

# **Response to Which?'s super-complaint:**

'Restrictions on business structures and direct access in the Scottish legal profession'

July 2007

OFT946

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# 1 BACKGROUND

1.1 Which? submitted a super-complaint to the OFT on 8 May 2007 asserting that the following restrictions imposed on providers of legal services in Scotland significantly harm the interests of consumers by stifling choice, inhibiting innovation, and excluding potential entrants from the legal services market:

- the restrictions on advocates' business structures
- the restrictions on solicitors and advocates providing services jointly
- the restrictions on third party entry, and
- the restrictions on direct access to advocates.

1.2 Which? further submitted that the regulatory structure for legal services in Scotland should be reformed in order to accommodate the lifting of these restrictions.

1.3 The right to submit a super-complaint was created by section 11 of the Enterprise Act 2002 (the Act). A super-complaint is defined under section 11(1) of the Act as a complaint made by a designated consumer body 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'. The OFT is satisfied that the super-complaint meets the criteria set out in section 11(1) of the Act.

1.4 Section 11(2) of the Act requires the OFT, within 90 days after the day on which it receives a super-complaint, to publish a response stating whether it has decided to take any action in respect of the complaint, or to take no action, in response to the complaint, and if it has decided to take action, what action it proposes to take. Under section 11(3) of the Act, the response must state the OFT's reasons for its proposals. This document represents the OFT's response to the super-complaint submitted by Which?.

## 2 SERVICES AFFECTED BY THE RESTRICTIONS

- 2.1 In this response, the OFT notes that the legal services market in Scotland is different from that in England and Wales. The OFT also considers that it is important to develop an appropriate Scottish solution to any perceived problems. While recognising that many of the same principles and benefits are likely to apply, the OFT has not assumed that the changes currently being made in England and Wales will be automatically suitable for the Scottish market. The OFT has therefore not come to a decision as to whether the introduction of an oversight regulator would be the most appropriate regulatory arrangement for Scotland. The form of the regulatory arrangements for legal services in Scotland should be given further consideration by the Scottish Executive (SE).
- 2.2 Some of the restrictions highlighted in the super-complaint apply only to solicitors or only to advocates operating in Scotland. Others apply to both professions. The purpose of this reasoned response is to determine what, if any, action it would be proportionate for the OFT to take in relation to the restrictions identified in the super-complaint, in the light of Which?'s allegation that these restrictions unnecessarily prevent legal services providers from operating in a manner that would best suit their clients. It is therefore not necessary to make a definitive determination of the relevant market.
- 2.3 There are approximately 460 advocates<sup>1</sup> and 9,900 practising solicitors<sup>2</sup> in Scotland. According to the Report by the Scottish Executive Research Working Group on the Legal Services Market in Scotland published in

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<sup>1</sup> Source: Faculty of Advocates web site [www.advocates.org.uk/profession/index.html](http://www.advocates.org.uk/profession/index.html) checked 10 July 2007

<sup>2</sup> Source: Law Society of Scotland Annual Report 2006  
[www.lawscot.org.uk/AnnualReport2006/LawSocietyAR06finalweb2.pdf](http://www.lawscot.org.uk/AnnualReport2006/LawSocietyAR06finalweb2.pdf)

April 2006 (the SE Research Working Group Report),<sup>3</sup> expenditure on legal services in Scotland in 2004 was almost £1 billion.<sup>4</sup>

## **Assessment of the restrictions in the super-complaint**

- 2.4 The OFT's views on all the restrictions in the super-complaint (and other aspects of the regulation of the market) were recorded in the SE Research Working Group Report. The report sets out the OFT's view at that time that the restrictions unnecessarily inhibited legal services providers from adapting their business in a manner that best suited their clients' needs, and that they prevented legal services providers from operating more efficiently, which might result in higher legal fees for clients.
- 2.5 During the course of considering the super-complaint, the OFT met with various stakeholders<sup>5</sup> in order to reach a view on the restrictions highlighted in the super-complaint and what action it would be reasonable for the OFT to take in respect of them.

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<sup>3</sup> In 2004 the SE 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. This work was driven by a desire on the part of Scottish Ministers that legal services in Scotland should be regulated in the interests of consumers, by developments at European Commission level (reviewing competition in the liberal professions) and by developments in England and Wales. The report of the Research Working Group is available on the website of the SE: [www.scotland.gov.uk/Publications/2006/04/12093822/0](http://www.scotland.gov.uk/Publications/2006/04/12093822/0)

<sup>4</sup> Based on aggregate fee income of almost £990 million earned by solicitors and advocates in private practice in Scotland in 2004, see paragraph 1.1 of the SE Research Working Group Report.

<sup>5</sup> OFT met with the SE, the Law Society of Scotland, the Faculty of Advocates, the Scottish Consumer Council, the Scottish Legal Services Ombudsman and members of the solicitor, advocate and solicitor advocate professions.

## Terminology

2.6 In discussing the restrictions on business structures and on third party entry we refer to 'alternative business structures' (ABSs). ABSs include:

- legal disciplinary practices (LDPs), which would allow lawyers from different professional disciplines (for example, solicitors and advocates) to offer legal services to clients as part of the same law practice
- multi-disciplinary practices (MDPs), which would allow lawyers and other professionals (for example, accountants and chartered surveyors) to be able to offer services, including legal services, to clients as part of the same practice, and
- law practices that are owned by non-lawyers.

### 3 RESTRICTIONS ON ADVOCATES' BUSINESS STRUCTURES

#### Origin of the restrictions

- 3.1 The Guide to the Professional Conduct of Advocates, at paragraph 1.2.4., states that '[an advocate] cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate'.
- 3.2 In addition, statute provides that any rule 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 of the Court of Session and the Scottish Ministers.<sup>6</sup> Before approving any such rule, the Scottish Ministers shall consult the OFT.<sup>7</sup>
- 3.3 The OFT was informed that advocates are currently not being permitted by the Faculty of Advocates (FoA) to adopt ABSs, for example by incorporating their practice. The FoA considers that if advocates were to incorporate, they would become an employee of their own company, and according to paragraph 15.4 of the Guide to the Professional Conduct of Advocates an advocate in salaried employment 'may not appear in court on his employer's behalf, nor may he do any act as 'representative' or agent of his employer [...]'.

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<sup>6</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 31(1).

<sup>7</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 40. In 1992 the then Director General of Fair Trading considered this restriction and came to the conclusion that it was likely to represent a restriction on competition, however, on the evidence before him, a significant anti-competitive effect had not been demonstrated. Since that date, the OFT has, through its participation in the SE Research Working Group, indicated that it considers this restriction unnecessarily inhibits choice for advocates and their clients and should be removed.

- 3.4 The above rules therefore effectively require advocates to operate as sole traders.

#### **Potential benefits for Scottish consumers in lifting the current restrictions**

- 3.5 The rules cited above prevent, or have been interpreted to prevent, advocates from choosing freely the organisational form they may consider the most optimal.
- 3.6 Were advocates able to enter partnerships or incorporate, they would be able to take advantage of efficiencies through, for example, sharing costs and overheads, or sharing risks (which may lead to lower insurance premiums), and limiting potential personal liability. There are also potential tax efficiencies. These efficiencies would in turn lead to lower costs, and thus could lead to lower fees for consumers of legal services. ABSs could also open up access to capital, encourage specialisation for some providers and allow others to make use of economies of scope, and benefit from shared work and shared professional reputation.

#### **The arguments for maintaining the restriction**

- 3.7 The FoA considers that lifting the prohibition would make it more difficult to enter the profession. The concern is that new entrants to the profession would be required to find a 'tenancy' within an existing partnership in order to be able to practise, which is not currently the case in Scotland. At present anyone who completes training and fulfils the entry requirements is entitled to practise and the costs of entry to the profession are low.
- 3.8 The OFT considers that the ability of newly qualified advocates to join an existing partnership could provide relative security due to being attached to or being employed by established advocates and could thereby facilitate entry to the profession. Further, the OFT does not consider that lifting the prohibition on partnerships will undermine the ability of advocates to practise in sole practice or will raise the costs of entry to the profession.

- 3.9 The FoA considers that partnerships between advocates may lead to conflicts of interest which may limit the choice of advocates available to a client. In the context of the SE Research Working Group Report the FoA considered that this would have a detrimental effect on the quality of legal representation. Similarly, the FoA considers that partnerships can lead to anti-competitive concentrations.
- 3.10 Competition legislation<sup>8</sup> can, however, address situations that result, or may be expected to result, in a substantial lessening of competition. This can ensure that consumer choice is adequately protected. The OFT therefore believes that a less than substantial reduction in consumer choice as a result of lifting this restriction would outweigh the potential benefits of allowing advocates to operate within different business structures.
- 3.11 Further, the OFT does not consider that removing the restriction would have a negative impact on the quality of legal representation. The option would still remain for advocates to operate within their current business structure should they feel it is optimal to do so in order for them to offer the best quality service to consumers.
- 3.12 Finally, the FoA considers that the current arrangements are cost-effective, efficient and meet the needs of consumers. The FoA believes that a prohibition on partnerships between advocates is not anti-competitive because advocates are always free to practise as solicitors or as solicitor advocates. In the OFT's view, the fact that advocates are free to practise as solicitors or solicitor advocates has no bearing on whether they are unnecessarily restricted from choosing freely the organisational form they see as the most optimal. In addition, for the reasons set out above, lifting the current restrictions can allow advocates to operate in a more cost-effective and efficient manner and to better meet the needs of consumers.

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<sup>8</sup> Enterprise Act 2002

## Conclusion

- 3.13 A requirement that advocates must operate as sole traders unnecessarily prevents advocates from taking advantage of the efficiencies that other organisational forms provide, the benefits of which could be passed onto consumers. Considering all the issues, the OFT believes that it is in the interest of consumers in Scotland that this prohibition should be lifted.

## **4 RESTRICTIONS ON SOLICITORS AND ADVOCATES PROVIDING SERVICES JOINTLY**

### **Origin of the restrictions**

- 4.1 Solicitors and advocates are prevented from providing services jointly by their respective professional rules. The Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991 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>9</sup> As noted above, the Guide to the Professional Conduct of Advocates provides at paragraph 1.2.4 that '[an advocate] cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate'.

### **Potential benefits for Scottish consumers in lifting the current restrictions**

- 4.2 If these restrictions were lifted, lawyers from different professional disciplines (for example, solicitors and advocates) would be able to offer legal services to clients as part of the same law practice – an LDP.
- 4.3 Members of the different legal professions who operate through an LDP could share overhead costs, which could result in lower legal fees, where the savings are passed on to consumers in Scotland. According to stakeholders within the solicitors' profession this is increasingly accepted to be an advantage within their profession.
- 4.4 LDPs also allow for risk-spreading where members of the different branches of the profession have different areas of specialisation of practice, such as in advocacy, and can generate economies of scope.
- 4.5 In addition, where the services of more than one type of legal professional are required by a client, LDPs can offer a broader range of

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<sup>9</sup> Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991, rule 4

legal services. One Scottish law firm has informed the OFT that its market research revealed that clients are interested in purchasing legal services through a one-stop shop. Lifting the restrictions on LDPs may also encourage innovations and efficiencies which might result from the combination of different services, the benefits of which may be passed on to Scottish consumers.

## **The arguments for maintaining the restrictions**

- 4.6 The FoA considers that if advocates were to practise in LDPs, they would effectively be operating as solicitors, in so far as they would be responsible for the relationship of the LDP with its clients and for the proper handling of clients' funds.<sup>10</sup> The OFT does not believe that this argument outweighs the potential benefits to Scottish consumers of lifting these restrictions.
- 4.7 The FoA further considers that lawyers in an LDP would have a strong incentive to advise their clients to instruct lawyers within their LDP for other legal services required by their client: this may not always lead to the best lawyer being instructed for a particular task. The OFT considers that a requirement to give independent and impartial advice can be ensured by a strict ethical standard for both advocates and solicitors. In addition, where the reputation of a business practice is at stake, there is a strong incentive to ensure that recommendations to use a particular lawyer are fully considered and meet the needs of the client. Clients will also be aware that they can obtain recommendations through other sources. A complete ban on LDPs is therefore disproportionate.
- 4.8 The FoA considers that in relation to certain areas of work a substantial number of practitioners may wish to join LDPs, which could have a negative impact on access to justice and could lead to market power.<sup>11</sup> The FoA suggests that if advocates operated through LDPs, this may

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<sup>10</sup> Paragraph 8.38 of the SE Research Working Group Report

<sup>11</sup> Paragraph 8.61 of the SE Research Working Group Report

reduce clients' choice of available advocates. As discussed above, situations that result, or may be expected to result, in a substantial lessening of competition can be addressed under competition legislation. The OFT does not believe that a less than substantial reduction in consumer choice as a result of lifting this restriction would outweigh the potential benefits of allowing advocates to operate within different business structures.

- 4.9 The FoA further noted that the 'cab-rank' rule<sup>12</sup> may be difficult to maintain in the context of an LDP. While this issue will require attention, we believe that the likely benefits for consumers outweigh the likely costs involved in addressing the points.
- 4.10 Finally, as noted above, the FoA believes that the current arrangements are cost-effective and efficient, meet the needs of consumers and do not cause consumers significant harm. The FoA further considers that if advocates were to operate through LDPs, this may raise regulatory costs to advocates.
- 4.11 For the reasons set out above, the OFT considers that lifting the current restrictions on LDPs can allow legal services providers to operate in a more cost-effective and efficient manner which can better meet the needs of consumers. Consideration will need to be given to how ABSs in Scotland can best be regulated. However, lifting the restrictions on LDPs does not necessarily mean that costs to consumers of legal services will increase. While this issue will require further attention, the OFT considers that the blanket ban on LDPs unnecessarily prevents lawyers from taking advantage of the efficiencies that this organisational form provides, the benefits of which can be passed on to consumers.

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<sup>12</sup> In accordance with the 'cab-rank' rule advocates have to accept any instructions to appear in court, subject only to the qualifications set out in the Guide to Professional Conduct of Advocates, and might withdraw from acting only in circumstances where it would no longer be proper for them to continue to act.

- 4.12 Stakeholders from the solicitors' profession were in favour of allowing LDPs, and felt that, in order for law firms to be able to expand, they required management skills which were not always held by lawyers.
- 4.13 The Law Society of Scotland (LSS) considers that the benefits of ABSs are untried and that it could not be assumed that they would benefit consumers. However, it has informed the OFT that it intends to consult its membership on the issue of ABSs (including LDPs, MDPs, and outside ownership). It will be publishing an Options Paper in August, setting out the range of available options on ABSs to its membership. The LSS intends to hold a conference on the subject on 28 September, after which it intends to produce a 'Green Paper' and, subsequently, to discuss the issues with the SE. The OFT welcomes this initiative.

## **Conclusion**

- 4.14 Restrictions on the formation of LDPs unnecessarily prevent lawyers from taking advantage of the efficiencies that this organisational form provides, the benefits of which can be passed on to consumers. For the reasons set out above, the OFT concludes that it is in the interest of the Scottish legal profession and, ultimately, of consumers in Scotland that such a prohibition should be lifted.

## **5 RESTRICTIONS ON THIRD PARTY ENTRY**

### **Origin of the restrictions**

- 5.1 Rule 4 of the Solicitors (Scotland) Practice Rules 1991 and section 26 of the Solicitors (Scotland) Act 1980 prohibit non-lawyers owning a law firm, by prohibiting solicitors from sharing their fees with any unqualified person.
- 5.2 In addition, rule 4 of the Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991 provides 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'.

### **Potential benefits for Scottish consumers in lifting the current restrictions**

- 5.3 Removal of these rules would allow non-lawyers to own law firms and would allow lawyers to take advantage of opportunities for capitalisation from outside the profession.
- 5.4 Since the publication of the SE Research Working Group Report, views of the solicitors' profession on the issue of ABSs, including MDPs, have been shifting. If the prohibition on the formation of MDPs were lifted, lawyers and other professionals (for example, accountants and chartered surveyors) would be able to offer services, including legal services, to clients as part of the same practice.
- 5.5 Practising solicitors told the OFT that, without any equity interest, it would be difficult to expand their business and also to fund innovation. At present the growth of law firms relies on a mixture of bank borrowing and equity participation by partners. These solicitors further considered that this inhibits the growth of law firms because they cannot obtain funds from other sources. In addition, solicitors considered that the personal liability linked with partnerships is 'unattractive'. Providing the

opportunity for outside ownership and shareholdings could remove these difficulties.

- 5.6 Practising solicitors further noted that solicitors operating in small law practices (high-street practices or rural practices) increasingly recognised that third party ownership would enable them to extract value from their goodwill, allowing them to exit the market, which may help to preserve those firms rather than to close them down on retirement.
- 5.7 In addition, lifting the restrictions would allow law firms to attract talented non-legal staff that would bring managerial skills. This could lead to law firms becoming more efficient and competitive, the benefits of which could be passed on to consumers. Lifting the restrictions on outside ownership was one way of attracting individuals with more diverse skills, such as management, and might help to facilitate consolidation for smaller firms.
- 5.8 Lifting the restrictions on outside ownership could also mean that law firms would become more responsive to clients and that the quality of legal services would improve. This view was expressed not only by the solicitors, but also by the Scottish Legal Services Ombudsman, and the Scottish Consumer Council.
- 5.9 The OFT was told that solicitors in Scotland increasingly recognise that operating through ABSs can have advantages, particularly because ABSs would allow solicitors to share overhead costs and to offer a broader range of services within their practice - lawyers and accountants, for example, often have common clients. Solicitor firms told the OFT that allowing lawyers and non-lawyers to operate under the same business structure could be more cost-effective and provide the convenience of a one-stop shop.

### **The arguments for maintaining the restrictions**

- 5.10 The LSS and the FoA have opposed lifting the restrictions on non-lawyer ownership of law firms on the basis that to do so could conflict with the core values of the lawyer: guaranteed independence, avoidance of

conflicts of interests, and client confidentiality. The LSS also considers that there would be difficulties in regulating such firms, particularly with regard to potential conflicts between the commercial interests of the owners and the professional duty of lawyers working in the firm. The LSS and the FoA further consider that lifting restrictions on third party entry may be an improper application of solutions appropriate for England and Wales to the Scottish market.

- 5.11 The OFT recognises that particular safeguards would be necessary in order for law firms owned by non-lawyers to operate properly, if the current restrictions were to be lifted. The OFT considers that the costs involved in implementing such safeguards do not, however, outweigh the benefits for consumers that could be achieved by lifting the current blanket ban. The OFT expects that an LSS Options Paper discussing outside ownership will set out the options available for ensuring that proper safeguards are in place in order for such ABSs to operate properly. The OFT considers that it is important to develop solutions appropriate for Scotland and its recommendations that unnecessary restrictions are lifted are made on the basis that this would benefit Scottish consumers.
- 5.12 Solicitor firms told the OFT that regulation of ownership can ensure that only appropriate persons own law firms. They further noted that the risk that a law firm may be owned by an 'inappropriate' lawyer equally exists and that there was no basis for suggesting that non-lawyers were inherently less trustworthy than lawyers. The regulation of law firms under outside ownership can ensure, first, that those who provide legal advice have the necessary qualifications and undertake continued professional development; secondly, that only accredited businesses operate in the legal services market; and thirdly, that the legal services provider is adequately insured. In England and Wales ownership of law firms will be regulated through a 'fit to own' test which might have regard to honesty, integrity and reputation, competence and capability and financial soundness. If appropriate, a similar test could be adopted in Scotland to alleviate these concerns. The OFT considers that the costs involved in implementing such a test do not outweigh the benefits to consumers that could be achieved by lifting the current blanket ban.

- 5.13 Concerns have been raised that outside ownership may lead to law firms offering only 'profitable' legal services and could deny consumers of legal services access to justice.
- 5.14 Solicitor firms told the OFT that they did not consider that outside ownership would deny clients access to justice. They said that vulnerable clients are those that depend on legal aid and that the levels at which legal aid rates are set would determine whether consumers would have access to justice. They further noted that profit margins for law firms were reducing and that firms therefore needed to be better managed. Outside ownership was one way of achieving this.
- 5.15 Finally, solicitor firms noted that once the relevant provisions of the Legal Services Act come into force in England and Wales, in approximately three to four years' time, lawyers operating in England and Wales would be able to access external capital and would have more opportunities to expand their business. Scottish law firms, however, would be prevented from expanding in this way and would thus be placed at a disadvantage vis-à-vis firms in England and Wales that have an equivalent skill-set. They noted that this could lead solicitors to 'rebrand' themselves as English and Welsh lawyers – though the OFT recognises that rebranding in this way would not necessarily cause consumers harm.

## **Conclusion**

- 5.16 The prohibition on external ownership and on MDPs prevents lawyers from taking advantage of the efficiencies that these organisational forms provide, the benefits of which can be passed on, directly or indirectly, to consumers. The OFT recognises that particular safeguards would be necessary in order for law firms owned by non-lawyers to operate properly, if the prohibition were to be lifted. The OFT believes that the need for such safeguards does not outweigh the benefits that could be achieved for consumers in Scotland by lifting the current blanket ban, and that these restrictions should be removed.

## 6 RESTRICTIONS ON DIRECT ACCESS TO ADVOCATES

### Origin of the restrictions

- 6.1 Rule 4.2 of the Guide to the Professional Conduct of Advocates provides that an advocate may act in a professional capacity only on the instructions of a Scottish solicitor, subject to the exceptions outlined in that Guide.
- 6.2 Rule 3 of the 2006 Direct Access Rules<sup>13</sup> provides that 'Advocates may not accept instructions to receive or handle clients' money; nor to do administrative work which would normally be carried out by an instructing solicitor; nor to carry out investigative work which would normally be carried out by an instructing solicitor, any more than they might do so when instructed by a solicitor.'
- 6.3 The restrictions on direct access to an advocate, as contained in rule 4.2 of the Guide to the Professional Conduct of Advocates, have been relaxed with the introduction of the FoA's 2006 Direct Access Rules. The 2006 Direct Access Rules set out that only legal professionals, other professionals, public authorities, and all other types of bodies who are on the approved list of 'other persons and bodies', such as voluntary organisations, may instruct an advocate directly. Lay clients and members of the public are still not able to access an advocate directly, however, and must instruct an 'approved' third party to do so on their behalf.

### Potential benefits for Scottish consumers in lifting the current restrictions

- 6.4 The restrictions on direct access are inefficient where a client is fully capable of instructing counsel without going through a solicitor. For such

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<sup>13</sup> [www.advocates.org.uk/downloads/directaccessrules.pdf](http://www.advocates.org.uk/downloads/directaccessrules.pdf)

clients the requirement to use a solicitor constitutes an unnecessary cost.

- 6.5 The OFT was informed that advocates had sought to introduce innovations to their practice by offering specialized services in direct competition with solicitors for which they had the necessary expertise. However, their practice rules prevented them from offering such services to consumers.
- 6.6 A further relaxation of the prohibition on direct access would allow advocates to compete directly with solicitors for the provision of certain work, provided the restrictions contained in rule 3 of the 2006 Direct Access Rules, which prohibit an advocate from carrying out the work of a solicitor, are lifted.

### **The arguments for maintaining the restrictions**

- 6.7 The FoA claims that it is in the interest of lay clients for the prohibition on direct access to be maintained because solicitors are better able to judge whether the services of an advocate are required. Where it transpires that an advocate's services are not required, however, clients incur an unnecessary cost. The OFT considers that increased information to lay clients published by the FoA on when it would be most appropriate to instruct an advocate directly can address this issue.
- 6.8 The FoA further considers that solicitors can act as informed intermediaries in the selection of a suitable advocate for a client.<sup>14</sup> The OFT considers that this would still be the case if the prohibition on direct access were further relaxed.
- 6.9 The FoA further argued that advocates could make cost savings by not being instructed directly, for example because this avoided costs associated with the handling of client funds. The OFT considers that it should remain open to advocates to choose whether or not to accept

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<sup>14</sup> Paragraphs 7.4-7.5 of the SE Research Working Group Report

instructions directly, and that a blanket prohibition is therefore not justified. In England and Wales, barristers are able to take instructions directly from lay clients, subject to certain exceptions.<sup>15</sup> There has been no reported increase in costs to consumers.

- 6.10 The FoA considers that if lay clients were able to instruct an advocate directly, advocates would effectively become solicitors. However, the OFT considers that relaxing the direct access rules further would not lead to advocates losing their specialisation in advocacy, nor would they effectively become solicitors.
- 6.11 Finally, the FoA asserts that advocates have no right to sue for their fees and that if their rules on direct access were to be further relaxed, the law on this issue would need to be changed. The FoA further noted that the 'cab-rank' rule would need to be changed in order to allow an advocate to decline direct instructions. While these issues will require attention, we believe that the likely benefits for consumers outweigh the likely costs involved in addressing the points.

## **Conclusion**

- 6.12 The remaining restrictions on lay clients instructing an advocate directly are inefficient where a client is fully capable of instructing counsel without going through a solicitor. For such clients the requirement to use a solicitor constitutes an unnecessary cost. Where, due to the nature of the case, involvement of a solicitor is needed, it would still be possible to instruct an advocate through a solicitor.
- 6.13 A further relaxation of the prohibition on direct access would also allow advocates to compete directly with solicitors for the provision of certain work. Increased competition would benefit Scottish consumers.

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<sup>15</sup> [www.barcouncil.org.uk/assets/documents/Public%20Access%20Work%20-%20Guidance%20for%20Barristers.doc](http://www.barcouncil.org.uk/assets/documents/Public%20Access%20Work%20-%20Guidance%20for%20Barristers.doc)

6.14 For these reasons, the OFT believes that the rules restricting direct access to advocates should be further relaxed, subject to appropriate safeguards being put in place to protect the interests of consumers.

## 7 SUMMARY OF FINDINGS

- 7.1 It is important to note that lifting the restrictions on ABSs will not compel legal services providers to adopt such structures. The current business models will still be available to solicitors and advocates should they feel that the current structure is best for their business. Legal services providers should, however, be free to choose the model that best suits their clients' needs. Enabling providers to choose from a number of business models will allow them to respond to the different needs of different consumers more effectively.
- 7.2 Concerns have been raised regarding the regulation of ABSs. One possible option is that lawyers in ABSs should be regulated by their respective professional bodies. There may be instances where the rules of the respective professional bodies would need to be amended in order to reflect new responsibilities that might fall to a legal services provider operating in an ABS (for example advocates may be responsible for handling clients' funds in an ABS). Another possible option is that a single regulator should take charge of regulating ABSs. While these issues are important and should be considered carefully before allowing ABSs, the OFT does not believe that the difficulties are insurmountable, nor that they form a valid argument for maintaining the current restrictions.
- 7.3 For the reasons outlined, the OFT agrees with Which? that it would be in the interests of consumers for the restrictions on ABSs and on direct access to advocates to be removed. In these circumstances we believe that the potential benefits of lifting the restrictions would outweigh the costs to the SE and the profession of conducting policy work to consider how to take the issues forward. The SE should, we believe, also consider with the professions how these restrictions might best be lifted, and the appropriate safeguards that would need to be put in place in order to protect the interests of consumers and the integrity of the profession.

## 8 POSSIBLE OUTCOMES

8.1 As part of our consideration of the super-complaint, the OFT considered a number of possible outcomes. These are discussed below.

### Take no action

8.2 In the OFT's view, Which? has made the case to show that the restrictions on ABSs and on direct access to advocates cause harm to consumers. We are therefore of the opinion that taking no action is not an available option.

### Market study

8.3 As set out in the OFT's Guidance, *Market studies*,<sup>16</sup> the principal outcomes of a market study can include any one or more of the following:

- giving the market a clean bill of health
- publishing information to help consumers
- encouraging firms to take voluntary action
- encouraging a consumer code of practice
- making recommendations to the Government or to sector regulators
- investigation and enforcement action against companies suspected of breaching consumer or competition law, and
- a market investigation reference to the Competition Commission.

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<sup>16</sup> The Guidance is available on the OFT website at:

[www.offt.gov.uk/shared\\_offt/business\\_leaflets/enterprise\\_act/oft519.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft519.pdf)

- 8.4 The views of the OFT, of the main stakeholders and the SE were already widely known through the SE Research Working Group Report. The OFT has now had the opportunity to set out its views in response to this super-complaint. The main benefit of any market study could be to provide the opportunity to investigate issues thoroughly so as to select from a range of available actions.
- 8.5 The OFT does not believe a market study would add significantly to the existing store of knowledge, and our work on the super-complaint has confirmed to us that, while enforcement action by the OFT under the Competition Act 1998 (CA98) cannot be ruled out (see paragraphs 8.6 - 8.11 below), in many cases change to the regulations can be implemented only by legislation. We are already in a position to make recommendations for legislative change, and note that responsibility for legislating in respect of regulation of the legal professions in Scotland is devolved to the Scottish Executive. Therefore, on balance, we believe that the resource cost on the OFT and on the industry of a full market study is not merited.

## **Reference to the Competition Commission**

- 8.6 Under Section 131 of the Act, the OFT may make a reference to the Competition Commission where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition.
- 8.7 The OFT will make a reference to the Competition Commission only when the reference test set out in section 131 of the Act is met, and when, in its view, each of the following criteria has been met:
- it would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to the OFT or, where appropriate, to sectoral regulators
  - it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference

- the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it, and
- there is a reasonable chance that appropriate remedies would be available.

8.8 In this instance, the OFT does not believe that a reference to the Competition Commission would be the most appropriate course of action as it is unlikely that the Competition Commission could propose any remedy that the OFT could not itself recommend as a direct result of the super-complaint.

### **Investigation under the CA98**

8.9 The majority of the restrictions discussed above have their origin in statute, and would thus not fall readily within the scope of the CA98.

8.10 The relevant provision for investigating rules of a professional body under the CA98 is the Chapter I prohibition. Chapter I of the CA98 prohibits, among other things, rules of an association of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK. The OFT has the power to commence an investigation under that prohibition, where it has reasonable grounds to suspect a breach of the prohibition.

8.11 There are legal complexities surrounding the application of Chapter I to the rules of professional bodies. The OFT is currently investigating a rule of the FoA under Chapter I which prohibits an advocate from appearing in court with a solicitor advocate instructed for the same client (known as the 'mixed doubles' rule). While we cannot rule out a further investigation under the CA98 into any of the above professional rules insofar as they are anti-competitive, the OFT currently intends to await the outcome of its existing investigation.

## 9 THE WAY FORWARD

- 9.1 There is little evidence that progress has been made on these issues since the publication of the SE Research Working Group Report in April 2006. It would be helpful if the SE would set out its own views on how it proposes to take the issues forward, with particular regard to how it believes legal services in Scotland should be regulated. These views might reflect, in particular, whether and how the SE foresees that the restrictions identified in the super-complaint could be lifted and when the issues will be resolved. The SE may wish to consider whether it would be appropriate to discuss the way forward with all interested parties. The OFT would, of course, be content to participate in that process.
- 9.2 The OFT believes that Scottish consumers are disadvantaged by these restrictions on Scottish legal services providers. Given that similar restrictions will be lifted on legal services providers in England and Wales it is timely to ensure that due consideration is given to, and action taken to set in hand, the process that will ensure that consumers and legal services providers in Scotland are not unnecessarily disadvantaged. Both the FoA and the LSS should carry out wide-ranging reviews of their respective rules and make significant and transparent progress towards lifting the restrictions discussed in this response. The OFT notes that the LSS is already looking at the available options and urges it to continue this work.
- 9.3 Given the circumstances, we believe that it is appropriate for the SE and the Scottish legal profession to take a leading role in taking these issues forward and to consider how these restrictions might best be lifted in Scotland, subject to appropriate safeguards being put in place in order to protect the interests of consumers and the integrity of the profession in Scotland.

## 10 RECOMMENDATION

10.1 The OFT recommends that by the end of 2007, the SE should publish a statement which details its policy views on:

- how it considers legal services in Scotland should be regulated
- how the restrictions outlined in the super-complaint can be lifted, and
- a timing commitment for these aims.

10.2 The OFT recommends that the legal professions in Scotland take full advantage of these opportunities and that the FoA and the LSS lift any of their own practice rules which contribute to the restrictions discussed in this response.

### Next steps

10.3 The SE has told the OFT that it expects to be able to publish its views on the recommendations contained in this response within 90 working days of publication. The OFT looks forward to those views and will, of course, work closely with the SE and other stakeholders in seeking to ensure that the recommendations contained in this response are implemented as soon as possible.