing options and support services for people in housing need.[54] Others in the commercial sector have also pointed out that, for example, in the context of claims arising out of motor accidents, MDPs could offer an integrated service which dealt with all the related issues, such as property damage (to the car), mobility (courtesy car), health, rehabilitation and compensation. Affinity groups, such as trade unions, also provide a range of services to their members, of which legal advice is one, but one that is sometimes closely connected with other needs such as employment and welfare issues.

85. Unlike the case with LDPs, the consumer could reasonably be expected to make a distinction between different professionals such as, say, 'a lawyer' and 'an accountant'. Although, as discussed earlier at paragraph 13, consumer demand may not have been articulated, one can readily see, for example in the areas of consumer debt, inheritance planning or personal taxation, that a combination of both legal and accounting skills could be a valuable asset for the client. Research carried out by MORI[55] suggests that there is some consumer interest in the convenience and accessibility of 'one stop shopping', provided that

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[52] op. cit.
[53] *Paths to Justice: What People Do and Think About Going to Law*, Hazel Genn, Oxford: Hart Publishing, 1999 - also referred to in *Geography of advice:* An overview of the challenges facing the Community Legal Service, Citizens Advice, February 2004
[54] Based on the response of the Advice Services Alliance
[55] MORI: op. cit.

appropriate regulatory safeguards are in place. As noted already, the issue is not about whether such combinations ought to be mandatory, merely why they should not be permitted.

86. Turning to providers, the fact that the aftermath of 'Enron' and 'WorldCom' has dampened corporate sentiment for large-scale MDPs, involving global networks of large accounting firms and linked legal practices, should not obscure the fact that small to medium sized professional service providers are well placed to cater to individuals, or small businesses, with a set of inter-related needs. Many such service providers (e.g. accountants, solicitors, estate agents) might benefit from sharing the overheads of high street premises and IT systems to make their business more viable.

Issues for MDPs

87. The Consultation Paper, and the responses to it, identified a number of issues with MDPs. These are:-

> (i) the issue of regulatory reach - how could a legal services regulator exercise power over people who were not lawyers, were offering clients a different professional service and who might have different codes of practice in areas such as client handling;
> (ii) the additional problem of regulatory reach where there were more than two professions involved and no obvious lead regulator; this would include the problems of using the HOLP model where non-legal professionals are involved;
> (iii) the issue of legal professional privilege; and
> (iv) the further complications of outside ownership by people who are not Managers.

Each is addressed in turn.

88. Of these issues the most fundamental is that of regulatory reach. This Review proposes a regulatory framework for legal services in England and Wales; and in Chapter B there are set out proposals for a Legal Services Board. But such Board would have no jurisdiction over services provided outside the legal sector. The Regulator would, therefore, have to enter into collaborative arrangements with other regulators where this was deemed appropriate. Such arrangements might well include determining who was to have the 'lead' regulatory role and how the regulator of the 'minority' profession was to operate.

89. There would be an extra layer of complexity if there were two or more professions represented in an MDP, and none had a majority. There could still be the concept of a lead regulator, but it would have limited force if the direct control was over a minority of the business. There could of course be separate Heads of Practice (HOPs) for each service stream within an MDP, perhaps under an overarching HOP to ensure the integrity of the whole entity. But it should be recognised that there would be few individuals with the ability to demonstrate competence across a wide range of services. Furthermore, the influence of the HOLP is likely to be somewhat more diffuse in a multiservice business, such as an MDP, the more so if legal services were not the dominant business.

90. A related inhibitor to the development of MDPs is the issue of legal professional privilege (LPP). In essence, LPP means that certain communications between a client and legal adviser in the context of obtaining legal advice or assistance are protected from disclosure, even in legal

proceedings. This feature is virtually unique to the legal profession and is regarded as a cornerstone of the lawyer-client relationship, to a degree that is greater than in comparable professions. As the recent *Three Rivers* case[56] highlighted, and as the money laundering regulations illustrate, the boundaries of privilege do get reviewed from time to time in the light of changed circumstances.

91. The difficulty facing an MDP would be a lack of clarity for its clients as to whether LPP applied only in respect of legal matters discussed with a legal professional (who was bound by the rules regarding LPP), or whether it applied equally to all matters dealt with by the MDP. Non-legal professionals may not be covered by these same rules; and in certain cases have quite different codes: for example auditors in the accountancy profession have a duty to prepare an objective report on the accounts of a business. In certain areas they have an obligation to look for independent verification of representations made by their client. Such objectivity could be compromised were it to be fettered by considerations of having to treat information as privileged.

92. One way around these problems, suggested by the Law Society, would be to place a ring-fence around the legal practice, separating it from that part of the practice dealing with non-legal affairs. The easiest way to give effect to this ring-fence would be to place the legal services business into a separate legal entity. It will be recognised, however, that the effect of this is to return to the concept of an LDP, albeit one that might have common ownership with a non-legal practice.

93. This reasoning underlines the point, made by the Law Society, that it would be possible to get close to a de facto MDP through the existence of different practices (one of which could be an LDP) with common ownership and common branding.

94. It should be noted that a form of MDP already exists within the current framework for legal services. A number of legal practices currently offer financial services as part of an all-round service to their customers. Where such financial services form part of the mainstream work of the law firm, the firm must be authorised by the FSA, and anyone who performs controlled functions (such as investment advice) must be an approved person (on the FSA's register). Where these financial services are incidental or supplemental to the main legal work these firms are not authorised by the FSA. Instead they follow rules set out by the appropriate professional body (called a Designated Professional Body), such as the Law Society.

95. These arrangements would need to be considered by the LSB and the FSA in the context of the proposals contained in this Review, but in general they appear to work in a satisfactory manner and should be 'passported' into the new regulatory regime.

96. As with LDPs, the opportunity for outside owners to participate in MDPs brings the opportunity of attracting capital investment as well as fresh business expertise. In connection with the 'fit to own' test, the criteria for financial soundness would need to take into account the activities to be undertaken by an MDP, and would be very different from that for a legal practice, if the MDP intended to engage in transactions across the service range as a principal.

97. It may be possible for some sort of criteria to be agreed by collaboration between the different professions. But this presupposes that each profession has a 'lead regulator' that can

[56] Three Rivers District Council v. The Bank of England [2004] UKHL 48

bind that profession in its entirety; and that the rules of the other professions would allow outside owners to invest in the MDP business – which may or may not be the case.

98. The overwhelming sentiment expressed to me, by those wishing to contemplate alternative business structures, was that it would be a good start to get lawyers working together in LDPs, and to assess the regulatory consequences of that, before proceeding with full-blooded MDPs. I concur with that sentiment but would encourage the efforts of the Law Society, who are doing further research to assess the demand for MDPs.

99. The Review, therefore, proposes that the necessary first step (which would facilitate the emergence of MDPs at a subsequent date) is the setting up of an appropriate regulatory framework for LDPs, including a regulatory lead body for the legal services industry, such as that which would exist with the Legal Services Board. It would be for that Board to determine whether satisfactory arrangements could be worked out with other regulators as to how different practices with common ownership might operate between themselves (as outlined in paragraph 88 above), or indeed how they might be permitted to operate together within the same legal entity, in both cases in a manner which properly protected the interests of the consumers.

100. None of these concerns should be taken to mean that they are not capable of resolution or that MDPs are an unviable proposition. But for MDPs to be a reality there would have to be a real movement in co-operation between the different professions. As has been commented, the first steps must be to find a way in which lawyers from different front-line bodies can work together in one consistent regulatory framework. The Review has concentrated on that goal. It would represent an important step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.

Conclusion

101. Legal Disciplinary Practices are law practices which permit lawyers from different professional bodies to practice together as equals. I conclude that non-lawyers should be permitted to be Managers of such practices, subject to the principle that lawyers should be in a majority by number in the management group. The non-lawyers would be there to enhance the services of the law practice, not to provide other services to the public.

102. Outside ownership of LDPs should be permitted. Such ownership should be subject to a ‘fit to own’ test; but the main focus of the regulatory authorities should be upon the identity of the management team, in particular the Head of Legal Practice and the Head of Finance and Administration, and the management systems that they employ, in short on who manages the practice and how. Within England and Wales outside ownership is already permitted in respect of certain types of legal practices which provide conveyancing services; it is proposed that, subject to proper safeguards to be set by the LSB, it should now be permitted in other areas of the legal services market.

103. In the regulation of LDPs it is proposed that the focus of the regulatory system should be upon the economic unit, rather than the individual lawyer. The principle to be applied is that of ‘lead regulation by reference to economic unit, residual regulation by reference to professional qualification’. Recognised front-line bodies would apply to the LSB for authorisation to regulate designated types of LDPs; and the LSB would determine each application against the recognised body's competence in particular legal service areas and the governance and administrative arrangements that the recognised body had in place.

104. Multi-Disciplinary Practices are practices which bring together lawyers and other professionals to provide legal and other services to third parties. Legal work might be only a minority of the work done by the practice. There are considerable issues around such practices, in particular that of regulatory reach; and the fact that a regulator, such as the Legal Services Board, would have no jurisdiction over activities outside the legal sector. The proposal of this Review is that attention should focus on the setting up of a new regulatory system for lawyers with the LSB at its centre, and the authorization of LDPs. This would represent a major step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.

APPENDIX 1

NOTES TO EDITORS

TERMS OF REFERENCE FOR THE REVIEW

"To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.

To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.

To make recommendations by 31 December 2004."

BACKGROUND

Following publication of a Consultation Paper in March 2004 the Regulatory Review team received 265 written responses. During the 12 week consultation period the team held a number of meetings in England and Wales: in Bangor, Birmingham, Bristol, Cardiff, Exeter, Leeds, Lincoln, London, Manchester, Newcastle and Norwich. In addition the team attended many meetings organized by other bodies, a number of them organized by the Law Society in regional centres and two arranged by the senior judiciary.

MEMBERS OF THE ADVISORY PANEL TO THE REVIEW

Stephen Locke - Board Member National Consumer Council; member of Consumer Panel of the Financial Services Authority

Baroness Neuberger DBE - former Chief Executive, King's Fund; former member of General Medical Council

Neil Rickman - Department of Economics, University of Surrey

Edward Walker-Arnott - Consultant to Herbert Smith; former Senior Partner

Graham Ward CBE - Partner of PricewaterhouseCoopers LLP; former President of the Institute of Chartered Accountants in England and Wales; President of the International Federation of Accountants

Robert S Webb QC - General Counsel, British Airways; member of the Board of The London Stock Exchange

Report of the Review of the Regulatory Framework for Legal Services in England and Wales

LIST OF RESPONDENTS

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Age Concern England
District Judge Jill Allen
Allen & Overy LLP, Solicitors
Allianz Cornhill
Mrs Sally Allix
Association of Law Costs Draftsmen (ALCD)
Association of Partnership Practitioners
Association of Personal Injury Lawyers (APIL)

Lawrence Bagshaw
Bar Association for Commerce Finance and Industry (BACFI)
Bar of the Wales & Chester Circuit
W Alasdair Baxter
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N D Bellis, solicitor
Berrymans Lace Mawer, Solicitors
Better Regulation Task Force
Professors Andrew Boon, Jenny Levin, Donald Nicholson, Julian Webb, Universities of Westminster and Strathclyde (joint response)
Sir Jeffery Bowman
Brent Community Law Centre
British Legal Association
British Printing Industries Federation
David L Brown
Michael B Buck
M F Burdett, solicitor
Burges Salmon LLP, Solicitors

Alan Caig
Sheila Cameron QC DCL, Master of the Faculties/ Peter Beesley, Registrar, Faculty Office (joint response)
Campaign for the Reform of the Office for the Supervision of Solicitors (CROSS)
Peter C Careless, solicitor
Carpenters, Solicitors
Susan Carter, Ross Carter, Solicitors
Carter Lemon Camerons, Solicitors
Citizens Advice
Clifford Chance LLP, Solicitors
COMBAR (Commercial Bar Association)
Committee of Heads of University Law Schools (CHULS)

Consumers' Association (Which?)
Linda M Costelloe Baker, Scottish Legal Services Ombudsman

CCBE (Council of the Bars and Law Societies of the European Union)
Council for Licensed Conveyancers (CLC)
Council of the Inns of Court
Coventry Law Centre
A B Craven, HIPS(97)
Credit Services Association
Mrs I Crosthwaite

Michael T Darwyne
DAS Legal Expenses Insurance Co Ltd
Michael Dew, solicitor
Sue Doughty, Member of Parliament for Guildford
E Durant

Edwards Geldard, Solicitors
Eifion Edwards
Mrs L J Elt
Kevin H Emsley, Lupton Fawcett, Solicitors
W E G Eusden
M M Evans

Faculty of Advocates (Scotland)
Family Law Bar Association
David Farrer QC, Simeon Maskrey QC, Nigel Rumfitt QC, Derek Sweeting QC, Barbara Connolly, Timothy Walker, Brendan Roche, Jeffrey Jupp, Steven Gray (joint response)
Mark Field, solicitor
Financial Services Authority, Small Businesses Division
FDA (First Division Association)
FirstLAW Limited, Solicitors
Forum of Insurance Lawyers (FOIL)
David Foster, Barlows, Solicitors
Roy Fox
John A Franks
Freeclaim IDC plc
Freshfields Bruckhaus Deringer, Solicitors

Michael Garson, solicitor
General Council of the Bar
J A E Gorst
Hazel Grant, solicitor

D R Hale
Ian R Hamilton
Melike Hart
Mrs Margaret Haworth
D C Heard

Richard Henchley, solicitor
Henmans, Solicitors
Herbert Smith, Solicitors
Herrington & Carmichael, Solicitors
K D Hoskin
Thurstan Hoskin, Thurstan Hoskin and Partners, Solicitors
Mrs Vivien Howarth
Anthony Hughes, Ricksons, Solicitors

Immigration Advisory Service
Independent Association of Advocates of South Africa
In-House Lawyers' Group of The Law Society of Scotland
Institute of Chartered Accountants England & Wales
Institute of Chartered Secretaries and Administrators
Institute of Indirect Taxation
Institute of Legal Cashiers & Administrators
ILEX (Institute of Legal Executives)
Institute of Professional Willwriters
Institute of Trade Mark Attorneys/ Chartered Institute of Patent Agents (joint response)
International Underwriting Association
Irwin Mitchell, Solicitors

Peter Jacks/Andrew Hodges, Fraser Brown, Solicitors (joint response)
W G Jeffery
C M Johnston
Jomati Ltd
Jack Jones
Justices' Clerks' Society

Ewan G Kennedy, Faulds Gibson Kennedy, Solicitors, Scotland
Alan Kerr, Kerr & Company, Notary Public
Kincardine & Deeside Faculty of Solicitors
Stephen Kinsey, Wildbore & Gibbons
Knights, Solicitors

Tim Lamb
Sir Stephen Lander, Independent Commissioner to the Law Society
Law Society of England and Wales
Law Societies of:-

Berkshire, Buckinghamshire & Oxfordshire;
Birmingham; Bournemouth & District;
Bournemouth & District Trainee Solicitors & Young Solicitors Groups;
Bristol; Buxton & High Peak;
Cambridgeshire & District; Cardiff & District; City of London;
City of Westminster and Holborn; Derby & District;
Devon & Exeter; Dorset; Gwynedd; Hampshire; Hertfordshire; Kent;

Leeds; Lincolnshire; Mid Essex; Newcastle upon Tyne;
Norfolk & Norwich; Northamptonshire;
Southend-on-Sea & District; Stockport; Surrey;

Tonbridge Tunbridge Wells & District; West Essex; West Wales; Westmorland; Wolverhampton; Worcestershire; Yorkshire.

Law Society of England and Wales Groups and Sections:-
- Association of Women Solicitors
- Black Solicitors Network
- Commerce & Industry Group
- Group for Solicitors with Disabilities
- Hertfordshire Local Group, Solicitor Sole Practitioners Group
- Lay Members, Law Society Council
- David Merkel, Council member for Solicitors with Disabilities
- Probate Section
- Solicitor Sole Practitioners Group
- Solicitors in Local Government Group
- Trainee Solicitors' Group/ Young Solicitors Group (joint response)

Law Society of Scotland
Law Society of Upper Canada
Elizabeth Leah, Howell-Jones Partnership, Solicitors
Legal Action Group (LAG)
Legal Aid Practitioners Group (LAPG)
Legal Marketing Services Ltd
Legal Services Commission
Legal Services Consultative Panel
Sir Andrew Leggatt
Mrs L H Lewy
Lexfutura
Nigel Ley
Linklaters, Solicitors
David Lock
London Criminal Courts Solicitors Association (LCCSA)
Lovells, Solicitors

Maclay Murray Spens, Solicitors, Scotland
P Male
Zahida Manzoor CBE, Legal Services Ombudsman for England and Wales
Professor Stephen Mayson, Nottingham Law School
McGrigors, Solicitors
Dr Harry McVea, University of Bristol
Mercer Human Resource Consulting
Mrs Diana Mitchell
Victoria Moore, Moore Academy
Richard Moorhead, Cardiff Law School
Larry Moriarty
Motor Accident Solicitors Society (MASS)
Sarah Mumford/Margaret Bromley, solicitors (joint response)

National Association of Paralegals
National Consumer Council
Nelsons, Solicitors
North Eastern Circuit (Bar)

Norton Rose, Solicitors
Notaries Society

Clifford J Oakes
Office of Fair Trading (OFT)
Mr David O'Hagan, Barry & Blott, Solicitors
Oldham Law Association
Olswang, Solicitors

David M S Palmer
Parabis
Paralegal Association
Crispin Passmore
Patent Office
Professor Alan Paterson, Strathclyde University
Mrs H S Peasegood
Lord Phillips of Sudbury, solicitor
Professor J F Pickering
V G Playle
Martin J Powell
Principal Registry of the Family Division
Tim Pyper, TLT, Solicitors

RAC Legal Services
Freda Raphael

Mrs Christine Reay, solicitor
Mrs K Robinson
ROCAS (Reform of Complaints Against Solicitors)
Royal Bank of Scotland Group
Royal Faculty of Procurators in Glasgow
Royal Institution of Chartered Surveyors
Royal Pharmaceutical Society of Great Britain
Christina M Rundle

John Scampion CBE, Immigration Services Commissioner
Scotland Against Crooked Lawyers
Colin Scott, London School of Economics
Scriveners Company
Shepherd & Wedderburn, Solicitors, Scotland
Geoffrey A Shindler, solicitor
Shoosmiths, Solicitors
Simon Smith
Society of Legal Scholars
Society of Scrivener Notaries
Society of Trust and Estate Practitioners (STEP)
Society of Will Writers & Estate Planning Practitioners
Society of Writers to Her Majesty's Signet (W S Society, Scotland)
SSARMCA (Soldier, Sailor, Airmen, Royal Marines Commando Association)
Solicitors Association of Higher Court Advocates (SAHCA)
Solicitors Disciplinary Tribunal

Solicitors Family Law Association (SFLA)
SIFA (Solicitors Independent Financial Advice)

Solicitors *Pro Bono* Group
Edward Solomons, solicitor
Anthony Speaight QC
Penelope and Geoffrey Stansfield
Alan Street

Taylor Vinters, Solicitors
Mrs Jane E Taylor/ Mrs Betty M Hine (joint response)
J M Taylor
John M Taylor
William S Taylor
Technology and Construction Bar Association
Thompsons, Solicitors
Paddy Tipping, Member of Parliament for Sherwood
Trade Marks Patents and Designs Federation (TMPDF)
Alan Turle, Richards & Morgan, Solicitors

UK200Group
Union Internacional del Notariado Latino, Mexico (Francisco S Arias, President)
Unione Internazionale del Notariato Latino, Italy (Dr Emanuele Ferrari, Secretary for Europe & Asia)

Walker Morris Online, Solicitors
Matthew Ward, Lancashire Paralegal Associates Ltd
Wards, Solicitors
Tom Williams
Mrs Penelope Wilson
David Wolfe
Wollastons, Solicitors

2 respondents requested confidentiality for their names, which consequently are withheld

APPENDIX 2

SLAUGHTER AND MAY ADVICE

The Application of EU and Other International Norms to the Regulation of the Legal Profession

INTRODUCTION

1. In its response to the consultation paper issued by the Review of the egulatory Framework for the Legal Services in England and Wales he Bar Council concluded at paragraph B6.10 of its paper:

> "Although the Consultation Paper proposes that a new Legal Services Authority would be an independent statutory body, we do not believe that this would be sufficient to comply with internationally recognised norms respecting the independence of the legal profession. UN Basic Principle 26 and other international standards for lawyers, as well as prevailing expectations within the European Union, emphasise the importance of the involvement of the profession in regulating its own members."

We are asked to advise whether that conclusion is sustainable. For the reasons set out below, we believe that it is not. We believe that both Model A and Model B+ are compatible with Community law, international norms and the European Convention on Human Rights.

2. We are also asked to consider the likely impact of the judgments in *Wouters* and *Arduino* on the assumption that the promotion of competition was one of the objectives which could underpin the regulatory regime

GROUNDS FOR CHALLENGING STATUTES

3. Whatever system of regulation is ultimately adopted, it will have to be introduced by statute because the current regulatory framework is largely statutory and would have to be repealed.

4. Under English law primary legislation can only be challenged in UK courts on two grounds: (1) because it infringes European Community law which has supremacy; or (2) because it offends against the Human Rights Act. Unlike subordinate legislation there is no form of judicial review on grounds of irrationality, illegality or procedural impropriety.

COMMUNITY LAW

5. The Bar Council refers to a number of provisions of Community Law and a resolution of the European Parliament. It argues that the Establishment Directive (Dir. 98/5/EC) is predicated on the legal profession in the Member States being self-regulating. That, however, falls a long way short of saying that the Directive requires selfregulation. We can find nothing whatever in the Directive that establishes such a requirement, let alone one which would result in any of the proposed models in the consultation paper infringing Community law.

6. Reference is also made to the CCBE Code of Conduct. This only applies to lawyers in respect of their European cross-border activities, if any. It is made binding by virtue of the Solicitors' Practice Rules and the Bar Council's Code of Conduct. The CCBE Code of Conduct contains a number of general principles including a requirement that lawyers remain independent. It does not, however, make any prescription as to how conduct should be regulated or disciplinary rules enforced. On the contrary, paragraph 1.2.2 stipulates expressly that traditions vary as between Member States:

> "The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures *and to its national legislation*" (emphasis added)

7. Finally reference is made to a resolution of the European Parliament of 11 December 2003 which stated:

> "... the importance of ethical conduct, of the maintenance of confidentiality with clients and of a high level of specialised knowledge necessitates the organisation of self-regulation systems such as those run today by professional bodies and orders ..."

That has no binding force and it is far from clear why the conclusion flows from the premise.

8. Indeed, recent case law of the Court of Justice if anything confirms that Member States retain the power to regulate the legal profession to a very considerable degree, even down to setting fee rates. In Case C- 35/99 *Arduino* the Court confirmed that the Italian system for regulating the legal profession was not an agreement between undertakings – which would fall within the purview of Article 81 which prohibits agreements which appreciably restrict competition – but a state measure, given that the Government retained substantial decisionmaking power and controls. Although the Italian Government was bound under Article 3(1)(g) of the Treaty not to introduce measures which would distort competition, it was entitled to take proportionate measures for regulating the profession in the public interest, including setting fee levels for the Italian Bar. There was no suggestion that Government intervention of this kind infringed Community principles. Commissioner Monti, commenting on that judgment in a speech to the Bundesanwaltskammer in March 2003, said:

> "The Arduino judgment clarifies that Member States have the right to regulate a profession. This is no surprise as in the absence of harmonisation at European level, Member States have the primary responsibility for defining the framework in which professions operate. It went on to say that *Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control*." (emphasis added)

COMMUNITY PRACTICE

9. The legal position - that Member States may play a substantial, direct role in regulating the legal profession - is confirmed by the practice. We have reviewed the position in France, Germany, Italy and Spain with local lawyers and in each case the state has very substantial, direct involvement in the regulation of the profession. The results of our review are summarised here.

10. In Germany, the profession is governed by statute, principally the Bundesrechtsanwaltsordnung ("BRO") and the Berufsordnung für Rechtsanwälte. This is far from being merely an enabling regime. Part III of the BRO sets out in detail the rules of ethics and conduct of lawyers, as well as the manner in which they may organise themselves and practise. Disciplinary procedures are admittedly delegated to the profession, but can ultimately come before the federal courts.

11. In France law 71-1130 and decree 91-1197 set out in some detail the principles applicable to the legal profession, including most of the rules on professional conduct, the conditions for entering the profession, the powers of the various bar councils, the regulation of fees and incompatible occupations. Whilst local bar councils are empowered to adopt their own internal rules, these must be compatible with the law and decree. The administration of the rules laid down by legislation is largely in the hands of the bar councils, subject to control by the Court of Appeal.

12. The regulation of the legal profession in Italy combines statutory and self regulatory elements: the main rules are set forth in legislative instruments, whereas the enactment of more detailed provisions, their enforcement and, more generally, the supervision on the profession is largely left to self-regulation. Legislative instruments set out the rules governing the legal profession, including the conditions for exercising the profession, some general principles on professional conduct and the sanctions for their breaches, the election and powers of the local and national bar councils and the regulation of fees and incompatible occupations. On the other hand, the bar councils (which are elected by the profession) are empowered to apply and enforce many of such statutory provisions, and have laid down a code of conduct drawn from the general principles set forth by law; in particular, disciplinary procedures are delegated to the bar councils, but can ultimately come before the Court of Cassation through appeals based on points of law, jurisdiction objections or abuse of powers.

13. In Spain, it is only very recently that provisions have been adopted regulating the legal profession, namely by Royal Decree 658/2001 of 2 June 2001. These were proposed by the National Bar Council but adopted by the government. The Royal Decree covers the conditions for admission to the profession, the governing bodies of the profession and disciplinary regulations. Disciplinary matters are enforced by the Bar Council but subject to the control of the courts.

HUMAN RIGHTS

14. There is no express right to be a non-state-regulated lawyer provided for by the European Convention on Human Rights. However the independence of lawyers is generally regarded as a fundamental principle and one that would be likely to be upheld by the European Court of Human Rights. State involvement and regulation of the legal profession seems to have been accepted to some degree and therefore it is really the detail of the system which would determine whether human rights were violated. Provided that the regulatory body was demonstrably independent of government and the system provided robust safeguards to prevent executive interference with the regulatory body's functions so that lawyers were objectively free to carry on their profession regardless of governmental influence, we do not foresee any viable human rights challenge.

OTHER INTERNATIONAL PRINCIPLES

15. The Bar Council relies on a number of other principles in the 1990 UN Basic Principles on the Role of Lawyers, in particular:

Recital 10:

> "professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from ... improper restrictions and infringements ... and cooperating with governmental and other institutions in furthering the ends of justice and public interest".

Basic Principles:

> "24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
>
> 26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.
>
> 28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court and shall be subject to an independent judicial review."

16. First, none of these principles is binding or fetters the UK Government in terms of the primary legislation it can introduce. Secondly, Principle 24 is concerned with the right of free association: it does not prescribe self-regulation. Thirdly, principle 28 relates to disciplinary proceedings and the need for the authority hearing such proceedings to be independent: it does not prescribe self-regulation. Fourthly, principle 26 clearly envisages (as is the case in Germany and France) that codes of professional conduct may be "established ... by legislation." The Bar Council is unable to point to any "recognised international standards or norms" that require a regulatory body to comprise primarily the profession for fear that the independence of the profession is jeopardised. The CCBE Code of Conduct insists on the independence of lawyers, but is not prescriptive as to how this should be achieved. Nor is there any reason in principle why a regulatory body which did not comprise mainly the profession should jeopardise the independence of lawyers from government, provided it is independent,

enforces objective standards of conduct and is required to uphold the independence of lawyers. This can be done just as easily by legislation as by the legal profession, as principle 26 clearly recognises.

COMPETITION ISSUES

17. We are asked to consider, on the assumption that the promotion of competition was one of the objectives which could underpin the regulatory regime, what impact the judgments of the European Court of Justice in Case C-309/99 *Wouters* and Case C-35/99 *Arduino* might have on the implementation of that objective.

18. In those two cases the Court distinguished between cases where rules of professional conduct were to be considered as State measures and where they were to be considered as decisions of associations of undertakings. In the former case (the rules for setting legal fees in Italy considered in *Arduino*), the Court found that they were State measures and consequently that the competition rules for undertakings (Articles 81 and 82 of the EC Treaty) did not apply. This was on the basis that the State laid down the general principles and retained substantial decision-making powers and powers of control. In the latter case (the rules of the Dutch Bar considered in *Wouters*), the Court found that the rules were subject to the competition rules applicable to undertakings.

19. The distinction is not clear-cut, as can be seen by comparing the two sets of facts in the two cases. If the competition aspect of the regulatory regime adopted is covered by the principles set out by *Wouters*, the competition principle would apply automatically by virtue of the application of Article 81 or the Chapter I prohibition of the Competition Act 1998 to the relevant rules. If, however, the competition aspect of the regime is covered by the principles of *Arduino*, it would be perfectly possible to enshrine the objective of the promotion of effective competition by requiring the rules to be scrutinised by the Office of Fair Trading prior to their adoption with that objective in mind.

Slaughter and May

APPENDIX 3

Ernst & Young LLP
1 More London Place
London
SE1 2AF

Ernst & Young LLP

December 2004

Sir David Clementi
Review of the Regulatory Framework for Legal Services in England and Wales
2nd Floor, Selborne House
54-60 Victoria Street
London SW1E 6QW

Dear Sir David
Report on our work for the Review of the Regulatory Framework for Legal Services in England and Wales

We are delighted to present this report which summarises our work for the Review.

You were appointed to undertake an independent review of the regulation of legal services in England and Wales.

In order to assess the various options, you needed to assess not only the qualitative advantages and disadvantages of each but also the financial implications of each.

You appointed us to help you assess the costs of the current regulatory framework; as well as the possible costs under each alternative model. We performed this assignment in accordance with the detailed scope of work we agreed with you. Our report is set out as follows:-

Yours sincerely

Ernst & Young LLP

Section 1: Scope of our work

We were engaged by the Review Team to undertake financial data collection and analysis to aid the Team in their assessment of the various model options put forward in the Review's Consultation Paper dated March 2004. Our aim was to enable the Team to have a clearer view on the financial implications of each model.

Our work was organised into two phases, as discussed below. We agreed our approach, methodology and key assumptions for each of the phases with the Review Team.

Phase 1 – Cost of current regulatory framework

The objective of Phase 1 was to collect financial information from each of the regulatory bodies on their costs of conducting regulatory activities.

In order to do this we agreed a template with the Review Team to analyse costs by regulatory function (regulatory rule-making, setting entry standards, monitoring, enforcement, complaints and discipline), by cost category (direct and indirect) and by cost type (such as employment, property). We also included key cost drivers (for example, numbers of employees, enquiries and complaints).

We sent the template to 20 institutions, identified by the Review Team as currently carrying out regulation, to complete. We asked for information from each institution for their last two financial years. We, typically with a member of the Review Team, then met with representatives of each of these institutions to obtain further understanding of the costs incurred by them in regulation, and the basis on which they completed the template.

We also asked the institutions for information on the time given voluntarily by their members to discharge regulatory functions. This gives rise to an opportunity cost that is not captured within the historic cost data which therefore understate the total cost of regulation.

The historic cost data do not fully capture senior judicial and ministerial time, and therefore understate the total cost of regulation in this respect, too.

We have relied upon the information provided to us by the institutions in the meetings and through the completed templates. We have not sought to audit or otherwise externally verify the data. Consequently, we express no opinion thereon.

Phase 2 – Cost of alternative models of regulation

The objective of Phase 2 was to estimate, using the data obtained in Phase 1, the ongoing cash costs (excluding opportunity or set-up costs) of each of the Review Team's possible alternative regulatory models.

We initially developed a high level estimate of the costs of the theoretical models and constructs, including those described in the Review's Consultation Paper as an initial costing, based directly on the data available from the Phase 1 templates. This was a "top-down" approach, re-allocating existing costs to the bodies proposed under each model according to their function.

At the request of the Review Team, we excluded from our assessment the impact of the models on the costs of the front-line bodies' representative functions, which are outside the regulatory framework.

As work progressed we focused, at the request of the Review Team, on two particular models – Model A and Model B+. Within each model we separated the costs of the regulatory functions dealt with in Chapter B (entry standards and training, rule making, monitoring and enforcement) from those dealt with in Chapter C (complaints and discipline). The issue we were asked to consider within Chapter B was the costs of Model A and Model B+. The issue we were asked to consider within Chapter C was the cost of a single consumer complaints body against the

current system. Our cost estimates for these models underwent a series of iterations following discussions with the Review Team as to how these options might work in practice.

We supplemented our top-down approach with a (still high level) bottom-up costing for a Legal Services Board (LSB) and an Office for Legal Complaints (OLC), based on the Review Team's estimation of the LSB's and the OLC's structure and number of staff. However, we recognise that the actual costs of either a Legal Services Authority (LSA) as part of Model A or LSB as part of Model B+ would be substantially dependent on decisions taken by its Board as to how it discharges its regulatory functions.

Section 2: Limitations of our work

Reliability of financial information collated from regulatory institutions

The level of financial management information held by the institutions as a basis for completing the Phase 1 template varied widely. The institutions have not previously been required separately to identify the costs of regulation along the lines of the regulatory functions set by the Review Team. The institutions, therefore, developed methodologies of substantially varying degrees of sophistication, according to the information they had available. Generally, each of the methodologies involved allocating costs on the basis of estimates of the proportion of time spent by the institution or its employees on regulatory activities.

During Phase 1 we encountered a number of definitional issues:

- the classification of certain activities as regulatory or non-regulatory; and
- the allocation of costs to the specific categories of regulatory activity.

We sought to manage these issues by issuing guidance notes with the template, and through the meetings held with the bodies. However, it is possible that there is nonetheless still some inconsistency in the manner in which institutions categorised their costs.

Reliability of the cost estimates of alternative regulatory models

The Review Team's work has been high level and accordingly we have not developed detailed budgets for the regulatory bodies under the proposed alternative operating models.

We have developed our cost estimates on the basis of an understanding of the current costs of conducting various regulatory activities. As such the reliability of our estimates is dependent upon the reliability of the direct and indirect costings provided by the regulatory institutions and upon a number of assumptions set out below.

Working assumptions

- The underlying nature and volume of activities performed under the new model would not be substantially different from those performed under the current regulatory framework, i.e. we assume steady state operation.

- Under Model A, the direct costs currently incurred by the regulatory bodies represent a reasonable basis for estimating the costs of the regulatory functions consolidated together within a Legal Services Authority, but that there will be a 10% saving of indirect costs achieved through economies of scale in managing the infrastructure.

- Under Model B+, the costs of the front-line bodies will remain at their present level, except that additional costs have been included arising from the requirement to separate regulatory and representative functions.

- Where front-line bodies do lose regulatory functions, as well as losing the direct costs associated with those functions, over time they will also be able to eliminate allocated indirect costs. Where they are unable to do so, these costs would have to be borne by the representational functions of the front-line bodies.

  By way of illustration, if, as is proposed in Chapter C, complaints were to be moved from the front-line bodies to a single Office for Legal Complaints, the failure to eliminate 15% of the allocated indirect costs would add £2 million to the costs of the front-line bodies' representational functions.

  - For the Legal Services Board and Office of Legal Complaints, for which we have conducted bottom-up costing, our work was informed by some benchmarking, based on the operating assumptions made by the Review Team and set out in the footnotes to tables 2 and 3 in the next section.

  - In respect of voluntary time:

    o Analysis of the historic costs of the current regulatory system excludes the cost of the significant time given on a voluntary basis by members of the professional bodies. This assumption is also made in respect of the alternative models considered in the tables in the Summary.

    o In costing the alternative models, we have to consider whether there will be a financial cost associated with the activity currently being performed voluntarily. The professional bodies provided us with estimates of the time involved, and two provided us with an estimate of the charge-out rate at which this time might be costed. The majority of the cost relates to governing bodies and committees.

    o In respect of Chapter B costs, under Model A, we assume that whilst there would be less practitioner involvement in different levels of governance than under the previous model, there would be some ongoing involvement through advisory panels, the members of which are paid an annual fee. Some of the voluntary time would be replaced by senior management of the Legal Services Authority and this time is costed. Under Model
    B+, we assume that, as the majority of activity remains with the front-line regulators, there will be no significant change from current arrangements. In either alternative model, we have not included time which continues to be given voluntarily within our
    cost estimates.

- In respect of Chapter C costs relating to complaints and discipline, assuming Model B+ is adopted for other regulatory functions, we assume that within a single complaints body
  complaints would be dealt with by full time employees of the Office of Legal Complaints (OLC). Therefore the element of voluntary time given by professionals in respect of complaints would be significantly reduced.

- Analysis of the historic costs also excludes senior judicial (other than the Master of the Rolls) and ministerial time, which cannot be reasonably costed. Under Model B+, we assume that this expertise would be delivered by senior staff and the board members of the LSB, who are included in the bottom-up costing.

Section 3: Summary of our findings

Costs of the current regulatory system

The aggregate of the costs reported to us by the institutions was £81m for 2003/4 and £69m for 2002/3 (an increase of 17% year-on-year). An analysis of costs by regulatory function is set out in figure 1 below. Of the £81m in 2003/4, £46m represents Chapter B costs and £35m represents Chapter C costs. Five bodies carrying out regulatory functions account for 90% of the costs. These are the Law Society, the Bar Council, the Office of the Immigration Services Commissioner, the Council for Licensed Conveyancers and the Legal Services Ombudsman. 56% of total costs are direct and 44% are indirect overhead costs.

Figure 1: Current regulatory costs

(see diagram in Convocation Report)

We noted that complaints handling is the largest regulatory function accounting for c.35% (£29m) of total costs. The Law Society's complaints functions account for £23m of this cost (including £11m allocated overhead costs) and over 90% of complaints volume.

In addition to these historic costs, our work identified a significant amount of time given by legal professionals at zero cost or on an expenses only basis. The opportunity cost of this time is estimated to be in the range £7.5m -£9.5m (assuming rates of £125 per hour to £250 per hour for that time for which we were not provided with an estimate of cost). The majority is accounted for by the Bar Council and the Law Society.

Estimated costs of alternative regulatory models

We were asked by the Review Team to focus our work on the decisions to be taken in Chapter B and Chapter C. These are set out in the tables 2, 3 and 4 on the following pages. These high-level costings are in 2003/4 prices and are subject to the limitations stated in section 2.

Given the conclusions of the Review, summarised in the Foreword, the cost of the proposed complete regulatory system, comprising front-line bodies, an oversight Board (LSB) and an

Office for Legal Complaints (OLC) would amount to approximately £79.5 million. This compares with the cost of the current system of approximately £81m. The key drivers of the difference are:

- The additional cost of a Legal Services Board, which is offset by:
- Savings from the rationalisation of existing oversight functions; and
- Savings from a single complaints body, compared to the current system.
  These are suggested by the bottom up costing of the OLC as arising through the rationalisation of numerous complaints functions into one body, and savings in indirect costs.

Table 1: Complete regulatory system

Current cost	£81m
Combined cost of proposed model	
Chapter B functions (New oversight body and front-line functions)	£50.5m
Office for Legal Complaints	£23m
Discipline	£6m
Total	£79.5m

Chapter B costs

Table 2: Chapter B functions

Body	Notes	Estimated annual costs
Model A		
Legal Services Authority (excluding complaints and disciplinary functions)	(1)	£45m
Replacement cost of work previously done voluntarily	(2)	£2m
Total		£47m
Model B+		

Legal Services Board	(3)	£4.5m
Professional bodies' regulatory functions (excluding complaints and disciplinary functions)	(4)	£46m
Total		£50.5m

Notes and assumptions

(1) All of the current direct costs of regulatory activities would continue to be incurred by the LSA, without taking account of any potential efficiency savings.

Assumed saving of 10% of current indirect costs, as a result of realising some economies of scale in managing the infrastructure.

Includes the cost of a Chief Executive and Board with non-executive directors.

(2) As explained in Section 2, some time may continue to be given voluntarily and this time is not included here. Some may be replaced by senior management time or by advisory panels, the members of which receive a fee. The figure represents an estimate of this cost.

(3) Based on assumed headcount for the Legal Services Board of 55 staff and 14 Board members.

(4) Based on the current costs of carrying out these functions. Also includes the possible costs to professional bodies of segregating the governance of their regulatory and representative functions.

Chapter C costs

Table 3: Complaints

	Notes	Estimated annual costs
Current costs		
Oversight functions (LSO, LSCC)		£3m
Front-line functions		£26m
Total		£29m
Costs of proposed model		
Office for Legal Complaints	(1)	£23m

Notes and assumptions

(1) The LSO and LSCC would no longer be required under this model but parts of their roles have been included in the cost of the complaints body, represented by senior advisory time.

Based on assumed headcount for the Office for Legal Complaints of 360 staff and 9 board members.

Table 4: Discipline

	Notes	Estimated annual costs
Current costs		
Discipline	(2)	£6m

Notes and assumptions

(2) Discipline remaining with professional bodies. Based on the current costs of carrying out these functions.

This Review was commissioned by the Secretary of State for Constitutional Affairs and is published by the Independent Reviewer, Sir David Clementi.

Editorial notes: wherever 'he' appears in the text, both 'he' and 'she' should be read. Where quotations are included in the text and a reference is not given, the text is taken from the relevant response to the Consultation Paper. References to 'the General Council of the Bar', 'the Bar Council' and 'the Law Society' are to those bodies in England and Wales.

This Report and the Consultation Paper are also available on the Review website at:-

www.legal-services-review.org.uk

Further copies of this Report may be obtained from :-
Mrs Susan Samuel
Review Team

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Selborne House
54 – 60 Victoria Street
London SW1E 6QW

Tel: 020 7210 1454
Fax: 020 7210 2664

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DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of January 27, 2005 were confirmed.

MOTIONS - REAPPOINTMENTS

It was moved by Mr. Gold, seconded by Ms. Ross -

THAT Derry Millar be reappointed Chair of the Appeal Panel.

THAT Larry Banack be reappointed Chair of the Hearing Panel.

THAT Diana Miles be reappointed to the Ontario Bar Assistance Program Board of Directors for a term of one year expiring March 2006.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESS

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 24th, 2005:

Kweku Tawiah Ackaah-Boafo	Bar Admission Course
Michellene Ann Beauchamp	Bar Admission Course
Paul Keith Boultbee	Bar Admission Course
Ann Marie Christian-Brown	Bar Admission Course
Daniel Hordofa Dagago	Bar Admission Course
Pietro Della Sciucca	Bar Admission Course
Julie Marie Jeannine Gravelle	Bar Admission Course
Peter Robert NicholasHarrison	Bar Admission Course
Celine Jing Jing Hwang	Bar Admission Course
Linda Vivian Joe	Bar Admission Course
Rakesh Mohan Joshi	Bar Admission Course
Selwyn Andrew Pieters	Bar Admission Course
Mary Josephine Renaud	Bar Admission Course
Lia Sara StellaRuccolo	Bar Admission Course
Benjamin Gérard Brian Tomlin	Bar Admission Course
Jin Zhu	Bar Admission Course

B.1.3. (b) Transfer from another Province - Section 4

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 24th, 2005:

Michael Richard Dunn	Province of British Columbia
Kerri Anne Froc	Province of Saskatchewan
Gavin McNeill Grant	Province of Alberta
Thomas Walter Jarmyn	Province of Nova Scotia
Terrance Ian McAuley	Province of British Columbia
Ranjeet Singh Walia	Province of Alberta

ALL OF WHICH is respectfully submitted

DATED this the 24th day of February, 2005

It was moved by Mr. Hunter, seconded by Messrs. MacKenzie and Simpson, that the Report of the Director of Professional Development & Competence setting out the candidates for Call to the Bar be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the bar. Mr. Bourque then presented them to Mr. Justice Gerald F. Day to sign the rolls and take the necessary oaths.

Kweku Tawiah Ackaah-Boafo	Bar Admission Course
Michellene Ann Beauchamp	Bar Admission Course
Paul Keith Boultbee	Bar Admission Course
Ann Marie Christian-Brown	Bar Admission Course
Daniel Hordofa Dagago	Bar Admission Course
Pietro Della Sciucca	Bar Admission Course
Julie Marie Jennine Gravelle	Bar Admission Course
Peter Robert Nicholas Harrison	Bar Admission Course
Celine Jing Jing Hwang	Bar Admission Course
Linda Vivian Joe	Bar Admission Course
Rakesh Mohan Joshi	Bar Admission Course
Selwyn Andrew Pieters	Bar Admission Course
Mary Josephine Renaud	Bar Admission Course
Lia Sara Stella Ruccolo	Bar Admission Course
Benjamin Gérard Brian Tomlin	Bar Admission Course
Jin Zhu	Bar Admission Course
Michael Richard Dunn	Transfer, Province of British Columbia
*Kerri Anne Froc	Transfer, Province of Saskatchewan
Gavin McNeill Grant	Transfer, Province of Alberta
Thomas Walter Jarmyn	Transfer, Province of Nova Scotia
Terrance Ian McAuley	Transfer, Province of British Columbia
Ranjeet Singh Walia	Transfer, Province of Alberta

*Kerri Anne Froc, a transfer candidate, was not in attendance and was not called to the bar.

REPORT OF THE TASK FORCE ON EMPLOYMENT OPPORTUNITIES FOR ARTICLING STUDENTS

Re: Terms of Reference

Ms. Carpenter-Gunn presented the Report of the Task Force on Employment Opportunities for Articling Students.

Task Force on Employment Opportunities for Articling Students
February 24, 2005

Report to Convocation – Terms of Reference

Task Force Members:
Kim Carpenter-Gunn, Chair
Andrea Alexander
Constance Backhouse
George Hunter
Paul Copeland
Laurie Pawlitza
Joanne St Lewis

Purposes of Report: Decision

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

OVERVIEW OF POLICY ISSUE
TERMS OF REFERENCE

Request to Convocation

1. Convocation is requested to approve the terms of reference for the Task Force on Employment Opportunities for Articling Students, appearing at paragraph 12 on page 5.

Summary of the Issue

2. On September 23, 2004, Convocation approved the creation of the Task Force on Employment Opportunities for Articling Students. At its second meeting on January 27th, 2005, the Task Force agreed on terms of reference for its work, which are submitted to Convocation for approval in this report.

THE REPORT

Terms of Reference/Committee Process

3. The Task Force held its first meeting on November 25th, 2004. Task Force members in attendance were Kim Carpenter-Gunn (Chair), Andrea Alexander, Laurie Pawlitza, Constance Backhouse, and Paul Copeland. Diana Miles, Josée Bouchard and Julia Bass, Law Society staff, also attended. At that meeting, the terms of reference for the Task Force were discussed and staff members were requested to prepare a draft for consideration.

4. The Task Force next met on January 27th, 2005. Task Force members in attendance were Kim Carpenter-Gunn (Chair), Andrea Alexander, Laurie Pawlitza, Connie Backhouse, George Hunter and Joanne St Lewis. Diana Miles and Sophia Sperdakos, Law Society staff, also attended. At that meeting the draft terms of reference were approved for submission to Convocation.

5. The Task Force is reporting on the following matter:

For Decision
- Terms of Reference

A. INTRODUCTION

6. On September 23, 2004, in recognition of concerns expressed in the media about whether the number of unplaced articling students is increasing, Convocation approved the creation of the Task Force on Employment Opportunities for Articling Students ("the Task Force"). The members of the Task Force are Kim Carpenter-Gunn (Chair), Andrea Alexander, Connie Backhouse, Paul Copeland, George Hunter, Laurie Pawlitza and Joanne St Lewis.

7. The Task Force met on January 27th, 2005 and prepared terms of reference for Convocation's approval.

B. BACKGROUND

8. The Law Society has determined that there are concerns about the placement rate for students seeking articling positions. At the same time, comparable statistics are difficult to obtain because of changes to the format and timing of the Bar Admission Course, the recent increase in the number of law school places and possible changes to the employment preferences of students arising from the increases in law school tuition fees.

9. It is therefore timely to consider whether new baselines need to be established to determine the success rate of students in obtaining employment, and whether the Law Society's existing substantial range of supports to students should be augmented.

10. Under the previous reforms to the bar admission process and under the current proposals for a new licensing process, articling remains a key feature of the professional development process for new lawyers. On this basis, the Task Force will undertake a review of the Society's activities in this area.

C. PROPOSED TERMS OF REFERENCE

11. The Task Force considered the following in framing its terms of reference:

- The preliminary reports considered by the Task Force do not indicate any drastic change to the placement rate for students over the last few years.
- The Law Society will need to consider the role of other major stakeholders such as the law schools, the law firms and government departments that provide a large number of articling positions.
- The Task Force should build on and not duplicate work already being undertaken by other bodies in the Law Society, such as the Task Force on Small Firms and Sole Practitioners, the Professional Development and Competence Department and the Equity Initiatives Department.

12. Based on the above considerations, the following terms of reference are presented for Convocation's approval: Whereas articling remains a fundamental component of the licensing process for lawyers, the Task Force proposes to examine and, if appropriate, make recommendations to Convocation on the following:

    1. The trends in student placement rates over the last few years and whether the Law Society's current statistical tracking of the situation is sufficient to identify and assist students who may be disadvantaged by the current system;

    2. Whether there is a role for the Law Society in,

        a. encouraging the creation of new articling placements by means of partnerships with,

            i) other legal organizations to encourage the creation of placements addressing student interest in social justice and access to justice issues,
            ii) law firms outside major metropolitan areas to support the development of new/joint/alternative articling placements in a wider geographic area;

        b. Working with the law schools to assist students in the early stages of law school with information, precedents and training on how to establish oneself in the market, how to develop and present a CV, how to have a successful interview, etc.

    3. The current supports provided by the Law Society to students seeking placements and whether these supports could be improved, including the Law Society's current communication activities directed at students, and whether further steps are appropriate to improve the information available to students about the articling job market.

    4. Whether the Law Society should provide further specific supports to students from equity–seeking groups to address concerns identified by the Task Force.

13. The Task Force will use any existing reports in its work and, if necessary, will conduct additional research and consultation on the issues it has identified for study. This may include consultation with other benchers and non-benchers, as appropriate, to obtain the views of those who have an interest in and are able to contribute to the Task Force's work.

14. The Task Force anticipates that its expenses for research or consultation will be such that funds allocated for such purposes within the budget of Policy and Tribunals ($100,000 annually) will be sufficient.

15. The Task Force will provide interim reports to Convocation as needed.

16. The Task Force will aim to conclude its work and prepare a final report to Convocation by October 2005.

.....

It was moved by Ms. Carpenter-Gunn, seconded by Ms. Pawlitza, that Convocation approve the terms of reference for the Task Force on Employment Opportunities for Articling Students as follows:

"Whereas articling remains a fundamental component of the licensing process for lawyers, the Task Force proposes to examine and, if appropriate, make recommendations to Convocation on the following:

1. The trends in student placement rates over the last few years and whether the Law Society's current statistical tracking of the situation is sufficient to identify and assist students who may be disadvantaged by the current system;

2. Whether there is a role for the Law Society in,

    a. encouraging the creation of new articling placements by means of partnerships with,

        i) other legal organizations to encourage the creation of placements addressing student interest in social justice and access to justice issues,
        ii) law firms outside major metropolitan areas to support the development of new/joint/alternative articling placements in a wider geographic area;

    b. working with the law schools to assist students in the early stages of law school with information, precedents and training on how to establish oneself in the market, how to develop and present a CV, how to have a successful interview, etc.

3. The current supports provided by the Law Society to students seeking placements and whether these supports could be improved, including the Law Society's current communication activities directed at students, and whether further steps are appropriate to improve the information available to students about the articling job market.

4. Whether the Law Society should provide further specific supports to students from equity–seeking groups to address concerns identified by the Task Force.

Carried

REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Re: Licensing Process - Final Design Approval

Mr. Hunter presented the Report of the Professional Development, Competence & Admissions Committee.

Professional Development, Competence & Admissions Committee
February 24, 2005

Report to Convocation

Purpose of Report: Decision

Committee Members
George D. Hunter (Chair)
Gavin A. MacKenzie (Vice-Chair)
William J. Simpson (Vice-Chair)
Robert B. Aaron
Peter N. Bourque
Kim A. Carpenter-Gunn
E. Susan Elliott
Alan D. Gold
Gary Lloyd Gottlieb
Laura L. Legge
Robert Martin
Bonnie R. Warkentin

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

LICENSING PROCESS –FINAL DESIGN APPROVAL

Request to Convocation

1. That Convocation, having approved in December 2003 the model for the new Licensing Process for admission to the Law Society of Upper Canada, approves the design of that model, as fully described in the Information reports listed in paragraph 8 below, and summarized in Appendix 1 to this report.

Summary of the Issue

2. In December 2003 Convocation approved a model for a new Licensing Process for admission to the Law Society of Upper Canada, to begin in 2006. The three components of the process that Convocation approved are:

   a. A skills and professional responsibility program and assessments;
   b. 2 licensing examinations: a barrister examination and a solicitor examination, each including a professional responsibility component; and
   c. the continuation of the articling program.

3. The Committee was to return to Convocation with the proposed design of the components for Convocation's approval. Since December 2003 the design of the new Licensing Process has been ongoing, with Convocation receiving detailed information reports on the progress of various design components in June 24, 2004 (Skills and Professional Responsibility competencies and Licensing Examination competencies), September 23, 2004 (Licensing Examinations), November 25, 2004 (Articling) and

January 27, 2005 (Skills and Professional Responsibility Program). A summary of the proposed design of the components is set out at Appendix 1 to this report.

4. The design work has now been completed.

THE REPORT

Terms Of Reference/Committee Process

5. The Committee met on February 10, 2005. Committee members George Hunter (Chair), Bill Simpson (Vice-Chair), Peter Bourque, Kim Carpenter-Gunn, Laura Legge and Bonnie Warkentin attended. Staff members Diana Miles and Sophia Sperdakos also attended.

6. The Committee is reporting on the following matter:

Policy – for Decision

- New Licensing Process – Final Design Approval

POLICY – FOR DECISION

NEW LICENSING PROCESS – FINAL DESIGN APPROVAL

7. In December 2003 Convocation approved a model for a new Licensing Process for admission to the Law Society of Upper Canada, to commence in 2006. The three components of the process that Convocation approved are:

   a. A mandatory attendance skills and professional responsibility program and assessments;
   b. 2 licensing examinations: a barrister examination and a solicitor examination, each including a professional responsibility component; and
   c. The continuation of the articling program.

8. The Committee was to return to Convocation with the proposed design of the components for Convocation's approval. As the Committee developed each design component it provided detailed information reports to Convocation:

   a. In June 2004 Convocation received a report setting out the competencies that will underlie the new process;
   b. In September 2004 Convocation received a report on the blueprinting portion of the Licensing Examination development process;
   c. In November 2004 Convocation received a report on enhanced articling educational supports and the length of the articling term. In addition, Convocation was advised of the Director of Professional Development and Competence's plan to establish advisory groups to provide ongoing annual assessment of the examination process and the skills and professional responsibility component of the process; and

d. In January 2005 Convocation received a report on the proposed curriculum plan for the skills and professional responsibility program, including the proposed length of the program.

9. A summary of the design described in the reports referred to above is set out at Appendix 1.

10. To date, over 1700 lawyers in Ontario have had substantial input into the development of the new Licensing Process. Lawyers will continue to be substantially involved in the process over the coming months.

11. To complete Convocation's consideration and approval of the policy components of the new Licensing Process, the Committee seeks approval of the design for the Licensing Process, as fully described in the information reports listed in paragraph 8 above, and summarized in Appendix 1.

Request to Convocation

12. That Convocation, having approved in December 2003 the model for the new Licensing Process for admission to the Law Society of Upper Canada, approves the design of that model, as fully described in the information reports listed in paragraph 8 above, and summarized in Appendix 1 to this report.

APPENDIX 1

LICENSING PROCESS FOR ADMISSION
TO THE BAR IN ONTARIO

Prepared for:
Convocation

Prepared by:
Diana Miles, Director
Professional Development & Competence
416-947-3328
dmiles@lsuc.on.ca

February, 2005

Executive Summary

1. Design and development of the components of the new Licensing Process began immediately following Convocation's approval in December 2003. The three components are:

a) Mandatory Skills and Professional Responsibility Program;

b) Licensing Examinations: Barrister Examination and Solicitor Examination;

c) Articling Term.

2. The first step in the design process was to establish the competencies that would be tested or otherwise assessed in the Licensing Process. Competencies are the knowledge, skills, abilities, attitudes and judgment to be expected of an entry-level lawyer.

3. The involvement of the profession has been a key component in determining the core competencies for entry-level lawyers. Involving subject matter experts has brought a comprehensive and essential perspective to competency identification.

4. To facilitate the development process, lawyers from across the province were recruited to participate in competency development teams, focus groups, surveys and examination teams. These lawyers assisted the Law Society to define and confirm (validate) the competencies that will be instructed, tested or otherwise supported.

5. To date, 1782 lawyers from across the province have been involved in the development of the various components of the new Licensing Process.

6. Many of these lawyers were asked to participate in substantial group work, such as advisory/development groups, focus groups and panels. This type of work involved many days of focused effort on the part of the lawyers who participated.

7. Specifically, the lawyers who have participated to date have supported the following activities:

a) Defining the substantive and professional responsibility competencies for the licensing examinations: 19 lawyers met in two groups for four consecutive full days per group;

b) Undertaking the first confirmation (validation) of the competencies for the licensing examinations: 46 lawyers met in six groups for one full day per group;

c) Undertaking the second confirmation (validation) of the competencies for the licensing examinations: 421 lawyers spent two and one-half hours per lawyer;

d) Undertaking the third confirmation (validation) of the competencies for the licensing examinations: 12 lawyers met in two groups for two full days per group;

e) Reviewing and weighting competencies and establishing blueprints for the examinations: 14 lawyers met in two groups for four consecutive full days per group;

f) Examination question writing: 103 lawyers met in nineteen subject matter specific groups for three consecutive full days per group;

g) Assessing and reviewing the examination questions to confirm their validity: 65 lawyers spent three hours per lawyer;

h) Defining the skills and professional responsibility program competencies: 39 lawyers met in seven groups for one full day per group;

i) Confirming (validating) the skills and professional responsibility competencies: 50 lawyers representing five groups of differing firm sizes and the judiciary spent four hours per lawyer/judge;

j) Participating in a survey to confirm the length of Articling term and define Articling enhancements: 1013 lawyers spent two hours per lawyer.

8. To date, these lawyers have spent over 7300 business hours assisting the Law Society to validate the framework for the new Licensing Process.

9. Participating lawyers reached a full consensus on every component of the design and development work that required group work and debate on the issues.

10. The amount of time and effort that members of the Law Society have devoted to this process is unprecedented. Members' dedication to supporting the licensing framework for the profession has substantially enhanced the quality of the development process for the new Licensing Process.

11. Attached at Appendix A to this report are various comments that lawyers who participated in the design have offered about their experience in the development process.

12. Information about the Licensing Process has been disseminated widely and will continue to be provided as development continues. In addition to the continuing work with the profession, the following steps to inform law school students, law school staff and the profession have been taken:

a) An information bulletin including questions and answers about the new Licensing Process was circulated to law schools students, Deans of the law schools, career development officers at the law schools, managers of students, Articling and associates at law firms across Ontario, and to education staff at law societies across Canada;

b) On October 1, 2004, December 8, 2004 and January 28, 2005, the bulletin was updated and re-circulated to reflect information provided in each of the PDC&A Committee's Reports to Convocation on the design of the Licensing Process;

c) All information is also posted on the Law Society Web site. This information is critical for law school students who are already making plans to apply to enter the Licensing Process;

d) PD&C Department staff have also visited each Ontario law school at least twice since Convocation's approval in December 2003 to outline the new process and respond to questions.

Attached at Appendix B is the most recently circulated bulletin (January 2005).

13. An ongoing communication and information plan has been developed to support the implementation of the new Licensing Process. These communications will provide continuing updates about the new system to candidates and members.

THE REPORT

The Licensing Process: Design and Development

14. The new Licensing Process for admission to the bar in Ontario is scheduled to be implemented in 2006. To meet this deadline, design and development has been ongoing since January of 2004.

15. A synopsis of the final design for each component follows. Convocation has already received detailed information in its Convocation materials on the work undertaken to support development and decision-making related to each component: June 24, 2004 (Skills and Professional Responsibility competencies and Licensing Examination competencies), September 23, 2004 (Licensing Examinations), November 25, 2004 (Articling) and January 27, 2005 (Skills and Professional Responsibility Program).

Component 1: Skills and Professional Responsibility Program

16. In December 2003 Convocation approved a mandatory Skills and Professional Responsibility Program, the framework of which was contained in the report to Convocation dated October 23, 2003. The only outstanding issue for Convocation's later approval was the length of the program, which was to be determined as part of the design and development process.

17. In summary, the format of the Skills and Professional Responsibility Program design is as follows:

- Begins in May, approximately one full week after law school, which allows candidates to take advantage of OSAP (Ontario Student Assistance Program) support;
- Will be offered in Windsor, London, Ottawa (English and French) and Toronto;
- Five weeks in length;
- Four hours per day;
- Attendance is mandatory;
- Employs a problem based learning method focusing on teamwork using file scenarios that reflect the realities of daily practice;
- Provides instruction and testing on practice skills in both the solicitor and barrister environment, professional responsibility and ethics, and practice and client management;

- Includes assessments, assignments and other methods of developing and testing the knowledge, skills and abilities of the candidates throughout the program;

- Final scoring designations will be pass or fail along with commentary and input from assessors;

- A remedial week, which will be the week immediately following the program of instruction (week six), allows candidates who are unsuccessful on an assessment or assignment to reassess or resubmit their work and complete the program prior to Articling.

18. The competencies to be instructed and assessed in the Skills and Professional Responsibility Program were developed through a series of focus group discussions with members throughout Ontario in the spring of 2004.

19. The first draft of the competencies was further refined and validated using a panel or group consensus approach. This approach is used to achieve consensus among panels of practitioner experts and has been successfully used by other professions, including the judiciary, in order to determine essential skills and knowledge and to plan the teaching and development of professional standards.

20. The final version of the competencies and the priority of skills identified by the lawyer participants were consistently viewed as most important for a newly called lawyer to possess. These priorities form the core of the curriculum design plan.

21. Convocation received the final list of competencies for the Skills and Professional Responsibility Program for information on June 24, 2004.

22. There are two concepts upon which all curriculum design decisions for this Program are based:

    a) That future lawyers should be effective, self-initiated problem-solvers who are able to identify the elements of what they need to know and should be able to carry out a task, even if they are approaching it for the very first time; and

    b) That future lawyers should be cognizant and respectful of their obligations as professionals in the service of the public.

23. The learning objectives for this Program will be achieved using a problem-based learning method (PBL) in combination with other instructional methods such as self-directed learning, small group activities, teaching sessions, and web-based exercises. All of the learning activities will be designed to:

    a) provide the candidates with opportunities to increase their awareness of issues relating to ethics and professionalism;

    b) improve their ability to identify issues when they arise; and

c) develop their analytical skills in dealing with the issues they will confront in the practice of law.

24. Problem-based learning requires that candidates work collaboratively and efficiently to develop strategies for handling client matters. Each of the files developed for the Program will be designed to raise both explicit and implicit professional responsibility, ethical and practice management issues. Candidates will be expected to identify those issues as they arise and propose ways to deal with them that are consistent with the *Rules of Professional Conduct* and within their own ethical framework.

25. The focus on collaborative work in this Program will reinforce for all candidates the importance of establishing and maintaining relationships with colleagues in the legal profession regardless of the type of environment in which they will eventually practice – sole practice, small firm, mid-sized firm, large firm, in-house, government or other.

26. All PBL instructors involved in this Program will be practising lawyers. Prior to the commencement of the Program, all PBL instructors will receive comprehensive training on facilitation in a small group learning environment, group dynamics, conflict resolution, skills development and how to apply the assessment criteria consistently. Candidates will be asked to evaluate the instructors and constructive feedback will be provided to facilitate instructor improvements.

27. The defined competencies have been integrated into the design of the Skills and Professional Responsibility Program. The learning objectives can best be achieved in a program that is five weeks long and consists of half-day sessions. In keeping with Convocation's decision, attendance at the Program will be mandatory during the five weeks.

28. A sixth week will be built into the Program to enable candidates who are unsuccessful on assessments or assignments to redo the assessment or resubmit their work. This will ensure that all candidates have a full opportunity to successfully complete the Program without any uncertainty as to their standing as they enter the other components of the Licensing Process. Reassessments will be scheduled throughout the sixth week and candidates will attend only at the time of their scheduled reassessment. Reassessments will take approximately one hour.

29. Attached at Appendix C is an excerpt from the Curriculum Plan which was provided in full to Convocation, for information, in January 2005. The excerpt provides the Program overview including scheduling and structure and outlines a typical week of instruction.

Component 2: Barrister Examination and Solicitor Examination

30. In December 2003 Convocation approved the examination component of the Licensing Process. Candidates are required to pass two examinations, a Barrister Examination and a Solicitor Examination. There are no further approval issues related to this component for Convocation to consider.

31. The format of the Licensing Examinations will be as follows:

· Barrister and Solicitor Examinations will be offered three times per licensing year in June/July, November and March;

- Candidates may take the Barrister and Solicitor Examinations in the same examination period or separately in different examination periods;

- Examinations will consist of four-option multiple-choice questions;

- Questions are presented in two formats: independent items where the text that is provided is used to answer one question; case based items where the text provided is used to answer between four and ten items linked together by a scenario;

- Examinations will be open book;

- Each examination will be one day, or approximately 7 hours, in length;

- Reference materials will be provided to support study and will be given to candidates at the beginning of the licensing year (the first day of the Skills and Professional Responsibility Program);

- An Advisory Group of practising lawyers who are subject matter experts will set examination pass scores for each individual test question;

- Candidates will receive a pass or fail score on an examination;

- Unsuccessful candidates will receive an evaluation form that will identify their relative strengths and weaknesses in the major competency categories which will assist in preparation for taking the examination again;

- Articling Principals must permit candidates five uninterrupted business days to study for each examination, one business day to write each examination and one free day per examination for a total of fourteen business days. This requirement must form a part of the Articling Contract between firm and student-at-law. An uninterrupted business day is a day that is free from the obligations of Articling employment;

- Candidates will be allowed three years within which to pass the examinations (and complete all other components of the Licensing Process), for a potential total of nine sittings of each examination.

32. As in the case of the Skills and Professional Responsibility Program design, many practising lawyers have been involved in the development of the licensing examinations. In the spring of 2004, approximately 500 lawyers from the profession participated in various group and survey activities to define and validate the entry-level substantive and professional responsibility competencies to be tested in two licensing examinations, a Barrister Examination and a Solicitor Examination.

33. The focus of this assessment was to ensure that the competencies that the examinations would test are those that:

a) have the most direct impact on public protection;
b) influence effective and ethical practice; and

c) can be measured reliably and validly by the question format used in the examinations.

34. Convocation received the final list of competencies, for information, on June 24, 2004.

35. Using the validated competencies as the starting point for developing a Barrister and a Solicitor Examination, lawyers then worked with expert facilitators to derive a blueprint for each examination, ensuring that:

a) what is being assessed is replicated as closely as possible from examination to examination; and

b) all test questions on an examination are linked to validated competencies.

This activity resulted in the examination format decisions outlined above in paragraph 30, among others.

36. Examination question development began immediately following the presentation of the Blueprint Document to Convocation in September 2004. Examination question writers are lawyers. They have been invited to join the process of drafting questions to measure the established and validated competencies.

37. Examination question writing for the first sitting of the examinations was completed mid-February 2005. The next step in the process is to conduct an examination question assessment with practising lawyers to revisit every question and confirm validity and fairness. Approved questions will then be placed in the examination bank and will be re-evaluated annually.

38. In support of the preparation for Licensing Examinations as well as ongoing skills development and Articling activities, the Law Society's e-Learning site will be enhanced and will offer a wide range of learning supports. These supports will include archived video presentations on skills, substantive and procedural areas, precedent documents and practice examination questions. Resources on the site will address the knowledge, skills and abilities required of entry-level lawyers in support of their licensing activities.

Component 3: Articling Term and Enhancements

39. In December 2003 Convocation approved a continuation of the current Articling system with enhancements. The only outstanding issue for Convocation's subsequent approval was the length of the Articling term.

40. As part of the Law Society's commitment to ensure that candidates involved in Articling continue to receive relevant and practical educational supports in the new Licensing Process and during their articles, consultants were retained to conduct two surveys, one to past and current principals and one to recently called members. The surveys were conducted in July 2004.

41. The overall objectives of the surveys were to:

a) investigate impressions of the Articling experience, and in particular, to assess the sufficiency of the ten month Articling term; and

b) assess the usefulness of current and proposed educational supports to enhance the Articling experience.

42. The survey results indicate that a strong majority of principals (78%) and of recently called members (84%) feel that the current ten month Articling term is sufficient and that the Articling experience is a valuable process in preparing candidates for the practice of law.

43. On that basis the program design recommends that the Articling term be ten months in length, including two weeks paid vacation.

44. The Articling contract between principal and candidate will include provision for the candidate to receive the required uninterrupted study time to prepare for the licensing examinations that are designed to be written during the Articling term.

45. In both surveys, members were also provided with a list of proposed educational enhancements and asked to indicate those they believe would be most useful in strengthening the Articling experience and preparing candidates for the practice of law.

46. The preferred enhancements members suggested were:

- Making available precedents and supplemental materials related to skills development;
- Connecting candidates with a skills mentor who would be designated to provide ongoing support throughout the Articling process;
- Creating CLE programming suitable for Articling and early practice stages;
- Continuing to supplement the Law Society's e-Learning site to provide self-study on demand webcasts, supplementary documents, precedents, checklists and other supports;
- Providing materials and/or seminars on expectations in the workforce, dealing with difficult people, taking direction, eliciting quality feedback and other similar tasks;
- Offering CLE programs on the business aspects of law firms targeted to candidates and new lawyers.

47. The Law Society already provides many of these supports. The Education Support Services Office offers placement support in the form of job search skills workshops, a job postings Web site, one-on-one career counseling and a mentorship program. Education Support Services also provides materials on personal and professional development. For example, there are resources on stress management, meeting a Principal's expectations and a guide for Principals on giving constructive feedback. These important supports will be continued and enhanced to ensure that candidates receive the assistance they require to move through Articling and other Licensing Process components.

48. In addition, a number of continuing legal education programs geared specifically to newly called lawyers are offered on a regular basis, for instance, the New Lawyer Experience Workshop. There are also several other resources available for lawyers to "bridge the gap" between licensing and actual practice such as the Opening Your Practice Workshop, Bookkeeping Guide, Practice Management Guidelines, and other tools.

49. The e-Learning site will also be enhanced with Articling supports and will continue to be an easily accessible online tool for both candidates and Principals to find information that will add value to the Articling term.

50. The PD&C Department will continue to build on existing educational supports for candidates in the Licensing Process. Candidates will have access to tools and resources to assist them in their preparation for entry into the profession and in their first few years of practice.

51. Attached at Appendix D is the summary information from each of the two Articling Surveys outlining the findings on the sufficiency of the 10 month Articling term and the preferred enhancements.

Ongoing Evaluation and Development of the Licensing Process

52. A standardized set of evaluation activities will be instituted leading up to and during the implementation of the first licensing year for the new Licensing Process.

53. The following outlines the ongoing annual evaluation that will take place in the Licensing Process.

54. Advisory Groups of between eight and ten subject matter expert lawyers will be established for the Skills and Professional Responsibility Program, the Barrister Examination and the Solicitor Examination. These three groups will meet at various times each year to:

    a) review the competencies that are being assessed or tested and confirm ongoing relevance and importance of those competencies;

    b) provide input and feedback on developments in the profession and impact on the validated competencies for entry-level lawyers;

    c) review the reference materials and curriculum used to support licensing preparation and provide input on improvements or revisions in accordance with required competencies;

    d) confirm the pass scores for all test questions and examinations and define the evaluation criteria for assessments and assignments;

    e) provide input on and assist with recruiting lawyers to support the continuing development of the Licensing Process, including question writing and all validation activities required to maintain the examination bank; skills and professional responsibility file scenario development; reference materials developers; appraisals of test questions and

instructional content; supplementary online educational resources; and other requirements.

55. With respect to the Skills and Professional Responsibility Program and the Barrister and Solicitor Examinations, candidate results will be presented to the PDC&A Committee for review and consideration on an annual basis. PDC&A Committee continues to work closely with the Equity and Aboriginal Issues Committee on matters related to candidate results. This assessment will include:

    a) Review and analysis of overall candidate results in the Licensing Process and specifically for candidates from equality-seeking communities;

    b) Comparative tracking of candidate results year to year;

    c) Review and consideration of changes in the profession that may impact the presentation or organization of the process.

56. The Articling program will continue to assess and enhance supports based on input that Principals and candidates provide. Candidates are and will continue to be surveyed three times per licensing year on issues related to the Articling experience. The three surveys are:

    a) Hiring Practices Survey: addressing perceptions relating to hiring practices, discrimination in hiring and general input on the overall hiring process;

    b) Articling Feedback Survey: assessing overall perceptions of the Articling experience including such issues as the amount of time spent in rotations, the type and quality of workload;

    c) Placement Report: queries on placement locations, hire back practices, and similar matters.

57. The PD&C Department will also continue to track and to benchmark all licensing activity year to year. This information is presented to Convocation on a quarterly basis.

Continuing Involvement of the Profession

58. The development of the new Licensing Process would not have been possible without the assistance of members of the profession. The willingness of Ontario lawyers to participate in this activity has been outstanding and the Law Society is grateful to all those who have given their time to assist.

59. The input and support of members will be required on an ongoing basis. Every year the Licensing Process will require the assistance of lawyers from across the province to:

    a) instruct in the mandatory Skills and Professional Responsibility Program to be held in Windsor, London, Ottawa (English and French) and Toronto;

    b) develop required materials to update the Skills and Professional Responsibility Program and the reference materials for the Barrister and Solicitor Examinations;

c) participate in Advisory Groups as appointed and provide input and assistance with the continuing development of each of the components;

d) develop and validate new examination questions and skills, professional responsibility and practice management assessments and assignments;

e) act as tutors to support candidates;

f) act as mentors to support candidates;

g) act as Principals for the Articling term.

60. It is anticipated that the PD&C Department will work with a minimum of 400 lawyers during a licensing year to support licensure. This does not include Articling Principals who number over 1000 every year. This joint effort, combined with continuing liaison with legal groups and associations, will ensure that the Licensing Process continues to validly confirm entry-level competence.

Scheduling of the Licensing Process

61. The Licensing Process schedule for the 2006 - 2007 licensing year will be as follows:

Activity	Date
Law School completed	April 28, 2006
Skills and Professional Responsibility Program ▪ 5 weeks of instruction and assessments	May 8 to June 9, 2006 inclusive
Available to begin Articling	June 12, 2006
Examination dates ▪ Solicitor Examination ▪ Barrister Examination ▪ Solicitor Examination ▪ Barrister Examination ▪ Solicitor Examination ▪ Barrister Examination	 June 26, 2006 July 6, 2006 November 6, 2006 November 15, 2006 March 19, 2007 March 28, 2007
Completion of articles ▪ includes required examination preparation time of 14 business days and two-week vacation	May 3, 2007
Activity	Date
Anticipated Call to the Bar dates in 2007 ▪ subject to change based on Convocation's schedule and candidate requirements ▪ scheduled to provide call dates as soon after completion of Licensing Process as possible ▪ Regular Convocation sittings can accommodate a maximum of 60 candidates	 Thursday, May 24 Regular Convocation Tuesday, June 12 Ottawa

▪ Large calls in Toronto accommodate up to 250 per call	Monday, June 18 London Thursday, June 21 Toronto Friday, June 22 2 calls - Toronto Thursday, June 28 Regular Convocation

Financial Implications

62. The financial implications of the new Licensing Process format as set out in this report have been assessed. The licensing fees are anticipated to be in the range of $2,600, reduced $1,800 from the current fee of $4,400. This savings is coupled with a reduction in the length of the process by two months which permits candidates to be called to the bar and eligible for employment or to open their practices sooner.

63. This licensing fee calculation is based on an assumption that the Law Foundation of Ontario will provide a continuing grant of no less than $1million to support access to legal education and that members will continue to support the Licensing Process by a comparable amount through membership fees.

64. The Skills and Professional Responsibility Program will be offered immediately after law school and the Ministry of Training, Colleges and Universities has confirmed that candidates will be eligible for OSAP assistance to support the Program fee.

65. The Law Society and Law Society Foundation will continue to offer bursaries and the Repayable Loan Allowance.

66. The final budget for the launch of the Licensing Process in 2006 including proposed licensing fees will be presented in the normal course of the budgeting process in the Fall of 2005 for Convocation's approval.

APPENDIX A

LICENSING PROCESS DEVELOPMENT

TESTIMONIALS

"I was fascinated by the competency profile development process. The group brainstorming was very good and very detailed. The process commenced by defining seven competency categories and sub-categories for solicitors and concluded with an exhaustive list of 206 competencies for entry-level solicitors and barristers. I was particularly impressed with how quickly the consultants picked up on the legal terms and asked questions when things were

unclear. I also felt that they paid attention to details such as having us identify statute sections and ensuring that we were consistent with the information throughout the profile.

I certainly feel the consensus we achieved on the competencies was driven by the group. I am very sorry that I was not able to participate in the Blueprint Development meeting due to other commitments. I am pleased that we are no longer tinkering with the bar admission course but embarking on a fresh new process."

Donald V. Thomson (Solicitor Competency Profile)
Walker Ellis, Toronto

"I thought there was a good cross section of practitioners and good expertise to help build the competency model. The exam consultants were very efficient in getting the work done. They were quite qualified and kept us focused and moving forward – not an easy task with a group of lawyers. It was good that they were not lawyers because they brought in an outside perspective in terms of 'is this competency model workable?' and 'will it make sense to others?' I have no concerns about the process and the model we developed."

May Cheng (Barrister Competency Profile)
Fasken Martineau, Toronto

"In March of 2004, I was invited to discuss entry-level skills competencies, professionalism and ethics related to the new licensing process for lawyers. I found the experience to be valuable, in that it provided me with an opportunity to have meaningful input into the substantial changes that were being made with the licensing process for new lawyers. It was clear to me as one of the participants in the process that a real attempt was being made to get meaningful input from lawyers from many different aspects of the practice, and this included sole practitioners and those practising in firms.

From my review of the final list of skills that has been completed, the involvement of lawyers was more than simply lip service to the profession, and has resulted in concrete, meaningful skill sets that will be emphasized and required of new lawyers. I will be watching with great interest to see how the new licensing process develops, in light of the profession's input through the assistance of the facilitators provided by the Law Society."

J. Douglas Shank (Skills & Professional Responsibility Focus Group)
Cheadles LLP, Thunder Bay

"It was a pleasure and an honour to participate. I think that by and large, the process used to identify and describe the competencies worked well. It was important - and a critical part of the success of this task, I believe – that there be a group of lawyers with very different practice experiences, which we had. The facilitators were important too. They were able to efficiently synthesize our discussions; help articulate the competencies; describe the educational

objectives and needs to us so that we could take them into account; and ensure we used consistent language to capture the competencies in a way that allowed for defensible and rational testing. They picked up quite quickly on legal language and brought the necessary professional educational expertise to the exercise that the lawyers did not have. I hope the results will be useful for the profession."

Douglas Watters (Barrister Competency Profile)
Ministry of Environment, Toronto

"I enjoyed being able to provide input at this stage. Reviewing and discussing the survey results was a great opportunity to reflect on what one does in every day practice. The solicitor blueprint group was a good group. I liked the fact that I was able to draw upon my own practice experience as well as give objective input.

I have never given it much thought on why and how we assess people. I was very impressed with the knowledge and expertise of the facilitators and how they explained assessment processes. It gives me great satisfaction that our viewpoints were heard. After going through this experience, the way we will be going about testing people will have a lot more integrity. I believe the end result will be an excellent process."

Wendy O'Neill (Solicitor Blueprint)
Chong & O'Neill, Kingston

"I have spoken very positively about my experience to others. In fact, I was honoured to have been asked to participate. The Blueprint Panel had very strong individuals on it and while we weren't afraid to state our opinions, we did reach consensus on the important issues. The facilitators were excellent and provided the necessary guidance the panel required to ensure a fair and defensible examination.

It was an intense and exhausting experience. I don't think the process could be improved upon. I would very much like to continue being involved in the development of the new examinations."

Henny Harmsen (Barrister Blueprint)
Legal Aid Ontario, Kingston

"It was a great process. The facilitators know a lot about the psychological aspects of testing and getting a room full of lawyers to agree on everything was amazing. If I had had any hesitancy on what we were asked to do, I would have spoken out or left. I think this new process is a good shift in what we are doing now."

Jeffery G. Hewitt (Barrister Blueprint)
Mnjikaning First Nation, Rama

"It was my pleasure to be a part of the new Licensing Process in which we worked to develop skills and professional responsibilities. The experience was very enriching. Both of the facilitators stimulated meaningful discussions and guided the participants through this important task.

The Law Society of Upper Canada, by choosing this method of determining the transition to new practices and procedures, has set a valuable precedent of transparency. Those of us who have not had the chance to make a direct contribution before, were given the opportunity to be a part of change. Thank you."

Marion Korn (Skills & Professional Responsibility Focus Group)
Queen Street Law Centre, Toronto

"I was very pleased to be asked by the Law Society of Upper Canada, my governing body, to participate on the Solicitors' Licensing Examination Blueprint Committee. The practitioners were respectful, competent professionals. The facilitators understood their function and provided the pointers to get us through the process to our destination. They had a thorough understanding of examination development and they were able to answer questions we had about testing and examinations in other professions as well. They had extensive knowledge in their area of expertise and were comfortable discussing the examination processes in the educational system at large, even at high school and university levels. I appreciated that expertise. My involvement in this part of the Licensing Examination Development process was a positive, enriching, learning experience."

Margarett R. Best (Solicitor Blueprint)
Sole Practitioner, Toronto

"Being involved in both the competency profile and the Blueprint sessions was a positive exercise. I was flattered to be asked and to be able to put in my 2 cents worth. It all seemed a little daunting at first but the facilitators had the ability to pace out the process. The facilitators were very professional, well organized, very open and easy to work with. They gave us just enough guidance but didn't influence the decisions we made. They deferred to the group on content issues and listened to alternative ideas. They have the knowledge and understand the science of assessments and testing. During the sessions I felt we were building something that is strong and we can defend it. I am confident that at the end of all of this, we'll have a fair process."

Raymond Leclair (Solicitor Competency Profile and Blueprint)
Kanata Research Park, Ottawa

"At first, the task of developing competencies seemed overwhelming. Through the facilitators' masterful management of the discussion, by posing appropriate and results-driven questions, yet giving each an opportunity to contribute, they were able to illicit relevant and useful information. This combined with their respect for the schedule and our time, allowed us to actually accomplish what we set out to do. It was a valuable experience."

The Blueprint process involved the equally difficult task of refining the results of the barrister survey. Here also, the consultants managed time effectively, allowing for comments, concerns and opinions to be heard. I was impressed with their ability to use the computer to track the discussion and record our thoughts directly into a working document. This allowed us to immediately appreciate the context in which each subject was being discussed and it greatly facilitated the progress of the task at hand. As in the competency development meeting, they

were respectful of time lines. The experience working with the group and the facilitators was very positive at both levels."

Josee Forest-Niesing (Barrister Competency Profile and Blueprint)
Lacroix Forest LLP, Sudbury

"I thoroughly enjoyed writing examination questions. It was very challenging, great group interaction and the exchange of ideas very good. I think the questions we drafted are very practical. The facilitator is very intelligent and competent and I think the fact he is not a lawyer is good. He had no biases and brought forth an objective viewpoint on what we were doing. I would like to come and do this again".

Alexandra Ngan (Item Writer)
Sole Practitioner, Toronto

"I'll admit that I was skeptical, but pleasantly surprised by this process. I was in a unique position given my academic and practice perspectives and teaching experience, and I wasn't sure whether this would all work. Because of the practice experience the people recruited to write the items brought to the table, they've been well positioned to ensure that the competencies are being tested at an entry level, and that the questions reflect both the reference materials and practice realities.

It helps that the facilitators are not lawyers. They bring an important perspective to the process and were able to extract themselves from the arguments about statues and procedure. Their focus on creating exam questions that test the competencies helped rein in the groups I worked with. And that was the key -- lawyers may know the law and what competencies are important, but don't necessarily know how to test on it."

Paul Paton (Item Writer)
Assistant Professor, Faculty of Law,
Queens University

"I was very pleased to participate in the session with your consultants respecting entry-level skills competencies, professionalism and ethics. I felt fortunate to have been asked to contribute my views, informed by a number of years of both government and private practice, to this exercise. The mix of experiences of the participating lawyers provided, I believe, a solid basis for the answers we proposed to the questions posed. We all had full opportunity to contribute, thanks both to the consultants and to the cooperative mood established from the outset (not always a feature of lawyerly discourse!).

It was a privilege to be able to make this contribution. There are no worthier objectives for the future of the legal profession than those raised by the questions we attempted to answer."

John B. Edmond (Skills & Professional Responsibility Focus Group)
Commission Counsel
Indian Claims Commission, Ottawa

APPENDIX B

LICENSING PROCESS INFORMATION BULLETIN

For 2006 Law School Graduates

Updated January 31, 2005

The Licensing Process

A competency-based Licensing Process for admission to the bar in Ontario will be implemented in May 2006. Professional competency is achieved through a combination of knowledge, skills, abilities and judgment. The focus of the Licensing Process is to ensure that candidates have demonstrated that they possess the required competencies at an entry-level in order to provide legal services effectively and in the public interest.

Structure

This Licensing Process will consist of four mandatory requirements:

1. Skills and Professional Responsibility Program with assignments and assessments
2. Barrister Licensing Examination
3. Solicitor Licensing Examination
4. Articling term (10 months)

You must successfully complete all mandatory requirements and submit all required documents in order to be eligible to be called to the bar.

Registration

If you plan to enroll in the Licensing Process in the 2006/07 licensing year, you will be required to register and complete, in sequence, the mandatory Skills and Professional Responsibility Program in May 2006 before the Articling Term. You will not be allowed to commence the Articling Term or write the licensing examinations unless you have completed the Skills and Professional Responsibility Program (certain exceptions apply, see the Q & A section in this Bulletin).

Application packages to enroll in the Licensing Process for 2006/07 will be available from the Law Society of Upper Canada's Office of the Registrar in the fall of 2005 and will be distributed at your law school.

The Skills and Professional Responsibility Program

The emphasis of the Skills and Professional Responsibility Program will be on building, developing and assessing skills that are essential for a lawyer in the first few years of practice. You will be expected to develop skills for client interactions, interviewing, writing, drafting, dispute resolution, managing a practice, and for identifying, analyzing and resolving legal and

ethical problems in a manner consistent with the appropriate professional conduct of a lawyer. You will be challenged to apply your analytical thinking and professionalism throughout the process.

Attendance at, and participation in all parts of the Skills and Professional Responsibility Program is mandatory. There will be a number of assignments and assessments to verify that a candidate has attained the necessary knowledge, skills, abilities, attitude and judgment for entry into the legal profession.

The Skills and Professional Responsibility Program will be offered once a year concurrently in Toronto, Ottawa, London and Windsor. The French Skills and Professional Responsibility Program will be held in Ottawa only.

The Licensing Examinations

The licensing examinations will consist of a self-study Barrister Examination and a self-study Solicitor Examination. The competencies tested are those required for entry-level practice, that have the most direct impact on the protection of the public and that influence an effective and ethical practice.

The Barrister Examination will assess competencies in the following categories: ethical and professional responsibility, knowledge of the law (public law, criminal procedure, family law and civil litigation) and establishing and maintaining the barrister-client relationship.

The Solicitor Examination will assess competencies in the following categories: ethical and professional responsibility, knowledge of the law (real estate, business law, wills, trusts and estate administration and planning) and establishing and maintaining the solicitor-client relationship.

It is expected that each examination will be a full day in length. The Law Society will provide you with the necessary reference materials to study for the examinations. You will be permitted to mark the materials and bring them to the examinations. The examinations will also be available in French.

The licensing examinations will be offered in late June/early July, November and March of each licensing year. The examinations can be written during your articling term.

You and your Articling Principal will agree on the scheduled examination session in which you will write the licensing examinations. You will be allowed five (5) uninterrupted business days to study for each examination, 1 day to write the examination and 1 free day. This designated time (which totals 14 business days) will be in addition to the articling term and must form part of the articling contract.

The academic requirements to be eligible to write the licensing examinations as a student-at-law are as follows:

a) Graduation from a common law program, approved by the Law Society, in a university in Canada; or
Certificate of Qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Committee of Canadian Law Deans; and

b) Attendance at the Skills and Professional Responsibility Program.

The Articling Term

The articling term will consist of 10 months, which includes up to two (2) weeks of vacation and occurs after completion of the Skills and Professional Responsibility Program. (The 10-month term is subject to Convocation's approval on February 24, 2005). It is your responsibility to ensure that you article with an approved Principal who has filed the required education plan with the Law Society. More information on the articling process will be provided in the application package.

Frequently Asked Questions

1. When will the Skills and Professional Responsibility Program be offered and how long is it?

   It will be offered once a year starting in early May 2006 and it will be approximately five (5) weeks long, half-day sessions, Monday to Friday. (Length of the Program is subject to final approval of Convocation on February 24, 2005).

2. Can I register for and attend the Skills and Professional Responsibility Program if I have not secured articles?

   Yes.

3. Why is completion of the Skills and Professional Responsibility Program a prerequisite to commencing articles?

   The Program is designed to provide you with basic entry-level lawyer skills that you will build upon and enhance during your articling term and into your first years in practice. During the Program you will have many opportunities to participate in problem-based learning, practice various skills and receive constructive feedback.

   The scheduling of the Skills and Professional Responsibility Program is timed to allow candidates to take advantage of continued OSAP assistance to help cover the cost of the Program.

4. What do I do if I cannot attend on the start date of the mandatory Skills and Professional Responsibility Program because I have not completed my law school classes or examinations?

   We are aware that some candidates are involved in joint degree or co-operative programs, academic exchanges or other activities that may require their attendance going beyond the anticipated early May 2006 start date of the Skills and Professional Responsibility Program. We are supportive of such endeavours and we realize that the start date of the Program may pose some difficulty for these candidates.

   If you feel that you are going to miss more than two full days of the mandatory Skills and Professional Responsibility Program, you should make an application

in writing to the Office of the Registrar at the Law Society of Upper Canada that you would like to take the Program out of sequence. This means that you may then be allowed to commence articles first and take the Program second, in May 2007. You should make this request well in advance of the May 2006 start date of the Licensing Process and preferably at the same time you submit your application as a candidate.

Your request to take the process out of sequence should indicate to the Registrar the reason why you cannot attend the Skills and Professional Responsibility at the scheduled time. As the Program is designed to be a prerequisite to commencing articles, we will require a written confirmation from your Articling Principal that he/she understands the circumstances of your request to take the Program out of sequence and that he/she has agreed to allow you to commence articles without the benefit of the Skills and Professional Responsibility Program.

We strongly suggest that if you must take the Skills and Professional Responsibility Program out of sequence due to one of the above-noted circumstances, you should arrange to commence your articles by June 15, 2006 at the latest in order to fulfill the articling term requirement of ten (10) months plus the designated study time and be ready to attend the Skills and Professional Responsibility Program in May of 2007.

5. What if I fail an assessment(s) in the Skills and Professional Responsibility Program?

You will be able to do supplemental assessments after the Program has finished and at the time they are scheduled. You may still write the licensing examinations and begin articling.

6. How do I prepare to write the licensing examinations?

In addition to the reference materials which you will receive a minimum of 1 month in advance of the examinations, the Law Society will offer tutorials on how to study for and write the competency-based licensing examinations.

There will also be a number of other substantive/procedural and skills resources available on the Law Society's e-Learning site, which you may find useful during articles.
Accommodation and special needs supports will be offered through the Education Support Services Office.

7. Can I write the licensing examinations if I have not yet secured articles?

Yes.

8. Can I write one examination, for example, the barrister examination in late June/early July and the solicitor examination in November?

Yes. You may write both examinations at one of the scheduled sessions or you may write one at a time in any session you prefer.

If there are circumstances that prevent you from attending the examination session you have registered for, you must notify the Registrar in writing and in advance of the examination date that you wish to defer writing the examination(s).

9. What happens if I fail one or both examinations?

You will be able to rewrite the examination(s) using the same reference materials, at any scheduled session in the licensing period (May 2006 – April 2007).

Please note that if you write the examinations for the first time in March 2007 and you fail, your next opportunity to write will be late June/early July 2007. You will then be required to purchase the 2007 updated reference materials to study for the examinations.

10. Will I receive the same amount of study time for a failed examination if I am articling and will that constitute an amendment to my articling contract with the articling employer?

No, you will not receive any formal uninterrupted study time for a rewrite. You will be responsible for studying on your own time and to make personal arrangements to do so either independently or in conjunction with your articling employer.

11. How many times am I permitted to write one or more failed examination(s) or redo an assessment(s)?

You are required to complete all components of the Licensing Process within three years. Therefore, you have the potential opportunity to rewrite or be re-assessed a total of nine times per failed examination or assessment (three (3) sessions of each per licensing year x three (3) years).

If your rewrite of an examination takes you into the next licensing period (May 2007 – April 2008), you will be required to purchase the reference materials for that new licensing period.

12. What is the tuition fee?

At this time, the tuition fee is estimated at $2600 plus GST and covers the Skills and Professional Responsibility Program, reference materials, one sitting of each of the two licensing examinations, access and use of all articling and other Licensing Process supports available online on the e-Learning Site and access to Law Society staff who provide support during the process. There will be a separate fee schedule for reassessments and examination rewrites.

13. Will I be able to apply for OSAP to help cover the tuition fee?

The Law Society has made an application to the Ministry of Training, Colleges and Universities requesting an extension of OSAP eligibility, which if approved, will cover only the Skills and Professional Responsibility Program, as it is a course of instruction.

Should you require financial assistance for your third year of law school, apply for OSAP through your financial aid office at your university and add the Skills and Professional Responsibility Program to your third year funding request. You will be unable to apply for OSAP for only the Skills and Professional Responsibility Program.

The Law Society Repayable Allowance Program and bursaries will continue to be available to eligible candidates.

14. Where can I obtain more information on the Licensing Process?

As the Law Society continues to develop and implement each component of the Licensing Process, you will be able to access this information at the Law Society's Education Web site (http://education.lsuc.on.ca/newlicensingprocess/home.jsp). When you apply in the fall of 2005 for the Licensing Process, your application package will contain detailed information on the documentation you will need, important dates, who to contact, etc.

15. I have applied for my permanent resident card but I do not think I will obtain it before May 2006. Can I attend the mandatory Skills and Professional Responsibility Program and also write the licensing examinations before I obtain my card?

Yes, you may attend the Skills and Professional Responsibility Program and write the licensing examinations. However, if you wish to be called to the Bar of Ontario, the Law Society Act requires you to be a permanent resident of Canada.

16. When and where do the Call to the Bar ceremonies take place?

Once you have successfully completed all mandatory requirements and submit all required documents, you will be eligible to be called to the bar.

The Law Society schedules a Call to the Bar ceremony in Toronto at each sitting of Convocation, which is the Society's governing body. A larger Call to the Bar ceremony is also conducted once a year in Toronto, Ottawa and London. It is anticipated that this large ceremony will take place in May or June of 2006 and onward.

17. I have heard that over 50% of the candidates fail the current Bar Admission Course (BAC) examinations. Is this true?

No, it is not true. Candidates are entitled to rewrite failed examinations in the current process and in the new process. In the current process, following rewrites, less than 1% of candidates have a failed standing in the program. These candidates may then consider taking the course over and writing examinations again. Candidates have three years in which to complete all of the licensing requirements.

18. How will I be able to pass the barrister examination and the solicitor examination in the new process if there is no instruction as is offered in the current BAC?

Attendance rates during the 2004 BAC were, on average, below 35%. The majority of candidates do not attend the lectures nor participate in the instructional seminars and attendance continues to fall. In the Licensing Process, reference materials and the scope of the examined issues will be streamlined and will focus only on entry-level competencies.

The reference materials support all examined competencies – no external material or information is required for preparation to write the examinations. There will also be educational supports provided through the e-Learning site. In addition, the examinations will continue to be open book.

New Questions and Answers (January 2005)

19. At the time I register for the Licensing Process in the fall of 2005 I will not have completed my law degree. Can I attend the Skills and Professional Responsibility Program even if I have not received confirmation that I have met all the academic requirements to be granted an LL.B. or the National Committee on Accreditation's Certificate of Qualification?

Yes, you may attend the Skills and Professional Responsibility Program and write the licensing examinations. However, if prior to completing the Licensing Process, you receive notification that you will not be graduating from an approved law course or that you will not be receiving a certificate of qualification from the NCA, you must immediately notify the Office of the Registrar and withdraw from the Licensing Process.

A candidate who withdraws from the Licensing Process will retain all standings of pass for assessments and/or licensing examinations received during the licensing year (May to April) during which time they will be expected to have fulfilled the requirement of an LL.B. or NCA qualification and notify the Office of the Registrar accordingly.

20. What does the Skills and Professional Responsibility Program entail?

The Skills and Professional Responsibility Program will run half-days for approximately five (5) weeks (subject to approval by Convocation on February 24, 2005).

In Toronto and Ottawa, candidates will be divided into morning and afternoon sessions. In Windsor, London, and for Francophone candidates in Ottawa, the Program will only be offered in the morning. When you register for the Licensing Process, you will be required to indicate your preference for either the morning or afternoon session. Once you have chosen a session you will not be allowed to switch back and forth.

21. What other time commitment is there other than the mandatory attendance?

In addition to the scheduled hours of in-class instruction, you will be required to complete individual, self-directed learning activities outside of the classroom

including preparing for daily in-class participation, assignments and web-based exercises, or the scheduled assessments.

22. What will I learn at the Skills and Professional Responsibility Program?

The learning objectives of the Skills and Professional Responsibility Program are to ensure that students-at-law can :

a) demonstrate effective problem-solving skills that have been applied to a range of tasks and functions and shall form the foundation of continued professional development; and
b) function effectively and ethically as newly called lawyers in relation to:

i. legal research, both paper-based and computer-based;
ii. legal writing, including memoranda, opinion letters and drafting simple legal documents;
iii. personal client contact, including interviewing, offering options and advice, and keeping the client informed;
iv. the management of transactions and applications including fact investigation, the preparation of relevant documents and strategic planning regarding dispute resolution;
v. the management of dispute settlement processes including planning with the client, reviewing a range of possible processes, and preparing and implementing the chosen dispute resolution approach;
vi. practice management tasks including time and file management; and
vii. the recognition and analysis of ethical and professional issues which arise in the course of file management.

23. What is the instructional format for Skills and Professional Responsibility Program?

In the Program, candidates will be divided into groups of approximately twenty-four (24) candidates per classroom and within that group you will work in groups of six (6). Much like in a legal practice environment, you and your colleagues will work on barrister and solicitor sample file scenarios that reflect the realities of daily practice. The group composition will change throughout the Program.

Problem-based learning (PBL) is the primary method of instruction in the Skills and Professional Responsibility Program. You will also be exposed to other types of instructional methods such as self-directed learning, small group activities, teaching sessions, and web-based exercises. All of the learning activities will be designed to provide you with opportunities to increase your awareness of issues relating to ethics and professionalism, to improve your ability to identify issues when they arise and to develop your analytical skills in dealing with the issues you will confront in the first years of practising of law.

Each classroom will have a practitioner instructor or facilitator. His or her role is to guide candidates through the challenges they will encounter working on the files and to encourage the groups to approach all difficulties by using problem-solving and appropriate professional attitudes.

24. Who evaluates the assignments and assessments?

> In addition to the facilitation role, the practitioner instructor will also provide both informal feedback on your assignments and conduct the formal assessments. All assessments will be based on a candidate's individual work and performance. Assessments and assignments are evaluated on a pass/fail basis.

25. What happens if I fail an assessment or I have to defer an assignment or assessment during the five weeks? When can I redo it?

> A sixth week will be built into the Program for reassessment in the event of a failed standing or you have had to defer an assignment or assessment. This will ensure that all candidates have a full opportunity to successfully complete the Program without uncertainty as to their standing extending into their articling term. Candidates will be scheduled to attend reassessments on an as needed basis during the sixth week.

26. When will a schedule be available with the precise start and end date for the Skills and Professional Responsibility Program, the licensing examination dates, and Calls to the Bar?

> A detailed schedule will be published following Convocation's final approvals on February 24, 2005 and will be found at http://education.lsuc.on.ca/newlicensingprocess/home.jsp

If you have specific questions about the Licensing Process, you may also contact:

Abena Buahene, Senior Competence Counsel
Professional Development and Competence
The Law Society of Upper Canada
130 Queen Street West, Toronto, Ontario M5H 2N6
E-mail: abuahene@lsuc.on.ca
Telephone: 416-947-3994
Toll Free: 1-800-668-7380, extension 3994
Fax: 416-947-3329

APPENDIX C

EXCERPT FROM CURRICULUM DESIGN PLAN FOR SKILLS-BASED PROFESSIONAL LEGAL EDUCATION

(Dr. J. Macfarlane and Professor J. Manwaring)

c. Course Overview: Scheduling and Structure

We are proposing a five-week course with a sixth week which will allow any students who have failed any required assessment to redo any failed assessment(s) (see details above at 2 (d)), and therefore satisfy the requirements for successful completion of the course. A five-week course is required to enable students to practice and improve the skills identified by the practitioners consulted in the process of developing the skills taxonomy which forms the basis of

this proposal. The skills identified by our consultations are extremely varied and sophisticated and, in our opinion, cannot be learned to the required threshold level of an articling lawyer in a shorter time.

The sixth week will ensure that all students have a full opportunity to successfully complete the course in a reasonable period of time without any uncertainty extending into the articling period. The exact content of the sixth week will not be examined here because it will depend in part on the areas where failing students encounter difficulties; and these will vary from year to year. However, the Curriculum Plan recognizes the need to provide students who encounter difficulties with a full and fair opportunity to remedy their failing marks and will build in the required opportunities to rectify failing performance. Moreover, the use of continuous feedback during the course will also enable students to revise any products that will be included in the student Portfolio in order to meet the criteria for successful completion of the course. In the event that a student's final submitted Portfolio is deemed to be a fail, they will have an opportunity to produce new work for inclusion in a revised Portfolio submitted at the end of week 6.

This section will describe the overall structure of the proposed program. At this stage it is premature to provide a detailed description of the teaching units and the course materials. The outline below suggests a progression through the teaching units and exercises but it is important to stress at the outset that the actual content of the units has not yet been decided definitively.

i. Contact hours

The Task Force Report envisages 96 hours of instruction during the skills program. The Curriculum Plan for the program is designed to achieve that objective. There are a number of constraints that have been taken into consideration in designing the course. For example, the availability of classrooms and rooms for small group work will definitely have an impact on the organization of the program. The number of students who will be taking the program each year will be substantial. We are estimating that approximately 1400 students will take this five week program in any given year.

Because of these constraints, we are proposing that the program be offered in a half-day format over five weeks with four instruction days and one assessment day each week. In our opinion, a five week course is necessary given the varied and diverse number of skills identified by focus groups, and the complexity and range of professional responsibility issues that need to be addressed. This format will also enable the LSUC to maximize the efficient use of available space, personnel and resources.

In each centre, the students will be divided into two groups - one group of students will attend in the morning and the other in the afternoon. The morning section would meet from 8.30am – 12.30pm, the afternoon section from 1.00pm-5.00pm.

This will mean that students receive 16 hours of training a week for a total of 80 contact hours over five weeks. All required firm or group work will take place during the mandatory attendance hours. In addition, Fridays will be devoted to assessment for which attendance will be mandatory. While the exact amount of time required to complete the assessment activities will depend on the nature of the assessment, the maximum would be 4 hours per week for a total of 20 hours devoted to assessment. The total number of hours of instruction including assessment time (100 hours) meets the target envisaged in the Task Force Report.

In addition, the scheduled hours of instruction will be supplemented by individual learning activities outside the classroom including completion of in-tray exercises and web-based learning exercises. We estimate that this work will require approximately 5 to 8 hours per week for a total of 25 to 40 hours over the five week period. If the maximum estimated number of hours required to complete individual work outside course time is added to the hours of mandatory attendance, students will be required to devote at most 140 hours over 5 weeks to this course, or 28 hours per week ([1]).

ii. Course structure

Because the course will be organized on the basis of the PBL methodology, most of the learning will occur in the context of work in teams or firms on files which simulate the realities of the practice of law. The format of the course will be flexible and students will not follow the same schedule each day. Students will engage in structured learning activities for four hours each day. There will often be some initial time devoted to didactic instruction addressing issues related to skills development, professional responsibility and professionalism. This didactic component can be delivered in different ways:

i. a short lecture by an invited expert;
ii. an archived video of an expert lecturing on the topic which the students can watch out of class time;
iii. a briefing by their PBL tutor (perhaps with a group of 24 students) at the start of each day's exercises during which the tutor can review the material, provide information, answer questions and so on.

The rest of the time students will engage in work in their firms on the files. This work will be focused on the development of the skills identified in our consultations with practitioners.

iii Files

The students will be placed in firms of at most 6 lawyers. Students will have the opportunity to change firms at specified times during the course. This will help deal with any intra-firm conflicts. This approach will also permit the inclusion of conflict of interest issues as students changing firms and the firms themselves ensure that they meet the requirements of Rules 2.04 and 2.05.

The firms will be expected to deal with a number of files over the five weeks of the program. Students will handle at most 6 files during the five weeks. There is no magic in the number of files and the amount of work required on each file depends on its design. The decision as to the number of files must be made in light of the achievement of the program's learning objectives. It will be important to develop files which provide opportunities to work on all of the skills identified by our consultation, including practice management. Each file will also include professional responsibility issues and ethical dilemmas which the students will be expected to identify and respond appropriately to, sometimes with the guidance of their PBL tutor.

[1] Students will also be asked to reserve a sixth week in case they are required to repeat one or more assessments.

The substantive law content of these files has not yet been decided but will vary from year to year. The program stresses the development of skills in relation to these files and is not designed to teach the substantive law, although students will do research and have to understand relevant legal concepts. The files will rotate from year to year. We recommend the initial development of sufficient files for three years of instruction. If it is not possible to develop three sets of completely different files, it would be possible to add new information and "twists" to files to ensure that the exercises are not the same each year. In addition, different products could be required from the students in relation to the files. (For example, one year file 1 could be used for memo drafting while the following year it would be the basis of a client interview and the drafting of an advice letter.)

It will be important for students to work on more than one file at one time at some point during the program in order to practice time and file management skills. There must be a sufficient number of files to allow the structuring of the firm work in such a way that the students have to make choices about the appropriate handling of files and establish priorities.

iv. A Typical Week

To illustrate how the learning activities would be structured, we will describe a hypothetical "typical week". The course will consist of learning activities designed to permit a progression through the skills identified as essential to success as a lawyer in the Taxonomy of Skills based on consultation with the legal profession and members of the Bench. Each week of the course will be designed to help students develop their skills in a specific area. For purposes of our example, the week described would focus on writing and drafting, managing the client relationship and file management in relation to dispute resolution. This would not be the first week of the course and is offered here only as an illustration of how the program might unfold. Note that students would have already been introduced to client interviewing prior to the beginning of this week.

Day One

Instruction on day One begins with an overview of dispute resolution strategies ranging from negotiation to litigation, and the criteria for choice of strategy in light of client objectives. Additional themes include the development of a dispute resolution strategy and the management of client expectations.

When students move into their firms, the PBL component of this day would include a second interview with the client for one current file (File 1). The PBL group would prepare for the interview (in which the client would be played by an actor) by reviewing the initial client interview (which took place the previous week) and any legal research conducted subsequently. In the second interview the client would present some new information and an ethical issue will be raised. The interviewer would work with the client to develop a strategy for dispute resolution and help the client to develop realistic expectations for the outcome.

At the end of the interview the PBL group along with their tutor would debrief review the skills, substantive and ethical issues raised by the interview. Also following the interview, the students would prepare an advice letter to the client. The group would decide on next steps in File 1 and distribute work accordingly. They will review these next steps and their "game plan" with the tutor.

Students would receive an In-Tray Exercise assignment which would have to be completed and handed in for assessment on the following Friday. The exercise will require legal research and legal writing on a specific topic.

Day Two

The instructional component of Day Two would focus on the development of a dispute resolution strategy and client communication issues. For example, students could be asked to listen to a pre-recorded practitioner "panel" or a lecture by a single expert discussing the role of advice letters in the relationship with the client and the types of ethical issues which the lawyer can encounter when working with the client on dispute resolution strategy. Alternatively these issues could be reviewed with a large group (perhaps four PBL groups or 24 students) by their PBL tutor.

The PBL component on this day would deal with a second file (File 2). The firm members receive a letter from the lawyer representing the other party. The firm may not have taken any action on this file at this point so that they will be required to suddenly pay attention to a file that has been on the back burner. The students would have to analyse the information they have available quickly and plan for a first interview with the client (played by an actor).

In order to make this exercise more challenging, the client actors would be instructed to raise more difficult communication issues. Within File 2, there could be a limitation period issue which students will be expected to uncover and respond to in an appropriate manner. Finally, they would be expected to draft a letter in response to counsel for the opposing party which could be reviewed with their PBL tutor.

Day Three

On Day Three the focus would shift to negotiation theory and practice. The instructional component would focus on negotiation styles and strategies with a discussion of different theories of negotiation, including interest-based and position-based theories. Some models for planning for negotiation, regardless of the strategy chosen, would be described and applied to fictional situations. This component of instruction on Day Three could involve negotiation exercises in the group of 24, as well as more theoretical presentations. The program could also make use of web-based exercises here to help students learn negotiation theory.

The PBL component of Day Three would require students to engage in file-related negotiation. The firm would either send a proposal to, or receive a proposal from, the firm representing the other side regarding a negotiation meeting regarding File 1 (see above). Students would be required to communicate appropriately with opposing counsel to discuss the parameters of the meeting. They would also have to make choices about the information they may want to exchange in advance of negotiation. They would also decide the composition of the negotiating team and the role of each member. For the purposes of this exercise, clients would not be present. Students would be expected to clarify the extent of their bargaining authority ahead of time. This exercise could include ethical issues relating to the desire of the client to hide information and the demands of professionalism in the context of negotiation.

Day Four

Day Four would be a continuation of the previous day's work on negotiation theory and practice. The PBL component will involve the actual negotiation meeting which students

prepared for yesterday. The firm's negotiators will meet with the negotiators for counsel representing the opposing side of File 1 (students from another PBL group). The remainder of each group will watch the negotiation, in order to provide feedback. The PBL tutor for these groups will watch at least part of the negotiation.

Students will then debrief their negotiation performance back in their firms, with their PBL tutor participating for some of this time. Students would receive feedback on their performance in preparation for Friday's assessed negotiation simulation. In addition, the firm would have to follow up on the limitation issue raised by File 2 (see Day Two) and deal with it appropriately. The final assignment for the week would be the individual preparation of a file analysis including a proposed plan for future action on File 2 to be submitted on Friday.

Day Five

Day Five would be devoted to assessment. Students would work in their firms to complete any research and other tasks relating to the handling of their ongoing files. Because practice management issues will be built into the course, students would be expected to docket their time spent on each file for the week and perhaps prepare client billing.

The analysis and plan for future action on File 2 (above) would be submitted to their PBL tutor and students would receive feedback. Students would also hand in their completed In-Tray Exercise. Note that both the file analysis and the In-Tray Exercise would be completed individually.

The main assessment activity for this week would be a "live" negotiation simulation where students would negotiate with one another in relation to a new problem, and their performance assessed on the basis of stipulated criteria. Students would be given a fixed period to prepare for and then conduct the negotiation. Students would be expected to act ethically and with appropriate professionalism in the context of this negotiation. The evaluation criteria communicated to the students ahead of time would explicitly include professional ethics and professionalism.

The Strategic Counsel

APPENDIX D

A Report to

The Law Society of Upper Canada

Articling Enhancement Survey - Principals

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Sufficiency of the10 Month Articling Term

Impressions of the sufficiency of the 10 month articling term were measured among both current and past principals. A strong majority (78%) believes that the current length of the articling term is sufficient. Furthermore, there are no significant subgroup differences here, suggesting that there is a broad consensus among current and past principals on this issue.

Among the minority that does not believe the 10 month term to be sufficient, the largest single reason provided is that a 10 month term is simply too short or that it does not provide enough time for articling student to learn properly (47%). About one-quarter (27%) oppose the 10 month term because it leaves a gap between students, which poses difficulties in firm administration and does not allow for the department students to engage in a "hand-over" to the incoming students. Finally, about one-in-ten (12%) note that it restricts the length of rotations or limits the ability of students to follow a file for more than one stage in its progress. The sample of those who believe that a 10 month term is not sufficient is too small to permit meaningful subgroup analysis here.

Finally, both current and past principals were invited to make suggestions as to how the articling process might be improved. Interestingly, just fewer than one-half (44%) of those who responded to the survey did not make any suggestions at all, while a further 11% said that the articling process is fine as it is or explicitly stated that they had no suggestions to make. Taken together, these findings suggest that neither current nor past principals see any glaring deficiencies in the articling process as it is currently constituted.

Of the suggestions made for ways in which the articling process could be improved, no one suggestion is made by more than 10% of respondents. Suggestions include that the articling term should be lengthened to 12 months (10%) that there should be more practice skills and practice management training (6%), that there should be more detailed or rigorous work plans or requirements governing the articling process (5%). All other suggestions are mentioned by fewer than 5% of respondents.

Assessments of Possible Enhancements to the Articling Process

In each of three broad areas - Skills Development, Substantive/Procedural Development, and Professional and Personal Development - both current and past principals were asked to indicate how useful they believe a series of proposed enhancements would be in strengthening the articling experience and preparing students for the practice of law. They were then asked to indicate, in rank order, which two of the possible enhancements in each of the three areas they believe would be *most* useful.

The questionnaire presented the following introduction to these questions:

> *As you may know, Convocation has recently approved the implementation of a competency-based licensure process for admission to the bar, which is scheduled to come into effect in the spring of 2006. Under the new process, the Law Society will continue to teach skills, professional responsibility, ethics and practice management, but will discontinue the teaching of substantive law. In conjunction with this new process, the Law Society is considering the implementation of a series of enhancements to the articling process. These enhancements fall into three broad areas: Skills Development; Substantive/Procedural Development; and, Professional and Personal Development.*

Overall, those who responded to the survey perceive most of the potential Skills Development, Substantive/Procedural Development and Professional/Personal Development enhancements tested to be "very" or "Somewhat" useful in strengthening the articling experience and preparing articling students for the practice of law.

Assessments of Possible Enhancements to the Articling Process

1. Skills Development

Six possible Skills Development enhancements were tested, and they are sharply differentiated by usefulness ratings. In fact, there is a 31 percentage point spread between the most highly rated and the most poorly rated possible enhancement. *"Making available precedents and supplemental materials related to skills development"* emerges as the clear winner. Fully 89% of respondents rate it as either "somewhat" or "very" useful, with half of respondents (52%) rating it as "very" useful.

Following this, three enhancements share the second tier with "total useful" ("very" or "somewhat") ratings ranging from 72% to 76%. These are *"providing task specific tutoring"* (76%), *"providing on the Law Society's e-learning website and by videotape easily accessible role-plays of skills competencies (e.g., interviewing, negotiating skills) as a refresher"* (75%), and *"connecting students with a skills mentor who would be designated to provide ongoing support throughout the articling process"* (72%). Based on "very" useful ratings, *"connecting students with a skills mentor"* is ranked the most highly at 35%.

Maintaining an online forum at the Law Society's website, with discussion forums and a frequently asked questions (FAQ) section" receives a "total useful" rating of 70%, but is only ranked as "very" useful by 24%. The final possible enhancement tested, *"partnering with local*

and regional law associations to host Q&A days" trails badly, with a "total useful" rating of 58%, and ranked by just 18% as "very" useful.

There are no meaningful differences by subgroup in ratings of the potential Skills Development enhancements tested, suggesting these perceptions are broadly shared.

When respondents are asked to rank the two most useful potential enhancements among the six tested, findings mirror the overall usefulness ratings reported above.*"Making available precedents and supplemental materials related to skills development"* again emerges as the most preferred enhancement. A solid majority (68%) rates this enhancement either first or second most useful, with 38% deeming it most useful.

"Connecting students with a skills mentor", providing role-plays" and *"providing task-specific tutoring"* share a closely clustered second tier. Among these, *"connecting students with a skills mentor"* receives the highest proportion of first most useful ratings (22%).

Assessments of Possible Enhancements to the Articling Process

2. Substantive/Procedural Development

Five potential Substantive/Procedural Development enhancements were tested, and while the spread in ratings from top to bottom is narrower than that found for the Skills Development enhancements tested, there is a clear first and second choice here.

A very strong majority (91%) rates *"creating CLE programming suitable for articling and early practice stages"* as either "somewhat" or "very" useful, with fully half (50%) rating it as "very" useful. There are no significant differences by subgroup in ratings of this possible enhancement, suggesting that making available CLE programming of this nature would be welcomed broadly by the profession.

The clear second choice is *"continuing to supplement the Law Society's e-learning site to provide self-study on demand web casts, supplementary documents, precedents checklists and other supports"*, which is rated as "somewhat" or "very" useful by 87%, and as "very" useful by 46%. Once again, perceptions of the usefulness of this potential enhancement are consistent across the subgroups.

The other three possible Substantive/Procedural Development enhancements tested receive significantly lower "total useful" scores, ranging from 74% for *"establishing, identifying and making known to students throughout the province the liaisons for registry offices, court offices and the like",* to 68% for *"facilitating the establishment of a mentor database and assisting students to connect with mentors".*

- Women (83%) are significantly more likely than men (70%) to rate *"establishing...the liaisons for registry offices..."* as "very" or "somewhat" useful.

- Those who are not engaged in private practice (85%) are significantly more likely than those who are (66%) to rate *"facilitating the establishment of a mentor database..."* as "very" or "somewhat" useful.

When the usefulness of these potential Substantive/Procedural Development enhancements is ranked, *"creating CLE programming suitable for articling and early practice stages"* again places first (36% rate it "most useful"), and *"continuing to supplement the Law Society's e-learning site..."* places second (rated "most useful" by 30%). The three remaining possible enhancements tested all fall significantly behind, with 12% being the highest "most useful" proportion received by any of them.

Assessments of Possible Enhancements to the Articling Process

3. Personal and Professional Development

Five possible Personal and Professional Development enhancements were tested. The spread between the highest "total useful" scores here, at just 15 percentage points, is narrower than for either of the other categories of enhancements tested, suggesting that respondents see less differentiation in usefulness here.

There is, however, a clear top tier on a "total useful" basis shared by three of the possible enhancements tested: *"Offering CLE programs on the business aspects of law firms targeted to articling students and new lawyers"* (85% "very" or "somewhat" useful); *"Providing placement support for new calls"* (82%) and, *"Providing materials and/or seminars on expectations in the work force, dealing with difficult people, taking direction, eliciting quality feedback and other similar skills"* (82%).

Examining these potential enhancements on the basis of "very" useful ratings, *"offering CLE programs..."* (44%) is rated most highly. There is only one significant difference by subgroup on this potential enhancement, suggesting that additional education on the business aspects of practicing law is widely seen as being of value. Moreover, the one significant subgroup difference would appear to confirm this.

- Those who have been in practice for 16 or more years (i.e., the most experienced members) are significantly more likely than those who have been in practice for 15 years or less to rate this potential enhancement as "very" or "somewhat" useful (88% and 81% respectively).

There is one significant subgroup variation on *providing materials...on expectations in the work force..."*

- Those who are not engaged in private practice (92%) are significantly more likely than those who are (81%) to rate this potential enhancement as "very" or "somewhat" useful.

The remaining possible Personal and Professional Development enhancements tested, *facilitating mentoring relationships to assist with professional and personal management issues"* and *"providing learning sessions, quick access information and links to mental health and stress relief sites such as OBAP"* receive significantly lower total useful ratings of 74% and 70% respectively.

- Those who are not engaged in private practice (85%) are significantly more likely than those who are (72%) to rate *"facilitating mentoring relationships..."* as "very" or "somewhat" useful.

Assessments of Possible Enhancements to the Articling Process

Reflecting the narrow spread in total "useful ratings", there is essentially no differentiation between the top two Personal and Professional Development enhancements tested when respondents are asked to rank two of them in order of usefulness. *"Providing materials...on expectations in the work force..."* receives virtually the same proportion of first place rankings as *"offering CLE programming on the business aspects of law firms..."* -28% and 27%, respectively. Second place rankings for these enhancements are equally close, at 26% and 27% respectively.

Providing placement support for new calls", which shared the top tier on a "total useful" basis, falls slightly behind when respondents are asked to rank their top two choices, receiving 22% of first place rankings and 18% of second place rankings.

The remaining two enhancements tested, as they did on a "total useful" basis, trail significantly here.

The Strategic Counsel

APPENDIX D

A Report to

The Law Society of Upper Canada

Articling Enhancement Survey - Recently-Called Members

September 2004

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Sufficiency of the 10 Month Articling Term

Overall, the large majority of recently-called members are satisfied with the length of the 10 month articling term. More than three-quarters of members (78%) indicate that the term was sufficient, with this proportion increasing to 84% when "don't know/no answer" responses are excluded.

A small proportion of members, however, did not find the 10-month articling term to be sufficient (15%). Just over half of these members (54%) report that the term is not sufficient because "ten months is not long enough to prepare properly for practice". Fewer than two-in-ten members mention that it "reduces variety of work exposure" (14%) or that it is "harder to follow files through to completion" (8%) as reasons for believing that 10 months is not sufficient.

The absence of significant subgroup differences on this issue suggests that there is a broad consensus among recently-called members that a 10 month term of articles is sufficient.

Assessments of Possible Enhancements to the Articling Process

In each of three broad areas - Skills Development, Substantive/Procedural Development, and Professional and Personal Development - recently-called members were asked to indicate how useful they believe a series of proposed enhancements would be in strengthening the articling experience and preparing students for the practice of law. Members were then asked to indicate, in rank order, which two of the possible enhancements in each of the three areas they believe would be *most* useful.

Recently-called members were given the following introduction prior to these questions:

> *As you may know, Convocation has recently approved the implementation of a competency-based licensure process for admission to the bar, which is scheduled to come into effect in the spring of 2006. Under the new process, the Law Society will continue to teach skills, professional responsibility, ethics and practice management, but will discontinue the teaching of substantive law. In conjunction with this new process, the Law Society is considering the implementation of a series of enhancements to the articling process. These enhancements fall into three broad areas: Skills Development; Substantive/Procedural Development; and, Professional and Personal Development.*

Overall, those who responded to the survey perceive most of the potential Skills Development, Substantive/Procedural Development and Professional/Personal Development enhancements tested to be "very" or "somewhat" useful in strengthening the articling experience and preparing articling students for the practice of law.

Assessments of Possible Enhancements to the Articling Process

1. Skills Development

Overall, recently-called members have positive impressions of the six possible Skills Development enhancements tested. The highest "very" or "somewhat" useful ratings are found for *"making available precedents and supplemental materials related to skills development"* (96%). This overall score is driven by the 70% of members who rate this enhancement as "very" useful.

Two enhancements place in the second tier. *"Connecting students with a skills mentor who would be designated to provide ongoing support throughout the articling process"* is rated as either "very" or "somewhat useful" by 83% of recently-called members, and *"providing task-specific tutoring"* is rated as either "somewhat" or "very" useful by 79%.

While still seen as being at least "somewhat/very" useful by at least 60% of recently-called members, the lowest useful scores are found for *"maintaining an online forum at the Law Society's website, with discussion forums and a frequently asked questions (FAQ) section" (64%), "partnering with local and regional law associations to host Q&A days"* (61%) and *"providing on the Law Society's e-learning website and by videotape easily accessible role-plays of skills competences (e.g. interviewing, negotiating skills) as a refresher)* (60%). These lower overall ratings are driven primarily by significantly lower "very" useful scores (20%, 23% and 21% respectively).

There are some significant subgroup variations in ratings of Skills Development enhancements.

- Those who articled outside of Toronto/GTA are significantly more likely than those who did to give a "very" or "somewhat" useful rating for both *"providing task-specific tutoring"* (83% and 75%, respectively) and *"partnering with local and regional law associations to host Q&A days"* (68% and 56%, respectively). Further, ratings of each of these enhancements decline as the size of the firm articled at increases, suggesting that they are of more value to those who practice in smaller firms.

- Similarly, ratings for *providing on the Law Society's e-learning website and by videotape easily accessibly role-plays of skills competencies (e.g. interviewing, negotiating skills) as a refresher"* decline as size of articling firm increases - among those who articled with 10 lawyers or less (80%), those who articled at firms with 11-50 lawyers (61%), and those who articled at firm with 51 or more lawyers (45%).

Assessments of Possible Enhancements to the Articling Process

Overall rankings of potential Skills Development enhancements correspond to the usefulness scores. Consistent with the usefulness ratings, *"making available precedents and supplemental materials related to skills development"* is ranked first by a wide margin. Three-quarters (75%)

of recently-called members rank this enhancement as first (47%) or second (28%) most useful among the six enhancements tested.

"Connnecting students with a skills mentor who would be designated to provide ongoing support throughout the articling process" (44%) and *"providing task-specific tutoring"* (32%) follow significantly behind.

Each of the remaining potential Skills Development enhancements is rated first most useful by fewer than 10% of recently-called members, and as first or second overall by no more than 20%.

Assessments of Possible Enhancements to the Articling Process

2. Substantive/Procedural Development

Compared to the Skills Development enhancements tested, "very" or "somewhat" useful ratings for the five Substantive/Procedural Development enhancements tested are less differentiated. In fact, there is only a 13 percentage point separation in the overall useful ratings between the top and bottom rated enhancements, as compared to a 36 percentage point separation for the potential Skills Development enhancements.

As with Skills Development enhancements, recently-called members give higher ratings for Substantive/Procedural enhancements that focus on providing supplemental materials and developing practice management skills. Specifically, among these top rated enhancements are *"creating CLE programming suitable for articling and early practice stages"* (88%), *"working with articling principals and firms to assist in facilitating practical training experiences (e.g. arranging for a corporate student to go to court)"* (87%) and *"continuing to supplement the Law Society's e-learning site to provide self-study on demand web casts, supplementary documents, precedents, checklists and other supports"* (86%). These potential enhancements place in the top tier largely as a result of their higher "very" useful scores (55%, 53% and 47%, respectively).

Lower, although still strong, scores place *"establishing, identifying, and making known to students throughout the province the liaisons for registry offices, court offices and the like"* (79%) and *"facilitating the establishment of a mentor database and assisting students to connect with members"* (75%) in the second tier.

There are some significant subgroup variations in ratings of Substantive/Procedural Development enhancements.

- Compared to their counterparts, women (80%), recently-called members who articled outside of Toronto/GTA (80%) and those who articled with 10 lawyers or less (83%) are significantly more likely to give a "very" or "somewhat" useful rating for *"facilitating the establishment of a mentor database and assisting students to connect with mentors".*

- Members who articled outside of Toronto/GTA are significantly more likely than those who articled in Toronto/GTA to rate *"working with articling principals and firms to assist in facilitating practical training experiences (e.g., arranging for a corporate student to go to court)"* as a useful enhancement (61% vs. 48%).

Assessments of Possible Enhancements to the Articling Process

- Members who articled with 10 lawyers or less are significantly more likely than members who articled in a firm with 51 or more lawyers to give a higher total useful score for *"continuing to supplement the Law Society's e-learning site to provide self-study on demand web casts, supplementary documents, precedents, checklists and other supports"* (91% vs. 81%).

Consistent with overall useful ratings, *"creating CLE programming suitable for articling and early practice stages"* emerges as the most useful enhancement on a total (first and second most useful) ranked basis (55%).

While there is less differentiation in total ranked scores among the remaining enhancements, there are significant differences among member rankings on a first choice basis. On this measure, one-quarter (26%) of members rank *"continuing to supplement the Law Society's e-learning site to provide self-study on demand web casts, supplementary documents, precedents, checklists and other supports"* as the most useful enhancement for improving the articling experience (44% total). Just below this, 20% of members rank *"working with articling principals and firms to assist in facilitating practical training experiences (e.g., arranging for a corporate student to go to court)"* as the most useful enhancement (47% total).

The remaining enhancements tested follow significantly behind on both a "most useful" and "total useful overall" basis.

Assessments of Possible Enhancements to the Articling Process

3. Professional and Personal Development

Among the five potential Professional and Personal Development enhancements tested, two clearly stand out. *"Proving placement support for new calls"* (87% useful overall), with fully 51% of members indicating that it is "very" useful, and *"offering CLE programs on the business aspects of law firms targeted to articling students and new lawyers"* (88%); however, the "very" useful score is significantly lower (44%) here.

Smaller, but nonetheless strong, majorities give "very" or "somewhat" useful ratings to *"facilitating mentoring relationships to assist with professional and personal management issues"* (75%) and *"providing materials and/or seminars on expectations in the work force; dealing with difficult people, taking direction, eliciting quality feedback and other similar skills"* (74%).

"Providing learning sessions, quick access information and links to mental health and stress relief sites such as OBAP" receives the lowest scores among the enhancements tested, with less than two-thirds (64%) rating it as "very" (16%) or "somewhat" (48%) useful in strengthening the articling experience and preparing students for practice.

There are some significant demographic variations in ratings of Professional and Personal Development enhancements.

- *"Facilitating mentoring relationships to assist with professional and personal management issues"* is significantly more likely to be rated as useful by women (79%) than by men (69%).

- Significantly more recently-called members who articled in a firm with 50 or fewer lawyers (79%) than members who articled with 51 or more lawyers (65%), and women (78%) compared to men (68%), rate *"providing materials and/or seminars on expectations in the workforce, dealing with difficult people, taking direction, eliciting quality feedback and other similar skills"* as a useful enhancement.

- Members who articled with 10 or fewer lawyers (92%) are significantly more likely than members who articled in a firm with 51 or more lawyers (83%) to rate *"providing placement support for new calls"* as useful in strengthening the articling experience.

Assessments of Possible Enhancements to the Articling Process

- Women (69% vs. 56% among men) and members who identify themselves as members of an equality-seeking community (73% vs. 60%) are significantly more likely to rate *"providing learning sessions, quick access information and links to mental health and stress relief sites such as OBAP"* as a "very" or "somewhat" useful enhancement.

Overall, rankings for Professional and Personal Development enhancements correspond to their usefulness ratings. More than half (54%) of members rank *"providing placement support for new calls"* as the most useful enhancement in strengthening the articling experience on a total ranked basis. The perceived usefulness of this potential enhancement is further confirmed by the significant proportion of members (32%) who rank it as their first choice.

Members also rank *"offering CLE programs on the business aspects of law firms targeted to articling students and new lawyers"* (51%) highly, although this enhancement is significantly less likely to be ranked as a first choice (26%). Slightly fewer members (47%) rank *"providing materials and/or seminars on expectations in the workforce, dealing with difficult people, taking direction, eliciting quality feedback and other similar skills"* as the first (22%) or second (25%) most useful enhancement.

The remaining two enhancements tested receive significantly lower rankings, both overall and as first choices.

.....

It was moved by Mr. Hunter, seconded by Messrs. MacKenzie and Simpson, that Convocation, having approved in December 2003 the model for the new Licensing process for admission to the Law Society of Upper Canada, approve the design of that model, as fully described in the Information reports listed in paragraph 8 and summarized in Appendix 1 of the Report.

Carried

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Re: Proposed Amendment to By-Law 19 with Respect to Money Laundering

Mr. Pattillo presented the item in the Report dealing with the proposed amendments to By-Law 19.

Professional Regulation Committee
February 24, 2005

Report to Convocation

Committee Members
Carole Curtis, Chair
Mary Louise Dickson, Vice-Chair
Laurence Pattillo, Vice-Chair
Gordon Z. Bobesich
Anne Marie Doyle
Sy Eber
George D. Finlayson
Patrick G. Furlong
Allan Gotlib
Ross W. Murray
Tracey O'Donnell
Mark Sandler
Roger D. Yachetti

Purposes of Report: Decision and Information

Prepared by the Policy Secretariat
(Jim Varro 416-947-3434)

OVERVIEW OF POLICY ISSUES

PROPOSED AMENDMENT TO
BY-LAW 19 WITH RESPECT TO MONEY
LAUNDERING

Request to Convocation

Convocation is requested to approve amendments to By-Law 19 (Handling of Money and Other Property) with respect to the prevention of money laundering. The motion to amend the By-Law, which also includes amendments to the French versions of By-Laws 18 and 19 with respect to amendments proposed in this report and amendments approved at January 27, 2005 Convocation, appears at page 11.

Summary of the Issue

1. On January 27, 2005, Convocation adopted amendments to By-Laws 18 and 19 and the Rules of Professional Conduct with respect to the prevention of money laundering. The amendments implement the Federation of Law Societies' Model Rule on Cash Transactions, which include new regulations aimed at preventing money laundering.

2. A number of issues related to the By-Law amendments were raised during the discussion at Convocation. Convocation agreed to make the By-Law and rule amendments on the understanding that the issues would be referred back to the Committee for consideration.

3. Based on its review of these issues at its February 2005 meetings, the Committee is proposing amendments to the By-Law to clarify the meaning of "financial institution" in s. 1.4(a) and clarify that the exemption in new section 1.4 (e) includes retainers for professional fees.

PROPOSED AMENDMENTS TO THE *LAW SOCIETY ACT* RESPECTING ORDERS FOR SEARCH AND SEIZURE, INTERIM SUSPENSIONS AND CONFIDENTIALITY OF INVESTIGATIONS

Request to Convocation

Convocation is requested to approve in principle three amendments to the *Law Society Act* to clarify the application of the provision for orders for search and seizure, revise the test for obtaining an interim suspension order and to provide an additional narrow exception to the confidentiality provision respecting information obtained during an investigation.

Summary of the Issue

4. The Committee is proposing the following amendments, which are described in detail in the report beginning at page 17:

    a. an amendment to s. 49.10 of the Law Society Act to clarify that an application for order for search and seizure may be made to obtain information not only from members but also from third parties;
    b. an amendment to s. 49.27 of the *Law Society Act* to change the test for obtaining an order for a member's interim suspension to a belief on reasonable grounds that there is a significant risk that members of the public would be harmed; and
    c. an amendment to s. 49.12 of the *Law Society Act* to provide an additional exception to the confidentiality requirement to permit disclosure arising from

information obtained during an audit, investigation, review, search, seizure or proceeding to prevent harm to the public.

PROPOSED AMENDMENT TO RULE 2.04(6) RESPECTING JOINT RETAINERS FOR SPOUSAL WILLS

Request to Convocation

Convocation is requested to approve the language of new commentary to rule 2.04(6) that addresses joint retainers for spousal or partner wills. On November 25, 2004, Convocation approved in principle the proposed commentary and deferred adopting the language of the commentary until redrafting to incorporate an amendment approved by Convocation on November 25 was completed.

Summary of the Issue

5. On November 25, 2004, Convocation approved in principle a new commentary to rule 2.04(6) that explains a lawyer's obligations when he or she has prepared joint or mirror wills for spouses or partners and one spouse or partner later requests the lawyer to make changes to his or her will.

6. Convocation deferred adoption of the commentary pending redraft of the commentary, necessitated by a motion which Convocation approved to amend the proposed draft presented to Convocation. The proposed commentary was redrafted to incorporate this amendment [1].

7. During its discussion of the redraft, the Committee dealt with the issue of the effect of the death of one spouse or partner or divorce on the lawyer's obligations in the commentary, and is requesting Convocation's approval of additional language in the commentary to address this issue. The proposed commentary appears at page 32.

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[1] The Committee's report to November 2004 Convocation noted that the commentary is based on the following principles:

a. A retainer for preparation of mutual or mirror wills by spouses or partners amounts to a joint retainer, to which rule 2.04(6) applies;

b. The joint retainer ends when the wills are executed. The only continuing obligation of the lawyer is not to act against a former client in the same or a related matter or transaction without consent, in accordance with rule 2.04(4);

c. If one of the spouses later contacts the lawyer to make a change to his or her will, that contact is a new matter. Without the consent of the other spouse, the lawyer is prevented from acting on the matter because it may adversely affect the interests of a former client;

d. In the absence of the other spouse's consent, the lawyer cannot act, but if he or she decides not to act, the lawyer is prevented from contacting the other spouse to advise of the contact, as lawyer and client confidentiality, as described in rule 2.03, attaches to the communication about the new matter.

The motion was essentially to incorporate paragraph d. above

THE REPORT

TERMS OF REFERENCE/COMMITTEE PROCESS

8. The Professional Regulation Committee ("the Committee") met on February 10 and February 15, 2005. In attendance were Carole Curtis (Chair), Mary Louise Dickson and Laurie Pattillo (Vice-chairs), Gordon Bobesich, Anne Marie Doyle, Sy Eber, George Finlayson, Patrick Furlong, Allan Gotlib, Ross Murray, Tracey O'Donnell and Mark Sandler. Staff attending were Bruce Arnott, Naomi Bussin, Leslie Greenfield, Stephen McClyment, Dulce Mitchell, Elliot Spears, Zeynep Onen, Jim Varro and Andrea Waltman.

9. The Committee is reporting on the following matters:

For Decision
- Proposed amendments to By-Law 19 with respect to money laundering
- Proposed amendments to the *Law Society Act* with respect to orders for search and seizure, interim suspensions and confidentiality of investigations
- Proposed amendment to rule 2.04(6) respecting joint retainers for spousal wills

Information
- Information on mortgage fraud investigations
- Professional Regulation Division Quarterly Report (October – December 2004)

PROPOSED AMENDMENT TO BY-LAW 19 WITH RESPECT TO MONEY LAUNDERING

A. BACKGROUND

10. On January 27, 2005, Convocation adopted amendments to By-Law 18 (Record Keeping Requirements), By-Law 19 (Handling of Money and Other Property) and rule 2.02(5) of the *Rules of Professional Conduct*. The amendments implement the Federation of Law Societies of Canada Model Rule on Cash Transactions[2] which includes new regulations aimed at preventing money laundering.

11. The Model Rule was prepared by the Federation of Law Societies' Money Laundering Task Force. The Task Force was struck to consult with the federal government following repeal of regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* that made lawyers subject to reporting and record keeping requirements under that legislation.[3]

12. In recognizing that lawyers support efforts to eradicate money laundering, the Federation proposed that each law society in Canada adopt regulations that would assist in

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[2] See Appendix 1.

[3] The Federation of Law Societies of Canada and the Law Society of British Columbia launched a constitutional challenge in British Columbia to the application of the legislation to lawyers. The Federation's position is that the application of the requirements to lawyers violates solicitor-client confidentiality and the independence of legal counsel. The case has been adjourned to November 2005.

preventing money laundering, including a prohibition on lawyers accepting or handling cash (above a certain threshold limit) on behalf of their clients or third parties. The Federation has requested that each law society adopt the Model Rule within its own regulatory instruments.

B. ISSUES ARISING AT JANUARY 27, 2005 CONVOCATION AND THE COMMITTEE'S PROPOSALS

13. A number of issues related to the By-Law amendments were raised during the discussion at Convocation on January 27. Convocation agreed to make the By-Law and rule amendments proposed by the Committee on the understanding that these issues, listed in Appendix 2 by reference to the appropriate By-Law section, would be referred back to the Committee for consideration. Blackline versions of the By-Laws showing the amendments made on January 27 appear at Appendix 3.

14. In considering these issues, the Committee was mindful of the need to ensure that the By-Law and rule amendments should reflect as much as possible the substance of the Model Rule. After its review, the Committee determined that only two of the issues should be the subject of amendments, as the other issues raised were not necessary for the purposes the amendments serve and in some cases, were not in keeping with the Federation's Model Rule.

The First Amendment

15. The first proposed amendment clarifies the meaning of "financial institution" in s. 1.4(a). The following explains the Committee's approach to this issue.

16. Section 1.4(a), which is one of the exceptions to the prohibition in s. 1.2 on receiving cash of $7,500 or more, reads as follows:

> Despite section 1.3, section 1.2 does not apply when the member,
>
> (a) receives cash from a financial institution or public body;

17. "Financial institution" is not defined in By-Law 19, but other than in s. 1.4(a), it is used exclusively in s. 7 of the By-Law which deals with electronic withdrawals from trust. Section 2(1) of the By-Law, which governs where lawyers must deposit trust funds, lists a number of entities which are financial institutions. It reads:

> Subject to section 3, every member who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or registered trust corporation, to be kept in the name of the member, or in the name of the firm of members of which the member is a partner or by which the member is employed, and designated as a trust account.

18. The federal money laundering regulation, repealed with respect to its application to lawyers, made under the *Proceeds of Crime (Money Laundering)* and *Terrorist Financing Act,* includes a definition of "financial entity" which lists a greater number of entities than those listed in s. 2(1) of the By-Law. It reads:

> "financial entity" means an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada or a bank to which that Act applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act*, a company to which the *Trust and Loan Companies Act* applies and a trust company or loan company regulated by a provincial Act. It includes a department or agent of Her Majesty in right of Canada or of a province where the department or agent is carrying out an activity referred to in section 45.
>
> (s. 45 reads: "Every department and agent of Her Majesty in right of Canada or of a province is subject to Part 1 of the Act when it accepts deposit liabilities in the course of providing financial services to the public.")

19. Although the Federation of Law Societies' Model Rule used "financial institution" for the purposes of the exception reflected in s. 1.4(a) of By-Law 19, the exception is intended to mirror the federal regulation. The exception in the federal regulation read as follows:

> 32. Subject to subsection 52(1), every legal counsel and every legal firm that, while engaging in an activity described in section 31, receives an amount in cash of $10,000 or more in course of a single transaction shall report the transaction to the Centre, together with the information set out in Schedule 1, *unless the amount is received from a financial entity or a public body.*
> (emphasis added)

20. The Committee's proposal is to replace the words "financial institution" in s. 1.4(a) with the list of entities that appears in the federal regulation under the definition of "financial entity". The Committee determined that this was more appropriate than using the list of entities in s. 2(1) as

- it is consistent with the federal regulation and includes a broader range of entities than those where trust funds must be deposited,
- it will avoid confusion with the use of "financial institution" in s. 7 and the list in s. 2(1) of By-Law 19, and
- it will establish a list of entities exclusively for the purposes of the section of By-Law 19 (on Cash Transactions) that deals with money laundering.

21. In the Committee's view, this proposal will not only bring some clarity to the matter, but for the reasons noted above, will not interfere with the substance of the amendments that originated with the Federation's Model Rule.

The Second Amendment

22. The second proposed amendment clarifies that the exception to the prohibition on accepting cash in section 1.4(e) of By-Law 19 applies to retainers and fees for professional services rendered. This is accomplished by using the following words in the this section:

Receives cash for fees, disbursements, expenses or bail…

Motion to Amend the By-Law

23. The motion to amend the By-Law in respect of the above appears on the next page. The motion also includes the French version of the amendments made by Convocation to both By-Laws 18 and 19 on January 27, 2005 and the English and French versions of the two amendments proposed above.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 24, 2005

MOVED BY

SECONDED BY

THAT by-laws made by Convocation under subsection 62 (0.1) and (1) of the Law Society Act in force on February 24, 2005 be amended as follows:

BY-LAW 18
[RECORD KEEPING REQUIREMENTS]

1. Subsection 1 (1) of the French version of By-Law 18 [Record Keeping Requirements] is amended by adding the following:

« espèces » Monnaie courante conformément à la définition de la *Loi sur la monnaie courante*, billets de banque prévus pour la circulation au Canada émis par la Banque du Canada en application de la *Loi sur la Banque du Canada* et monnaie courante et billets des pays autres que le Canada;

2. Subsection 1 (1) of the French version of the By-Law is amended by deleting “monnaie courante, effets du gouvernement ou billets de banque” and substituting “espèces” in the interpretation of « fonds ».

3. Paragraph 1 of section 2 of the French version of the By-Law is amended by adding “la méthode de réception des fonds” after “pour une cliente ou un client”.

4. Paragraph 5 of section 2 of the French version of the By-Law is deleted and the following substituted:

5. un livre-journal où sont inscrits tous les fonds reçus autrement qu’en fiducie pour une cliente ou un client, la date de réception des fonds, la méthode de réception des fonds, le montant des fonds reçus et la personne dont ils proviennent;

5. The French version of the By-Law is amended by adding the following:

Obligations relatives à la tenue de registres si les espèces sont reçues en fiducie
2.1 (1) Chaque membre qui reçoit des espèces maintient des registres financiers en plus de ceux qui sont requis en vertu de l'article 2 et, comme obligation additionnelle minimale, maintient, selon les articles 4, 5 et 6, un livre de duplicata de reçus, et chaque reçu indique la date à laquelle les espèces sont reçues, de qui les espèces proviennent, le montant des espèces reçues, le client ou la cliente pour qui les espèces sont reçues et tout numéro de dossier pour lequel les espèces sont reçues et portant la signature du membre ou de la personne autorisée par le membre à recevoir des espèces et de la personne de qui les espèces sont reçues.

Pas de violation
2) Un membre n'enfreint pas le paragraphe (1) si un reçu ne porte pas la signature de la personne pour qui les espèces sont reçues si le membre a fait des efforts raisonnables pour obtenir la signature de cette personne.

6. Subsection 4 (1) of the French version of the By-Law is amended by deleting "et 3" and substituting "2.1 et 3".

7. Subsection 5 (1) of the French version of the By-Law is amended by deleting "et 3" and substituting "2.1 et 3".

8. Subsection 6 (1) of the French version of the By-Law is deleted and the following substituted:

Conservation des registres financiers prescrits par les articles 2 et 2.1
6. (1) Sous réserve du paragraphe (2), les membres conservent les registres financiers prescrits par l'article 2 et 2.1 qui couvrent au moins les six années précédant la date à laquelle s'est terminé leur dernier exercice.

BY-LAW 19
[HANDLING OF MONEY AND OTHER PROPERTY]

9. Clause (a) of section 1.4 of the English version of the By-Law is deleted and the following substituted:

(a) receives cash from a public body, an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada or a bank to which the Bank Act applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act*, a company to which the *Trust and Loan Companies Act* applies, a trust company or loan company regulated by a provincial Act or a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public.

10. Clause (e) of section 1.4 of the English version of the By-law is amended by deleting "payment of".

11. Subsection 1 (1) of the French version of By-Law 19 [Handling of Money and Other Property] is amended by adding the following:

« espèces » Monnaie courante conformément à la définition de la *Loi sur la monnaie courante,* billets de banque prévus pour la circulation au Canada émis par la Banque du Canada en application de la *Loi sur la Banque du Canada* et monnaie courante et billets des pays autres que le Canada;

12. Subsection 1 (1) of the French version of the By-Law is amended by deleting “monnaie courante, effets du gouvernement ou billets de banque” and substituting “espèces” in the interpretation of « fonds ».

13. Section 1 of the French version of the By-Law is amended by adding the following:

Définition : « jour férié »

(3) Dans les articles 1.2 et 8.1, les jours suivants sont des jours fériés :

a) les samedis et les dimanches;

b) le Jour de l’n;

c) le Vendredi saint;

d) le lundi de Pâques;

e) la fête de la Reine (Jour de Victoria);

f) la fête du Canada;

g) le congé municipal;

h) la fête du travail;

i) l’Action de grâces;

j) le jour du Souvenir;

k) le jour de Noël;

l) le lendemain de Noël;

m) tout congé spécial proclamé par le gouverneur général ou le lieutenant gouverneur.

Idem

(4) Lorsque le Jour de l’An, la fête du Canada ou le jour du Souvenir tombent un samedi ou un dimanche, le lundi suivant est un jour férié.

Idem

(5) Lorsque le jour de Noël tombe un samedi ou un dimanche, le lundi et le mardi suivants sont des jours fériés.

Idem
(6) Lorsque le jour de Noël tombe un vendredi, le lundi suivant est un jour férié.

14. The French version of the By-Law is amended by adding immediately before section 1 the following:

PARTIE I

GÉNÉRAL

15. The French version of the By-Law is amended by adding immediately before section 2 the following:

PARTIE II
OPÉRATIONS EFFECTUÉES EN ESPÈCES

Définitions

1.1 Les définitions qui suivent s'appliquent à la présente partie,

« effets » Espèces, devises, valeurs mobilières et titres négociables ou autres instruments financiers qui font foi du titre ou d'un intérêt à l'égard de ceux-ci.

« organisme public »,

a) Tout ministère ou mandataire de Sa Majesté du chef du Canada ou d'une province;

b) Une ville, constituée en personne morale ou non, un village, une autorité métropolitaine, un canton, un district, un comté, une municipalité rurale ou un autre organisme municipal constitué en personne morale, ou un mandataire de ceux-ci;

c) Toute institution qui exploite un hôpital public et qui est désignée comme administration hospitalière par le ministre du Revenu national aux termes de la Loi sur la taxe d'accise, ou tout mandataire de celle-ci.

Espèces reçues
1.2 (1) un membre ne peut recevoir ni accepter de quiconque, pour aucun dossier de client, des espèces pour un montant total de 7 500 $ ou plus en argent canadien.

Devises étrangères
(2) Aux fins de cet article, si un membre reçoit ou accepte de quiconque des espèces en devises étrangères, le membre sera considéré comme ayant reçu ou accepté les espèces converties en dollars canadiens selon,

a) le taux de conversion officiel de la Banque du Canada publié dans ses taux à midi en vigueur à la date où l'opération est effectuée;

b) si le jour où le membre effectue l'opération est un congé férié, le taux de conversion de la Banque du Canada en vigueur à la date du jour ouvrable le plus récent avant le jour où l'opération est effectuée.

Application
1.3 L'article 1.2 s'applique aux membres lorsque, par rapport à un dossier de client ou de cliente, un membre reçoit ou donne des instructions sur les activités suivantes :

1. Le membre reçoit ou paie des effets.

2. Le membre achète ou vend des valeurs, des biens immobiliers, ou un actif ou une entité commerciale.

3. Le membre transfère des effets par quelque moyen que ce soit.

Exceptions
1.4 En dépit de l'article 1.3, l'article 1.2 ne s'applique pas au membre lorsque celui-ci,

a) reçoit des espèces d'un organisme public, banque régie par la *Loi sur les banques,* banque étrangère autorisée – au sens de l'article 2 de la *Loi sur les banques* – dans le cadre de ses activités au Canada, coopérative de crédit, caisse d'épargne et de crédit ou caisse populaire régies par une loi provinciale, association régie par la *Loi sur les associations coopératives de crédit*, société régie par la *Loi sur les sociétés de fiducie et prêt, société de fiducie ou de prêt* régie par une loi provinciale ou ministère ou mandataire de Sa Majesté du chef du Canada ou d'une province lorsque le ministère ou mandataire accepte des dépôts dans le cadre des services financiers qu'il fournit au public;

b) reçoit des espèces d'un agent de la paix, d'un organisme d'exécution de la loi ou de tout autre mandataire de la Couronne agissant à titre officiel;

c) reçoit des espèces conformément à une ordonnance d'un tribunal administratif;

d) reçoit des espèces pour payer une amende ou une sanction;

e) reçoit des espèces pour honoraires, débours, dépenses ou cautionnement à condition que tout remboursement fait à partir de cet argent soit aussi fait en espèces.

16. The French version of the By-Law is amended by adding immediately before section 2 the following:

PARTIE III
OPÉRATION DES COMPTES EN FIDUCIE

17. The French version of the By-Law is amended by adding “PARTIE IV” immediately before the heading “RETRAITS AUTOMATIQUES DES COMPTES EN FIDUCIE”.

18. The French version of the By-Law is amended by deleting subsection 7.1 (7) and substituting the following:

Application du paragraphe 8.1 (2)
(7) Le paragraphe 8.1 (2) s’applique, avec les adaptations nécessaires, à l’égard de tout acte accompli en vertu du présent article.

19. The French version of the By-Law is amended by deleting subsections 8.1 (4), (5), (6) and (7).

20. The French version of the By-Law is amended by adding immediately before section 9 the following:

PARTIE V
ENTRÉE EN VIGUEUR

PROPOSED AMENDMENTS TO THE *LAW SOCIETY ACT* RESPECTING ORDERS FOR SEARCH AND SEIZURE, INTERIM SUSPENSIONS AND CONFIDENTIALITY OF INVESTIGATIONS

A. NATURE OF THE ISSUE

24. In December 2004, the Committee began review of a report prepared by the Director of Professional Regulation, Zeynep Onen, which identified a number of Law Society regulatory processes that could be improved to enhance the effectiveness of the Law Society’s regulatory mandate.

25. The issues included the process to obtain an order for search and seizure, the procedures relating to obtaining an order for the interim suspension of a member and the confidentiality requirements for information obtained during a conduct investigation.

26. The Committee recommends that changes be made to improve the ability of the Law Society to respond appropriately to member conduct issues as a matter of public protection, and is proposing the following amendments to the *Law Society Act,* discussed in detail in the report that follows:

a. an amendment to s. 49.10 of the *Law Society Act* to clarify that an application for an order for search and seizure may be made to obtain information not only from members but also from third parties;
b. an amendment to s. 49.27 of the *Law Society Act* to change the test for obtaining an order for a member’s interim suspension to a belief on reasonable grounds that there is a significant risk that members of the public would be harmed;

c. an amendment to s. 49.12 of the *Law Society Act* to provide an additional exception to the confidentiality requirement to permit disclosure of information obtained during an audit, investigation, review, search, seizure or proceeding, to prevent harm to the public, including bodily harm or death.

27. The Committee urges Convocation to adopt these amendments at February 2005 Convocation, given that amendments to the *Law Society Act* are required for paralegal regulation. The Committee's view is that Convocation should use this window of opportunity to propose necessary amendments to the Act that are also related to functions that the Society will be adapting for paralegal regulation.

28. The Committee did not prepare specific language for the amendments, as the precise drafting will be done by legislative counsel should Convocation approve the amendments.

B. ORDERS FOR SEARCH AND SEIZURE FOR INFORMATION FROM THIRD PARTIES

Current Process

29. Section 49.10 of the Act[4] provides that the Law Society may apply to the court to obtain information required as evidence in connection with an investigation of a member's conduct.

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[4] Order for search and seizure

49.10 (1)On application by the Society, the Superior Court of Justice may make an order under subsection (2) if the court is satisfied that there are reasonable grounds for believing,

(a)that circumstances exist that authorize or require an investigation to be conducted under section 49.3 or that require a review to be conducted under section 49.4'

(b)that there are documents or other things that relate to the matters under investigation or review in a building, dwelling or other premises specified in the application or in a vehicle or other place specified in the application; and

(c)that an order under subsection (2) is necessary because of urgency or because use of the authority in subsection 49.3 (2), (4) or (6) or 49.4 (2) is not possible, is not likely to be effective or has been ineffective. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

Contents of order
(2)The order referred to in subsection (1) may authorize the person conducting the investigation or review, or any police officer or other person acting on the direction of the person conducting the investigation or review,

(a)to enter, by force if necessary, any building, dwelling or other premises specified in the order, or any vehicle or other place specified in the order;

(b)to search the building, dwelling, premises, vehicle or place;

30. In summary, this section provides where reasonable grounds exist for believing that documents or other things that relate to the matters under investigation are in a location specified in the application and the circumstances call for urgent action or where use of the standard investigation authority in the Act is not possible or is ineffective, the court may order that the documents or things may be seized by the person authorized to carry out the search and seizure.

Problems with the Current Process

31. Investigations of more serious allegations against members are becoming more complex. As would be expected, they often require the Society's Investigations staff to obtain information from third parties (not the complainant or the member). Third parties are often financial institutions as opposed to individuals. While members of the Society are obviously required to co-operate with an investigation, third parties are not.

32. While s. 49.10 provides that the Law Society may apply to the court to obtain information required as evidence, it is not clear whether this section applies to information required from the member under investigation or third parties. It is the only section that permits obtaining evidence from anyone other than the complainant and the member.

33. The only other recourse is to summons the individual with the information as a witness in a prosecution. In most cases, when information is provided at this stage in response to the summons, an adjournment of the hearing will be required to permit the Law Society and the member or the member's counsel to examine the information. This delays the timely adjudication of the matter and increases the cost of the proceeding.

34. In the Committee's view the ambiguity of s. 49.10 is problematic for investigations. In the absence of clear authority to obtain such evidence in the right case, the Investigations staff spend significant amounts of time attempting to use persuasion to obtain the necessary information, and there are cases when the information cannot be obtained. The issue arises in mortgage fraud cases, where information is sought from financial institutions. Some financial institutions voluntarily provide the information, some do not and some request that an order for search and seizure issue before they can provide the information.

35. The inability to obtain information in a timely way is a primary reason for delays in completing investigations in a significant number of cases, leading to an inability to adequately enforce the rules and by-laws.

Other Law Societies' Processes

36. Other law societies have provisions that more clearly facilitate orders for search and seizure or production by third parties. Three examples appear below:

Saskatchewan - Legal Profession Act, 1990

(c)to open, by force if necessary, any safety deposit box or other receptacle; and

(d)to seize and remove any documents or other things that relate to the matters under investigation or review. 1998, c. 21, s. 21.

Subpoena

39 (1) On application by:
(a) a member whose conduct is under investigation;
(b) counsel for the society; or
(c) the chairperson of:
(i) an investigation committee;
(ii) a hearing committee;
(iii) the discipline committee;
(iv) the competency and standards committee; or
(v) a committee appointed pursuant to subsection 41(1)* ;
the local registrar of the court at any judicial centre, on payment of the appropriate fees, shall issue writs of *subpoena ad testificandum or subpoena duces tecum.*

(2) Where a writ issued pursuant to subsection (1) is disobeyed, the proceedings and penalties are those applicable in civil cases in the court.

* this section permits the competency and standards committee to strike an investigative committee

British Columbia – *Legal Profession Act*

Search and seizure

37 (1) The society may apply to the Supreme Court for an order that the files or other records, wherever located, of or relating to a lawyer or articled student be seized from the person named in the order, if there are reasonable grounds to believe that a lawyer or articled student may have committed or will commit any
(a) misconduct,
(b) conduct unbecoming a lawyer, or
(c) breach of this Act or the rules.

Alberta – *Legal Profession Act*

s. 55(3) The Society may apply to the Court of Queen's Bench for
(a) an order directing the member concerned or any other member to comply with all or part of subsection (2);
(b) an order directing any person
(i) to produce to the investigator any records or other property in the person's possession or under the person's control that are or may be related in any way to the investigation, or
(ii) to give up possession of any record referred to in subclause (i) for the purpose of allowing the investigator to take it away, make a copy of it and return it within a reasonable time after receiving it;
(c) an order directing any person to attend before the investigator to answer any inquiries the investigator may have relating to the investigation.

The Proposal

37. Section 49.10 of the Act should be amended to clarify that an order for a search and seizure may issue against a third party who has possession or control of documents and information that relate to the matters under investigation. In the Committee's view, this clear authority to obtain third party information with the right checks and balances would clarify jurisdiction, and more importantly, assist in completing investigations in a timely manner.

C. INTERIM SUSPENSIONS

The Current Process

38. Where there is a serious allegation of wrongdoing against a member that also raises a concern about protection of the public, a remedy available to most regulators is the ability to quickly suspend the member's privileges pending a determination of the allegations.

39. The Law Society has the authority to order the interim suspension of a member. Section 49.27 of the *Law Society Act* provides that the Hearing Panel may make an interlocutory order suspending a member. This section reads:

> The Hearing Panel may make an interlocutory order authorized by the rules of practice and procedure, but no interlocutory order may be made suspending the rights and privileges of a member or student member or restricting the manner in which a member may practise law unless the Panel is satisfied that the order is necessary for the protection of the public.

Problems with the Current Process

40. In the Committee's view, there are a number of things, discussed below, which undermine the efficacy of the remedy of the interim suspension, which is primarily meant to address urgent problems apparent before the conduct investigation is complete and the Society is ready to prosecute a member on the merits of a conduct application. The focus is on ensuring that the public is protected.

41. The current process for an order for an interim suspension, given the purpose of the remedy, is lengthy, complex, and applies a higher standard that tends to favour the member's continued ability to practice.

Meeting the Test

42. In applying for an interim suspension, the Law Society is required to satisfy the Hearing Panel that the order is *necessary* for the protection of the public. This test was interpreted by the Hearing Panel as placing the onus on the Law Society to satisfy a panel, on a balance of probabilities, that the order is necessary for the protection of the

public.[5] In the Committee's view, this is too stringent a test for the purposes of the remedy.

43. One difficulty is that on its face, the Act is silent as to what would be a necessary or unnecessary order in this context. It is not clear, for example, whether there must be evidence of actual danger to the public posed by the member's continued practice, or whether a reasonable inference of apparent danger, shown on the balance of probabilities, would suffice. The Act also does not specify that the member's own interests and the risk of prejudice to the member are to be somehow balanced against the need for public protection.

Procedural Requirements and Evidentiary Issues Related to the Test

44. Where a motion for an interim suspension is brought prior to the authorization of a Notice of Application or the Hearing Panel has not commenced a hearing to determine the merits of a proceeding, the process requires:

a. Proceedings Authorization Committee authorization of a motion seeking an interim suspension;
b. Service and filing of a motion record with affidavit evidence which satisfies the Law Society's burden of proof, namely, that the order is necessary for the protection of the public. Generally this involves establishing the misconduct to be alleged in the conduct application which deals with the merits of the misconduct; and
c. Appearance before a Hearing Panel with at least three days' notice to the member at which the member has a right to a full hearing.

45. The Committee noted that other law societies in Canada have more expeditious processes than that of the Law Society. These are discussed in more detail below.[6]

46. The effect of the test in the Act is that the evidence necessary to support an interim suspension is often unavailable until the Law Society is ready to prosecute on the merits.

Implications for Mobility

47. In the context of the National Mobility Agreement, there is increased activity in which two or more law societies will deal with the same lawyer on the same facts. This interaction is highlighting the fact that the Law Society's response differs and, in the Committee's view, may not be sufficient in situations where a member has been charged with a serious offence or is otherwise facing serious allegations.

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[5] *Law Society of Upper Canada v. Raymond Li,* 2004 CanLII 47764 (ON L.S.H.P.)

[6] As an example, the Law Society of Manitoba has a process in which staff may bring an application to suspend a member on an interim basis to a committee of benchers, who decide the matter. The member is provided with 24 hours notice, and may appear before the committee. The committee receives the investigator's report but the formal rules of evidence do not apply.

The Process of Other Law Societies and Regulators

48. Other law societies have an explicit requirement that there be a danger to the public before a suspension may be ordered. A summary of some of the provisions is set out below.

49. The express requirement of a danger to the public is common to four other law societies:

- Section 39(2) of British Columbia's *Legal Profession Act* permits the chair of the Discipline Committee or any three Benchers to suspend a member if on a balance of probabilities "the respondent's continued practice would be dangerous to the public or the respondent's clients";
- Section 68 of Manitoba's *Legal Profession Act* permits the Complaints Investigation Committee to suspend a member "if the committee considers it necessary for the protection of the public…";
- Section 53(1) of New Brunswick's *Law Society Act* permits an interim suspension where the Complaints Committee "considers it probable that the continued practice of the respondent will be harmful to the public or to the respondent's clients"; and
- Section 38(6) of Prince Edward Island's *Legal Profession Act* allows an interim suspension where the Council or Discipline Committee considers it "necessary…for the protection of the public".

50. Saskatchewan's Legal Profession Act and Alberta's *Legal Profession Act* are less specific in the grounds required for an interim suspension. Section 45(1) of Saskatchewan's Act provides for the power to be exercised by the Investigation Committee, and in Alberta's Act, by the Benchers. Under s. 63(1) of Alberta's Act, the Benchers must "consider the suspension warranted in the circumstances having regard to the nature of the conduct."

51. Similarly, s. 32(2) of Nova Scotia's *Barristers and Solicitors Act* provides that a Discipline Subcommittee may impose an interim suspension for up to three months, which is renewable, where it determines that such a suspension "may be desirable in the public interest," and where notice has been given to the member and member's representations have been received.

52. The professional colleges regulated under Ontario's *Regulated Health Professions Act* have a similar power to make an interim order before a discipline hearing in order to protect the public, if the Executive Committee is of the opinion "that the conduct of the member exposes or likely exposes his or her patients to harm or injury."

The Proposal

53. As stated above, the test in s. 49.27 of the Act is whether the "Panel is satisfied that the order is necessary for the protection of the public" based on a balance of probabilities.

54. The Committee is proposing that the test be revised so that Act expressly permits the Hearing Panel to be satisfied of the necessity of an order where there are reasonable grounds to believe that there is a significant risk that members of the public would be harmed. This test, which is less onerous than that currently in s. 49.27, requires a

reasonableness standard that is more appropriate for the purposes for which the interim suspension authority is intended.

Separate Review of Procedural and Evidentiary Matters

55. Unlike the Law Society, other law societies do not require that the Hearing Panel or its equivalent hear an application for an interim suspension.[7] In the Committee's view, this is consistent with the variety of situations in which an interim suspension order will be appropriate – situations in which an apparent danger to the public exists and the benefit of protecting the public outweighs any specific prejudice to the member in the interim. The procedural and evidentiary requirements in these jurisdictions are also less complex in these circumstances.

56. The Committee reviewed the Law Society's *Rules of Practice and Procedure* that govern the procedure for obtaining of an interim order, which in its view are stringent. As a result of that review, the Committee will be reporting separately on proposals for changes to the procedural and evidentiary requirements for an application for an interim suspension, and on an alternative to a three-member Hearing Panel for these applications. While the Committee believes that these changes will add the necessary flexibility to address the various situations in which interim suspensions are appropriate, the amendment to the test in the Act is a key enabling change.

D. DISCLOSURE OF INFORMATION OBTAINED DURING A CONDUCT INVESTIGATION FOR REASONS OF PUBLIC PROTECTION

The Current Requirement for Confidentiality

57. Section 49.12 of the Act[8] sets a high standard of confidentiality for any information obtained in the course of activities such as investigation. The Act provides that no

[7] O. Reg. 30/99 requires a three-member panel for applications under s. 49.27.

[8] Confidentiality

49.12 (1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

Exceptions

(2)Subsection (1) does not prohibit,

(a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;

(b) disclosure required in connection with a proceeding under this Act;

(c) disclosure of information that is a matter of public record;

(d) disclosure by a person to his or her counsel; or

information obtained during an investigation may be disclosed. Limited exceptions to this requirement appear in s. 49.12(2). The allegations against a member do not become public until he or she is served with the Notice of Application.

The Issue

58. In some cases, during an investigation, and while still under the s. 49.12 requirement for confidentiality, the Law Society obtains information which ought to be shared with other agencies for reasons of public protection and prevention of harm.

59. The Society may disclose information with the permission of the court if the Society makes an application under section 49.13 of the Act.[9] In the Committee's view, this is an onerous process in circumstances where immediate action and flexibility are often critical. In addition, the scope of disclosure that a court may order is very limited.

(e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

Testimony
(3)A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1). 1998, c. 21, s. 21.

[9] Disclosure to public authorities
49.13 (1)The Society may apply to the Superior Court of Justice for an order authorizing the disclosure to a public authority of any information that a bencher, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing under section 49.12. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

Restrictions
(2)The court shall not make an order under this section if the information sought to be disclosed came to the knowledge of the Society as a result of,

(a)the making of an oral or written statement by a person in the course of the audit, investigation, review, search, seizure or proceeding that may tend to criminate the person or establish the person's liability to civil proceedings;

(b)the making of an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege; or

(c)the examination of a document that the court determines to be subject to solicitor-client privilege. 1998, c. 21, s. 21.

Documents and other things
(3)An order under this section that authorizes the disclosure of information may also authorize the delivery of documents or other things that are in the Society's possession and that relate to the information. 1998, c. 21, s. 21.

No appeal
(4)An order of the court on an application under this section is not subject to appeal. 1998, c. 21, s. 21.

60. Mortgage fraud investigations are an example of a type of investigation in which the Law Society may discover information that, for reasons of prevention, ought to be disclosed to other agencies such as the registrar of land titles. On occasion, Investigations staff become aware of circumstances in which members themselves are at risk of physical harm.

61. With the advent of mobility and an increase in memberships in more than one law society in Canada, there is a need to disclose the fact of serious allegations against a member.

62. The Committee believes that the Law Society's lack of flexibility to disclose quickly in cases where there are serious allegations at issue leaves the Law Society at risk of having had in its possession information that, if disclosed, could have prevented further harm.

The Proposal

63. The Committee is proposing that s. 49.12 be amended to provide for disclosure for public protection reasons and prevention of harm.

64. The proposal is for a new exception in s. 49.12(2) to the general confidentiality requirement in s. 49.12(1) that would permit disclosure that is necessary for the protection of the public, more specifically, to prevent harm to the public, including bodily harm or death. The disclosure would primarily involve providing information to public authorities who would be in a position to use the information disclosed for prevention of harm.

PROPOSED AMENDMENT TO RULE 2.04(6) ON JOINT RETAINERS FOR SPOUSAL WILLS

A. BACKGROUND

65. On November 25, 2004, Convocation approved in principle a new commentary to rule 2.04(6) that explains a lawyer's obligations when he or she has prepared joint or mirror wills for spouses or partners and one spouse later requests the lawyer to make changes to his or her will.[10]

66. Convocation deferred adopting the language of the commentary pending drafting of an amendment to the commentary, approved by Convocation on November 25. The amendment arose from the decision to mirror more closely in the commentary the principles on which the new commentary is based, which were set out in the Committee's November 25 report as follows:

    a. A retainer for preparation of mutual or mirror wills by spouses or partners amounts to a joint retainer, to which rule 2.04(6) applies;

[10] Additional background information on this issue is summarized in Appendix 4, which also includes current rule 2.04.

b. The joint retainer ends when the wills are executed. The only continuing obligation of the lawyer is not to act against a former client in the same or a related matter or transaction without consent, in accordance with rule 2.04(4);
c. If one of the spouses later contacts the lawyer to make a change to his or her will, that contact is a new matter. Without the consent of the other spouse, the lawyer is prevented from acting on the matter because it may adversely affect the interests of a former client;
d. In the absence of the other spouse's consent, the lawyer cannot act, but if he or she decides not to act, the lawyer is prevented from contacting the other spouse to advise of the contact, as lawyer and client confidentiality, as described in rule 2.03, attaches to the communication about the new matter.

The motion to amend the proposed commentary was essentially to incorporate paragraph d. above

67. The proposed commentary was redrafted by Rules drafter Paul Perell to incorporate the amendment, and reads as follows:

RULE 2.04(6)

Joint Retainer

(6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
(c) the lawyer would have a duty to decline the new retainer, unless the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8)[11] .

B. ADDITIONAL ISSUE RAISED BY THE COMMITTEE AND THE REVISED PROPOSAL

68. During its review the revised commentary at its January and February 2005 meetings, Committee members raised questions about whether the commentary should apply where, before one of the spouses returns to the lawyer, one spouse has died or the spouses have divorced.

69. There was a consensus that the commentary should be confined to situations where the spouses or partners are still spouses or partners at the time one of the spouses or partners later approaches the lawyer who drew the mirror wills to change the spouse's or partner's will.

70. Based on this decision, the Committee added language to the commentary, with the assistance of Mr. Perell, to provide that the lawyer may act in the matter without the consent of the other spouse where the spouses have divorced or act where one spouse has died.

71. For clarity's sake, the language of the definition of "partner" in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30, which is referenced in the commentary, is used. The detail is provided because the word "divorce" may not accurately describe the termination of a conjugal relationship or a close personal relationship. The definition of "partner" is as set out below:

> "partner" means,
>
> (a) a person of the same sex with whom the person is living in a conjugal relationship outside marriage, if the two persons,
> (i) have cohabited for at least one year,
> (ii) are together the parents of a child, or
> (iii) have together entered into a cohabitation agreement under section 53 of the Family Law Act, or
> (b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives; ("partenaire")

72. The following is the proposed language of the commentary which the Committee requests Convocation approve. This is the commentary appearing under paragraph 67

[11] This subrule says that where a lawyer has advised the clients as provided under subrule (6) and the parties are content that the lawyer act, the lawyer must obtain their consent.

above, with bold underlined text added to indicate the new language for the divorce and death situations:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:
> (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
> (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
> (c) the lawyer would have a duty to decline the new retainer, unless
>
> > (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
> >
> > (ii) the other spouse or partner had died; or
> >
> > (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

INFORMATION

REPORT FROM THE PROFESSIONAL REGULATION DIVISION

Information on Mortgage Fraud Investigations

73. At the request of the Committee's chair, Zeynep Onen, the Director of Professional Regulation, is preparing a memorandum that provides general information on mortgage fraud investigations. The memorandum will be distributed under separate cover.

Quarterly Report

74. The Professional Regulation Division's Quarterly Report, provided to the Committee by Ms. Onen, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period October to December 2004.

APPENDIX 1

FEDERATION OF LAW SOCIETIES OF CANADA
MODEL RULE ON CASH TRANSACTIONS

APPENDIX 2

ISSUES ARISING FROM DISCUSSION OF BY-LAW AND RULE CHANGES RELATED TO MONEY LAUNDERING RAISED ON JANUARY 27, 2005

Definitions of "financial institution" and "person"

1. It was suggested that these two terms used in By-Law 19 be defined.

By-Law 18, section 2 paragraph 1

2. This section of the By-Law was amended to read as follows (new text in boldface type):

    1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received and the client for whom money is received in trust

3. It was suggested that to simplify the record keeping requirements primarily for small practices, the words "where the method is by cash" should be added after the word "received" in boldface type.

By-Law 19, section 1.2

4. New section 1.2 is the prohibition on accepting large cash amounts and reads as follows:

    A member shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars.

5. A motion was made that words be added to reflect that the prohibition also applies to "a series of files or transactions" in addition to "any one client file", to avoid a situation where a client wishes to arrange a number of matters or transactions in separate files to avoid the prohibition. The motion was defeated.

By-Law 19, section 1.3

6. New section 1.3 described the circumstances in which the prohibition applies, and reads as follows:

    1.3 Section 1.2 applies when, in respect of a client file, a member engages in or gives instructions in respect of the following activities:

        1. The member receives or pays funds.

2. The member purchases or sells securities, real properties or business assets or entities.

3. The member transfers funds by any means.

7. It was suggested that the words “or receives” should be added after the word “gives” to indicate that the application includes the receipt of instructions for the listed activities.

By-Law 19, section 1.4(d) and (e)

8. New section 1.4 lists the exemptions to the prohibition on a lawyer’s receipt of cash, and reads as follows:

> Despite section 1.3, section 1.2 does not apply when the member,
>
> (a) receives cash from a financial institution or public body;
>
> (b) receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
>
> (c) receives cash pursuant to an order of a tribunal;
>
> (d) received cash to pay a fine or penalty;
>
> (e) receives cash for payment of fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

9. It was suggested that (d) be amended to incorporate similar wording appearing in the last phrase of (e), to the effect that if the person delivering the cash to pay a fine or penalty requests its return before the payment is made, the return should be made in cash.

10. A concern was raised that in effect, the exemption in (d) permits a client or the person delivery the cash for payment of the fine or penalty to launder the money.[12]

11. It was suggested that it should be made clear that the word “fees” in (e) includes retainers and not only amounts paid for accounts rendered for fees.[13]

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[12] The Committee noted that these funds go to (and the transaction ends) with a governmental office.

[13] The intention in the model rule is that “fees” includes a retainer for fees. This exemption appeared in the repealed money laundering regulations, and was worded as follows:

31.(1)Every legal counsel...is subject to Part 1...when they engage in any of the following activities....

(a)receiving or paying funds, <u>other than those received or paid in respect of professional fees, disbursements expenses or bail”</u>

12. It was also suggested that (e) should not require payment of cash to the client who requests a refund of cash paid for fees for professional services rendered where the client threatens to assess the lawyer's account unless a refund is paid.

Real Estate Transactions

13. It was indicated that real estate contracts call for payment of the purchase price in cash or by certified cheque. It was suggested that the Society notify the Ontario Real Estate Association (OREA) about the prohibition on receipt of cash of $7500 or greater.[14]

APPENDIX 3

BY-LAW 18

Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999
October 31, 2002

RECORD KEEPING REQUIREMENTS

GENERAL

Interpretation
1. (1) In this By-Law,

"cash" means current coin within the meaning of the *Currency Act,* notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act* and current coin or banks notes of countries other than Canada;

"client" includes a person or group of persons from whom or on whose behalf a member receives money or other property;

"firm of members" means a partnership of members and all members employed by the partnership;

"lender" means a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or corporation;

"member" includes a firm of members;

"money" includes cash ~~current coin, government or bank notes,~~ cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

[14] The Committee learned that the current OREA form for agreements of purchase and sale does not refer to cash but to "negotiable cheque" (with respect to deposits), and "bank draft" or "cheque certified" by a financial institution (with respect to tender).

"arm's length" and "related"

(2) For the purposes of this By-Law, "arm's length" and "related" have the same meanings given them in the *Income Tax Act* (Canada).

"Charge"

(3) For the purposes of this By-Law, "charge" has the same meaning given it in the *Land Registration Reform Act.*

"Teranet"

(4) In paragraph 12 of section 2, "Teranet" means Teranet Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Business Services.

Requirement to maintain financial records

2. Every member shall maintain financial records to record all money and other property received and disbursed in connection with the member's practice, and, as a minimum requirement, every member shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received and the client for whom money is received in trust.

2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed and the client on whose behalf money is disbursed.

3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.

4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.

~~5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the person from whom money is received and the amount of money received.~~

5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the method by which money is received, the amount of money which is received and the person from whom money is received.

6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.

7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:

    i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.

    ii. A detailed reconciliation made monthly of each trust bank account.

9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the member took possession of each property, the person who had possession of each property immediately before the member took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.

10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.

11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.

12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

Record keeping requirements if cash received in trust

2.1 (1) Every member who receives cash for a client shall maintain financial records in addition to those required under section 2 and, as a minimum additional requirement, shall maintain, in accordance with sections 4, 5 and 6, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received, any file number in respect of which cash is received and containing the signature of the member or the person authorized by the member who receives cash and of the person from whom the cash is received.

No Breach

(2) A member does not breach subsection (1) if a receipt does not contain the signature of the person from whom cash is received provided that the member has made reasonable efforts to obtain the signature of the person from whom cash is received.

Record keeping requirements if mortgages and other charges held in trust for clients

3. Every member who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in

addition to those required under section 2 and, as a minimum additional requirement, shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,

    i. all funds received and disbursed on account of the mortgage or charge,

    ii. the balance of the principal amount outstanding for each mortgage or charge,

    iii. an abbreviated legal description or the municipal address of the real property, and

    iv. the particulars of registration of the mortgage or charge.

2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,

    i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,

    ii. the balance of the principal amount invested in each mortgage or charge,

    iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and

    iv. the particulars of registration of each mortgage or charge.

3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

    i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.

    ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

Financial records to be permanent

4. (1) The financial records required to be maintained under sections 2, 2.1 and 3 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

Paper copies of financial records

(2) If a financial record is entered and posted by mechanical or electronic means, a member shall ensure that a paper copy of the record may be produced promptly on the Society's request.

Financial records to be current

5. (1) Subject to subsection (2), the financial records required to be maintained under sections 2, 2.1 and 3 shall be entered and posted so as to be current at all times.

Exceptions

(2) The record required under paragraph 8 of section 2 and the record required under paragraph 3 of section 3 shall be created within fifteen days after the last day of the month in respect of which the record is being created.

~~Preservation of financial records required under s. 2~~

~~6. (1) Subject to subsection (2), a member shall keep the financial records required to be maintained under section 2 for at least the six year period immediately preceding the member's most recent fiscal year end.~~

Preservation of financial records required under ss. 2 and 2.1

6. (1) Subject to subsection (2), a member shall keep the financial records required to be maintained under sections 2 and 2.1 for at least the six year period immediately preceding the member's most recent fiscal year end.

Same

(2) A member shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10, and 11 of section 2 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Preservation of financial records required under s. 3

(3) A member shall keep the financial records required to be maintained under section 3 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Record keeping requirements when acting for lender

7. (1) Every member who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 2 and 3, maintain a file for each charge, containing,

(a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;

(b) a copy of a completed report on the investment;

(c) if the charge is not held in the name of all the lenders, an original declaration of trust;

(d) a copy of the registered charge; and

(e) any supporting documents supplied by the lender.

Exceptions

(2) Clauses (1) (a) and (b) do not apply with respect to a lender if,

(a) the lender,

(i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,

(ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and

(iii) has given the member a copy of the written commitment before the advance of money to or on behalf of the borrower;

(b) the lender and borrower are not at arm's length;

(c) the borrower is an employee of the lender or of a corporate entity related to the lender;

(d) the lender has executed Form 1 of Regulation 798 of the Revised Regulations of Ontario, 1990, made under the *Mortgage Brokers Act*, and has given the member written instructions, relating to the particular transaction, to accept the executed form as proof of the loan agreement;

(e) the total amount advanced by the lender does not exceed $6,000; or

(f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

Requirement to provide documents to lender

(3) Forthwith after the first advance of money to or on behalf of the borrower, the member shall deliver to each lender,

(a) if clause (1) (b) applies, an original of the report referred to therein; and

(b) if clause (1) (c) applies, a copy of the declaration of trust.

Requirement to add to file maintained under subs. (1)

(4) Each time the member or any member of the same firm of members does an act described in subsection (5), the member shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

Application of subs. (4)

(5) Subsection (4) applies in respect of the following acts:

1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.

2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.

3. Releasing collateral or other security held for the loan.

4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

New requirement to provide documents to lender

(6) Forthwith after completing anew the report on the investment under subsection (4), the member shall deliver an original of it to each lender.

Requirement to add to file maintained under subs. (1): substitution

(7) Each time the member or any other member of the same firm of members substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the member shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

Exceptions

(8) The member need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

Investment authority: Form 18A

(9) The investment authority required under clause (1) (a) shall be in Form 18A.

Report on investment: Form 18B

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 18B.

Report on investment: alternative to Form 18B

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 18B.

Commencement

8. This By-Law comes into force on February 1, 1999.

BY-LAW 19

Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999
April 26, 2001
October 31, 2002

HANDLING OF MONEY AND OTHER PROPERTY

PART I
GENERAL

Interpretation

1. (1) In this By-Law,

"cash" means current coin within the meaning of the *Currency Act,* notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act* and current coin or banks notes of countries other than Canada;

"client" means a person or group of persons from whom or on whose behalf a member receives money or other property;

"firm of members" means a partnership of members and all members employed by the partnership;

"member" includes a firm of members;

"money" includes cash ~~current coin, government or bank notes,~~ cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

(2) For the purposes of subsections 4 (1), (2) and (3) and section 8, cash, cheques negotiable by the member, cheques drawn by the member on the member's trust account and credit card sales slips in the possession and control of the member shall be deemed from the time the member receives such possession and control to be money held in a trust account if the cash, cheques or credit card sales slips, as the case may be, are deposited in the trust account not later than the following banking day.

Interpretation: "holiday"

(3) In sections 1.2 and 8.1, "holiday" means,

(a) any Saturday or Sunday;

(b) New Year's Day;

(c) Good Friday;

(d) Easter Monday;

(e) Victoria Day;

(f) Canada Day;

(g) Civic Holiday;

(h) Labour Day;

(i) Thanksgiving Day;

(j) Remembrance Day;

(k) Christmas Day;

(l) Boxing Day; and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor.

Same

(4) Where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday.

Same

(5) Where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays.

Same

(6) Where Christmas Day falls on a Friday, the following Monday is a holiday.

PART II
CASH TRANSACTIONS

Definition

1.1 In this part,

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or interest in them.

"public body" means,

(a) a department or agent of Her Majesty in right of Canada or of a province;

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body or an agent of any of them; and

(c) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* or agent of the organization.

Cash received

1.2 (1) A member shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars.

Foreign currency

(2) For the purposes of this section, when a member receives or accepts from a person cash in a foreign currency the member shall be deemed to have received or accepted the cash converted into Canadian dollars at,

(a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada's Daily Noon Rates that is in effect at the time the member receives or accepts the cash; or

(b) if the day on which the member receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the member receives or accepts the cash.

Application
1.3 Section 1.2 applies when, in respect of a client file, a member engages in or gives instructions in respect of the following activities:

1. The member receives or pays funds.

2. The member purchases or sells securities, real properties or business assets or entities.

3. The member transfers funds by any means.

Exceptions
1.4 Despite section 1.3, section 1.2 does not apply when the member,

(a) receives cash from a financial institution or public body;

(b) receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;

(c) receives cash pursuant to an order of a tribunal;

(d) received cash to pay a fine or penalty;

(e) receives cash for payment of fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

PART III

TRUST ACCOUNT TRANSACTIONS

Money received in trust for client
2. (1) Subject to section 3, every member who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or registered trust corporation, to be kept in the name of the member, or in the name of the firm of members of which the member is a partner or by which the member is employed, and designated as a trust account.

Interpretation
(2) For the purposes of subsection (1), a member receives money in trust for a client if the member receives from a person,

(a) money that belongs in whole or in part to a client;

(b) money that is to be held on behalf of a client;

(c) money that is to be held on a client's direction or order;

(d) money that is advanced to the member on account of fees for services not yet rendered; or

(e) money that is advanced to the member on account of disbursements not yet made.

Money to be paid into trust account

(3) In addition to the money required under subsection (1) to be paid into a trust account, a member shall pay the following money into a trust account:

1. Money that may by inadvertence have been drawn from a trust account in contravention of section 4.

2. Money paid to a member that belongs in part to a client and in part to the member where it is not practical to split the payment of the money.

Withdrawal of money from trust account

(4) A member who pays into a trust account money described in paragraph 2 of subsection (3) shall as soon as practical withdraw from the trust account the amount of the money that belongs to him or her.

One or more trust accounts

(5) A member may keep one or more trust accounts.

Money not to be paid into trust account

3. (1) A member is not required to pay into a trust account money which he or she receives in trust for a client if,

(a) the client requests the member in writing not to pay the money into a trust account;

(b) the member pays the money into an account to be kept in the name of the client, a person named by the client or an agent of the client; or

(c) the member pays the money immediately upon receiving it to the client or to a person on behalf of the client in accordance with ordinary business practices.

Same

(2) A member shall not pay into a trust account the following money:

1. Money that belongs entirely to the member or to another member of the firm of members of which the member is a partner or by which the member is employed, including an amount received as a general retainer for which the member is not required either to account or to provide services;

2. Money that is received by the member as payment of fees for services for which a billing has been delivered, as payment of fees for services already performed

for which a billing will be delivered immediately after the money is received or as reimbursement for disbursements made or expenses incurred by the member on behalf of a client.

Record keeping requirements

(3) A member who, in accordance with subsection (1), does not pay into a trust account money which he or she receives in trust for a client shall include all handling of such money in the records required to be maintained under By-Law 18.

Withdrawal of money from trust account

4. (1) A member may withdraw from a trust account only the following money:

1. Money properly required for payment to a client or to a person on behalf of a client

2. Money required to reimburse the member for money properly expended on behalf of a client or for expenses properly incurred on behalf of a client;

3. Money properly required for or toward payment of fees for services performed by the member for which a billing has been delivered.

4. Money that is directly transferred into another trust account and held on behalf of a client.

5. Money that under this By-Law should not have been paid into a trust account but was through inadvertence paid into a trust account.

Permission to withdraw other money

(2) A member may withdraw from a trust account money other than the money mentioned in subsection (1) if he or she has been authorized to do so by the Secretary or, in the absence of the Secretary and all persons authorized to exercise the powers and perform the duties of the Secretary under this By-Law, the Chief Executive Officer.

Limit on amount withdrawn from trust account

(3) A member shall not at any time with respect to a client withdraw from a trust account under this section, more money than is held on behalf of that client in that trust account at that time.

Manner in which certain money may be withdrawn from trust account

5. A member shall withdraw money from a trust account under paragraph 2 or 3 of subsection 4 (1) only,

(a) by a cheque drawn in favour of the member;

(b) by a transfer to a bank account that is kept in the name of the member and is not a trust account; or

(c) by electronic transfer.

Withdrawal by cheque

6. A cheque drawn on a trust account shall not be,

(a) made payable either to cash or to bearer; or

(b) signed by a person who is not a member except in exceptional circumstances and except when the person has signing authority on the trust account on which a cheque will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all the trust accounts on which signing authority has been delegated to the person.

Withdrawal by electronic transfer

7. (1) Money withdrawn from a trust account by electronic transfer shall be withdrawn only in accordance with this section.

When money may be withdrawn

(2) Money shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the member must be one that does not permit an electronic transfer of funds unless,

i. one person, using a password or access code, enters into the system the data describing the details of the transfer, and

ii. another person, using another password or access code, enters into the system the data authorizing the financial institution to carry out the transfer.

2. The electronic transfer system used by the member must be one that will produce, not later than the close of the banking day immediately after the day on which the electronic transfer of funds is authorized, a confirmation from the financial institution confirming that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer were received.

3. The confirmation required by paragraph 2 must contain,

i. the number of the trust account from which money is drawn,

ii. the name, branch name and address of the financial institution where the account to which money is transferred is kept,

iii. the name of the person or entity in whose name the account to which money is transferred is kept,

iv. the number of the account to which money is transferred,

v. the time and date that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer are received by the financial institution, and

vi. the time and date that the confirmation from the financial institution is sent to the member.

4. Before any data describing the details of the transfer or authorizing the financial institution to carry out the transfer is entered into the electronic trust transfer system, an electronic trust transfer requisition must be signed by,

i. a member, or

ii. in exceptional circumstances, a person who is not a member if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic trust transfer system describing the details of the transfer and authorizing the financial institution to carry out the transfer must be as specified in the electronic trust transfer requisition.

Application of para. 1 of subs. (2) to sole practitioner

(3) Paragraph 1 of subsection (2) does not apply to a member who practises law without another member as a partner and without another member or person as an employee, if the member himself or herself enters into the electronic trust transfer system both the data describing the details of the transfer and the data authorizing the financial institution to carry out the transfer.

Same

(4) In exceptional circumstances, the data referred to in subsection (3) may be entered by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Additional requirements relating to confirmation

(5) Not later than the close of the banking day immediately after the day on which the confirmation required by paragraph 2 of subsection (2) is sent to a member, the member shall,

(a) produce a printed copy of the confirmation;

(b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;

(c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and

(d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

(6) In exceptional circumstances, the tasks required by subsection (5) may be performed by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition

(7) The electronic trust transfer requisition required under paragraph 4 of subsection (2) shall be in Form 19A.

Definitions

7.1 (1) In this section,

"closing funds" means the money necessary to complete or close a transaction in real estate;

"transaction in real estate" means,

(a) a charge on land given for the purpose of securing the payment of a debt or the performance of an obligation, including a charge under the *Land Titles Act* and a mortgage, but excluding a rent charge, or

(b) a conveyance of freehold or leasehold land, including a deed and a transfer under the *Land Titles Act*, but excluding a lease.

Withdrawal by electronic transfer: closing funds

(2) Despite section 7, closing funds may be withdrawn from a trust account by electronic transfer in accordance with this section.

When closing funds may be withdrawn

(3) Closing funds shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the member must be one to which access is restricted by the use of at least one password or access code.

2. The electronic transfer system used by the member must be one that will produce immediately after the electronic transfer of funds a confirmation of the transfer.

3. The confirmation required by paragraph 2 must contain,

i. the name of the person or entity in whose name the account from which money is drawn is kept,

ii. the number of the trust account from which money is drawn,

iii. the name of the person or entity in whose name the account to which money is transferred is kept,

iv. the number of the account to which money is transferred, and

v. the date the transfer is carried out.

4. Before the electronic transfer system used by the member is accessed to carry out an electronic transfer of funds, an electronic trust transfer requisition must be signed by,

i. the member, or

ii. in exceptional circumstances, a person who is not the member if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic transfer system describing the details of the electronic transfer of funds must be as specified in the electronic trust transfer requisition.

Additional requirements relating to confirmation

(4) Not later than 5 p.m. on the day immediately after the day on which the electronic transfer of funds is carried out, the member shall,

(a) produce a printed copy of the confirmation required by paragraph 2 of subsection (3);

(b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;

(c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and

(d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

(5) In exceptional circumstances, the tasks required by subsection (4) may be performed by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition: closing funds

(6) The electronic trust transfer requisition required under paragraph 4 of subsection (3) shall be in Form 19C [Electronic Trust Transfer Requisition: Closing Funds].

Application of subss 8.1 (2) ~~and (4) to (7)~~

(7) Subsections 8.1 (2) applies ~~(4), (5), (6) and (7) apply,~~ with necessary modifications, with respect to the doing of any act under this section.

Requirement to maintain sufficient balance in trust account

8. Despite any other provision in this By-Law, a member shall at all times maintain sufficient balances on deposit in his or her trust accounts to meet all his or her obligations with respect to money held in trust for clients.

PART IV

AUTOMATIC WITHDRAWALS FROM TRUST ACCOUNTS

Interpretation: "Teranet"

8.1. (1) In sections 8.2 and 8.3, "Teranet" means Teranet Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Business Services.

Interpretation: time for doing an act expires on a holiday

(2) Except where a contrary intention appears, if the time for doing an act under sections 8.2 and 8.3 expires on a holiday, the act may be done on the next day that is not a holiday.

Interpretation: counting days

(3) In subsection 8.3 (4), holidays shall not be counted in determining if money has been kept in a trust account described in subsection 8.3 (1) for more than five days.

~~Interpretation: "holiday"~~

~~(4) In this section, "holiday" means,~~

~~(a) any Saturday or Sunday;~~

~~(b) New Year's Day;~~

~~(c) Good Friday;~~

~~(d) Easter Monday;~~

~~(e) Victoria Day;~~

~~(f) Canada Day;~~

~~(g) Civic Holiday;~~

~~(h) Labour Day;~~

~~(i) Thanksgiving Day;~~

~~(j) Remembrance Day;~~

~~(k) Christmas Day;~~

~~(l) Boxing Day; and~~

~~(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor.~~

~~Same~~

~~(5) Where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday.~~

~~Same~~

~~(6) Where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays.~~

~~Same~~

~~(7) Where Christmas Day falls on a Friday, the following Monday is a holiday.~~

Authorizing Teranet to withdraw money from trust account

8.2 (1) Subject to subsection (2), a member may authorize Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

Conditions

(2) A member shall not authorize Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction unless Teranet agrees to provide to the member in accordance with subsection (3) a confirmation of the withdrawal that contains the information mentioned in subsection (4).

Time of receipt of confirmation

(3) The confirmation required under subsection (2) must be received by the member not later than 5 p.m. on the day immediately after the day on which the withdrawal is authorized by the member.

Contents of confirmation

(4) The confirmation required under subsection (2) must contain,

(a) the amount of money withdrawn from the trust account;

(b) the time and date that the authorization to withdraw money is received by Teranet; and

(c) the time and date that the confirmation from Teranet is sent to the member.

Written record of authorization

(5) A member who authorizes Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, in any, related to a client's real estate transaction shall record the authorization in writing.

Same

(6) The written record of the authorization required under subsection (5) shall be in Form 19B and shall be completed by the member before he or she authorizes Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the

document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

Additional requirements relating to confirmation

(7) Not later than 5 p.m. on the day immediately after the day on which the confirmation required under subsection (2) is sent to a member, the member shall,

(a) produce a paper copy of the confirmation, if the confirmation is sent to the member by electronic means;

(b) compare the paper copy of the confirmation and the written record of the authorization relating to the withdrawal to verify whether money was withdrawn from the trust account by Teranet as authorized by the member;

(c) indicate on the paper copy of the confirmation the name of the client and any file number in respect of which money was withdrawn from the trust account, if the confirmation does not already contain such information; and

(d) after complying with clauses (a) to (c), sign and date the paper copy of the confirmation.

Special trust account

8.3 (1) The trust account from which Teranet may be authorized by a member to withdraw money shall be,

(a) an account at a chartered bank, provincial savings office, credit union or league to which the Credit Unions and Caisses Populaires Act, 1994 applies or a registered trust corporation kept in the name of the member or in the name of the firm of members of which the member is a partner or by which the member is employed, and designated as a trust account; and

(b) an account into which a member shall pay only,

(i) money received in trust for a client for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction; and

(ii) money properly withdrawn from another trust account for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction.

One or more special trust accounts

(2) A member may keep one or more trust accounts of the kind described in subsection (1).

Payment of money into special trust account

(3) A member shall not pay into a trust account described in subsection (1) more money than is required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction, and if more money is, through inadvertence, paid into the trust account, the member shall transfer from the trust account described in subsection

(1) into another trust account that is not a trust account described in subsection (1) the excess money.

Time limit on holding money in special trust account

(4) A member who pays money into a trust account described in subsection (1) shall not keep the money in that account for more than five days, and if the money is not properly withdrawn from that account by Teranet within five days after the day on which it is paid into that account, the member shall transfer the money from that account into another trust account that is not a trust account described in subsection (1).

Application of ss. 4, 6, 7 and 8

8.4 Sections 4, 6, 7 and 8 apply, with necessary modifications, to a trust account described in subsection 8.3 (1).

PART V

COMMENCEMENT

Commencement

9. This By-Law comes into force on February 1, 1999.

APPENDIX 4

BACKGROUND TO THE NEW COMMENTARY TO RULE 2.04(6) ON JOINT RETAINERS FOR SPOUSAL WILLS

Over three years ago, members of the estates bar raised an issue through the then Practice Advisory service on the application of rule 2.04(6) to circumstances in which a lawyer prepares mutual or joint wills for spouses or partners. The primary question was: when the lawyer is later asked by one spouse to change the will, is the lawyer required to inform the other spouse of the contact?

After extensive review and a call for input on the issue, the Professional Regulation Committee concluded that in these circumstances, a joint retainer exists which is subject to rule 2.04(6) of the *Rules of Professional Conduct* on conflicts of interest and joint retainers. The Committee then considered the following question:

> Is the joint retainer for the wills at an end when the wills are executed by the clients, or does the joint retainer continue such that subsequent contact by one spouse to the change the will is within the joint retainer?

If the joint retainer continues, the lawyer must advise the other spouse of the contact. If the joint retainer is at an end, the matter between the lawyer and returning client is a new retainer, and the lawyer cannot disclose the fact of the contact to the other spouse because of the duty of confidentiality.

The Committee drafted two options for a new commentary to rule 2.04(6) for Convocation's consideration, which was reviewed for the first time in April 2002.[15] After some discussion, Convocation referred the matter back to the Committee for further consideration of concerns expressed by some benchers on the proposals. The Committee reported the matter to Convocation again in September 2002, with a majority of the Committee favouring Option 1, but the report was not reached. Additional bencher comment was received after September 2002 Convocation. The matter was not returned to the Committee's agenda in the short term.

The majority of the Committee believed that a joint retainer for preparation of wills for the spouses or partners ends when the wills are executed. The only continuing obligation of the lawyer is not to act against a former client in the same matter or transaction without consent (rule 2.04(4)[16]). If one of the spouses later contacts the lawyer to make a change to the will, that contact is a new matter. The lawyer would be prevented from acting on the matter because it may adversely affect the interests of a former client. In the absence of the other spouse's

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[15] Option 1:
A lawyer who receives instructions from spouses or partners as defined in the Substitute Decisions Act, 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to decline to act unless both spouses or partners agree.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Option 2:
A lawyer who receives instructions from spouses or partners as defined in the Substitute Decisions Act, 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to make reasonable efforts to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[16] 2.04 (4)A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter:

(a)in the same matter,

(b)in any related matter, or

(c)save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

unless the client and those involved in or associated with the client consent.

consent, the lawyer cannot act, but if he or she decides not to act, the lawyer is not obliged under the rule to contact the other spouse to advise of the contact. This approach is consistent with the current rules and affirms the intent of rule 2.04(4) for joint retainers for preparation of wills for spouses or partners.

The above position is consistent with at least one other law society's position on the issue. The Law Society of Manitoba in its September 2002 Communiqué stated that the communication made by the returning spouse with the lawyer is confidential and not the subject of the earlier joint retainer.

When the Committee reconsidered this issue following April 25, 2002 Convocation, it concluded that the two options should again be presented to Convocation for decision with Option 1 reflecting the majority view. This continued to be the position of the Committee when it reported the matter to November 25, 2004 Convocation. At that Convocation, a new commentary based on Option 1 was approved, subject to redrafting to incorporate an amendment to the commentary to make the obligations with respect to rule 2.03(1) more explicit. This rule reads:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

The reasons in support of the option chosen by Convocation are as follows:

a. A retainer for preparation of mutual or mirror wills by spouses of partners amounts to a joint retainer, to which rule 2.04(6) applies;
b. The joint retainer ends when the wills are executed. The only continuing obligation of the lawyer is not to act against a former client in the same or a related matter or transaction without consent, in accordance with rule 2.04(4);
c. If one of the spouses later contacts the lawyer to make a change to his or her will, that contact is a new matter. Without the consent of the other spouse, the lawyer is prevented from acting on the matter because it may adversely affect the interests of a former client;
d. In the absence of the other spouse's consent, the lawyer cannot act, but if he or she decides not to act, the lawyer is prevented from contacting the other spouse to advise of the contact, as lawyer and client confidentiality, as described in rule 2.03, attaches to the communication about the new matter.

Convocation agreed with the Committee's view that this approach is consistent with the current rules and affirms the intent of rule 2.04(4) for joint retainers for preparation of mutual or mirror wills.

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Attached to the original Report in Convocation file, copies of:

(1) Copy of The Professional Regulation Division Quarterly Report, October - December 2004.

(pages 34 - 77)

(2) Copy of the Federation of Law Societies of Canada Model Rule on Cash Transactions.

(Appendix 1, pages 78 - 84)

(3) Copy of Rule 2 .04 of the Rules of Professional Conduct.

(pages 113 - 120)

The motion to amend By-Laws 18 and 19 contained in the Report at pages 11 to 16 was revised and distributed to Convocation.

REVISED MOTION TO AMEND BY-LAWS 18 AND 19

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 24, 2005

MOVED BY

SECONDED BY

THAT by-laws made by Convocation under subsection 62 (0.1) and (1) of the *Law Society Act* in force on February 24, 2005 be amended as follows:

BY-LAW 18
[RECORD KEEPING REQUIREMENTS]

1. Subsection 2.1 (1) of the English version of By-Law 18 [Record Keeping Requirements] is amended by deleting “in trust” in the marginal note.

2. Subsection 1 (1) of the French version of the By-Law is amended by adding the following:

   « espèces » Monnaie courante conformément à la définition de la *Loi sur la monnaie courante*, billets de banque prévus pour la circulation au Canada émis par la Banque du Canada en application de la *Loi sur la Banque du Canada* et monnaie courante et billets des pays autres que le Canada;

3. Subsection 1 (1) of the French version of the By-Law is amended by deleting “monnaie courante, effets du gouvernement ou billets de banque” and substituting “espèces” in the interpretation of « fonds ».

4. Paragraph 1 of section 2 of the French version of the By-Law is amended by adding “la méthode de réception des fonds” after “pour une cliente ou un client”.

5. Paragraph 5 of section 2 of the French version of the By-Law is deleted and the following substituted:

> 6. un livre-journal où sont inscrits tous les fonds reçus autrement qu'en fiducie pour une cliente ou un client, la date de réception des fonds, la méthode de réception des fonds, le montant des fonds reçus et la personne dont ils proviennent;

6. The French version of the By-Law is amended by adding the following:

Obligations relatives à la tenue de registres si les espèces sont reçues

2.1 (1) Chaque membre qui reçoit des espèces maintient des registres financiers en plus de ceux qui sont requis en vertu de l'article 2 et, comme obligation additionnelle minimale, maintient, selon les articles 4, 5 et 6, un livre de duplicata de reçus, et chaque reçu indique la date à laquelle les espèces sont reçues, de qui les espèces proviennent, le montant des espèces reçues, le client ou la cliente pour qui les espèces sont reçues et tout numéro de dossier pour lequel les espèces sont reçues et portant la signature du membre ou de la personne autorisée par le membre à recevoir des espèces et de la personne de qui les espèces sont reçues.

Pas de violation

(2) Un membre n'enfreint pas le paragraphe (1) si un reçu ne porte pas la signature de la personne pour qui les espèces sont reçues si le membre a fait des efforts raisonnables pour obtenir la signature de cette personne.

7. Subsection 4 (1) of the French version of the By-Law is amended by deleting "et 3" and substituting "2.1 et 3".

8. Subsection 5 (1) of the French version of the By-Law is amended by deleting "et 3" and substituting "2.1 et 3".

9. Subsection 6 (1) of the French version of the By-Law is deleted and the following substituted:

Conservation des registres financiers prescrits par les articles 2 et 2.1

6. (1) Sous réserve du paragraphe (2), les membres conservent les registres financiers prescrits par l'article 2 et 2.1 qui couvrent au moins les six années précédant la date à laquelle s'est terminé leur dernier exercice.

BY-LAW 19
[HANDLING OF MONEY AND OTHER PROPERTY]

10. Clause (a) of section 1.4 of the English version of By-Law 19 [Handling of Money and Other Property] is deleted and the following substituted:

> (a) receives cash from a public body, an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada or a bank to which the *Bank Act* applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act*, a company to which the *Trust and Loan Companies Act* applies, a trust company or loan company

regulated by a provincial Act or a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public;

11. Clause (e) of section 1.4 of the English version of the By-law is amended by deleting "payment of".

12. Subsection 1 (1) of the French version of the By-Law is amended by adding the following:

« espèces » Monnaie courante conformément à la définition de la *Loi sur la monnaie courante,* billets de banque prévus pour la circulation au Canada émis par la Banque du Canada en application de la *Loi sur la Banque du Canada* et monnaie courante et billets des pays autres que le Canada;

13. Subsection 1 (1) of the French version of the By-Law is amended by deleting "monnaie courante, effets du gouvernement ou billets de banque" and substituting "espèces" in the interpretation of « fonds ».

14. Section 1 of the French version of the By-Law is amended by adding the following:

Définition : « jour férié »

(3) Dans les articles 1.2 et 8.1, les jours suivants sont des jours fériés :

a) les samedis et les dimanches;

b) le Jour de l'An;

c) le Vendredi saint;

d) le lundi de Pâques;

e) la fête de la Reine (Jour de Victoria);

f) la fête du Canada;

g) le congé municipal;

h) la fête du travail;

i) l'Action de grâces;

j) le jour du Souvenir;

k) le jour de Noël;

l) le lendemain de Noël;

m) tout congé spécial proclamé par le gouverneur général ou le lieutenant gouverneur.

Idem
(4) Lorsque le Jour de l'An, la fête du Canada ou le jour du Souvenir tombent un samedi ou un dimanche, le lundi suivant est un jour férié.

Idem
(5) Lorsque le jour de Noël tombe un samedi ou un dimanche, le lundi et le mardi suivants sont des jours fériés.

Idem
(6) Lorsque le jour de Noël tombe un vendredi, le lundi suivant est un jour férié.

15. The French version of the By-Law is amended by adding immediately before section 1 the following:

PARTIE I
GÉNÉRAL

16. The French version of the By-Law is amended by adding immediately before section 2 the following:

PARTIE II
OPÉRATIONS EFFECTUÉES EN ESPÈCES

Définitions
1.1 Les définitions qui suivent s'appliquent à la présente partie,

« effets » Espèces, devises, valeurs mobilières et titres négociables ou autres instruments financiers qui font foi du titre ou d'un intérêt à l'égard de ceux-ci.

« organisme public »,

a) Tout ministère ou mandataire de Sa Majesté du chef du Canada ou d'une province;

b) Une ville, constituée en personne morale ou non, un village, une autorité métropolitaine, un canton, un district, un comté, une municipalité rurale ou un autre organisme municipal constitué en personne morale, ou un mandataire de ceux-ci;

c) Toute institution qui exploite un hôpital public et qui est désignée comme administration hospitalière par le ministre du Revenu national aux termes de la *Loi sur la taxe d'accise*, ou tout mandataire de celle-ci.

Espèces reçues
1.2 (1) un membre ne peut recevoir ni accepter de quiconque, pour aucun dossier de client, des espèces pour un montant total de 7 500 $ ou plus en argent canadien.

Devises étrangères
(2) Aux fins de cet article, si un membre reçoit ou accepte de quiconque des espèces en devises étrangères, le membre sera considéré comme ayant reçu ou accepté les espèces converties en dollars canadiens selon,

a) le taux de conversion officiel de la Banque du Canada publié dans ses taux à midi en vigueur à la date où l'opération est effectuée;

b) si le jour où le membre effectue l'opération est un congé férié, le taux de conversion de la Banque du Canada en vigueur à la date du jour ouvrable le plus récent avant le jour où l'opération est effectuée.

Application
1.3 L'article 1.2 s'applique aux membres lorsque, par rapport à un dossier de client ou de cliente, un membre reçoit ou donne des instructions sur les activités suivantes :

1. Le membre reçoit ou paie des effets.

2. Le membre achète ou vend des valeurs, des biens immobiliers, ou un actif ou une entité commerciale.

3. Le membre transfère des effets par quelque moyen que ce soit.

Exceptions
1.4 En dépit de l'article 1.3, l'article 1.2 ne s'applique pas au membre lorsque celui-ci,

a) reçoit des espèces d'un organisme public, banque régie par la *Loi sur les banques*, banque étrangère autorisée – au sens de l'article 2 de la *Loi sur les banques* – dans le cadre de ses activités au Canada, coopérative de crédit, caisse d'épargne et de crédit ou caisse populaire régies par une loi provinciale, association régie par la *Loi sur les associations coopératives de crédit*, société régie par la *Loi sur les sociétés de fiducie et prêt*, société de fiducie ou de prêt régie par une loi provinciale ou ministère ou mandataire de Sa Majesté du chef du Canada ou d'une province lorsque le ministère ou mandataire accepte des dépôts dans le cadre des services financiers qu'il fournit au public;

b) reçoit des espèces d'un agent de la paix, d'un organisme d'exécution de la loi ou de tout autre mandataire de la Couronne agissant à titre officiel;

c) reçoit des espèces conformément à une ordonnance d'un tribunal administratif;

d) reçoit des espèces pour payer une amende ou une sanction;

e) reçoit des espèces pour honoraires, débours, dépenses ou cautionnement à condition que tout remboursement fait à partir de cet argent soit aussi fait en espèces.

17. The French version of the By-Law is amended by adding immediately before section 2 the following:

PARTIE III
OPÉRATION DES COMPTES EN FIDUCIE

18. The French version of the By-Law is amended by adding "PARTIE IV" immediately before the heading "RETRAITS AUTOMATIQUES DES COMPTES EN FIDUCIE".

19. The French version of the By-Law is amended by deleting subsection 7.1 (7) and substituting the following:

Application du paragraphe 8.1 (2)

(7) Le paragraphe 8.1 (2) s'applique, avec les adaptations nécessaires, à l'égard de tout acte accompli en vertu du présent article.

20. The French version of the By-Law is amended by deleting subsections 8.1 (4), (5), (6) and (7).

21. The French version of the By-Law is amended by adding immediately before section 9 the following:

PARTIE V
ENTRÉE EN VIGUEUR

…….

IN CAMERA

…….

IN CAMERA Content Has Been Removed

…….

IN PUBLIC

…….

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE (continued)

Re: Amendment to By-Law 19 Respecting Money Laundering

It was moved by Ms. Curtis, seconded by Mr. Pattillo, that Convocation approve the amendments to By-Laws 18 and 19 respecting money laundering including the French versions as set out in the motion distributed to Convocation.

Carried

Ms. Curtis presented the balance of the Report.

Re: Amendments to Law Society Act re: Regulatory Processes

It was moved by Mr. Finkelstein, seconded by Mr. Heintzman, that the words "of the necessity of an order where there are reasonable grounds to believe" be deleted from paragraph 54 of the Report.

Lost

ROLL-CALL VOTE

Alexander	Against	MacKenzie	Against
Backhouse	Against	Manes	Against
Banack	For	Murray	Against
Bobesich	For	O'Donnell	Against
Bourque	Against	Pattillo	Against
Campion	Against	Pawlitza	Against
Carpenter-Gunn	Against	Potter	Against
Caskey	Against	Ross	For
Chahbar	Against	St. Lewis	For
Cherniak	Against	Sandler	Against
Copeland	Against	Silverstein	Against
Curtis	Against	Simpson	For
Dickson	Against	Swaye	Against
Doyle	Against	Warkentin	Against
Dray	Against	Wright	For
Eber	Against		
Feinstein	Against		
Finkelstein	For		
Gold	Against		
Gotlib	Against		
Gottlieb	For		
Harris	For		
Heintzman	For		
Hunter	For		
Krishna	Against		

Vote: 29 Against; 11 For

It was moved by Ms. Curtis, seconded by Mr. Pattillo, that Convocation approve in principle an amendment to the Law Society Act to clarify that an order for search and seizure may issue against a third party who has possession or control of documents and information that relate to the matters under investigation.

Carried

It was moved by Ms. Curtis, seconded by Mr. Pattillo, that Convocation approve in principle an amendment to the Law Society Act that permits the Hearing Panel to be satisfied of the necessity of an interim suspension order where there are reasonable grounds to believe that there is a significant risk that members of the public would be harmed.

Carried

It was moved by Ms. Curtis, seconded by Mr. Pattillo, that Convocation approve in principal an amendment to the Law Society Act that would permit disclosure that is necessary for the protection of the public, more specifically, to prevent harm, including bodily harm or death.

Carried

Re: New Commentary on Joint Retainers for Spousal Wills

It was moved by Ms. Curtis, seconded by Mr. Pattillo, that Convocation approve amendments to the commentary to rule 2.04(6) that addresses joint retainers for spousal or partner wills as set out at paragraph 72 of the Report.

Carried

Item for Information

- Professional Regulation Division Quarterly Report

…….

IN CAMERA

…….

IN CAMERA Content Has Been Removed

…….

IN PUBLIC

…….

GOVERNANCE TASK FORCE REPORT

The Governance Task Force Report was deferred to March Convocation.

Governance Task Force
February 24, 2005

Report to Convocation

Task Force Members
Clay Ruby, Chair
Andrew Coffey
Sy Eber
Abe Feinstein
Richard Filion
George Hunter
Vern Krishna
Laura Legge
Harvey Strosberg

Purposes of Report: Decision

Prepared by the Policy Secretariat
(Jim Varro – 416-947-3434)

OVERVIEW OF POLICY ISSUE

AMENDMENTS TO BY-LAW 6 (TREASURER)

Request to Convocation

1. Convocation is requested to approve amendments to By-Law 6 as described in paragraphs 13 through 15. Language reflecting the amendments that Convocation approves will be provided at a subsequent Convocation in a motion to amend By-Law 6.

Summary of the Issue

2. By-Law 6 (Treasurer) sets out the procedures for the Treasurer's election. On January 27, 2005, Convocation made three amendments to the By-Law. Convocation requested that the Task Force reconsider a fourth issue that was included in the report but on which the Task Force recommended no action. That issue was the situation where, following the close of nominations, there are two candidates for the position of Treasurer. If, prior to voting, one candidate is no longer able to become Treasurer (e.g. appointment to the Bench, illness, withdrawal after the time for withdrawal has passed), the second candidate is acclaimed.

3. The Task Force reconsidered this issue and is proposing an amendment that in the above event would postpone the election to another date and reopen nominations for a specific time.

THE REPORT

Terms of Reference/Committee Process

4. The Task Force met on January 31, 2005. Task Force members in attendance were Clay Ruby (chair), Sy Eber, Richard Filion, Vern Krishna and Laura Legge. Jim Varro and Malcolm Heins also attended.

5. The Task Force is reporting on the following matter:

For Decision
- Amendments to By-Law 6 (Treasurer)

THE ISSUE

6. At Convocation's request, the Task Force reconsidered an issue related to procedures for the Treasurer's election in By-Law 6 (Treasurer) reported to January 27, 2005 Convocation without recommendation. The current By-Law, which has yet to include other amendments made at January 27, 2005 Convocation, appears at the end of this report.

7. The issue arises in the situation where, following the close of nominations[1] , there are two candidates for the position of Treasurer. If, prior to voting, one candidate is no longer able to become Treasurer (e.g. appointment to the Bench, illness), the second candidate is acclaimed.

8. Some benchers have expressed concern about this possibility and have suggested that a process be instituted that would allow nominations to be reopened.

9. The most often cited argument in favour of this change is the following: if the situation described in paragraph 7 arose the day after voting (e.g. the elected Treasurer was appointed to the bench), a new election would have to be conducted. The view is that the same situation occurring the day before voting is held should not result in an acclamation.

10. Prior to January 27 Convocation, the Task Force reviewed wording prepared by Brad Wright for an amendment to the By-Law. It read:

> If, between the close of nominations for Treasurer and the election of the Treasurer, a nominated candidate dies, becomes incapacitated or accepts an appointment or position incompatible with being Treasurer, the Secretary shall send a notice to all benchers advising that the nominations have been reopened and specifying that new nominations may be made within seven days of the

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[1] Subsections 2(3) and (4) read:
(3) Subject to subsection (4), the close of nominations of candidates shall be 5 p.m. on the second Thursday in May.
Exception
(4) In a year in which there is an election of benchers under section 3 of B-Law 5, the close of nominations of candidates shall be 5 p.m. on the fourth Friday in May.

notice. In the event that there are fewer than seven days remaining before the election day, the election day shall be postponed as necessary and the sitting Treasurer shall continue in office until replaced. The notice shall specify that, in the event that some votes were already cast, they shall be destroyed without being examined, and all benchers will be asked to vote anew.

11. At January 27 Convocation, some support was expressed for this amendment. In addition, it was noted that a candidate's withdrawal from the election following the close of nominations and after the time specified in the By-Law for withdrawal had passed[2] had not been addressed.

12. Convocation referred the matter back to the Task Force, and after considering the matter further, the Task Force is recommending the following procedures.

13. Where there are two nominated candidates for Treasurer, if, between the close of nominations for Treasurer and the election of the Treasurer and after the time for the withdrawal of candidates from the election has passed, one of the nominated candidates dies, becomes incapacitated, accepts an appointment or position incompatible with being Treasurer, or for any reason withdraws as a candidate for Treasurer, the Secretary shall:

(a) immediately cancel the election on the day described in subsection 1(1),
(b) as soon as is reasonably possible but no later than seven days after the event described in paragraph 13 notify all benchers that:

(i) the nominations have been reopened for a period of two weeks from the date of the notice,
(ii) the election day shall be arranged for a date two weeks after the two week period described in (i),
(iii) the sitting Treasurer shall continue in office until the new Treasurer is elected, and
(iv) in the event that some votes were cast in the advance poll, they shall be destroyed without being examined, and all benchers will be asked to vote anew.

14. If, after the close of nominations described in paragraph 13(b)(i), there remains only one candidate nominated for election, the Secretary shall declare that candidate to be elected as Treasurer.

15. If after the close of nominations described in paragraph 13(b)(i), there are two nominated candidates and before the election, one of the nominated candidates dies, becomes incapacitated, accepts an appointment or position incompatible with being Treasurer, or for any reason withdraws as a candidate for Treasurer, the Secretary shall declare the remaining candidate to be elected as Treasurer.

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[2] Withdrawal of candidates
3. A candidate may withdraw from an election of Treasurer at any time before 5 p.m. on the Friday immediately preceding the first day of the advance poll by giving the Secretary written notice of his or her withdrawal.
(Note: the advance poll opens on the second Wednesday of June)

BY-LAW 6

Made: April 30, 1999
Amended:
June 25, 1999
December 10, 1999
May 24, 2001
October 31, 2002

TREASURER

ELECTION OF TREASURER

Time of election
1. (1) There shall be an election of Treasurer every year on the day on which the regular meeting of Convocation is held in June.

First matter of business
(2) Despite subsection 6 (1) of By-Law 8, the election of Treasurer shall be the first matter of business at the regular meeting of Convocation in June.

Nomination of candidates
2. (1) A candidate for election as Treasurer shall be nominated by two benchers who are entitled to vote in Convocation.

Nomination in writing
(2) The nomination of a candidate shall be in writing and signed by the candidate, to indicate his or her consent to the nomination, and the two benchers nominating the candidate.

Time for close of nominations
(3) Subject to subsection (4), the close of nominations of candidates shall be 5 p.m. on the second Thursday in May.

Exception
(4) In a year in which there is an election of benchers under section 3 of By-Law 5, the close of nominations of candidates shall be 5 p.m. on the fourth Friday in May.

Withdrawal of candidates
3. A candidate may withdraw from an election of Treasurer at any time before 5 p.m. on the Friday immediately preceding the first day of the advance poll by giving the Secretary written notice of his or her withdrawal.

Election by acclamation
4. If after the close of nominations, or the time for the withdrawal of candidates from the election has passed, there is only one candidate, the Secretary shall declare that candidate to be elected as Treasurer.

Poll
5. (1) If after the time for the withdrawal of candidates from the election has passed, there are two or more candidates, a poll shall be conducted to elect a Treasurer.

Secret ballot

(2) A poll to elect a Treasurer shall be conducted by secret ballot.

Treasurer is candidate in election

6. If the Treasurer is a candidate in an election of Treasurer, the Treasurer shall appoint a bencher who is a chair of a standing committee of Convocation and who is not a candidate in the election for the purpose of performing the duties and exercising the powers of the Treasurer under this By-Law.

Right to vote

7. Every bencher entitled to vote in Convocation is entitled to vote in an election of Treasurer.

Announcement of candidates

8. (1) Subject to subsection (3), if a poll is to be conducted to elect a Treasurer, the Secretary shall, at the regular meeting of Convocation in May, announce the candidates and the benchers who nominated each candidate.

List of candidates to be sent to benchers

(2) Subject to subsection (3), immediately after the regular meeting of Convocation in May, the Secretary shall send to each bencher entitled to vote in an election of Treasurer a list of the candidates.

Announcement of candidates in year in which there is election of benchers

(3) In a year in which there is an election of benchers under section 3 of By-Law 5, the Secretary shall, as soon as practicable after the close of nominations, send to each bencher entitled to vote in an election of Treasurer a list of the candidates that identifies the benchers who nominated each candidate.

Advance poll

9. (1) For the purpose of receiving the votes of benchers entitled to vote in an election of Treasurer who expect to be unable to vote on election day, an advance poll shall be conducted beginning at 9 a.m. on the day in June on which standing committees meet and ending at 5 p.m. on the day preceding election day.

Methods of voting at advance poll

(2) A bencher may vote at the advance poll by,

(a) attending at the office of the Secretary on any day that is not a Saturday or Sunday between the hours of 9 a.m. and 5 p.m. to receive a ballot and to mark the ballot in accordance with subsection (3); or

(b) requesting a voting package from the Secretary and returning the voting package to the Secretary by regular lettermail or otherwise.

Marking a ballot

(3) A bencher voting at the advance poll shall mark the ballot in accordance with subsection (4) or (5).

Two candidates

(4) If there are no more than two candidates, a bencher shall vote for one candidate only and shall indicate the candidate of his or her choice by placing a mark beside the name of the candidate.

More than two candidates

(5) If there are three or more candidates, a bencher shall rank the candidates in order of preference by placing the appropriate number beside the name of each candidate.

Ballot box

(6) If a bencher is voting at the advance poll under clause (2) (a), after the bencher has marked the ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Secretary, put the ballot into a ballot box.

Same

(7) If a bencher is voting at the advance poll under clause (2) (b), after complying with subsections 9.1 (3) and (4), the Secretary shall remove the ballot envelope from the return envelope and put the ballot envelope into a ballot box.

Ballots not to be opened

(8) Ballots received at the advance poll shall not be opened until the ballots cast on election day are opened.

Special procedures: voting by mail

9.1 (1) If a bencher requests a voting package from the Secretary under clause 9 (2) (b), the Secretary shall send to the bencher a voting package that includes a ballot, a ballot envelope and a return envelope and shall specify the address to which the voting package must be returned.

Same

(2) If a bencher is voting at the advance poll under clause 9 (2) (b), the bencher shall,

(a) in accordance with subsection 9 (3), mark the ballot received from the Secretary;

(b) after complying with clause (a), place the marked ballot inside the ballot envelope and seal the ballot envelope;

(c) after complying with clause (b), place the sealed ballot envelope inside the return envelope and seal the return envelope;

(d) after complying with clause (c), sign the return envelope; and

(e) after complying with clause (d), send to the Secretary, by regular lettermail or otherwise, the voting package, that includes the ballot, the ballot envelope and the return envelope, so that it is received by the Secretary not later than 5 p.m. on the day preceding election day.

Receipt of return envelopes

(3) When the Secretary receives a voting package at the specified address, the Secretary shall check to see if the return envelope bears the signature of a bencher to whom a voting package was sent.

Discarding ballots

(4) The Secretary shall discard a voting package that the Secretary receives,

(a) at an address other than the specified address;

(b) that does not bear the signature of a bencher to whom a voting package was sent; and

(c) after 5 p.m. on the day preceding election day.

Procedure for voting on election day: first ballot

10. (1) On election day, each bencher entitled to vote in an election of Treasurer who has not voted at the advance poll shall receive a first ballot listing the names of all candidates.

Second ballot

(2) On election day, if a Treasurer is not elected as a result of the votes cast at the advance poll and on the first ballot, each bencher entitled to vote in an election of Treasurer who has not voted at the advance poll shall receive a second ballot listing the names of the candidates remaining in the election at the time of that ballot.

Application of subs. (2) to second and further ballots

(3) Subsection (2) applies, with necessary modifications, to the second ballot and any further ballots in an election of Treasurer.

Marking ballot

(4) Each bencher shall vote for one candidate only on each ballot and shall indicate the candidate of his or her choice by placing a mark beside the name of the candidate.

Ballot box

(5) After a bencher has marked a ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Secretary, put the ballot into the ballot box.

Counting votes

11. (1) On election day, after all benchers entitled to vote in an election of Treasurer have voted or declined on a ballot, the Secretary shall, in the absence of all persons but in the presence of the Treasurer,

(a) open the ballot box used on election day, remove all the ballots from the ballot box, open the ballots and count the votes cast for each candidate; and

(b) open the ballot box used at the advance poll, remove all the ballots and any ballot envelopes from the ballot box, remove the ballots from any ballot envelopes, open the ballots and count the votes cast for each candidate.

Counting votes cast at advance poll

(2) If at the advance poll votes were cast for candidates by rank of preference, in counting the votes cast for each candidate at the advance poll, the Secretary shall assume that a bencher's candidate of choice was the candidate on the ballot given the highest rank by the bencher.

Application

(3) This section applies to the count of votes on the first ballot in an election of Treasurer and, with necessary modifications, to the count of votes on the second ballot and any further ballots in an election of Treasurer.

Report of results: two candidates

12. (1) If on any ballot there are no more than two candidates, immediately after counting the votes cast for each candidate, the Secretary shall report the results to Convocation and shall declare to be elected as Treasurer the candidate who received the larger number of votes.

Report of results: three or more candidates

(2) If on any ballot there are three or more candidates and, after counting the votes, the Secretary determines that at least one candidate received more than 50 percent of all votes cast for all candidates, the Secretary shall report the results to Convocation and shall declare to be elected as Treasurer the candidate who received the largest number of votes.

Same

(3) If on any ballot there are three or more candidates and, after counting the votes, the Secretary determines that no candidate received more than 50 percent of all votes cast for all candidates, the Secretary shall report to Convocation that no candidate received more than 50 percent of all votes cast for all candidates and that a further ballot will be required in order to elect a Treasurer.

Further ballot required

(4) If a further ballot is required under subsection (3), the Secretary shall report to Convocation the candidate on the previous ballot who received the smallest number of votes and that candidate shall be removed as a candidate in the election.

Casting vote

13. (1) If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one of them to be declared to be elected as Treasurer, the Treasurer shall give the casting vote.

Same

(2) If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one or more of them to remain in the election, the Treasurer shall randomly select the candidate to be removed as a candidate from the election.

TERM OF OFFICE

Taking office

14. (1) In an election of Treasurer under section 1,

(a) a bencher elected as Treasurer by acclamation shall take office at the regular meeting of Convocation in June following his or her election; and

(b) a bencher elected as Treasurer by poll shall take office immediately after his or her election.

Term of office

(2) Subject to any by-laws providing for the removal of a Treasurer from office, the Treasurer shall remain in office until his or her successor takes office.

HONORARIUM

Treasurer's entitlement to receive honorarium

15. The Treasurer is entitled to receive from the Society an honorarium in an amount determined by Convocation from time to time.

VACANCY IN OFFICE

Vacancy

16. If a Treasurer resigns, is removed from office or for any reason is unable to act during his or her term in office, Convocation shall, as soon as practicable, elect an elected bencher to fill the office of Treasurer until the next election of Treasurer under section 1.

ACTING TREASURER

Acting Treasurer

17. If a Treasurer for any reason is temporarily unable to perform the duties or exercise the powers of the Treasurer during his or her term in office, or if there is a vacancy in the office of Treasurer under section 16, the chair of the standing committee of Convocation responsible for financial matters, or if he or she for any reason is unable to act, the chair of the standing committee of Convocation responsible for admissions matters, shall perform the duties and exercise the powers of the Treasurer until,

(a) the Treasurer is able to perform the duties or exercise the powers of the Treasurer; or

(b) a Treasurer is elected under section 16 or 1.

REPORT FOR INFORMATION

Equity & Aboriginal Issues Committee/Comité sur L'équité et Les Affaires Autochtones Report

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
February 24, 2005

Report to Convocation

Committee members:
Joanne St. Lewis (Chair)
Derry Millar (Vice-Chair)
Marion Boyd
Mary Louise Dickson
Sy Eber
Thomas G. Heintzman
Ronald D. Manes
Tracey O'Donnell
Mark Sandler
William J. Simpson

Purpose of Report: Information

Prepared by the Equity Initiatives Department
(Josée Bouchard: 416-947-3984)

THE REPORT

Terms of Reference/Committee Process

1. The Committee met on February 10, 2005. Committee members participating were Joanne St. Lewis (Chair), Marion Boyd, Mary Louise Dickson, Dr. Sy Eber, Thomas Heintzman, Mark Sandler and William J. Simpson. Invited member, David Smagata (Chair of the Equity Advisory Group (EAG)), participated. Staff members in attendance were Josée Bouchard, Katherine Haist, Sudabeh Mashkuri and Marisha Roman.

2. The Committee is reporting on the following matters:

Information
- Appointment of New Members to the Equity Advisory Group (EAG)
- Equity Public Education Events - 2005

INFORMATION

APPOINTMENT OF NEW MEMBERS TO THE EQUITY ADVISORY GROUP

Background

3. The mandate of the Equity Advisory Group (EAG) is to assist the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the Committee) in the development of policy options for the promotion of equality and diversity in the legal profession. The EAG identifies and advises the Committee on issues affecting equality communities, provides input to the Committee on the planning and development of policies and practices related to equality and comments on Law Society reports and studies relating to equality issues within the profession.

4. Appointments to EAG are made by the Committee based on recommendations from EAG.

5. The Terms of Reference for the EAG have recently been amended to allow for the appointment of organizational members. The Terms of Reference provide that, at its first meeting of the calendar year 2005, EAG shall undertake a recruitment process and make recommendations for appointment of between 8 and 12 members.

6. The Terms of Reference also provide that the EAG has no fewer than 16 members and no more than 22 members. The membership of EAG consists of individual members of the legal profession and of members that are organizations. The term of membership is three years. Individual members serve for a maximum of two consecutive terms. Each organizational member designates one person and an alternate to act as representative for the organization.

7. In October 2004, EAG began a recruitment process to appoint up to 12 new members. An invitation to apply for membership was posted in the Ontario Reports, on the website and was widely distributed to stakeholders and communities. The deadline for applications was November 22, 2004.

8. EAG received applications from six organizations and more than thirty individuals. At its January 26, 2005 meeting, EAG approved five individual candidates and six organizations for membership on EAG, based on criteria established by EAG. The Committee approved the recommended candidates at its February 10, 2005 meeting.

9. The following organizations are appointed to EAG:
    a. Advocates' Society
    b. Association des juristes d'expression française de l'Ontario (AJEFO)
    c. Canadian Association of Black Lawyers (CABL)
    d. Nishnawbe-Aski Legal Services (Thunder Bay, Ontario)
    e. South Asian Legal Clinic of Ontario (SALCO)
    f. Women's Law Association of Ontario (WLAO)

10. The following individuals are appointed to EAG:
    a. Jonathan Batty
    b. Fasial Bhabha
    c. Peggy J. Blair
    d. Andrea Horton
    e. Azmina Ladha (Law Student)

EQUITY PUBLIC EDUCATION EVENTS - 2005

Black History Month – Comparing Racial Equality Rights in Canada and South Africa
Event date: February 23, 2005

Marking the 20th anniversary of the enactment of section 15 - equality rights - of the Charter.

Speakers will discuss the constitutional frameworks and judicial interpretations to compare progress of substantive equality rights in these two diverse and multi-racial nations with similar structures in democracy.

Workshop: Museum Room - 4:00 p.m. to 6:00 p.m.

Speakers:

- The Honourable Stephen T. Goudge, Judge of the Court of Appeal for Ontario
- Professor Joanne St. Lewis, Bencher, Law Society of Upper Canada
- Estella Muyinda, Barrister and Solicitor, LL.M. candidate, Osgoode Hall Law School, Professional Development Centre
- Jewel Amoah, Member, Law Society of Upper Canada, LL.M. candidate, University of Cape Town, South Africa

Reception: Convocation Hall – 6:00 p.m. to 8:00 p.m.

International Women's Day - The Role of Lawyers in Preventing and Addressing Domestic Violence
Event date: March 8, 2005

The workshop will include perspectives from practitioners and/or community workers in the area of family law, immigration law, criminal law and poverty law.

Workshop: Museum Room - 4:00 p.m. to 6:00 p.m.

Speakers:

- Carole Curtis, Bencher, Law Society of Upper Canada
- Mary Lou Fassel, Director of Legal Department, Barbra Schlifer Commemorative Clinic
- Sudabeh Mashkuri, Counsel, Equity Initiatives Department, Law Society of Upper Canada
- Angela Robertson, Executive Director, Sistering

Reception: Convocation Hall - 6:00 p.m. to 8:00 p.m.

International Day for the Elimination of Racial Discrimination
Event date: March 21, 2005
Reception: Convocation Hall - 6:00 p.m. to 8:00 p.m.

National Holocaust Memorial Day
Event date: April 18, 2005
Workshop: Museum Room - 4:00 p.m. to 5:30 p.m.
Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

South Asian Heritage Month
Event date: May 5, 2005
Workshop: Museum Room - 4:00 p.m. to 5:30 p.m.
Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

National Access Awareness Week
Event date: May 31, 2005
Workshop: Museum Room – 4:00 p.m. to 5:30 p.m.
Reception: Convocation Hall - 5:30 p.m. to 8:30 p.m.

National Aboriginal Day
Event date: June 8, 2005
Workshop and reception: Convocation Hall: 4:00 p.m. to 8:00 p.m.

Pride Week Reception
Event date: June 23, 2005
Reception: Convocation Hall: 5:00 p.m. to 8:00 p.m.

CONVOCATION ROSE AT 12:20 P.M.

Confirmed in Convocation this 24th day of March, 2005

Treasurer