

## RESTRICTIONS ON BUSINESS STRUCTURES AND DIRECT ACCESS IN THE SCOTTISH LEGAL PROFESSION

### Executive Summary:

This supercomplaint asserts that the regulatory restrictions on lawyers and non-lawyers working together, the prohibition on lawyers adopting appropriate business models for the provision of legal services and the prohibition on consumers having direct access to advocates is a combination of features in the Scottish legal services market which appears to be significantly harming the interests of consumers.<sup>1</sup>

Consumers access legal services in Scotland on a diverse number of issues including family law, consumer complaints, personal injury, employment, immigration, debt, social security, tax and with a view to the sale or purchase of property.

Consumers in Scotland are, in the main, provided with legal services by members of two professional bodies - the Law Society of Scotland (“the Society”) and the Faculty of Advocates (“the Faculty”). Both bodies are self-regulating.

The Society imposes an absolute restriction on non-lawyers owning a legal firm and on solicitors forming a legal relationship with persons who are not solicitors with a view to offering professional services.

The Faculty compels its members to practice as sole traders and prohibits any legal relationship with a view to providing legal services with other advocates,

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<sup>1</sup> The Consumers Association is a designated body for the purposes of section 11 of the Enterprise Act 2002. Section 11(1) of the Act provides that “This section applies where a designated consumer body makes a complaint to the OFT that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.”

solicitors or any third parties. The Faculty also imposes restrictions on who may instruct an advocate directly. Consumers cannot instruct an advocate without first instructing a solicitor.

Third party ownership of or participation in legal services firms is not possible by reason of the foregoing regulatory prohibitions. Lawyers are prohibited from working with non-lawyers either with a view to providing legal services or a mixture of legal and complimentary services to consumers.

The present structure of the legal services market in England and Wales is very similar to the Scottish legal services market. However, as a direct result of the Clementi report<sup>2</sup> (“Clementi”) and the resultant Legal Services Bill<sup>3</sup> (“the Bill”) that structure will be comprehensively overhauled. The Bill will allow lawyers in England and Wales to work together in whatever business structure they deem appropriate and will also allow third parties to enter the market and to enter into legal relationships with lawyers to provide legal and other services to consumers.

The deregulation of the legal services market in England and Wales is predicted to lead to new and improved services, market innovation and increased consumer choice. To our knowledge there are no plans to similarly deregulate the Scottish legal services market.

The restrictions on business structures in Scotland cause significant consumer harm as they impede the development of the Scottish legal services market to meet consumer demand; hamper service providers from harnessing efficiencies offered by certain business structures; may result in increased cost to the consumer; prevent legal service providers from offering mixed and complimentary services in addition to core legal services and impede third party ownership and involvement in the Scottish legal services market.

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<sup>2</sup> Report of the Review of the Regulatory Framework for Legal Services in England and Wales (“Clementi”), December 2004.

<sup>3</sup> The Legal Services Bill (HL).

The existing restrictions on advocates working together with other advocates, advocates working together with solicitors and the prohibition on consumers to instruct an advocate directly could be revoked without recourse to primary legislation. However, we recognize that third party participation in the Scottish legal services market requires legislation to protect consumer interests and preserve the integrity of the market.

This supercomplaint proposes reform of the Scottish legal services market which would result in improved access to justice and significantly increased consumer benefit. We believe that our proposals are in the interests of consumers and other stakeholders in the Scottish legal services market.

In order to achieve these aims we propose that a new body, the Scottish Legal Services Board (the “Board”), is established. The Board would be independent of the legal profession and from government. All legal service providers would have to prove to the Board that they were fit and proper persons to provide these services.

The Board would be responsible for the ultimate regulatory control of the Scottish legal services market. The Board would either directly regulate solicitors, advocates and the third party entrants to that market; or it would oversee regulation by the Society and the Faculty to ensure that their rules facilitate alternative business structures, enable direct access of consumers to advocates and allow third party participation in the market.

In addition, the Board would be charged with ensuring the support of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of legal services; encouraging an independent and effective legal profession and promoting and maintaining adherence to the professional principles.

## PART 1: The Market

### 1.1. Market Participants

- (1) The provision of legal services to consumers in Scotland is in the main delivered by solicitors and advocates. Solicitors are regulated by the Law Society of Scotland,<sup>4</sup> while advocates are regulated by the Faculty of Advocates.<sup>5</sup>
- (2) Solicitors have rights of audience in the district and sheriff courts and in those tribunals where legal representation is allowed. Unless a solicitor has qualified as a solicitor advocate, a solicitor may not in general appear in the Court of Session, the High Court, the House of Lords or the Judicial Committee of the Privy Council.<sup>6</sup>
- (3) The Society has powers to appoint solicitor advocates, who are solicitors who have gained rights of audience in the supreme courts in Scotland, as well as the House of Lords and the Judicial Committee of the Privy Council, through additional training and examinations.<sup>7</sup>
- (4) An advocate is entitled to plead in any court in Scotland, including the Supreme Courts (the High Court of Justice, the Court of Criminal Appeal and the Court of Session); the Judicial Committees of the House of Lords and the Privy Council; the European Court of Human Rights and the Court of Justice of the European Communities; and a wide range of tribunals, inquiries and other such proceedings.<sup>8</sup>

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<sup>4</sup> The Law Society of Scotland was established by the Legal Aid and Solicitors (Scotland) Act 1949. The regulation of solicitors in Scotland is now subject to the Solicitors (Scotland) Act 1980. The Society has a statutory responsibility for the promotion of the interests of solicitors and the interests of the public in relation to that profession in terms of section 6 and 1(2) of the 1980 Act.

<sup>5</sup> The Faculty of Advocates can trace its history back to at least the seventeenth century although advocates existed before this time. Historically the regulation of advocates has been a matter for the Court of Session. However that function has long since (17<sup>th</sup> Century) been delegated by the court to the Faculty. The Faculty is a registered charity and an unincorporated body. Its powers to regulate the admission of members to the Faculty and their conduct arise from common law and custom. For a fuller discussion on the regulatory responsibilities of the Faculty and the Society see Chapter 2 of the Report by the Research Working Group on the Legal Services market in Scotland ("SE Report") and the Stair Memorial Encyclopaedia Vol. 13.

<sup>6</sup> SE Report, para 2.25.

<sup>7</sup> *Op. cit.*, para 2.26.

<sup>8</sup> *Op. cit.* para 2.27.

- (5) The Report by the Research Working Group on the Legal Services market in Scotland<sup>9</sup> (“the SE report”) noted that “in Scotland the education and training of solicitors and advocates was typically common up to the point when the practitioner decided to become an advocate” and that “there was a tradition of movement between the two branches of the profession in Scotland. Most entrants to the bar would have qualified as solicitors and many would have practised as solicitors for a number of years before deciding to become advocates. They might subsequently decide to return to the solicitor’s branch of the profession.”<sup>10</sup>
- (6) Consumers can normally represent themselves in all court or tribunal proceedings<sup>11</sup>. Representation by non-lawyers is permitted in many statutory tribunals such as the employment and social security tribunals.<sup>12</sup>

## 1.2. Business Structures

### 1.2.1. Solicitors

- (7) Restrictions are imposed on non-lawyers owning a law firm, and on employed solicitors acting for third parties, by a rule which prohibits solicitors from sharing their fees with any unqualified person.<sup>13</sup> The effect of this rule is that non-lawyers cannot own a law firm and employed solicitors can only act on behalf of their employers and not the clients of their employers.
- (8) Although this rule does not prohibit Solicitors from sharing fees with advocates or other legally qualified practitioners<sup>14</sup> the Solicitors Multi-Disciplinary Practices Practice Rules 1991 (“multi-disciplinary practice rules”) provide that “[a] solicitor shall not form a legal relationship with a person or body who is not a solicitor with a view to their jointly offering professional services as a multi-disciplinary practice to any person or body.”<sup>15</sup>

<sup>9</sup> The report was published by the Scottish Executive in April 2006.

<sup>10</sup> SE Report, para 8.7(a).

<sup>11</sup> *Op. cit.*, para 2.22.

<sup>12</sup> *Op. cit.*, para 2.24.

<sup>13</sup> Solicitors (Scotland) Practice Rules 1991, Rule 4.

<sup>14</sup> *Op. cit.*, Rules 2 & 4.

<sup>15</sup> *Op. cit.*, Rule 4.

### 1.2.2. Advocates

- (9) The Faculty of Advocates is a referral profession. Advocates cannot, as a general rule, be instructed by clients directly. Normally, work is referred to them by third parties, principally solicitors. The Scottish Bar’s status as a referral Bar is derived from paragraph 4.2.1 of the Faculty of Advocates Guide to Professional Conduct (“the Code of Conduct”) which provides that “an advocate may act in a professional capacity only on the instructions of a Scottish solicitor.” This provision does not apply to a limited number of persons or bodies such as local authorities and ‘Direct Access Professions’ who are identified within the rules.<sup>16</sup>
- (10) An advocate cannot also be a solicitor, or be in partnership, or be employed by a solicitor, nor can he enter into partnership with another advocate or with any other person in connection with his practice as an advocate<sup>17</sup>.
- (11) The prohibition on direct access to the Bar compels potential clients to instruct a solicitor before being able to consult with an advocate. The restriction applies to all the legal services an advocate can provide.<sup>18</sup> The prohibition on direct access to the Bar is partially suspended for professional or commercial clients who may instruct an advocate directly under the 2006 Direct Access rules.
- (12) The Direct Access rules do not permit a client to instruct an advocate directly in a case which is being litigated or where litigation is in contemplation in the Scottish Courts.<sup>19</sup> Where litigation is in progress a client must instruct a solicitor who may then instruct an advocate. The rules also expressly prohibit an advocate carrying out the work of a solicitor.<sup>20</sup> Direct access is not available to consumers or lay persons in that capacity.<sup>21</sup>

<sup>16</sup> Those bodies are the Chief Executive of a Local Authority, a Patent Agent, a Parliamentary Agent and a lawyer Furth of Scotland in a case in which no litigation in Scotland is contemplated or in progress (“Code of Conduct”, para 4.2.1).

<sup>17</sup> *Op. cit.*, paras 1.2.4 & 14.1.

<sup>18</sup> This includes representation in courts, tribunals and hearings, legal opinion work, drafting pleadings, contracts and formal legal documents, and advising on contentious and non-contentious matters.

<sup>19</sup> The Faculty of Advocates’ standard terms of instruction for Direct Access provide that an advocate may only conduct proceedings on behalf of a client where that client has a right of audience in that forum (“Direct Access” rules, para 2.2).

<sup>20</sup> *Op. cit.*, Rule 3.

<sup>21</sup> In explaining its reasons for maintaining its ban on direct access to members of the public, the Faculty has stated: “The committee felt that [direct access] was neither necessary nor desirable in Scotland and it would undermine the existence of the Faculty as a referral profession.” News Release, 15 January 2007, [www.advocates.org.uk](http://www.advocates.org.uk).

- (13) Due to these regulatory restrictions all advocates practice as sole traders, although a small number of advocates are employed *pro tem* by the Crown as Advocates depute, or prosecutors.

### 1.2.3. Third Party Participation

- (14) The regulatory requirement that an advocate practices as a sole trader combined with the prohibition on solicitors sharing their fees with non-lawyers effectively excludes third party or non-legal participation in the market.

## 1.3. Market Definition

### 1.3.1. The Product Market

- (15) The SE report estimated that the Scottish legal services market was worth approximately £1bn in 2004.<sup>22</sup> This figure will almost certainly have risen by 2007 and includes only the earnings of solicitors and advocates in private practice. This figure excludes, in large part, the considerable public sector expenditure on legal services.
- (16) The SE Report has adopted a restricted definition of the legal services market. The public sector including the Scottish Executive, the UK government and local authorities, spends significant sums on legal services. The most significant part of that expenditure is spent on in-house legal teams. Some of this expenditure permeates into the private legal services market when public bodies engage private lawyers to provide services to them.
- (17) The SE Report market definition also fails to include the growing numbers of commercial, charitable, professional and trade union bodies who maintain their own in-house legal teams. This supercomplaint is concerned with the regulatory restrictions which inhibit lawyers in private practice from adopting alternative business structures and which prevent consumers obtaining direct access to advocates. The restriction on

<sup>22</sup> This figure is based on the aggregate fee income of almost £990m earned by solicitors and advocates in private practice in Scotland in 2004 (SE Report, para 1.1).

the definition of the legal services market adopted by the SE report is therefore adequate and suitable for the purposes of this supercomplaint.

- (18) Typically solicitors provide two types of services to consumers : private client and litigation.
- (19) *Private client services* are non-contentious services and include but are not exclusively limited to conveyancing,<sup>23</sup> tax and trust advice, and executory services.<sup>24</sup>
- (20) *Litigation services* include preparation for and representation at the various courts and tribunals in Scotland. Consumers access all of these fora. Consumers typically require legal services in respect of disputes arising from family law, employment law, consumer contract law, debt advice, housing and social security law, immigration and personal injury.
- (21) Family law services include advice and representation arising from the breakdown of family relationships including divorce, child contact, adoption and advice and representation for adults and children in the Children’s Hearing system.
- (22) Employment law services include the preparation for and representation of employees in the employment tribunal system.
- (23) Consumer contract law includes the preparation of and representation of consumers who have consumer contract disputes with suppliers of consumer services. This category includes disputes under the Consumer Credit Act, the Unfair Terms in Consumer Contract Regulations 1999 and the multitude of consumer disputes that generally arise between consumers and suppliers. Normally these disputes are litigated in the Sheriff Court.
- (24) Personal injuries claims include loss sustained by a consumer as a result of the negligence of another. These claims arise as a result of road traffic accidents, accidents

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<sup>23</sup> The purchase or sale of heritable property.

<sup>24</sup> These latter two categories are often provided by a solicitor’s private client department. The large rise in the value of property in Scotland means that increasing numbers of consumers are seeking advice on tax and estate planning. The complexity of the UK tax system often requires expert advice on capital gains and inheritance tax.

at work, accidents on dangerous premises, medical and professional negligence, and injuries as a result of defective products.

- (25) The solicitor is usually the first point of contact a consumer has when he or she needs legal services. If a case is complex, of high value or is being litigated in the Court of Session then a solicitor may decide to instruct an advocate to advise on the case and to conduct any hearing.
- (26) Advocates do not provide legal services directly to consumers. Advocates provide written legal advice, draft pleadings and appear in all the courts and tribunals in Scotland. When they do act on behalf of consumers they often give written opinions, draft pleadings and appear in courts and tribunals in relation to the subject matter described in paragraphs 17-22 above. Advocates also provide advice on tax and private client issues and appear in proceedings which arise from those matters.

#### *1.3.2. The Geographic Market*

- (27) The legal services market which is the subject of this supercomplaint is confined to Scotland. The geographical market is delimited by reason of the jurisdiction of the Scottish courts.

## PART 2: The Problem

(28) This supercomplaint will argue that the current limitations on the business structures lawyers can adopt, the restrictions on direct access of consumers to advocates and the exclusion of third parties from the market result in significant consumer detriment by stifling choice, inhibiting innovation and excluding potential entrants from the market.

### 2.1. Restrictions on Advocates' Business Structure

(29) We believe that consumers are disadvantaged as a result of advocates being compelled to operate as sole traders. Necessarily this form of business structure has many risks. The availability of capital is constrained; there is no opportunity to share risk; the potential tax efficiencies of incorporation cannot be realised and economies of scope and specialisation may also be impeded.

(30) We believe that the imposition of the sole trader structure upon an advocate also prevents new services being developed; it prevents effective marketing being undertaken; and may prevent entry to the market due to the risks of practicing as a sole trader. We are of the view that sole traders are impeded from scaling up their services and achieve the efficiencies that this may bring.

(31) Sole traders inevitably have limited resources and time: this limits the services that can be provided. Were advocates allowed to enter into business relationships with others this would allow a broader range of legal services to be provided. It is possible that advocates legal firms may be able to offer wider legal services or indeed may be able to join together to offer specialised services to meet particular market needs. Similarly, firms comprised of solicitors, advocates and non-lawyer third parties would be able to provide seamless litigation services.

(32) We do not suggest that advocates should be prohibited from remaining in sole practice. The availability of alternative business structures would represent an *opportunity* only to practice in a different way. We do not propose that advocates be compelled to adopt alternative business structures, only that they should have the right to do so if they wish.

## 2.2. Restriction on Direct Access to Advocates

- (33) We believe that the prohibition on consumers seeking direct access to an advocate is difficult to justify on a number of grounds. First, as has been explained advocates are under a duty to ensure that where they do not have the necessary experience to provide the service sought they can ask their clerk to obtain more suitable Counsel.
- (34) Secondly, many sophisticated consumers are in a position to independently conclude that their particular legal problems require Counsel. For example the service of a writ or summons may immediately alert the consumer to the need to instruct Counsel. In these circumstances the direct access rules prevent this and compel the consumer to first instruct a solicitor before he or she can access an advocate.
- (35) Finally, many legal problems do not necessarily result in court action being raised but even where no litigation is contemplated and the consumer requires the services of an advocate he or she must again first instruct a solicitor. These situations result in duplication, increased cost and waste.

## 2.3. Restrictions on Solicitors and Advocates Providing Services Jointly

- (36) As has been noted solicitors and advocates are prevented from jointly providing legal services. This prohibition is particularly difficult to understand as both solicitors and advocates share a common professional ethical structure. There is little doubt that this restriction is unjustified and has no rational basis and causes significant consumer harm. Were this restriction removed we believe that consumers would enjoy significant benefits as:

- (a) New legal services firms would emerge.

The new firms might be able to provide legal services including access to advocates at lower cost, as the existing restrictions on advocates taking instructions only via a solicitor would be removed.

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

- (c) Consumers would enjoy easier access to specialised legal services.

One of the difficulties a consumer faces when purchasing legal services is a lack of information on who may be the correct service provider for the job. Marketing provides a partial answer to this difficulty. Larger and specialist firms are able, where the sole trader cannot, to properly disseminate information into the marketplace.

- (d) Asymmetry would be reduced by increased competitive forces and improved marketing - thus improving consumer awareness and choice;
- (e) Innovative new legal services would be developed improving access to justice and reducing cost to the consumer;

Innovation in legal services is already taking place in Scotland but is inhibited by the current regulatory framework. For example see the recent launch of [clydeconveyancing.com](http://clydeconveyancing.com) which is a joint venture between a solicitors firm and estate agents to provide a seamless estate agency/conveyancing service. The venture comprises two separate and distinct parts - the solicitors firm and the estate agency firm. Although the venture appears to be an integrated one, both businesses are separate. It is likely that such a venture will lead to duplication of administration costs and, as a result, cannot achieve the efficiencies available to a truly integrated estate agent/solicitor firm. In our view innovation will only take place once potential entrants are in a position to properly assess the opportunities and that will only occur once the necessary regulatory structure is in place.

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

In our view, commoditisation of legal services often results in lower prices. Domestic conveyancing, debt recovery services and claims firms are all examples of this phenomenon.

#### 2.4. Restrictions on Third Party Entry

- (37) We believe that third party entry into the Scottish legal services markets would also result in significantly improved consumer welfare. In our view, third party participation in the market would result in the following effects which we believe would benefit consumers:

- (a) Key non-legally qualified staff in firms would be in a position to be offered ownership rights in legal firms. This would allow lawyers to involve managerial and technical staff more directly in the firm and reward those staff with ownership rights in the firm. This would allow legal firms to attract high quality staff with suitable incentives. All of these changes would allow a legal firm to become more efficient and competitive, benefits that we believe could be passed onto consumers.

- (b) By going public, partners of large law firms would gain liquidity and spread their risk efficiently.
  - (c) Law firms would gain direct access to the capital markets.
  - (d) Non-traditional firms such as retailers, insurance companies, banks and estate agents would gain the freedom to realize synergies by offering legal services to their existing clients.
  - (e) New ways to distribute legal services through non-traditional outlets would be encouraged, thus improving access to justice<sup>25</sup>.
  - (f) Existing small law firms would be able to offer one-stop shopping by exchanging ownership stakes with other professional firms.
- (38) We believe that the market is in general the best judge of efficiency. This general proposition appears to be accepted in all of the academic literature we have reviewed which accompanies the Clementi report. Typically it is said that:
- “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.”<sup>26</sup>
- (39) We also accept and agree with the paper entitled “The Organisational Structure of Legal Firms” by leading academics, Richard Brealey and Julian Franks, which concluded, loosely speaking, that “the fewer restrictions on ownership structure the better.”<sup>27</sup>
- (40) We accept that upon deregulation of the Scottish legal services market it cannot be said with any certainty,
- “which [...] developments will in fact occur nor how rapidly, but *absent any market failure*, economic systems will evolve so as to offer the services that consumers want at the lowest cost. While it is impossible to quantify the benefits that would flow from such changes, our judgment is that they are significant.”<sup>28</sup>

## 2.5. Conclusion

- (41) We believe that alternative business structures will enable lawyers and other professionals to work together on an equal basis to deliver legal and other related

<sup>25</sup> The Coop in England has already expressed its intention to expand into the legal services market see ‘Co-op dives head first into ‘Tesco law’’, The Lawyer, 2 April 2007, [www.thelawyer.com](http://www.thelawyer.com).

<sup>26</sup> Clementi, para 82.

<sup>27</sup> Richard A. Brealey, Julian R. Franks, *The Organisational Structure of Legal Firms; a Discussion of the Recommendations of the 2004 Review of the Regulatory Framework for Legal Services in England and Wales*, 2005, p 33, [www.dca.gov.uk/legalsys/brealey-franks.pdf](http://www.dca.gov.uk/legalsys/brealey-franks.pdf).

<sup>28</sup> *Op. cit.*, p 31.

services in ways that will best meet the needs of Scottish consumers. The combination of the availability of external investment and new business structures will give legal service providers greater flexibility to respond to market demands. The present restrictions undoubtedly inhibit demand, restrict market developments and impede innovation, all with significant harm to the consumer.

- (42) It is noteworthy that the President of the Law Society of Scotland has recently accepted that alternative business structures in England and Wales may result in Scottish solicitor firms being put at a competitive disadvantage.<sup>29</sup> We agree with this assertion which implies that alternative business structures including third party involvement in the market will allow English firms to harness otherwise unavailable efficiencies.
- (43) We are of the view that the status quo results in increased cost and lower standards of service to the consumer. Deregulation will reduce the costs, improve service levels, promote demand and improve access to justice.

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<sup>29</sup> The Journal of the Law Society of Scotland, April 2007, p 26.

## PART 3: The Wider Reform Context

### 3.1. Reform in Europe - Review of Competition in Professional Services

- (44) In March 2000 the Lisbon European Council adopted an economic reform programme with the aim of making the EU the most competitive and dynamic knowledge based economy in the world by 2010.<sup>30</sup> As part of this initiative the European Commission invited national governments, regulatory bodies<sup>31</sup> and the competition authorities to review the rules governing the liberal professions.
- (45) The Commission has stated that “a significant body of empirical research shows the negative effects that excessive or outdated restrictive regulations may have for consumers. Such regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services.”<sup>32</sup>
- (46) The Commission sought to examine “whether the current regulatory mix [was] the most efficient and least restrictive of competition, or whether better regulation, more adapted to the modern world could help spur economic growth, and deliver better services and value for consumers.”<sup>33</sup>
- (47) The European Commission proposed that the existing restrictions in professional services should “pursue a clearly articulated and legitimate public interest objective” and that those restrictions should be the minimum necessary to achieve their objective.<sup>34</sup> We accept and adopt that approach.

<sup>30</sup> The European Commission’s Report on Competition in Professional Services (COM(2004) 83, Executive Summary).

<sup>31</sup> Regulatory bodies included those professional bodies such as the Society and Faculty who were responsible for the regulatory arrangements of their profession (*Ibid.*).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Op. cit.*, para 93.

### 3.2. Reform in England & Wales - the Clementi Review & the Legal Services Bill

- (48) In his report Sir David Clementi noted that the legal services market in England and Wales was characterised by the following restrictions on the types of business structures that are able to offer legal services: -
- (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.<sup>35</sup>
- (49) The restrictions on the adoption of business structures in the English and Welsh legal services market are very similar to those that currently exist in the Scottish market.
- (50) The Legal Services Bill which implements the Clementi proposals is currently progressing through Parliament and is expected to become law in the summer of 2007. The Bill, if it becomes law, permits solicitors, barristers and third parties to provide legal services to consumers without any restriction on the business structure they wish to adopt but subject to regulatory safeguards to protect the interests of consumers and others.<sup>36</sup> The Legal Services Bill is permissive in nature: barristers and solicitors may retain their traditional business arrangements should they so choose.
- (51) In order to ensure that the highest professional standards are maintained in the legal services market the Bill establishes a number of regulatory objectives which promote the rule of law, improve access to justice, protect consumer interests, promote competition in the provision of services, encourage an independent and effective legal profession; promote public understanding of the citizen's rights and duties and promote adherence to professional principles.<sup>37</sup>

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<sup>35</sup> Clementi, p 105.

<sup>36</sup> Legal Services Bill, Part 5 and Schedule 13.

<sup>37</sup> *Op. cit.*, clause 1(1).

(52) The professional principles are:

- (a) that authorised persons<sup>38</sup> should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- (e) that the affairs of clients should be kept confidential.<sup>39</sup>

### 3.3. Reform in Scotland - the Scottish Executive Report

(53) In 2004, the Scottish Executive established a Research Working Group on the Legal Services Market in Scotland to draw together and analyse the evidence base on the Scottish legal services market. In 2006, the group published a report (the “SE report”) identifying many “restrictions, whether deriving from statute, professional rules or custom and practice, which might have the effect of preventing, limiting or distorting competition.”<sup>40</sup>

(54) The SE report was produced as a result of, “a desire on the part of Scottish Ministers that legal services in Scotland should be regulated in the interests of consumers, by developments at European Commission level (reviewing competition in the liberal professions) and by developments in England and Wales (a report by the Office of Fair Trading in 2001 which led to the independent review of the regulatory framework by Sir David Clementi and latterly to the publication by the Department for Constitutional Affairs of a White Paper “The Future of Legal Services : Putting Consumers First” in October 2005 ).”<sup>41</sup>

(55) To our knowledge the Scottish Ministers have taken no further steps to develop the work carried out by its own working party. We note that the SE report arose as a result of the EU initiative to examine whether current regulatory structures were suitable to the modern world. The Commission opined that some regulatory structures were not fit for purpose, impeded economic growth and failed to deliver better services and value for

<sup>38</sup> Authorised persons are those persons entitled to provide legal activities (2006 Legal Services Bill, clause 1(4)).

<sup>39</sup> *Op. cit.*, clause 1(3).

<sup>40</sup> SE report, p 1.

<sup>41</sup> *Ibid.*

consumers. Further, we note that the regulation of the Scottish legal profession has been devolved to the Scottish Ministers by the Scotland Act 1998. But competition policy is a reserved matter. We concur with the Scottish Consumer Council who are quoted in the SE report as being “of the view that such further work must happen quickly, in order to ensure that Scottish consumers were not at a disadvantage in the market in comparison to their counterparts in England and Wales.”<sup>42</sup>

- (56) The SE report helpfully records the Faculty’s arguments for retaining its prohibition on alternative business structures<sup>43</sup> and direct access to consumers in the following terms:
- (a) **Asymmetry:** The market for advocacy services was characterised by asymmetry of information. Many consumers could not competently instruct an advocate as they had no knowledge of which advocates were suitably qualified to carry out their instruction. Solicitors were however in a better position to assess the suitability of an advocate as they had the necessary expertise so to do.<sup>44</sup>
  - (b) **Economies of scale:** Advocates did not have expensive overheads and enjoyed economies of scale by virtue of the common availability of shared services and facilities.<sup>45</sup>
  - (c) **Alternative service providers:** Solicitor advocates can already provide both the service provided by a solicitor and an advocate. If a legal practitioner wished to practice both as a solicitor and an advocate he could simply become a solicitor advocate.<sup>46</sup>
  - (d) **The unique legal status of the advocate:** The Faculty argued that their members were not entitled to sue for their fee and thus had a special status in law.<sup>47</sup>
  - (e) **The current structure promoted consumer choice:** The Faculty believed that an independent referral bar promoted choice and high quality representation in the Scottish courts to the benefit of consumers.<sup>48</sup>
  - (f) **The advocate’s duties to the court:** The Faculty has also argued that an individual advocate’s duty of honesty and integrity can only be guaranteed if they practice as sole traders.<sup>49</sup>
- (57) By contrast the SE report is silent on what, if any, arguments were made by the Society in defence of the prohibition of solicitors entering into practice with advocates. Indeed, the Society’s main concerns appeared to relate to the prospect of non-lawyer ownership of multi-disciplinary practices.<sup>50</sup>

<sup>42</sup> SE report, para 8.82.

<sup>43</sup> The term “alternative business structure” is a misnomer. The use of partnership, legal liability partnerships and limited liability company as suitable structures with which to engage in commerce could hardly be described as alternative.

<sup>44</sup> SE report, para 7.4 & 7.5.

<sup>45</sup> *Op. cit.*, paras 6, 8.7(b) & 8.7(g).

<sup>46</sup> *Op. cit.*, paras 7.7, 7.8, 8.7(a), 8.7(d).

<sup>47</sup> *Op. cit.*, para 7.10.

<sup>48</sup> *Op. cit.*, paras 8.7(e) & 8.7(f).

<sup>49</sup> See speech of the Dean of Faculty, 27 March 2007, [www.advocates.org.uk/news](http://www.advocates.org.uk/news).

<sup>50</sup> SE report, paras 8.25 - 8.26 & 8.36.

- (58) The SE report noted that the “Law Society of Scotland could see no circumstances in which the ownership and control of law firms by non-lawyers could be permitted, without surrendering the prime objectives of maintaining independence and public protection. The Society foresaw grave risks to maintaining the rule of law if non-lawyers were to have either ownership or control of law firms.”
- (59) The Society considered that the risk to clients and the difficulties of regulating such firms would be insurmountable, particularly with regard to potential conflict between the commercial interests of the owners and the professional duty of solicitors working in the firm to serve the interests of the client.”<sup>51</sup> Third part ownership is also opposed by the Faculty.<sup>52</sup>

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<sup>51</sup> SE report, para 8.28.

<sup>52</sup> SE report, para 8.27.

## PART 4: The Profession's Defence

(60) Drawing on the SE Report and other evidence, this section critically analyses the various objections the incumbents have deployed to defend the status quo. We then show that the incumbents' position is untenable, unjustifiable and results in significant consumer harm.

### 4.1. Asymmetry

(61) In our view there is an element of asymmetry in the Scottish legal services market. A degree of asymmetry exists in many markets. But, in our opinion, the present structure of the Scottish legal profession acts to augment asymmetry rather than alleviate it.

(62) Asymmetry arises where consumers do not have sufficient information to make an informed choice. This will remain the case for as long as the Faculty continues to be a referral based profession and takes no action to inform consumers of their members' services or skills, as there is no current need for marketing directly to consumers.<sup>53</sup>

(63) The restriction on alternative business structures prevents the services of advocates being marketed at a local level. Were advocates, solicitors and third party participants in a position to offer their services on a joint basis we believe that asymmetry would diminish as a result of the increased exposure of the services an advocate can provide to a consumer. This would be achieved at both a local and national level through improved marketing and the consequent exposure of advocates in the market place.

(64) We reject the Faculty's assertion that solicitors are in the best position to advise consumers on the suitability of a particular advocate. The Faculty Code of Conduct provides that an advocate is not bound to accept a case which he or she feels unqualified by reason experience to competently conduct.<sup>54</sup> This professional obligation

<sup>53</sup> We note at this juncture that there is limited marketing of the Faculty or by individual members of Faculty. The Faculty has a web site [www.advocates.org.uk](http://www.advocates.org.uk) which provides information on the Faculty and contains a directory of members. The Faculty also issues a quarterly newsletter which is issued to its members and posted on the web site. Some interest groups within the Faculty produce directories of members' interest. One such group is the Planning and Environmental Law Group. Moreover, the Murray and Ferguson Stable each have their own web site.

<sup>54</sup> The Code of Conduct at para 4.3.15(c) states: "While not refusing to accept instructions, an advocate may ask his clerk to suggest to the instructing solicitor that another advocate should be instructed. This may be appropriate in the following circumstances - where, because of the specialised nature of the subject matter, the

would remain incumbent upon an advocate no matter what business structure he or she adopted. This professional rule, which is binding on the advocate, effectively protects consumers from instructing an advocate who is unable to competently provide the service sought.

#### 4.2. Economies of Scale

- (65) The Faculty has argued that it is efficient for advocates to operate as sole traders, but sharing facilities and services. We are unconvinced by this argument and support the reasoning of Clementi in this regard:

“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”*. 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.”

- (66) Advocates are prevented by the present rules from enjoying potential efficiencies in joining with others to offer their services. There is no evidence that advocates in partnership (or in some other form of business arrangement) with each other, with other legal professionals or indeed with non-lawyers cannot retain low overheads. Nearly all advocates work from home or from the Advocates Library in Edinburgh and there is no reason why this type of sustainable arrangement would not continue. If the Faculty’s arguments about the inherent economic efficiencies are correct then there will be no migration to other alternative business structures, but otherwise any restrictions on the adoption of alternatives cannot be justified.

#### 4.3. Alternative service providers

- (67) The Faculty argues that solicitor advocates are a viable and available alternative to the advocate. We are in a position to firmly rebut that assertion. As will be demonstrated below solicitor advocates appear infrequently in the final and often determinative

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advocate feels that the client needs the services of an advocate with greater specialist knowledge or experience than himself.”

stages of a civil case litigated in the Scottish supreme courts. Solicitor advocates themselves recognise this and made representations on the matter which were recorded in the SE report<sup>55</sup>.

- (68) Until 1993 advocates enjoyed a monopoly of audience rights in the higher civil courts in Scotland.<sup>56</sup> Although solicitor advocates now also have rights of audience in these courts, as will be seen from the table below, advocates continue to dominate appearance work in those courts. The table below considers the number of appearances<sup>57</sup> by advocates, solicitor advocates, English barristers<sup>58</sup> or by party litigants in cases originating in the Scottish civil supreme courts and which were recently argued in either the Court of Session<sup>59</sup> or the House of Lords.<sup>60</sup>

**Table 1: Number of appearances in the Scottish civil supreme courts**

	Court of Session	House of Lords	Total Appearances	% of Total Appearances
<b>Advocates</b>	378	43	421	96.1
<b>Solicitor Advocates</b>	6	nil	6	1.4
<b>Party</b>	8	nil	8	1.8
<b>English Barrister</b>	Nil	3	3	0.7
<b>Total Appearances</b>	392	46	438	100.0

- (69) As can be seen from the table solicitor advocates have appeared in the final and determinative stages of a case in the supreme courts in only 1.4% of cases during the last two years which are subject to the study. Indeed it is noteworthy that it is more

<sup>55</sup> The report considered the Faculty imposed prohibition on advocates to appear in court with solicitor advocates - the so called 'mixed double rule' (SE Report, para 5.39-5.57).

<sup>56</sup> The higher civil courts are the Outer House of the Court of Session where cases at first instance are heard usually by a judge sitting alone; the Inner House of the Court of Session which is the Scottish civil appeal court; and the House of Lords which is the final court of appeal in Scotland. We have not included any figures on appearances in the European Court of Human Rights or the European Court of Justice as these figures are insignificant.

<sup>57</sup> This table does not consider the number of cases during the stated period but the number of discrete appearances by lawyers or party litigants (see footnotes 59 and 60). Some cases have multiple parties and multiple lawyers representing each party.

<sup>58</sup> Unless they have qualified as an advocate, English Barristers cannot normally appear in the Scottish supreme courts, they can, however, appear in Scottish cases which are heard in the House of Lords. All of the appearances of English Barristers referred to in Table 1 arise from their appearing in cases originating in the Scottish courts and being heard in the House of Lords.

<sup>59</sup> These figures include all civil cases reported in Session Cases 2005 and 2006 (the authoritative case reports for Scotland) and those reported on the Scottish Courts web site during the period from 21/12/06 to 07/02/07, when 42 cases were reported. The figures do not include routine interlocutory appearances in these courts but relate to proofs (civil trials), debates (substantive legal argument hearings) and appeals during this period. See [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk).

<sup>60</sup> These figures cover all seven appeals to the House of Lords that originated in Scotland in 2005 and 2006.

likely that a party litigant appears on his own behalf in the Scottish supreme courts than a solicitor advocate.

- (70) Solicitor advocates are the only potential alternative service providers in the market for appearance work in the Scottish supreme civil courts but as we have shown they have largely failed to enter this market. The Faculty's argument that solicitor advocates represent a viable alternative to the services provided by their members is therefore wholly unfounded.<sup>61</sup>
- (71) The Faculty also argues that advocates who want to provide the services of both a solicitor and an advocate should re-qualify as a solicitor and then obtain the necessary rights of audience as a solicitor advocate. We have already noted that the common system of legal training in Scotland means that most advocates who may wish to provide services normally provided by a solicitor would be in a position so to do by reason of their prior qualification as a solicitor. The Faculty's proposal condemns the transferring advocate to close his existing business (with a resultant loss of income) and resign their membership of the Faculty in order that they can then re-qualify as a solicitor and then regain rights of audience they already hold. The Faculty's proposal therefore imposes significant and unnecessary costs on transferring advocates and operates as a major and unjustifiable deterrent to those who wish to offer both solicitor and advocate services.
- (72) We see no reason why an advocate should be prevented from offering expanded legal services to consumers either on his own or with other advocates, solicitors or non-lawyer third parties when he or she has already qualified as a solicitor.

#### 4.5. The unique status of an advocate

- (73) The assertion that the advocate cannot sue for his fee is wrong, despite some historical pedigree. The SE report cites the case of *Batchelor v Pattison & Mackersy* (1876) 3R 914 at 918 as authority for this proposition. There is some reason to doubt whether this case would be considered as authoritative some 130 years later. First, the opinion of the Lord

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<sup>61</sup> Part of the reason solicitor advocates have yet to make an impact in appearance work in the Scottish supreme courts may be as a result of the 'mixed doubles' rule mentioned in footnote 55. To date the mixed doubles rule remains.

President was obiter.<sup>62</sup> Secondly, there is no doubt that as a result of section 2A of the Late Payment of Commercial Debts (Interest) Act 1998<sup>63</sup> advocates can indeed sue for their fee and for interest on that unpaid fee. The Act stipulates that “[t]he provisions of this Act apply to a transaction in respect of which fees are paid for professional services to a member of the Faculty of Advocates as they apply to a contract for the supply of services for the purpose of this Act”.

#### 4.6. The current structure promotes consumer choice

(74) The Faculty believes that an independent referral bar promotes choice and high quality representation in the Scottish courts to the benefit of consumers. We believe that the use of alternative business structures will not undermine an advocate’s commitment to provide professional services throughout Scotland to whoever requires them. An advocate is under a binding professional commitment so to do.<sup>64</sup> We do not propose that this rule be modified in any way.

#### 4.7. The advocate’s duties to the court

(75) The Faculty also argues that an advocate’s duty to the court prevents him or her from providing services other than as a sole trader. In a recent speech the Dean of Faculty, Mr Roy Martin, asserted that:

“Competition authorities in many parts of the world simply do not appear willing to acknowledge that members of the legal profession owe duties to the court and to the interests of justice which set them apart from all others who provide consumer services.”<sup>65</sup>

(76) In our view this argument is difficult to understand. There is no conflict between adopting a particular business structure either with other lawyers or with non-lawyers and the advocate’s personal duties toward the court and the client.

<sup>62</sup> An obiter remark in a case is a ‘by the way’ remark. Obiter remarks do not form part of the main subject matter of a judgment and are therefore not binding although they are persuasive. The case of Batchelor related to the professional services provided by a solicitor. The obiter remarks of the court in Batchelor about the status of an advocate were made for comparative purposes.

<sup>63</sup> Section 2A was introduced in a 2002 amendment of the Act.

<sup>64</sup> Code of Conduct, para 4.3.1.

<sup>65</sup> The Faculty of Advocates’ news release, 23 March 2007.

- (77) We do not propose that an advocate's or a solicitor's personal duties to the court are in any way diluted. We accept that these duties act in the interests of justice and thereby in the interests of consumers. We note that solicitors adopt a number of different business structures including corporate structures and it has never been suggested that these business arrangements compromise their professional duties to the court or to their client. The Faculty's arguments that the advocate's imposed status as a sole trader somehow sets him above and apart from solicitors is in our view spurious and wrong.
- (78) Furthermore, we do not believe that the Faculty has put forward any robust arguments to defend current rules regarding business structures and access to advocates. It is important to recognise that the Faculty represents primarily the interests of its members and does not have, as its objective, the interests of consumers.<sup>66</sup> There is an obvious conflict between the Faculty's desire to protect its members and its responsibility to regulate the profession in the wider consumer interest.<sup>67</sup>
- (79) We therefore note with some concern the Dean of Faculty's recent comments which demonstrates an apparent hostility of this professional body towards competition policy and consumer interest:

“[T]he increasing power and activities of the competition and consumer lobbies are bringing about a situation in which legal services are seen as no different to any other commodity available to the public, which should be de-regulated on the basis of purely economic principles.”<sup>68</sup>

#### 4.9. Third Party Ownership - Integrity of the Market and regulatory control

- (80) Both the Society and Faculty are opposed to third party ownership of legal firms. We acknowledge that third party ownership of legal services firms presents regulatory difficulties for both professional bodies. The Society and Faculty can only exercise regulatory control over their members.

<sup>66</sup> The Society has as one of its objects in terms of section 1(2)(a) of the Solicitors (Scotland) Act 1980 “the promotion of the interests of the public in relation to that profession.”

<sup>67</sup> We note that in its Follow-up report on Competition in Professional Services, COM (2005) 405, p 10, para 25, the European Commission noted: “The weight of tradition should not be underestimated as affecting the pace of change, and in many countries regulators fail to see how things can be done differently. Moreover, the professions themselves have in general not been actively promoting it. The current picture could also indicate that some countries have relatively weak regulatory oversight of the professions. This could be caused by the economic phenomenon of regulatory capture which is not uncommon especially in areas subject to self-regulation.”

<sup>68</sup> The Faculty of Advocates' news release, 23 March 2007.

- (81) We fully accept the Society's concerns over third party ownership and the possible effect that third party involvement may have on the integrity of the market. We agree that the core professional duties lawyers have toward their clients and to the court should not be diluted as they are in the public interest.
- (82) We do not accept that the problem of third party participation in this market is too difficult to solve and we believe that resolution will result in considerable consumer benefit and improvements in access to justice. Third party involvement in legal firms will allow legal services providers greater flexibility to respond to consumer demands and will increase competition in the market by allowing lawyers and non-lawyers to work together to deliver legal and other services in ways that better meet the needs of consumers. It is likely that third parties would improve capital availability in the market. The improved availability of capital may reduce investment costs leading to lower prices. It is for these reasons that third party involvement in the Scottish legal services market lies at the very heart of this supercomplaint.
- (83) We note that Clementi directly addresses the problem of third party ownership of legal firms by proposing a 'fit to own test' in addition to a number of other safeguards. We accept and adopt this general approach. We also accept that third party ownership of legal services firms requires primary legislation. Further, we acknowledge that safeguards such as a licensing system would have to be established to protect consumer and stakeholder interests.
- (84) We are of the view that subject to the necessary safeguards being established, a similar regulatory arrangement can be devised for Scotland to allow for non-lawyer entry to the Scottish legal services market. We are of the opinion that third party involvement in this market is central to ensuring that the competitiveness of the market is maintained in the long term.

## PART 5: The Solutions

- (85) The regulatory inhibitions on solicitors working with advocates and advocates working with each other or with solicitors are all to be found in the rules promulgated by the Society and the Faculty.<sup>69</sup> These rules can be readily revoked without legislation to ensure that solicitors and advocates can work together and that advocates are not obliged to work as sole practitioners.
- (86) The restriction upon advocates providing services directly to consumers and the prohibition on advocates carrying out tasks normally provided by a solicitor can also be simply revoked without legislation where they appear in the Faculty's code of conduct and direct access rules.
- (87) The outcome of a comprehensive overhaul of the Society's and Faculty's rules should result in solicitors being allowed to work directly with advocates; in advocates being able to adopt alternative business structures as they please and for advocates being able to provide a full range of legal services to consumers without restriction.
- (88) Third party participation in the legal services market will, in our view provide for large scope for consumer benefit and we accept that this can only come about by way of legislation.

### 5.1. Regulatory options

- (89) We believe there are two alternative approaches that would provide the necessary regulatory structure which would address the substance of our complaint, one involving removal of regulatory powers from the Society and the Faculty and one which would keep the powers within these bodies but subject them to regulatory oversight by an

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<sup>69</sup> We note that Section 31(1) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 provides: "Any rule, whether made before or after the coming into force of this section, whereby an advocate is prohibited from forming a legal relationship with another advocate or with any other person for the purpose of their jointly offering professional services to the public shall have no effect unless it is approved by the Lord President and the Secretary of State; and before approving any such rule the Secretary of State shall consult the Director in accordance with section 40 of this Act." We note that the Act appears to allow for a continuing review of any prohibitions on an advocate forming a legal relationship with another advocate with a view to their jointly providing legal services.

independent body. We are of the firm view that “doing nothing” is not a meaningful option and therefore do not propose it.

### Option I

- (90) The first option would be to vest the regulatory control of the Scottish legal profession and of third party entrants directly in a newly established Scottish Legal Services Board which would be charged with regulating that market. This means that regulatory powers would be removed from the Society and the Faculty. Moreover, all third party entrants would have to satisfy a ‘fitness to own’ test before they were able to provide legal services to the market.
- (91) This option would result in a single independent body being responsible for the regulation of the whole market. This solution may not be acceptable to the Society and the Faculty but would have the advantage of allowing for a consistent regulatory approach and would limit regulatory costs.

### Option II

- (92) The second option is to adopt the general approach of the Legal Services Bill in England and Wales and establish a Scottish Legal Services Board which would oversee the Society and the Faculty. The Society and the Faculty would regulate third parties who wished to enter the market. The Board would ensure that the Society’s and the Faculty’s regulation benefits consumers.
- (93) This option would allow the front line regulators to continue in their regulatory capacity and therefore has the advantage of harnessing the experience of those bodies. This option would however involve regulatory control being exercised by three separate bodies, the Society, the Faculty and the Board, which may increase the cost of regulation.
- (94) We believe that both options would ensure that consumer welfare is given the appropriate weight in the future Scottish legal services market whilst protecting the

market's values and integrity. However, we believe that the first option may be more appropriate for Scotland and result in lower regulatory costs.

## 5.2. The Importance of an Independent Regulator

- (95) Whichever of the two options is adopted, the Scottish Legal Services Board must be independent of government and of the Society and the Faculty. Executive control of the Scottish Legal Services Board should be exercised by representatives of all stakeholders in the Scottish legal services market including consumers. Board members' tenure should be secure and fixed and not subject to inappropriate government interference.
- (96) An independent Scottish Legal Services Board would ensure that the interests of consumers would be given appropriate weight and it would be responsible for ensuring that alternative business structures and third party involvement in the market was facilitated. The Scottish Legal Services Board should be statutorily charged with ensuring that legal service providers comply with the regulatory objectives of :
- (a) supporting the rule of law;
  - (b) improving access to justice;
  - (c) protecting and promoting the interests of consumers;
  - (d) promoting competition in the provision of legal services;
  - (e) encouraging an independent and effective legal profession;
  - (f) promoting and maintaining adherence to the professional principles.<sup>70</sup>

## 5.3. General Regulatory Principles

- (97) Further, we are of the view that the provision of legal services in Scotland must be conducted in accordance with the long-established principles of professional legal practice and that practitioners and owners of legal services firms must:
- (a) act with independence and integrity;
  - (b) maintain proper standards of work;
  - (c) act in the best interests of their clients;
  - (d) ensure client affairs are confidential and;
  - (e) those practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, should comply with their duty to the court to act with independence in the interests of justice.<sup>71</sup>

<sup>70</sup> Our proposed regulatory objectives have been adopted directly from clause 1 of the Legal Services Bill.

<sup>71</sup> Regulatory objectives would minimise the risk of a Scottish Legal Services Board being subject to 'regulatory capture' by obliging it to consider the effects of regulation on all stakeholders and by ensuring it was independent of government, the Society and Faculty.

## Conclusion

- (98) This supercomplaint firmly establishes that the current regulatory restrictions on lawyers' business structures and consumers' direct access to advocates in the Scottish legal services market are features of that market which are causing significant harm to the interests of consumers.
- (99) The regulatory arrangements imposed by the Faculty of Advocates in particular reflect its historical dominance of advocates of appearance work in the supreme courts and its traditional roots. The Faculty's regulatory prohibitions on advocates' business structures fail to take account of consumer welfare and are an example of particularly deep rooted regulatory capture. The Faculty's regulatory prohibitions on consumers' direct access to advocates leads to inefficiencies and is likely to raise costs to consumers.
- (100) The Society's and Faculty's resistance to third party ownership of legal firms is easier to understand due to the absence of appropriate regulatory control. We accept that careful and necessary regulatory controls will need to be established to ensure the independence of the legal profession before third party ownership can become a reality. But despite these difficulties we are of the opinion that third party ownership of legal services firms would result in a significant improvement in consumer welfare.
- (101) In the meantime, it would be relatively straightforward to dismantle the rules which prevent solicitors and advocates working together; to allow consumers direct access to advocates and to allow for alternative business structures to be adopted by both solicitors and advocates.
- (102) Moreover, a new body, the Scottish Legal Services Board, would be established to either directly regulate or oversee the regulation of the Scottish legal profession to ensure that consumer interest is the prime regulatory objective of the profession.
- (103) Finally, this supercomplaint offers the opportunity to deregulate the Scottish legal services market in an appropriate and measured way which will result in significant consumer welfare being realised. This supercomplaint also offers the opportunity for Scottish consumers to be put on an equal footing with consumers England and Wales.