

Legal Services Regulatory Authority

Public Consultation on Multi-Disciplinary Practices

**Submission by the Standing Committee of the Council on behalf of the Honorable
Society of King's Inns**

16 June 2017

I. INTRODUCTION

1. The Legal Services Regulatory Authority (“the Authority”) has sought submissions on the establishment, regulation, monitoring, operation and impact of multi-disciplinary practices (MDPs) in the State. A MDP is defined in s 2 of the Legal Services Regulation Act 2015 as “a partnership formed under the law of the State by written agreement, by two or more individuals, at least one of whom is a legal practitioner, for the purpose of providing legal services and services other than legal services”.
2. The Authority has already submitted an initial report to the Minister for Justice and Equality under s 119(1) of the Act in respect of the establishment, regulation, monitoring, operation and impact of MDPs (“the Initial Report”). It is a lengthy report which includes, *inter alia*, very useful research on alternative business structures available to legal practitioners in other jurisdictions.
3. Many of the issues that arise in the context of legal partnerships, a subject on which the Authority has already consulted and delivered its own report to the Minister, apply *a fortiori* to MDPs. In its submissions to the Authority on legal partnerships, the Society raised *inter alia* the issues of differing professional codes, independence, the cab-rank rule, the handling of client moneys and a compensation fund. The Society wishes to adopt those submissions (which it has included at Appendix I) as appropriate in response to the present public consultation.

II. REGULATORY OBJECTIVES AND PROFESSIONAL PRINCIPLES

4. In considering whether or not to recommend the introduction of MDPs, the Authority will have constant regard to the objectives of the Act and the regulatory objectives contained in s 13(4). “The Authority shall, in performing its functions of the regulation of the provision of legal services under this Act, have regard to the objectives of –
 - (a) protecting and promoting the public interest,
 - (b) supporting the proper and effective administration of justice,
 - (c) protecting and promoting the interests of consumers relating to the provision of legal services,
 - (d) promoting competition in the provision of legal services in the State,
 - (e) encouraging an independent, strong and effective legal profession, and

(f) promoting and maintaining adherence to the professional principles specified in subsection (5).”

5. The professional principles referred to in s 13(4)(f) are:
 - (a) that legal practitioners shall—
 - (i) act with independence and integrity,
 - (ii) act in the best interests of their clients, and
 - (iii) maintain proper standards of work,
 - (b) that legal practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and
 - (c) that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.
6. The importance of the s 13(4) regulatory objectives and the s 13(5) professional principles in the context of MDPs is specifically emphasised in s 116(5) of the Act.
7. The extent to which the introduction of MDPs, whatever form that may take, furthers the objectives of the Act, including the promotion of and adherence to the aforesaid professional principles, must be at the forefront of any consideration of this issue by the Authority. If the regulatory objectives are not strengthened, and indeed if they are imperilled, by the introduction of MDPs, they should not be introduced. Moreover, as one might expect from the requirement to uphold core legal professional principles within a potentially new and radical vehicle for providing legal services, the regulatory regime is likely to be complex. At a minimum, it will require the formulation, implementation and oversight of sound and effective management and governance policies and structures to ensure that the independence of lawyers is upheld, that conflicts of interest are dealt with appropriately, that privilege and confidentiality are protected, and that the overriding duty to the administration of justice is respected. It is also likely to require consultation and cooperation with multiple other professional regulators. In circumstances where the take-up of alternative business structures in other jurisdictions has been slow, and where no clear appetite for them has been shown to exist in Ireland, it requires strong justification to impose these extra regulatory burdens and costs on the legal profession, which would inevitably leads to increased costs for consumers.

III. INDEPENDENCE AND CONFLICTS OF INTEREST AND DUTY

8. The importance of protecting the independence of the legal profession cannot be overstated. It is one of the critical tests by which any regulatory change must be assessed. The legislature has forcefully acknowledged this in its enumeration of the Authority's regulatory objectives. Section 13(4)(e) of the Act requires the encouragement of an independent legal profession. Indeed, that objective is expressly included in two of the six regulatory objectives. Section 13(4)(f) refers to the desire to promote and maintain "adherence to the professional principles specified in subsection (5)", one of which is that lawyers act with independence. Furthermore, three of the four remaining objectives to be pursued by the Authority are very clearly related to, and furthered by, the independence of the legal profession: protecting and promoting the public interest; supporting the proper and effective administration of justice; protecting and promoting the interests of consumers relating to the provision of legal services. The Oireachtas has also emphasised the importance of the professional independence of lawyers in s 173(2) of the Act, in the context of the granting of patents of precedence, and in s 218(4), in the context of advertising regulations.
9. In a similar way to the challenge posed to the exercise of independent professional judgment in a partnership, there are challenges to the preservation of lawyers' overriding duty to the administration of justice when in partnership with non-lawyers. It is difficult, both theoretically and practically, to reconcile the conflicting interests and duties that would exist in an MDP. Barristers and solicitors owe an overriding duty to the administration of justice when providing legal services. This overriding duty has coexisted successfully with lawyers' duties to their clients. However, adding an additional duty to non-lawyer partners in an MDP (or even more simply a business relationship between them) complicates matters considerably. It is materially different to the issues which might arise in a legal partnership because in such a partnership all partners would owe a primary duty to the administration of justice. In circumstances where a duty with the potential to conflict with this primary duty is owed to partners as opposed to clients, it seems likely that the pressure not to subjugate the former to the latter will be greater (as it is less likely that the future success of the partnership depends on the relationship with a particular client, but it certainly depends on the relationship between the partners).
10. As the Initial Report discusses, all non-lawyer ownership models that have been introduced in other jurisdictions have put in place specific features to deal with the fundamental issues of lawyer independence and conflicts of interest. The approaches adopted have included

mandatory majority lawyer ownership; application of lawyer codes to all partners and employees working in the firm; contractual requirements in respect of non-lawyer partners that they must not interfere with the ability of lawyers in the firm to follow their professional duties; “carve-outs” of particularly sensitive modes of practice, for example amongst barristers, as in Australia.

11. The Society foresees difficulties in some of these approaches and considers it a strong possibility that they would prove inadequate to protect the interests of clients and the interests of justice from the pressures arising in a MDP. It is difficult to see how the application of lawyer codes to non-lawyer professionals in the firm would be acceptable to them or to their professional regulators. The Authority’s report on legal partnerships expressed reservations about simply applying solicitor professional standards to barristers in legal partnerships. A similar point would no doubt arise in respect of MDPs. It is hard to imagine that other professionals would enter into MDPs if, in addition to their own professional standards and duties, they had to follow legal professional codes.
12. The use of contract to address these issues also, in the Society’s view, offers inadequate protection. It would require enforcement by a party to the contract. This presents obvious difficulties in a partnership scenario where a lawyer partner is experiencing pressure that runs contrary to his/her independence and professional duties but either succumbs to such pressure or is reluctant to allege breach of contract against his/her non-lawyer partners. A more effective mechanism is required to protect the fundamental values of the legal profession.
13. The option of carving-out some areas of practice appears attractive. This has the dual attraction of facilitating the introduction of a new business model for the provision of legal services while also protecting the most sensitive area of legal practice: representative work before the courts. Of course, if a carve-out approach is adopted, it would still be necessary to adopt measures to preserve lawyers’ independence and to protect against conflicts of interests in respect of advisory and other legal services that MDPs could provide. However, the risks to the administration of justice would be less acute.
14. It is suggested by the Society that an appropriate approach could be to carve out the provision of legal services involving “exercis[ing] before any court a right of audience, or conduct[ing] litigation in relation to proceedings in any court”. This classification of legal services is helpfully provided in s 13(5)(b) of the Act (setting out the professional principles the Act seeks to uphold, specifically “duties ... rightfully owed to the court”).

15. Barristers and solicitors owe an overriding duty to the court which has the potential to conflict with the duty to and/or relationship between partners in a MDP. The duties owing in and commercial pressures flowing from involvement in a partnership with non-lawyers appear to be incompatible with – or at a minimum threaten – the regulatory objective and professional principle of independence and protection of the administration of justice. The commercial and relational circumstances surrounding this conflict appear to be materially different to those where the conflict is between the duties owing to clients and the court. The difference is such that the Authority, in considering the establishment, regulation and operation of MDPs, ought to be keenly aware of the risks posed to the administration of justice. This is why special measures should be considered, including the option of restricting legal practitioners in MDPs from exercising rights of audience.
16. The Initial Report mentions the possibility of excluding barristers from MDPs. However, the Society is of the view that any such restriction would be both too narrow and too broad. It would be too narrow because it would fail to capture the participation of solicitors in contentious proceedings before courts. Yet it would capture barristers who may not wish to exercise rights of audience in their legal services offering. It appears likely that under the new regime introduced by the Act there will be many barristers on the roll of practising barristers who will offer legal services in a way not hitherto offered by practising barristers. The provision in the Act for barristers to enter employment is one way in which such a non-traditional legal service may be offered. Barristers in partnership, and the point applies *a fortiori* in respect of MDPs, may also wish to offer advisory and other legal services which do not involve the exercise of a right of audience. Thus, the Society does not advocate a possible carve out which would exclude all barristers from MDPs. Rather, the appropriate restriction would be to limit MDP partners (or an MDP partnership) from exercising before any court a right of audience, or from conducting litigation in relation to proceedings in any court.
17. It is submitted that such a solution is consistent with the twin objectives of the Act of widening the variety of legal services offerings in Ireland, but at the same time protecting the administration of justice. In its report on legal partnerships, at para 21, the Authority refers to innovative solutions to overcome the challenges arising from the asymmetry in professional duties and obligations of barristers and solicitors and how this does not necessarily make a legal partnership model unworkable. The Act, the Authority reports, “support[s] the introduction of new approaches ... [and if] the introduction of legal partnerships is used as a mechanism for introducing different types of regulation for different categories of lawyers working collectively under different practice requirements, then these legal partnerships may add value

to the market. In other words, simply regulating legal partnerships as regulated solicitor-owned law firms, may add nothing to the market. Creating partnerships which have different scopes of practice authorisations, may facilitate the regulation of these entities in new ways. Nonetheless, every effort will need to be taken to ensure that a different approach to regulating legal partnership can operate in harmony with existing professional regulation regimes for regulating solicitor firms.” A similar point is made at para 29 where the Authority observes that “[r]ather than seek to extend the same level of regulation [to legal partnerships as applies to solicitors’ firms] ... the public interest may be better served by the creation of new models which preserve the equality of treatment of legal practitioners in circumstances in which they are undertaking the same roles but also permit them to have a different scope of practice and hence a different regulatory risk profile.”

18. It is submitted that such thinking, which envisages new models of practice for legal professionals, but not at the expense of core professional principles, could be applied in the context of MDPs and may lead to a conclusion that, if they are introduced, then removing litigation from the authorised scope of practice is an effective way of meeting the various objectives of the Act.

IV. ONE-STOP SHOPPING

19. One of the suggested advantages of MDPs is that they become a “one-stop shop” for professional services. However, a degree of caution is warranted before advertising MDPs in this way. To assume that MDPs will be able to offer, under one roof, the full complement of professional services that may be required by consumers fails to take into account the special requirement for independence in the administration of justice. One obvious example of how such expectations could be frustrated relates to the use of expert witnesses in litigation. If a client’s legal team were in partnership with engineers or accountants, for example, it might be expected that the latter could be expert witnesses in proceedings if required. However, not possessing the requisite independence demanded of expert witnesses, partners (or employees) of MDPs whose legal practitioners were involved in the proceedings would not be in a position to perform such a role for the benefit of the court.

V. ACCESS TO JUSTICE

20. One of the major concerns that must exist in relation to the potential impact of MDPs in Ireland is the effect which they may have on access by consumers to leading barristers. At present, a combination of the cab-rank rule for barristers, which is to be adopted in rule 32 of the

proposed new Code of Conduct of the Society, and the independent sole trader nature of the profession, means that solicitors from all across the country, irrespective of the size of their firm, are able to instruct the leading barristers to represent their clients. This means members of the public can currently access leading barristers through their local solicitor. The commercial realities and pressures of operating in a partnership would threaten the survival of this rule. This issue was also addressed by the Society in its submissions to the Authority on legal partnerships.

VI. LEGAL PROFESSIONAL PRIVILEGE

21. This is a major issue for MDPs which arises time and again in the Initial Report. The maintenance of client confidentiality is expressly acknowledged as a professional principle which the Authority must seek to uphold in s 13(5)(c) of the Act. Moreover, legal professional privilege is a core principle of the legal profession and underpins many of the regulatory objectives set out in the Act. It is acknowledged to be a fundamental cornerstone of the administration of justice. To ensure that legal professional privilege and client confidentiality are not compromised in a MDP with non-lawyers who are not subject to the same professional obligations in this regard, and who cannot invoke the same protections in respect of same, will require detailed, thorough and secure policies and systems. The extent to which any such system, which could be potentially cumbersome, would deter non-lawyers from entering MDPs is not clear.
22. While legal professional privilege and client confidentiality may be protected in MDPs, in order to safeguard those pillars of the lawyer-client relationship robust policies and structures will need to be designed and closely monitored. The question remains whether the onerous measures required outweigh the benefits of forming MDPs. It is unclear what the level of appetite for this new business structure would be. Added to doubts over whether MDPs further the regulatory objectives set out in s 13(4) of the Act, a real question must be asked about the merits of introducing MDPs to the regulatory landscape.

APPENDIX I

Legal Services Regulatory Authority Initial Public Consultation on Legal Partnerships

**Submission by the Standing Committee of the Council on behalf of the Honorable
Society of King's Inns**

24 March 2017

I. INTRODUCTION

1. The Standing Committee of the Council makes these submissions on behalf of the Honorable Society of King's Inns ("the Society") in response to the invitation issued by the Legal Services Regulatory Authority ("the Authority") by way of public consultation notice dated 24 February 2017. As stated in the notice, the Authority is undertaking an initial public consultation pursuant to section 118 of the Legal Services Regulation Act 2015 ("the 2015 Act") prior to reporting to the Minister for Justice and Equality ("the Minister") on the regulation, monitoring and operation of legal partnerships. The deadline for submissions is 24 March 2017.

2. In light of the short time period between the date of notice and the date for submissions, as well as the Authority's indication that the current process relates to an initial public consultation and the making of preliminary recommendations to the Minister, these submissions cannot be viewed as comprehensive or final submissions on behalf of the Society on this subject-matter. These submissions ought to be viewed as initial observations on some of the potential issues associated with the introduction of legal partnerships. The aim of these submissions is to assist the Authority in making its initial report to the Minister by highlighting some of the issues which would have to be addressed in any future regulatory regime. The Society reserves its right to make further submissions on this subject-matter in future public consultations undertaken by the Authority. In that regard, the Society would welcome the opportunity to provide such elaboration as may be sought by the Authority on these or other issues affecting legal partnerships.

II. LEGAL PARTNERSHIPS

A. Definition

3. Section 2(1) of the 2015 Act defines a "legal partnership" as "a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services".

4. The 2015 Act thus envisages two different types of legal partnership: partnerships between barristers ("barrister partnerships") and partnerships between solicitors and barristers ("barrister-solicitor partnerships"). The various issues raised in these submissions may relate to both types of legal partnership, or just one. Where this is not clear from the context, these submissions will endeavour to identify the type of legal partnership at issue.

B. Liability of Partners for Acts of Co-Partners

5. A key characteristic of partnerships is that each partner is liable for the acts of co-partners done as part of the ordinary course of business of the firm. This principle must be kept in mind at all times when considering the introduction of legal partnerships; it potentially has significant implications for the protection of consumers, the professional regulation of legal practitioners and the administration of justice. The joint and several liability of partners flows from the fact that each partner is his co-partner's agent for the purposes of the partnership business. It is a general principle of partnership law and is set out in the Partnership Act 1890, s 5:

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

C. Partnership Business

6. As is clear from the previous section, the concept of the "business of the partnership" is fundamental in partnership law. It is the foundation stone for the principle of joint and several liability. Partners are agents of each other, and bind one another, when they carry on "business of the kind carried on by the firm". This important principle would appear to be premised on the provision of a unitary professional service. There are questions surrounding its application to legal partnerships where not all partners are members of the same profession.
7. What is the business of a barrister-solicitor legal partnership? It can be described as the provision of legal services; yet the reality is that solicitors and barristers provide legal services of a different nature. There are, in particular, services offered by solicitors, representing a significant part of the business carried on by solicitors, which barristers cannot offer. Some of these are addressed in more detail below, but include notably the handling of client moneys and the provision of undertakings. This complicates the definition of the partnership business. There will be significant aspects of the business which barrister partners are professionally and/or statutorily prohibited from undertaking. This confusion surrounding the partnership business poses potential difficulties for consumers who may seek to rely on the principle of joint and several liability or who may seek payment out of the solicitors' compensation fund (see *infra*).

III. ISSUES

8. It is proposed to highlight a number of areas where the introduction of legal partnerships raises regulatory and other concerns. These submissions do not purport to express a definitive view on the desirability or otherwise of introducing legal partnerships, nor do they express a view on whether, or how, any of the issues raised may be overcome. Instead, these submissions aim to assist the Authority in making its preliminary recommendations to the Minister by bringing to its attention the potential issues created by legal partnerships for the administration of justice, consumer protection and professional regulation.

A. Different Professional Codes

9. The question of which professional code would apply to legal practitioners in barrister-solicitor partnerships arises. All barristers, even those in legal partnerships, will continue to be subject to the professional code of the Society, in addition to any profession specific code of practice issued by the Authority. All solicitors will continue to be subject to the professional code of the Law Society, as well as relevant rules promulgated by the Authority. While many of the rules in the separate professional codes regulating barristers and solicitors overlap, there are also critical differences (some of which are addressed in more detail *infra*). How will these differences be reconciled with the nature of a legal partnership? Where there is a conflict between the different professional rules of conduct, as there is, for example, with the wider discretion of solicitors not to accept clients,¹ how will the conflict be resolved? If such resolution would involve a relaxation of some of the professional duties of barristers, how would this affect the administration of justice in Ireland and the interests of consumers?

B. Independence and Overriding Duty

¹ The Law Society Guide to Good Professional Conduct (3rd ed), p 7: “The decision to accept instructions in any particular case is a matter for the discretion of the individual solicitor.” Rule 32 of the proposed new Professional Code of the Society, however, sets out the “cab rank” rule for barristers: “Save insofar as legal services as a barrister are being provided under a contract of service, having regard to the anticipated length and complexity of a case and having regard to their other professional commitments and the provisions of the Code, barristers are bound to accept instructions in any case in the field in which they profess to practise (having regard to their experience and seniority) subject to the payment of a proper professional fee. A barrister may be justified in refusing to accept instructions where a conflict of interest arises or is likely to arise or where they possess relevant or confidential information or where there are other special circumstances.”

10. Would changes which might be necessary to the professional duties of barristers in barrister-solicitor partnerships, or indeed in barrister partnerships, fundamentally alter the nature of the profession and its role in the administration of justice? One of the most prominent and distinctive features of the role played by barristers in the administrative of justice is their status as independent advocates. Independence is the hallmark of the profession.² This independence is a valuable cog in the administration of justice. It is respectfully submitted that this long-established and oft-asserted independence is an important offering to consumers of legal services. The question is whether the independence of barristers in legal partnerships would be compromised and the extent to which this would harm either the administration of justice or consumers, or both.
11. Related to the independence of barristers is their “overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved”.³ This is an equally important feature of the profession, without which the administration of justice would be impaired. It is crucial that any consideration of the operation and regulation of legal partnerships has regard to the implications for, and the importance of preserving, barristers’ overriding duty to the court.

C. Holding Client Moneys

12. Barristers are prohibited, by professional duty and by statute,⁴ from handling client moneys. This poses a major difficulty for barrister-solicitor partnerships. Solicitors in any future legal partnership would be able to receive and handle client moneys; indeed it would be a key part of the services they offer. Barrister partners, however, would be prohibited from doing so. The question is whether such a distinction between the powers of partners is desirable or practicable. The partners are agents of each other in the course of the partnership business. Yet how could a barrister partner be considered a principal in relation to the handling of client moneys by a solicitor partner where the barrister partner is statutorily prohibited from same? Moreover, is it fair and appropriate that a barrister partner be liable for the partnership’s

² Rule 22 of the proposed new Professional Code of the Society: “It is the duty of barristers to be independent and free from influence, especially such as may arise from their personal interests or external pressure, in the discharge of their professional duties. Barristers must avoid any impairment of their independence and be careful not to compromise their professional standards in order to please their client, the court, third parties, or, as the case may be, their employer(s) or partner(s).”

³ Rule 20 of the proposed new Professional Code of the Society.

⁴ Rule 28 of the proposed new Professional Code of the Society and s 45(1) of the 2015 Act which provides that “a legal practitioner shall not hold moneys of clients unless that legal practitioner is a solicitor.”

handling of client moneys where the barrister partner is not permitted to exercise any powers in relation to same?

13. Solutions to this problem can be envisaged. For example, it may be possible to include in the written partnership agreement terms which expressly state the authority of the various partners as regards handling client moneys and which seek to limit the liability of barrister partners. However, any such terms would have to be brought to the attention of clients to be effective. Moreover, it will have to be considered whether or not this would be an appropriate solution and whether it is desirable to sub-divide partnership responsibility in this way.

D. Compensation Fund

14. There are major issues of consumer protection to be considered before barrister-solicitor partnerships are introduced. In the previous section it was asked whether or not it would be fair to impose a liability on barrister partners in respect of solicitor partner handling of client moneys, where barrister partners are prohibited from same. It is necessary now to consider the increased exposure to risk faced by consumers where legal partnerships hold their money.
15. There exists a solicitors' compensation fund, governed by s 21 of the Solicitors (Amendment) Act 1960 and the Solicitors (Compensation Fund) Regulations 2013, the purpose of which is to provide compensation where a client of a solicitor has suffered loss due to the dishonesty of a solicitor or the clerk or servant of a solicitor arising from that solicitor's practice as a solicitor ("the Compensation Fund"). This is an extremely important and valuable protection afforded to the clients of solicitors in circumstances where, in ordinary practice, an extraordinary level of trust is placed in the solicitors' profession. It reinforces that trust and no doubt serves to strengthen the confidence that the general public has in the profession, evidenced on a daily basis by the recourse people have to the services provided by solicitors.
16. In the context of a barrister-solicitor partnership, however, the protection afforded by the Compensation Fund would be undermined because it would not be available in respect of acts by barrister partners. Although barrister partners would be prohibited from handling client moneys, it is not inconceivable that, given the practicalities of a partnership, situations could arise whereby a client of the legal partnership suffers a loss which would have been covered by the Compensation Fund but for the fact that the relevant acts are attributable not to a solicitor but to a barrister.

17. Section 113 of the 2015 Act makes clear that the Law Society will not be required to expand the coverage provided by the Compensation Fund to acts of barrister partners or barrister employees of the legal partnership:

Nothing in this Part shall be construed as extending the obligation of the Law Society under section 21(4) (as amended by section 29 of the Solicitors (Amendment) Act 1994) of the Solicitors (Amendment) Act 1960 to loss sustained in consequence of dishonesty on the part of a legal practitioner who is a partner in or an employee of a legal partnership or, as the case may be, a multi-disciplinary practice or any clerk or servant of that legal practitioner arising from the provision by that legal practitioner of legal services to a client, where that legal practitioner is not a practising solicitor.

18. This would leave consumers exposed. It would also complicate the process of making an application to the Compensation Fund. Clients would only be able to avail of compensation for dishonest acts of solicitor partners. It is not a distinction which, it is respectfully submitted, to the consumer would seem justifiable. However, it is an inevitable consequence of the proposal to permit legal partnerships under the current Compensation Fund regime. At a minimum, of course, legal partnerships ought to be required to inform clients whether and to what extent they are protected by the Compensation Fund. However, it remains to be decided whether or not this alone is adequate or if other measures would be required to protect clients of legal partnerships where there is a gap in the coverage of the Compensation Fund.

E. Undertakings

19. The provision of undertakings by solicitors is an issue which arises in respect of barrister-solicitor partnerships. Undertakings are a part of the ordinary business of solicitors, but they are not a feature of barristers' practices. Currently, where a solicitor in partnership gives an undertaking as a solicitor in the course of practice, all partners are responsible for its performance.⁵
20. In barrister-solicitor partnerships, how will the giving of undertakings be regulated and where will liability for failure to comply with undertakings fall? In a manner similar to the issues surrounding client moneys, if a solicitor partner, or indeed a solicitor employee, provides undertakings which a barrister partner is incapable of giving, or over which he cannot exercise any control *qua* partner, is it fair, just and reasonable that a barrister partner would be exposed

⁵ Law Society Guide to Good Professional Conduct (3rd ed), p 49.

to liability on foot thereof? Is it consistent with the nature of a partnership that certain partners are professionally prohibited from exercising or supervising such important functions which potentially expose the partnership to significant liabilities?

F. Investment Advice

21. Solicitors can provide investment business services, investment advice or insurance intermediary services to clients. These are not services that barristers have provided or can provide.⁶ Therefore, once again, there are difficulties in how a legal partnership will operate and be regulated with respect to such services.

G. Availability of Barristers

22. This is a major area of concern for consumers of legal services. If barristers and solicitors are permitted to enter into partnership, it is not inconceivable that the largest solicitors firms and the leading barristers may enter into partnership whereby these barristers would no longer accept briefs from smaller solicitor firms. This would restrict the access of many solicitors throughout the country to the professional services of the leading barristers. It would deprive many individual litigants of their services, which would in all likelihood have a negative impact on their ability to assert their legal rights and further negative consequences for the administration of justice.
23. Moreover, the choice of barristers for the clients of legal partnerships would likely be diminished as the solicitors in a legal partnership would presumably encourage, or at least have an interest in, the client being represented by a barrister partner. This would not appear to be in the best interests of consumers.

H. Individual Responsibility

24. It is an important duty of the profession that barristers are individually responsible for their own conduct.⁷ It is a feature of the profession that comes to the fore in proceedings before a court. It is important that any future regulatory regime take account of this duty and enforce it in respect of barristers in legal partnerships.

⁶ Rule 28 of the proposed new Professional Code of the Society: "Barristers are prohibited from directly or indirectly administering or handling the funds or assets of any client and barristers shall not give any financial advice or assistance to a client or their solicitor on the investment of such funds or assets."

⁷ Rule 12 of the proposed new Professional Code of the Society.

I. Regulation by the Professional Bodies

25. The Law Society will exercise its residual regulatory and disciplinary function in respect of solicitors only; the Society will exercise its residual regulatory and disciplinary functions in respect of barristers only. With no power to regulate members of the other profession, how will the two professional bodies regulate legal practitioners in legal partnerships effectively? The potential reliance on the principles of vicarious or joint liability in disciplinary matters would, it is submitted, be controversial. The difficulties facing the professional bodies in this regard could lead to reduced oversight of legal practitioners in legal partnerships, which would be detrimental to consumers.

J. Conflicts of Interest

26. Barrister partners in legal partnerships will face an increased risk of conflicts of interest. There will be potential for conflict between the interests of their clients and the interests of their partners; there will also be potential for conflict between the interests of their clients and the interests of their partners' clients. These risks will require detailed regulation. It is imperative that appropriate structures and procedures be put in place so that potential conflicts of interest are identified and addressed. There is also a risk to clients considered "less valuable". For example, if a conflict arises between two clients, will the partnership automatically cease to represent the "less valuable" client? Under the current regulatory regime barristers would be prevented from doing this, which, it is submitted, is of significant benefit to consumers.

K. Solicitors on Record

27. Consideration will have to be given to how the introduction of barrister-solicitor legal partnerships will affect the practice of solicitors' firms coming on record for parties to proceedings. It is unclear whether or not such a firm, comprising as it does barristers and solicitors, would be able to enter an appearance.