



DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL15/05)**

NOVEMBER 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST

Executive Summary

- APIL has serious concerns over the independence of the Legal Services Board (LSB) as currently envisaged under the Government's White Paper.
- APIL recommends, in order to avoid further debates concerning the potential undue influence of the Executive on regulation of the legal profession, that the appointment of the Legal Services Board's (LSB) chairman should be made via consensus between the Secretary of State and the heads of the judiciary – the Lord Chief Justice and the Master of the Rolls.
- APIL believes that it is premature for the Government to introduce alternative business structures (ABSs) into the legal market prior to first considering what their effect would be and whether they would work or not. APIL suggests that only after legal disciplinary practices (LDPs) have been shown to work should there be further consideration of introducing more radical ABSs, such as multi-disciplinary practices (MDPs).
- APIL generally supports the suggested definition of 'legal services' as detailed within Appendix C of the White Paper. Indeed APIL originally recommended the inclusion of such a definition in our submission to Sir David Clementi in June 2004.
- APIL suggests that the Government should wait until the impact of the recent increase in the Law Society's compensation limit to £15,000 is fully assessed before attempting to introduce a £20,000 upper limit for complainant compensation within the new system.

- APIL believes that the regulation of the legal profession is in the public interest, and the costs associated with the establishment of a new regulatory body should be borne by Government.
- While APIL is generally content with the structure of how complaints will be handled via the new Office of Legal Complaints (OLC) – broadly similar to APIL’s proposed structure - we are wary about how the new system will be funded.

Introduction

1. APIL welcomes the opportunity to put forward its comments in relation to the Department of Constitutional Affairs (DCA) White Paper on *'The Future of Legal Services: Putting Consumers First'*. This paper reflects the suggestions made by APIL¹² in response to both Sir David Clementi's final report into the *'Review of the regulatory framework for legal services in England and Wales'*³ in December 2004 and the DCA's presentation entitled *'Consumer focussed reform of legal sector regulation'* in May 2005.

Simplifying regulation

2. APIL has serious concerns over the independence of the Legal Services Board (LSB) as currently envisaged under the Government's White Paper. The current suggestion is that the new chairman of the LSB will be appointed by the Secretary of State for Constitutional Affairs, and once appointed, the Secretary of State and chairman will jointly appoint the other board members⁴. Furthermore the LSB will have *"a duty to report to the Secretary of State for Constitutional Affairs at his request on any matter concerning the discharge of its duties"*⁵. APIL is concerned that such a suggestion will have serious democratic implications as a senior member of the Executive would ultimately be responsible for governing how the legal profession is regulated. We believe that such a structure could undermine the principle inherent within the separation of powers concept, a principle which the Government has previously endorsed by proposing the separation of the judiciary from the UK legislative body via the creation of the Supreme Court.

¹ Appendix A – APIL's response to The Department for Constitutional Affairs (DCA) – *'Review of the Regulatory Framework for Legal Services in England and Wales'* (APIL13/04) (June 2004). A copy can also be downloaded at: www.apil.com/pdf/ConsultationDocuments/126.pdf

² Appendix B – APIL's response to The Department for Constitutional Affairs (DCA) – *'Consumer focussed reform of legal sector regulation'* (August 2005). A copy can also be downloaded at: <http://www.apil.com/pdf/ConsultationDocuments/162.pdf>.

³ A copy of the *'Review of the regulatory framework for legal services in England and Wales – Final Report'* (Dec 2004) can be found at: <http://www.legal-services-review.org.uk/content/pubs.htm>

⁴ White paper – page 32, paragraph 5.5

3. A further issue, APIL suggests, is that on many occasions – including in relation to personal injury claims – the state will be a defendant in a case. APIL submits that the dual role of defendant and regulator creates a direct conflict of interest. While there is no suggestion that there would be any impropriety of conduct within the new structure, APIL considers that it is vital for there to be transparency and impartiality in terms of both perception and reality. This concern would seem to be particularly pertinent at the moment following the recent criticisms by the Commission for Judicial Appointments of the Secretary of State concerning his intervention in the appointment of several recorders in the Midland Circuit 2004/05 competition⁶.

4. APIL recommends, in order to avoid further debates concerning the potential undue influence of the Executive on regulation of the legal profession, that the appointment of the Legal Services Board's (LSB) chairman should be made via consensus between the Secretary of State for Constitutional Affairs and the heads of the judiciary – the Lord Chief Justice and the Master of the Rolls. APIL believes the use of a consensual approach, involving both the legal profession and the Executive, will ensure that the appointment of the LSB chairman is not viewed as being overly politically motivated or, conversely, overly judicially motivated. The appointment of the other board members should also be made via this consensual approach, but with the additional aid of the newly appointed chairman. Following the appointment of the chairman and board members, however, the Executive should cease to have any further direct involvement with the LSB in order for the new board to effectively maintain its independence as a regulator.

⁵ White paper – page 35, paragraph 5.8

⁶ The Commission for Judicial Appointments: The commissioners' Review of the Recorder 2004/-5 Competition (Midland Circuit) (September 2005) – page 12, paragraph 3.34 (see http://www.cja.gov.uk/files/PDF_of_Recorder_Audit.pdf for a copy of the report)

5. APIL proposes that the constitution and governance of the LSB should follow the same, or broadly similar, lines as the Electoral Commission. The Electoral Commission is *“an independent body set up by the UK Parliament in 2000”*. It is *“independent of the Government and political parties and [is] directly accountable to Parliament through a committee chaired by the Speaker of the House of Commons”*⁷.
6. APIL would also like further clarification concerning the stipulation that *“all appointments will be made on merit”*⁸. As discussed above, APIL is concerned that under the proposed structure the Executive is directly involved in the regulation of legal services. Due to the political bias inherent within the Executive it is essential that “merit” should consist of clear and transparent criteria and should not reflect a particular political allegiance. Such criteria would mean that any appointments made would avoid any accusations of cronyism.
7. While the Government’s White Paper deviates slightly from APIL’s original suggestion that the LSB should have an *“equal distribution of lay and practitioner members elected on merit”*⁹, we feel the presence of a majority of non-lawyers on the board will not adversely affect its functioning. APIL believes that the primary consideration should be that the members are elected based on merit alone and the workings of the board should be transparent and accountable to the consumer.

Confidence and choice – new ways of delivering for consumers

8. APIL believes that it is premature for the Government to introduce alternative business structures (ABSs) into the legal market prior to first considering what their effect would be and whether they would work or not. APIL has always recommended that if new business

⁷ Electoral Commission – Our Role (see <http://www.electoralcommission.gov.uk/about-us/our-role.cfm> for further details).

⁸ White paper – page 32, paragraph 5.4

⁹ See Appendix A

structures are to be accepted, their introduction should be staggered and trialled. This means that prior to more diverse and radical structures - such as multi-disciplinary practices (MDP) – being introduced, legal disciplinary practices¹⁰ (LDPs) should be ‘rolled out’. Only after LDPs have been shown to work should there be further consideration of introducing MDPs. Interestingly APIL’s caution is reflected in Sir David’s recommendation concerning alternative business structures:

“The proposal of this Review is that attention should focus on the setting up of a new regulatory system for lawyers with the LSB at its centre, and the authorisation of LDPs. This would represent a major step towards MDPs, if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.”¹¹

9. One aspect of multi-disciplinary practices (MDPs) which APIL is particularly concerned about is the issue of regulatory reach – i.e. who will regulate these new business structures. MDPs are practices which bring together lawyers and other professionals to provide legal and other services to third parties. Indeed legal work might only be a small part of the work done by the practice. It is this sort of structure which is being recommended within the White Paper under the title of alternate business structure (ABS). Sir David Clementi, however, noted that “[t]here are considerable issues surrounding such practices¹²” including the issue of who should regulate them. For instance, while APIL is satisfied that legal professionals are effectively regulated – via the Law Society, Bar Council, etc. – it is unclear whether non-legal parts of an ABS will be regulated to the same high standards. This could lead to a personal injury claimant agreeing to

¹⁰ “Legal Disciplinary Practises (LDPs) are practices which permit lawyers from different professional bodies, for example solicitors and barristers, to work together on an equal footing to provide legal services to third parties. They may permit others (e.g. HR professionals, accountants) to be Managers, but these others are there to enhance the services of the law practice, not to provide other services to the public”. Review of the Regulatory Framework for Legal Services in England and Wales - Final Report – Sir David Clementi (December 2004) – page 106, paragraph 7

¹¹ Ibid – page 139, paragraph 104

¹² Ibid

have his case handled by an unregulated, or poorly regulated, member of an ABS firm in the belief that this firm member was regulated to the same high standards as a lawyer.

10. APIL considers that the introduction of radical ABSs - as suggested by the Government - could lead to considerable problems in the provision of legal services by allowing unregulated, or poorly regulated, non-lawyers into the marketplace. In particular, we are concerned that it will allow organisations which view personal injury cases simply as money-making business opportunities to enter the legal services market. It should be noted that previous 'shake-ups' in the provision of legal services have led to similar undesirable side-effects including the growth of unregulated claims management companies (CMCs). The unregulated nature of these providers eventually resulted in several high profile incidences of consumers being placed in vulnerable and disadvantaged positions while attempting to gain access to legal services – for example, the cases involved in the collapse of The Accident Group (TAG). While CMCs will now be regulated via the Compensation Bill, APIL is concerned that the current proposed changes to the provision of legal services could lead to another unregulated industry developing and further damaging consumers perception of legal services.

11. APIL contends that the ability to attract external capital and combine services with other professional providers by adopting ABS will indeed increase competition, but at the possible expense of numerous other legal services. Ultimately the introduction of ABSs into the legal marketplace would destroy the current framework of general legal advice, whilst failing to replace it with anything. Increased costs incurred by compliance with the new regulatory regime will mean that firms will have to concentrate on only undertaking work which is profitable. Naturally an increase in competition will heighten this drive, leaving legal firms fighting over profitable work and abandoning marginal legal work such as housing

advice and some aspects of personal injury work. Reducing cost via increased competition would, in this example, lead to reduced choice. It would also lead to a reduction in local legal provision and possibly legal provision in general. APIL believes that the restriction of choice necessitated by there being fewer solicitors ultimately leads to restricted access to justice for not only marginal work but for all types of legal work.

12. APIL's previous submission to Sir David in relation to the original consultation on legal services highlighted the fact that the supplying of legal advice is conducted as a profession rather than simply an industry. For instance, "[u]nlike an industry, the people working in legal services – predominately solicitors and barristers – have a fiduciary duty to their client, outside of the simple contractual relationship. These duties of trust – similar to that between a trustee and a beneficiary – mean that they are professionally and ethically bound to work in the best interests of their client, regardless of their own situation.¹³" It would, however, seem that this distinction has been lost in the Government's drive to introduce competition into the marketplace. Indeed this distinction may lead to direct conflict with a potential investor due to the difference in objectives; an investor or business will want to maximise profit while a legal professional will be obliged to pursue the best interests of their client. APIL believes that these differing objectives will inevitably lead to conflicts of interest, and possibly injustices.

Protecting consumers if new problems occur

13. APIL is pleased to note the Government's decision to include a definition of 'legal services' within the proposed new regulatory regime echoes our original recommendation from our submission to Sir David Clementi in June 2004¹⁴. In terms of the definition itself –

¹³ See Appendix A

¹⁴ Ibid

which is detailed within Appendix C of the White Paper – APIL believes that it is generally positive. We do, however, believe that mediation and other forms of alternative dispute resolution (ADR) should be included in the remit of the definition as currently proposed. The current definition implies that anyone involved in mediation should be treated in a similar fashion to judicial and/or quasi-judicial figures. We believe that mediators do not fulfil a judicial function in the same way in which, for example, judges do and should therefore not be excluded from being included within the definition of ‘legal services’. In addition, APIL believes that lecturing at conferences and/or training seminars should be considered within the excluded category of academic work as it is not a direct legal service which is being provided.

Complaints – what happens if things go wrong?

14. APIL suggests that the Government should wait until the impact of the recent increase in the Law Society’s compensation limit to £15,000 is fully assessed before attempting to introduce a £20,000 upper limit for complainant compensation within the new system¹⁵. From the 1st January 2006, the Law Society can order a solicitor to make a payment up to £15,000, three times the previous £5,000 limit. Previously, complainants had to go to court for compensation of more than £5,000. APIL finds it strange therefore that the white paper is suggesting an additional increase to £20,000 prior to the impact of the most recent increase being properly considered. APIL would recommend that the limit should be kept at £15,000 until it can be determined whether this limit is appropriate, or should be increased, within the new OLC system.

¹⁵ White paper – page 65, paragraph 8.11

Cost and funding of the new arrangements

15. APIL is concerned about the suggestion by the Government that *“the legal profession should pay the cost of its regulation”*¹⁶. At the moment the Government funds a considerable amount of the regulation of the legal profession and it is difficult to see why the proposed changes should reduce this contribution to nothing. For example, while the front line regulators such as the Law Society and Bar Council are funded by the profession *“judicial oversight falls to the taxpayer, as does the cost of the oversight function carried out by Government departments”*¹⁷¹⁸. APIL believes that the regulation of the legal profession is in the public interest, and the costs associated with the establishment of a new regulatory body should be borne by Government. This was a view shared by Sir David in his report in which he stated that the *“LSB should be funded through a mix of Government and practitioner input”*¹⁹. He also recognised that *“an element of payment by other than the bodies being regulated confirms that the regulator is independent of the regulatee”*²⁰.

16. The public interest nature of any new regulatory system should reflect the need for appropriate ‘access to justice’ for consumers of legal services. In this context APIL believes that the costs which will need to be borne by the legal profession due to the need to finance the new system will have serious repercussions on people’s access to justice. While exact figures are not yet available it is possible to envisage, for example, a situation where solicitors’ practices will have to pay out large sums of money to a variety of regulators and representative bodies – i.e. the LSB, the OLC, the Law Society, etc. – in order to keep practising. This increase in costs will make it

¹⁶ White paper – page 67, paragraph 9.1

¹⁷ Review of the Regulatory Framework for legal Services in England and Wales - Final Report – Sir David Clementi (December 2004) – page 89, paragraph 35 (see <http://www.legal-services-review.org.uk/content/report/report-chap.pdf> for a copy of the report)

¹⁸ For instance the legal profession is overseen by a myriad of government department and government-funded organisations such as the Rules Committee, Office of Fair Trading, Legal Services Ombudsman, Immigration Services Commissioner, etc.

¹⁹ Review of the Regulatory Framework for legal Services in England and Wales - Final Report – Sir David Clementi (December 2004) – page 91, paragraph 42

increasingly uneconomic for lawyers to continue with marginal areas of work, such as personal injury litigation. Inevitably this will lead to socially responsible areas of legal work such as housing advice and, to a certain extent, personal injury disappearing, to be replaced by higher paying commercial work. Such a situation would create, or expand, so-called 'advice deserts' where no local solicitors can provide help or advice on these topics. APIL believes this represents a significant risk to people's ability to gain appropriate 'access to justice'.

17. APIL considers that there is a need, on the part of Government, to demonstrate that the proposed regulatory changes are for the benefit of the consumer. APIL feels that the implication of the Government's insistence that the entire cost of regulation should be borne solely by the profession might lead some to think that the change is being driven for economic reasons – i.e. in order to reduce government spending – rather than to enhance consumer confidence and participation in legal services.

18. While APIL is generally content with the structure of how complaints will be handled via the new Office of Legal Complaints (OLC) – broadly similar to APIL's proposed structure - we are wary about how the new system will be funded. The Government's suggestion reflects APIL's proposal that the funding of OLC should *"come in part from a general levy on the profession, and in part as a payment from those against whom complaints are made (the 'polluter pays' principle)"*²¹. In terms of the percentages assigned to each of these stages, the Government are suggesting following the Financial Ombudsman Service model, with 30 per cent of the revenue coming from a levy on the profession and 70 per cent from the polluter pays mechanism. In order for this proposed 'mix' of funding to work, there would have to be a significant increase in the number of complaints

²⁰ Ibid – page 89, paragraph 35

²¹ White paper – page 67, paragraph 9.1

made in order to fund the £16.1 million needed to meet the annual operating cost of the OLC and the £6.3 million needed for the transfer of the current functions.

19. APIL does, however, believe that firms against whom complaints are not upheld, or dismissed, should not be required to pay costs towards the scheme. These are firms where a complaint has been made against them, yet has failed. It would be manifestly unjust to expect these firms to be considered a 'polluter' under the 'polluter pays' principle as they have been exonerated in relation to the complaint and should therefore be exempted from paying the costs of the investigation. According to the latest figures from the Law Society²² only six percent of complaints are upheld, just under half are conciliated by the Law Society prior to an actual decision being taken. Without further details it is difficult to fully consider how many of these conciliated complaints concluded with the solicitors firm being found to be at fault. If it is a large number, there will be few instances where costs will be exempted on a 'polluter pays' basis. This conclusion would indicate that there is no need, financially speaking, for non-guilty firms to pay costs.

²² The Law Society – Consumer Complaints Service – Summary of Performance Measure and Statistics (September 2005) page 9 (see <http://www.lawsociety.org.uk/documents/downloads/CCSrecordSept05.pdf> for a copy of the figures)

Appendix A

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN
ENGLAND AND WALES (APIL13/04)

JUNE 2004

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

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

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL13/04)**

JUNE 2004

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,400 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

Colin Ettinger	President, APIL
Allan Gore QC	Vice-President, APIL
Mark Harvey	Secretary, APIL
Roger Bolt	Treasurer, APIL
David Marshall	Immediate Past-President, APIL

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EXECUTIVE SUMMARY

In summary, APIL presents the following views in relation to the DCA consultation of the review of the regulatory framework for legal services in England and Wales:

- APIL's primary objective is to ensure that the interests and welfare of the client comes first.
- APIL believes that any review of the regulatory framework must recognise that the provision of legal services is a profession, carrying with it certain and onerous fiduciary burdens.
- APIL considers that any regulatory scheme must set and enforce appropriate quality standards across the entire profession and, while specific to personal injury law, APIL's College of Personal Injury Law (CPIL) offers a successful template for such accreditation and standards.
- In terms of regulatory models, APIL endorses the adoption of a B+ model with the additional criteria that 'legal services' should be defined – a B+*Plus* regulatory model in effect.
- APIL proposes that within any new regulatory model specialist legal associations need to play an important role by developing and setting standards and that the new regulator should have a duty to consult such organisations.
- Any governance regime which the regulatory model adopts must be both accountable to the consumer and transparent in its workings. In addition, APIL feels that a board structure with an equal distribution of lay and practitioner members elected on merit is the most appropriate structure.
- APIL believes that it is ineffective to deal with complaints within a single procedure, and suggests that:
 - Conduct and disciplinary complaints should be dealt with directly by the regulator;

- Service level or consumer complaints should be handled directly by the service provider; and
 - Competence complaints should be referred back to the lawyer's accreditation body.
- APIL supports the further development of Multi-Disciplinary Practices (MDPs) and Legal-Disciplinary Practices (LDPs), on the provision that consumer interests are effectively protected against the undue influence of other interest within the business. In order to assess the feasibility of MDPs, APIL feels that it will be worthwhile to developing LDPs in the first instance. LDPs have the additional protection that they will be governed by the legal codes of practice.

THE REGULATORY FRAMEWORK FOR LEGAL SERVICES

Introduction

1. APIL welcomes the opportunity to comment on the Government's review of the regulatory framework for legal services in England and Wales, headed by Sir David Clementi. Our response to this review is on behalf of the many personal injury victims on whose behalf APIL members act. APIL's primary objective is to ensure that the interests and welfare of the client comes first. As such, we believe that this aim should be among the over-riding considerations within any new regulatory regime. In addition the following factors are listed by the consultation document as possible objectives:

- Maintenance of the rule of law
- Access to justice
- Protecting the consumer interest
- Ensuring fair competition within the legal services industry
- Upholding a confident, strong and effective legal profession
- Promoting public understanding of legal rights

2. APIL agrees that *"the first step in defining any regulatory regime is to make it clear what the objectives of the regime are"*²³, and while we do not object to any of the above objectives, we consider that there are several others which are necessary additions for any new regulatory structure. These include:

- The setting and enforcing of appropriate competence standards;
- That all processes should be transparent to both the profession and the consumer;
- There must be effective protections for the consumer.

²³ Consultation document - Page 18, paragraph 11

3. The aim of any successful regulatory regime must be to deliver its objectives via effective policing. By the appropriate monitoring and policing of the above detailed aims, APIL firmly believes that the rights of injured people will be protected.
4. APIL considers, however, that the majority of personal injury lawyers, and indeed lawyers in general, already embrace these objectives in their current work and behaviour through their adherence to professional standards.

Personal Injury Law – A profession, not an industry

5. APIL is concerned that the consultation document fails to fully comprehend the distinction between the supply of legal services as a profession and the supply of legal services as an industry. Unlike an industry, the people working in legal services – predominately solicitors and barristers – have a fiduciary duty to their client, outside of the simple contractual relationship. These duties of trust – similar to that between a trustee and a beneficiary – mean that they are professionally and ethically bound to work in the best interests of their client, regardless of their own situation. A further distinction of this fiduciary relationship can be seen in the fact that legal professionals, including solicitors and barristers, are officers of the court. For example, unlike a plumber who shares only casual contractual relationships with his client, lawyers are professionally bound to protect and promote their client's welfare, even to the detriment of their own. This badge of probity, that the title of officer of the court bestows, can be further seen in the fact that solicitors and barristers are allowed to hold money for clients. In addition, all practising solicitors and barristers can be struck off for serious professional misconduct and prevented from practising – plumbers are not regulated in a similar fashion.
6. APIL is a leader in both promoting client focused service and developing professional standards. We have just launched a 'Consumer Charter' campaign, where APIL members sign up to a series of promises defining

the standards of treatment of client and their claims²⁴. In terms of professional standards, the College of Personal Injury Law (CPIL) was founded by APIL in September 1999 *“to build and recognise expertise in personal injury law through training and professional development.”*

The Association of Personal Injury (APIL) as an organisation

7. The Association of Personal Injury Lawyers (APIL) was established in April 1990 by a group of barristers and solicitors working for claimants, dedicated to the improvement of services provided for victims of accidents and disease. APIL currently has over 5,400 members in the UK and abroad.
8. APIL’s head office, based in Nottingham, is staffed by both dedicated full-time and part-time employees under the direction of a chief executive, reporting to APIL's elected officers. Members of APIL subscribe to a code of conduct and support APIL's main objectives.
9. Membership of APIL is on the basis of a commitment to APIL's objectives and this code. The development of the specialist CPIL accreditation scheme was developed as a guarantee of competence and specialisation.
10. The aims of the Association of Personal Injury Lawyers (APIL) are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally;

²⁴ Please see Appendix A – Copy of APIL’s Consumer Charter

- To promote health and safety.

11. As detailed, all APIL members are bound by the APIL Code of Conduct, which is rigidly enforced with a prescribed complaints and enforcement procedure²⁵.

Accreditation, standards & continuing specialism in the professions

12. APIL believes that a central aim of any regulatory regime for legal services must be to set and enforce appropriate quality standards across the entire profession. It is vital that these standards are accredited by independent sources and policed by the regulator. While specific to personal injury, APIL's College of Personal Injury Law (CPIL) offers a successful template for such accreditation. The general standards which CPIL promotes would provide a robust basis upon which to base all accreditation within the wider context of legal services. Such a basis would allow for all systems of accreditation to carry the same weight, so that accreditation for family lawyers echoed the standards for immigration lawyers. This will mean that the industry is governed by a series of common standards for a common purpose, this common purpose being for the protection and benefit of the consumer.

13. APIL believes that under the umbrella of regulation providing supervision of both the standards set, and systems by which accreditation is awarded or removed, it should be possible in the public interest to :

- Provide accreditation in a wide variety of specialism (examples could include contentious and non-contentious legal services);
- Provide accreditation in a variety of functions (an example could include advocacy by regulation of the system of accreditation leading to the rank of QC);

²⁵ See Appendix B for copy of APIL Code Of Conduct and detailed Complaints Procedure.

- Set common standards for all relevant accreditation systems.

14. The particular value of CPIL accreditation for personal injury practitioners is that it drives up standards, while always ensuring that there is a basic level of competence. It also acts as an independent 'kite-mark' of quality within its specified field, so that consumers can effectively identify levels of competence and specialism. For example, GPs (general practitioners) do not hold themselves out to be specialists in any particular area of medicine. In contrast, however, a consultant will often identify himself as a specialist of some description (i.e. an oncologist), and this specialism can be verified by his membership or fellowship of a particular specialist College within the BMA and/or a relevant accreditation in that specialism. Finally, CPIL can provide further consumer protection - via the use of a complaints system - wherein anyone who falls below the standard expected of an accredited member can be stripped of their accreditation.

15. The College of Personal Injury Law (CPIL) is the training division of the Association of Personal Injury Lawyers (APIL) and was established in September 1999 to build and recognise expertise in personal injury law through training and professional development. It has been supported by the Lord Chancellor, the Law Society and the National Consumer Council. Its aims are:

- to establish a recognised quality standard of competency and expertise
- to provide flexible and affordable training, specially designed for personal injury practitioners, within a specialist educational programme
- to help the consumer recognise expertise and specialism within the profession

16. CPIL was formed in partnership with The College of Law and is supported by the Law Society and the General Council of the Bar. CPIL is monitored by an Academic Quality Council (AQC), administered by The College of Law. The AQC oversees the academic quality and integrity of all CPIL

programmes. Independent panels assess senior fellow applications and appeals procedures.

17. CPIL has five levels of membership: senior fellow, fellow, litigator, member and associate. All levels have upwards of five years' experience in personal injury law. Once someone has qualified for CPIL membership, however, in order to maintain this level of membership, a set number of hours of CPIL training must be undertaken over a specified period. For example, senior fellows have to complete 50 hours worth of CPIL training over a five year period. The amount of training that each CPIL member receives is closely monitored and scrutinised via entries in their CPIL training log. Conversely, if a CPIL member fails to fulfil the minimum training requirements required their CPIL membership can be revoked.
18. CPIL enjoys a membership of well over 700 practitioners who are specialists in personal injury law for claimants. All members are committed to continuous training and development to ensure that claimants receive access to justice and full compensation for their accidents or injuries.

Regulatory Models

19. APIL supports the adoption of a B+ based regulatory model, with the additional criteria that 'legal services' should be defined - a B+ *Plus* regulatory model, in effect. This has the advantage of bringing under the umbrella of regulation all providers of legal services including claims management services, and not simply those present professions that provide such services.
20. The B+ model within the consultation document involves the current regulatory structures being retained, but with the separation of the regulatory and representative functions – analogous to the General Medical Council (GMC) / British Medical Association (BMA) division in the medical profession. In summary, the advantage of a regulatory structure

initially based on the B+ model is that it would improve the promotion of the public and consumer interest but with the direct aid, guidance and experience of the professions. Thus we advocate that:

- Both regulation and accreditation fall within the regulation structure
- Representation falls outside the regulation structure

21. Overall, the advantages of the B+*Plus* regulatory model are:

- i) By the “unbundling” of the regulatory function from the representative function, there would be less potential conflict of interest between the two separate functions. For example, there could be no accusations that regulation was being decided by lawyers representing lawyers governing lawyers. The regulatory process therefore becomes transparent and any suggestion of self-interest is removed. In terms of precedents, this separation has been achieved successfully in utility unbundling around the world.
- ii) The retention of an element of self-regulation would mean that any new regulatory scheme would reflect both international and European principles concerning the delivery of legal services²⁶, and this would help maintain the international reputation of British law. The self-regulatory element of this model would also limit any real, or perceived, undue influence by the Government, further protecting the professions standing within the international legal community.
- iii) Any new regulatory system would be able to be built on the existing infrastructure of the professional bodies, including their strengths, which would facilitate any change more quickly and without incurring significant additional cost.

²⁶ The UN principles on the role of lawyers provide that lawyers are entitled to form professional associations and to regulate themselves: “Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body ... shall exercise its functions without external interference.” The European Union relies strongly on self-regulation by professional bodies. The resolution of the European Parliament on market regulations competition rules for the liberal professions on 11th December 2003 stated: ... “the importance of ethical conduct, the maintenance of confidentiality with clients and of a high level of specialised knowledge, necessitates the organisation of self-regulation systems such as those run today by professional bodies and orders”.

- iv) The regulatory standards, rules and enforcement mechanisms would still have the input of experienced practitioners, so be designed with a high degree of technical input and direct feedback from the legal service marketplace.
- v) With the profession still actively involved in the regulation it is more likely that they will 'buy-into' any new regulatory regime, and abide by the spirit of the new regulations. In addition standards would be maintained by the subsequent peer pressure within the self-regulation structure.
- vi) The umbrella of wider regulation would bring under supervision providers of legal services other than barristers or solicitors (i.e. claims management services).

22. In terms of the separation of the representative functions and the regulatory functions within the professional bodies, and whether there should be a separate entity for each, APIL feels it is for the representative bodies themselves to specify. We would, however, like to stress that APIL represents claimant lawyers and their clients, and has been doing so effectively and efficiently for almost 15 years. Our support for the benefits of model B+ should not be taken to imply any perceived failings in self regulation, but should be seen as support for the introduction of an element of independence and transparency in the regulation of legal services provision in the future.

23. One problem with the model B+ structure, without the modification suggested at paragraph 19, is that it does not allow for regulation of entities such as claims management companies (CMCs). The recognition that claims management companies pose an unregulated threat to injured people was recently acknowledged by the Better Regulation Task Force's report into 'compensation culture'. The report stated that the claims management companies *"earn their money by non-transparent and*

*complex systems of referral fees and charges*²⁷. The report called for the recently-formed Claims Standards Federation (CSF) to approach the Office of Fair Trading to apply for approval of its Code of Practice by September 2004. Within model B+ if the CSF gained approval for its code of practice, it would be regulated by the Legal Service Board (LSB) in the same manner as the Law Society and Bar Council and to the same standards.

24. APIL is concerned, however, that *“not all companies have joined the Federation”*²⁸. In order to ensure regulation of CMCs, APIL proposes that the LSB should define what constitutes ‘legal services’, so that non-regulated providers of legal services or legal advice would be held to a defined set of standards. This would allow for the consumers’ protection as disreputable providers would be effectively regulated and policed.

25. In particular, any definition of ‘legal services’ needs to be able to include the following types of organisations within its remit:

- Claims management companies (CMCs);
- Legal expenses insurers;
- Voluntary advice centres, such as Citizens Advice Bureaux and Legal Advice Centres; and
- Trade Unions

²⁷ The Better Regulation Task Force report – ‘*Compensation Culture: Exploding the urban myth*’ - 27 May 2004 (the report can be downloaded at <http://www.brtf.gov.uk/taskforce/reports/entry%20pages/Litigcompensation.htm>) - page 21

²⁸ The Better Regulation Task Force report – ‘*Compensation Culture: Exploding the urban myth*’ - 27 May 2004 (the report can be downloaded at <http://www.brtf.gov.uk/taskforce/reports/entry%20pages/Litigcompensation.htm>) - page 21

26. One way in which 'legal services' could be defined would be to follow the example of the Financial Services Authority (FSA) definition of the services under its umbrella of regulation. Within section 22 of the Financial Services and Markets Act 2000, under which the Financial Services Authority was established, the classes of activity and categories of investment to which it relates are defined as:

22. – (1) ... an activity of a specified kind which is carried on by way of business and-

(a) relates to an investment of a specified kind; or

(b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried out on in relation to property of any kind.)

27. Within Schedule 2 there are more detailed provisions amplifying what is covered under section 22. For example, "Dealing in investments" is defined as:

(1) Buying, selling, subscribing for or underwriting investments or offering or agreeing to do so, either as a principal or as an agent.

(2) In the case of an investment which is a contract of insurance, that includes carrying out the contract.

28. The use of a similar structure for defining 'legal services' within the proposed regulatory model – APIL's B+Plus model – will allow for new and innovative models for the provision of legal services to be included within the regulated area governed by the Legal Services Board. This can only be in the public interest as this will ensure that all activities which are defined as being a 'legal service' will have to meet a series of minimum standards. This will inevitably improve the level of service of all suppliers.

Disadvantages of model A and model B

29. In addition to the detailed advantages of model B+, APIL's support for this model is based on weaknesses of the two other models suggested by the consultation document: model A and model B.

30. Model A proposes the establishment of an overarching Legal Services Authority (LSA) which would directly regulate all the services within the regulatory net. All regulatory functions would be removed from the professional bodies, leaving them with only their representative function. Such a structure would be analogous with that of the Financial Services Authority (FSA). The disadvantages of such a model are:

- i) Who watches the watchmen, or in the present case, who regulates the regulator? Model A increases the scope for the Government to be involved in the regulation of legal services. Regulatory powers would be vested in a single body which would be appointed through or via direct involvement of the Government. It is in the public interest to have a strong and independent legal profession, free from the influence of Government. As such a model A regulator would be a direct attack on this independence.
- ii) The cost of establishing a new overarching body would be huge. This expense would be born by the legal profession itself, and would eventually be passed onto the consumer. APIL is concerned that the general public already has fears over the cost of legal services, and research has shown that cost is a major factor in deterring the public from using solicitors and gaining access to the courts. This additional expense would thus hinder access to justice.
- iii) The lack of practitioner involvement in a model A structure would lead to lawyers not "buying into" the new system and the regulations issued soon becoming out of touch with the marketplace and with the professional practice of law. In particular lawyers are driven by a strong sense of professionalism and ethics, which naturally they take pride in. By taking ownership of the rules and regulations under which they want

to be guided by, and by their technical input, the standards of the professions can only increase.

- iv) The size and lack of practitioner involvement in a Legal Services Authority (LSA) would mean that decision making processes would become over-bureaucratic (requiring wider consultation) and therefore slow.
- v) Model A fails to appreciate the professional nature of many suppliers of legal services – i.e. solicitors and barristers – and would simply regulate along lines of service.

31. In contrast, Model B would keep the regulatory functions in the hands of the existing professional bodies such as the Law Society and Bar Council, but establish a body as a central overseer to these organisations. Under this model, regulatory functions would be given to the professions in addition to their representative functions, subject to oversight by the Legal Services Board (LSB). The disadvantages of such a model are:

- i) The retention of representative and regulatory functions within a single body will be perceived by the consumer as smacking of self-interest. It can be viewed as lawyers who represent lawyers making rules for lawyers. Clients may view actions by the professional bodies as being in the profession's best interests rather than the consumer's. It should be noted, however, that this view is simply a perception and may not represent the decision making process in either of the professional bodies.
- ii) The perception of self-interest can also be seen to be partially driven by the lack of non-legal input into the legal regulatory process. Basing regulation on the existing professional bodies may provide inadequate lay input, at least in the absence of a significant increase in lay membership of Government organisations.
- iii) Due to the fact that model B largely retains the current regulatory structure, it fails to include adequate mechanisms for policing current non-regulated legal service providers such as claims management

companies, or to supervise existing regulation to see that it in fact operates in the public interest.

Specialism and Accreditation in APIL's Model B+Plus

32. APIL believes that while the Law Society is able to represent the interests of solicitors across the board, it is not always able to represent the interests of particular specialist sectors of the legal profession. Indeed the Law Society may have internal conflicts in trying to represent the interests of all solicitors. For example, the Law Society represents both claimant lawyers and defendant/insurer lawyers who traditionally are on opposite sides of the adversarial process and have considerably different aims.

33. As solicitors and barristers become more specialised the Law Society and Bar Council are less able to represent the interests of particular sections of the legal profession. The growth and increasing importance of special interest groups, such as APIL and SFLA (Solicitors Family Law Association) demonstrates the need for specialist sections of the professions.

34. Specialist lawyer associations have an important role in developing and setting standards, developing new ways of practising, providing specialist guidance, bringing together practitioners for training, exchange of information and also advising government, the courts and other agencies on good practice, law reform and procedure. These roles are vital. APIL's experience is invaluable to policy makers and administrators in the personal injury legal field. An important aspect of this role is that it develops using the experience of practitioners, and the development of quality standards is 'bottom-up' driven. Much of the Law Society's standard setting and regulation is 'top-down' driven, as well as being generic rather than specific. The Law Society model therefore can have a tendency to be 'one size fits all' and is not always able to be sensitive to the differing needs of particular sections of the profession.

35. Within model B+, APIL sees itself as being similar to the role of what are known as the 'crafts' in the British Medical Association (BMA). The 'crafts' represent differing sections of the medical profession, and each 'craft' helps guide policy and advises the main BMA council. APIL envisages itself acting in a similar capacity in its relationship to the Legal Service Board (LSB). Yet regardless of the model of regulation chosen, APIL would want to see a more defined and enhanced role for specialist associations in any revised regulatory model. APIL believes that the new regulator should have a duty to consult various bodies, in particular specialist associations, and it may be appropriate for this role to be defined in statute. While the professional bodies may have a continuing role in representing their arm of the profession generically, specialist associations should be recognised as representing the part of the profession they cover. These could be defined by particular criteria, such as having a majority of professionally qualified members, having entrance requirements which relate to the discipline the association represents and having enforceable quality standards.

36. Although APIL believes that the specialist associations have an important and growing role to play in feeding into the new regulatory framework, particularly in relation to the setting of standards, we believe that the Law Society and other professional bodies should continue to have a representative function. The professional bodies have an important role in representing the views across their arm of the profession generally, while the specialist associations are able to speak authoritatively about the experience of specialists in their particular area of law.

Governance, Accountability and Related Issues

37. APIL considers that any new regulatory regime must be accountable to the consumer as well as being transparent in its workings. We believe as long as these principles are paramount in the development of any new regulatory regime, the consumer will be suitably protected. In general APIL

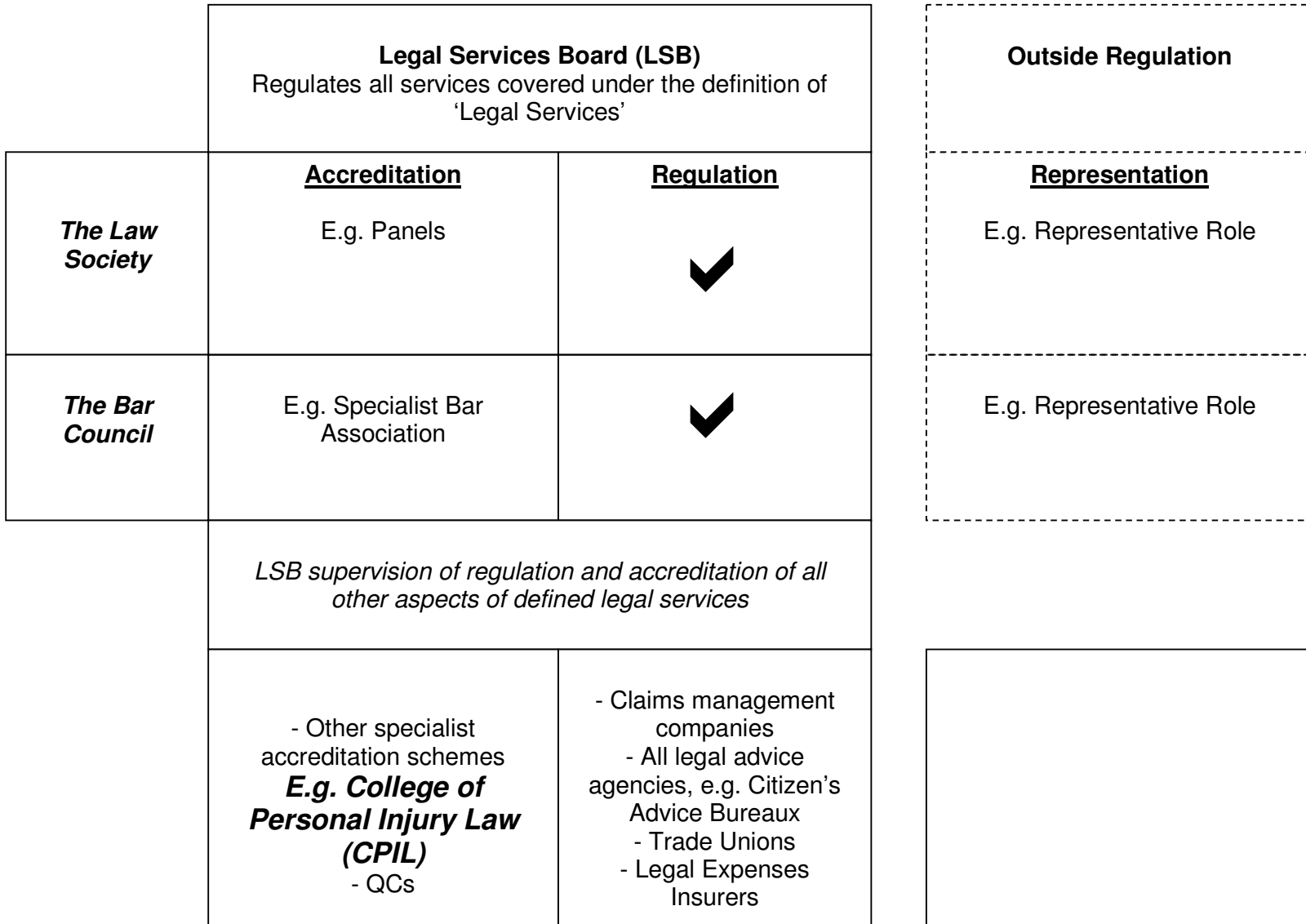
feels that these aims would be best achieved by the following mechanism being put into place within the new regulator:

- The regulator should be a board
- This regulatory board should be appointed on their own merits, and there should be a broad equality of public/lay members and practitioner members
- The regulatory board should be obliged to consult with specialist organisations (i.e. APIL and/or SFLA)
- All board members should be statutorily obliged to act in the public and consumer's best interests
- Appointments should be for a specific term, and this term should be renewable.

38. In terms of more specific recommendations, APIL assumes that the establishment of a new regulator, regardless of the model chosen, will necessitate wider consultation. As such APIL will wait until a definite model of regulation has been proposed and is being consulted on before commenting extensively on the mechanism of governance.

39. Please see Diagram 1 for a representation of the proposed structure of APIL's regulatory model *B+Plus*.

Diagram 1: APIL's proposed regulatory model B+Plus



Complaints

40. APIL believes that it is ineffective to deal with complaints within a single procedure, as the nature of complaints varies so dramatically. It would also be too onerous, too time-consuming and too expensive to demand that the regulator deal directly with all complaints, whatever type or category. Thus we propose that:

- Conduct and disciplinary complaints should be dealt with directly by the regulator – the Legal Services Board (LSB) in APIL’s proposed B+Plus model;
- Service level or consumer complaints should be handled directly by the service provider – the solicitor’s firm or barristers chambers; and
- Competence complaints should be referred back to the lawyer’s accreditation body if one exists - in respect of personal injury lawyers whom APIL represent, this would be the College of Personal Injury Law (CPIL) – or if no such body yet exists (e.g. for claims management companies) then they should be dealt with by the regulator.

41. The current complaint systems, in large part due to the troubles which faced the one administered by the Law Society, seems to have lost the confidence of the public. While APIL supports a split of the disciplinary procedure between the three above defined categories, we would emphasise the importance of maintaining information exchanges between the three bodies dealing with consumer complaints, discipline and conduct and competence complaints.

Conduct and disciplinary complaints

42. APIL believes that conduct and disciplinary complaints should be dealt with by the regulator directly. We feel that there is a strong argument for complaints about conduct and discipline to be handled by a single independent body which is seen to be easily accessible to the consumer.

From a consumer point of view it would make sense to have a single entry point – the current proliferation of complaints bodies can be confusing.

43. APIL considers that the independent regulator should be able to set conduct and disciplinary standards across the professions. These standards must be transparent and objectively measurable, and have the primary objective of protecting the consumer and upholding professional standards.

Consumer Complaints

44. APIL believes that consumer complaints should be handed back to the service providers; for example, the solicitor's practice or barrister's chambers. While standards for handling consumer complaints should be set and supervised by the regulator, to ensure that those standards are actually met, the primary responsibility for dealing with customer complaints concerning service should be dealt with by the service provider. One possible way of achieving 'buy-in' by the service providers in order to encourage effective handling of complaints, is for there to be a requirement by the regulator for all practices to have an appointed partner as a complaints manager. It would be this person's duties to co-ordinate and handle all complaints in a manner satisfactory to both the regulator's set standards and the consumers' satisfaction.

45. A further encouragement for the provider to deal with complaints 'in-house', would be to operate a policy of 'polluter pays' for any complaints which were not dealt with at this level. For example, if a complaint needed to be referred to the regulator due to the unsatisfactory resolution of it from the service provider, a substantial (almost punitive) one-off fee would be charged to the service provider in question. This penalty, however, will only be applicable in relation to genuine complaints that have not been dealt with efficiently and fairly, and would not apply to unfounded or unreasonable complaints that were not able to be solved at firm level.

Indeed, if a compliant were dismissed then the cost of the claim would be borne by the profession as a whole.

46. To further penalise persistent unsatisfactory complaints handling, the regulator should have the ability to review the complaints handling procedures in place at any particular service provider, and if they are found to be unsatisfactory the regulator would have the power to recommend change within a certain time-frame or impose other penalties including the option of removing the ability to practice – i.e. for solicitors, the withdrawal of the practising certificate – or referral of the offending service provider to his professional body for disciplinary proceedings.

Competence Complaints

47. APIL strongly endorses the use of CPIL accreditation for personal injury practitioners. As such we propose that prior to someone being able to join CPIL they would have to demonstrate that their particular practice has effective and adequate complaints procedures. These procedures would be auditable by CPIL, and any demonstration that they were inadequate subsequent to the person joining CPIL would result in the revocation of their CPIL status.

Multi-Disciplinary Practices (MDPs) and Legal-Disciplinary Practices (LDPs)

48. APIL believes that it is an unnecessary restriction not to enable lawyers to go into partnership with other people, as long there are adequate protections for the consumer. There are benefits from moving in with other organisations. The injection of external capital investment into PI practices, as well as the addition of services, will help deliver better value to injured victims. For example, a marketing firm company and personal injury firm could form a partnership which could lead to more work, more profits, a better infrastructure, and therefore a better service to injured clients.

49. In addition, there are numerous consumer advantages of having a “one-stop” shop for services. A demonstration of this would be a personal injury solicitor operating alongside a rehabilitation provider to deliver a full range of services to help the injured client return to their previous position within life. We feel, however, that any influx of funds or services should not be at the expense of legal impartiality. Injured clients should be able to feel confident that their legal representatives are acting in their best interests, not out of commercial or self-interest.

50. APIL proposes that the delivery of legal services – as part of any MDP – should contain the following safeguards, including:

- i) a requirement that the legal practice is ring-fenced from all other areas of the business;
- ii) a requirement that all those managing the business and/or owning the practice should be suitable persons and/or organisations to do so;
- iii) a requirement for all managers to be subject to the regulatory rules of the legal practice;
- iv) guarantees, through regulation, that the legal practice can operate independently and free from interference, in the provision of legal services, from non-lawyer owners, whether or not they were managers of the practice.

51. Within APIL’s proposed regulatory model, lawyers would be regulated via their professional organisations while any service which does not have a professional organisation, yet involves the provision of legal services, will come under the regulator’s direct scrutiny. This structure would apply to MDPs as well. For example, even though in-house lawyers are directly answerable to the board of directors of the company, they are still governed by the Law Society’s rules and would continue to be so. In addition, under APIL’s proposed regulatory scheme, they would be regulated by the LSB and subject to the LSB’s accreditation and complaints rules and procedures.

52. There are also consumer advantages to having non-lawyers involved in the business aspects of a legal firm. While lawyers may be excellent in regard to their legal abilities, there is not necessarily any correlation between this and the ability to efficiently run a business. APIL feels that by employing a business-person specifically for the purposes of managing the business, there will be an introduction of a more structured approach. This structured approach, however, should never be at the expense of the client orientated obligations of the legal practitioner; the needs of the client must override the needs of the business. APIL believes that the above detailed consumer protections will minimise there being any possible chance of undue influence. In fact, a more structured business focused approach may result in the introduction of more customer focused services – i.e. customer relations – into the business.

53. More business involvement may also lead to more innovative business styles and structures being introduced, as well as efficiencies via improved information technology and systems.

54. In respect of LDPs – where lawyers from different professions work together – APIL believes that these need to be governed by strict consumer protection codes. These will be provided by regulation by the Legal Services Board, and LDPs will also to be subject to the LSB's accreditation and complaints rules and procedures. The fact that all participants in them will be regulated via a professional body, already provides significant protections.

55. APIL feels with these additional protections in place, that it may be wise to introduce LDPs prior to the wider introduction of MDPs. If LDPs can be shown to succeed in both offering a cost-effective and quality service to consumers, without in any way impinging on the independence of the legal service providers, there would a stronger basis on which to proceed with MDPs.

APPENDIX A

APIL Consumer Charter

APIL CONSUMER CHARTER

- APIL members will put your interests first
- APIL members will provide clear, impartial, honest advice about your case
- APIL members will tell you if you will have to pay anything to pursue your case and, if so, how much
- APIL members will keep your costs to a minimum
- APIL members will explain your legal position in plain English
- APIL members who feel unable to deal with your case will refer you to another APIL member who is more suitably qualified
- APIL members will keep you updated about all aspects of your case
- APIL members will consider other appropriate remedies as well as financial ones
- APIL members will not cold call
- APIL members will only publish advertisements which are accurate and truthful

Your welfare is our concern

APPENDIX B

APIL Code of Conduct & Enforcement of Code of Conduct

CODE OF CONDUCT

Introduction

The Association of Personal Injury Lawyers (APIL) was established in April 1990 by a group of barristers and solicitors working for plaintiffs, dedicated to the improvement of services provided for victims of accidents and disease.

APIL's head office, based in Nottingham, is staffed by dedicated full-time staff under the direction of a Chief Executive, reporting to APIL's elected Officers.

Members of APIL subscribe to a code of conduct and support APIL's main objectives.

Membership of APIL is on the basis of a commitment to APIL's objectives and this code. Membership is not a guarantee of excellence or specialisation.

APIL's objectives are:

- To promote full and just compensation for all types of personal injury
- To promote and develop expertise in the practice of personal injury law
- To promote wider redress for personal injury in the legal system
- To campaign for improvement in personal injury law
- To promote safety and alert the public to hazards wherever they arise
- To promote a communication network for members

APIL members recognise the need to:

- Provide a professional service
- Keep their clients regularly informed
- Proceed expeditiously with all personal injury claims
- Keep themselves informed, educated and up to date with current law and procedure
- Share information with other APIL members
- Give independent advice
- Maximise the amount of compensation receivable in the hands of the client

- Ensure that the client is fully aware of, and fully and professionally advised, on all costs issues, including legal aid.
- Ensure that clients have the opportunity to receive advice on the investment and/or use of damages.

Code of Conduct

1. APIL members will act in the best interests of the client
2. APIL members shall at all times behave and act in a manner which will uphold the standing and good reputation of plaintiff personal injury lawyers and APIL.
3. No APIL member shall pursue a frivolous claim issue or position. However, no APIL member should refrain from taking or pursuing any claim issue or position that is believed to have merit.
4. No APIL member shall make excessive or unnecessary monetary charges to the client.
5. No APIL member shall personally or through an agent make representations of experience or specialist skills which they do not possess.
6. No APIL member shall knowingly make any statement, whether in publicity material to a prospective client, an existing client, or otherwise which may give the client false expectations.
7. No APIL member shall undertake false deceptive or misleading advertising.
8. APIL's logo shall not be used by any APIL member, either personally or through their firm, for advertising or marketing purposes. Members are however able to identify their individual APIL membership.
9. No APIL member shall personally, or through a representative, directly contact a potential client except through permitted advertising, where there has been no request for such contact. "Permitted advertising" is defined as "advertising which complies with the Code of Practice of the Advertising Standards Authority and with the Rules of the member's relevant legal

professional body".

10. Save where permitted by rules of the member's relevant legal professional body, no APIL member shall pay or receive a fee for the introduction of clients.
11. No APIL member shall knowingly accept a referral from a person, whether an APIL member or not, who obtained the representation by means contrary to this code.

Enforcement of Code of Conduct

1. Details if any alleged breach of Code of Conduct to be notified to APIL's Secretary.
2. If the Secretary is of the opinion that there is a prima facie breach of the Code but that such breach is not grave or persistent, the Secretary will communicate with the member or members concerned to attempt to resolve the matter complained of.
3. If the Secretary is of the view that the prima facie breach is grave or persistent, or if a complaint dealt with under paragraph 2 above cannot be satisfactorily resolved, the Secretary and 3 other EC members shall investigate the alleged breach, giving the member proper opportunity to answer the complaint, and ensuring the member is aware of the relevant Articles of Association relating to termination or suspension of membership.
4. The three member EC panel will report to the EC who will decide on the issue(s) and whether membership should be suspended or terminated. In the event that pending the opinion of the Executive Committee on the issue of breach it forms the view that it is appropriate to do so, the Executive Committee may suspend the membership of any member pending such opinion. The decision and reasons for it will be notified in writing.
5. An appeal against the EC's decision must be made to the Secretary in writing within 21 days of notification to the member of the EC's decision.

6. An appeal will be dealt with by an Appeals Panel consisting of an independent legally qualified chair (who shall not be or have been an APIL member), appointed by the EC, and two other panel members who shall be appointed by the chair, one of whom shall be a past officer of APIL, and the other of whom shall be a member of APIL who is not currently, nor ever has been a member of the EC.

Revised October 2000

Appendix B

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

CONSUMER FOCUSED REFORM OF LEGAL SECTOR REGULATION

AUGUST 2005

DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

CONSUMER FOCUSSED REFORM OF LEGAL SECTOR REGULATION

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Allan Gore QC	President, APIL
Colin Ettinger	Immediate Past-President, APIL
Richard Langton	Vice President, APIL
Gary Barker	Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

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CONSUMER FOCUSED REFORM OF LEGAL SECTOR REGULATION

Executive Summary

- APIL fully supports the objectives and principles as proposed by Sir David, and believes that the recommended structure of the Legal Service Board (LSB) – i.e. a light touch regulator which oversees front line regulatory bodies – closely reflects APIL’s suggested B-plus regulatory model.
- APIL believes that the established frontline regulators – such as the Law Society and the Bar Council – should initially be ‘passport’ into the new regulatory framework by virtue of the practical necessity of maintaining continuity and avoiding disruption within the current regulatory regime. In addition, while we feel that unregulated organisations such as claims management companies should be brought within the scope of the LSB, it is essential that the specified frontline regulator should have its remit clearly defined.
- APIL supports the authority of the LSB to discuss cross-jurisdictional issues with other regulators as it is vital that those being regulated know which regulator is responsible for which activity.
- APIL believes that the regulation of the legal profession is in the public interest, and the costs associated with the establishment of a new regulatory body should be borne by Government.
- APIL believes that the LSB’s role in the complaints process should be limited to auditing the delegated front-line regulators’ system of complaints handling. In addition, an appeal mechanism for service complaints within this new framework would needlessly slow down the system as a whole.

- APIL does not feel it is appropriate for complaints to be redressed via the awarding of money as this would fundamentally alter the original intention behind the concept of redress.
- APIL suggests that the fairest method of funding the Office of Legal Complaints (OLC) is to combine professional indemnity insurance with a polluter pays principle. APIL also considers the OLC to be a designated front-line regulator and should therefore come under the auspices of the LSB, the same as other such regulators – e.g. the Law Society and Bar Council.
- APIL is concerned that by allowing such a large amount of discretion on the part of the LSB in terms of what it can regulate, various organisations will be unsure whether they are included in the LSB's remit.
- APIL suggests that prior to any implementation of Multi-Disciplinary Practices (MDPs), the Government should first assess the effect of introducing Legal Disciplinary Practices (LDPs) into the professional legal landscape.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the questions currently being considered by the Department for Constitutional Affairs (DCA) prior to the publishing of the Government's white paper on legal sector regulation. The Government's white paper follows the recommendations made by Sir David Clementi in his December 2004 final report into the '*Review of the regulatory framework for legal services in England and Wales*'²⁹, to which APIL also responded³⁰.

Legal Services Board - issues

The objectives and principles proposed by Sir David have been supported by most stakeholders. Are we content with them?

- *Maintaining the rule of law*
- *Improving Access to justice*
- *Protection and promotion of consumer interests*
- *Promotion of competition*
- *Encouragement of a confident, strong and effective legal profession*
- *Promoting public understanding of the citizen's legal rights.*

Should all regulatory powers be vested in the LSB and handed down to the front line bodies subject to meeting the requirement of the LSB (e.g. regulatory and representative split)?

2. APIL fully supports the objectives and principles as proposed by Sir David, and believes that the recommended structure of the Legal Service Board (LSB) – i.e. a light touch regulator which oversees front

²⁹ A copy of the '*Review of the regulatory framework for legal services in England and Wales – Final Report*' (Dec 2004) can be found at: <http://www.legal-services-review.org.uk/content/pubs.htm>

³⁰ See previous Appendix A – APIL's response to The Department for Constitutional Affairs (DCA) – '*Review of the Regulatory Framework for Legal Services in England and Wales*' (APIL13/04) (June 2004). A copy can also be downloaded at: www.apil.com/pdf/ConsultationDocuments/126.pdf

line regulatory bodies – closely reflects our suggested B plus regulatory model.

In addition to the “nuclear option” of de-designating a body, should there be a sliding scale of “smart sanctions” available to the LSB, and what should these be? e.g.

- *issuing regulatory guidance notes to front line bodies (falling short of issuing Directions which could impact on the independence of the legal professions)*
- *setting a range of regulatory targets for front line bodies (with the ability to require the provision of information to enable monitoring by the LSB)*
- *imposing fines for failing to achieve compliance*
- *removal of one or more regulatory functions if a front line body is failing in specific areas*
- *de-designation of a professional body (the “nuclear option”)*

3. APIL cannot think of any additional sanctions which could be used by the over-arching LSB to punish a frontline regulator for regulatory infringements.

Should existing regulators be “passported in” to the new regulatory framework?

4. APIL believes that the established frontline regulators – such as the Law Society and the Bar Council – should initially be ‘passported’ into the new regulatory framework by virtue of the practical necessity of maintaining continuity and avoiding disruption within the current regulatory regime. In addition, APIL is aware that there are concerns about transporting some of the current regulators directly into the framework, especially while there still appear to be problems with certain customer care elements – in particular the Law Society’s ongoing problems relating to consumer complaints. We feel that any continuing breach, however, would result in the LSB exercising the

sanction available to it, including the so-called ‘nuclear option’ of withdrawing regulatory powers from the organisation completely.

5. APIL is, however, more concerned about the need for previously unregulated organisations, or types of legal services provider, to be appropriately regulated, in particular claims management companies. We are therefore pleased to learn that the regulation of the claims management sector is currently in the process of being fast-tracked by the Government, possibly through the ‘Compensation Bill’ which was recently announced in the Queen’s speech. It is our understanding that regulation of the claims management sector will be via a front-line regulator – possibly the Claims Standards Council (CSC) – with the LSB the over-arching regulator above it.

6. In terms of the regulation of claims management companies, APIL firmly believes that the Government must be cautious about the remit under which any such organisation is accepted as a front-line regulator. For instance, APIL is concerned that in attempting to bring the regulation of claims management companies under the umbrella of the LSB, the appointed front-line regulator will be given an overly wide remit to regulate *all* claims. Such a wide remit may potentially include the regulation of any person or organisation which handles claims, including solicitors. APIL would be deeply opposed to any attempt to bring the regulation of personal injury lawyers under the same front-line regulator as claims management companies.

7. APIL’s concern over the possible ramifications concerning the poor-definition of regulation for claims management companies helps to illustrate the general lack of definition within the proposals concerning what precisely is a ‘regulator’ for the purposes of the new legal services framework. APIL firmly believes that prior to establishing which organisations should be included, or ‘passported’ in, under the new regulatory framework, the Government needs to define exactly what is meant by ‘front-line regulator’. This is especially important as

over time the number, and type, of organisations which may need to be regulated is going to change. It is therefore essential that all regulators, and potential regulators, know what the LSB expects of front-line regulators. For example, APIL is currently in the process of introducing accreditation standards for all of its members; a change which may position APIL as a possible front-line regulator in terms of personal injury practitioners depending on the definition of ‘regulator’ provided by the Government. In addition, with the introduction of more competition within the legal services arena – one of the primary drivers for Sir David’s review – they may well be different business structures and organisations formed, and these will need to be properly regulated. The LSB must therefore have the flexibility to be able to regulate these new businesses.

Should the LSB be required to consult any persons or organisations about its regulatory decisions? e.g.

- *the Office of Fair Trading*
- *the higher judiciary (where matters affecting the courts are being regulated)*
- *other advisory panels?*

8. APIL has no particular view on this issue. In terms of the possibility of APIL promoting itself in a consultancy role to the LSB, however, our activities are currently being re-structured so as to provide a regulatory focus to both the organisation and members, and so any type of advisory role would be inappropriate.

Should the LSB have the authority to enter in discussions with other statutory regulators to seek to delegation?

9. APIL supports the authority of the LSB to discuss cross-jurisdictional issues with other regulators as it is vital that those being regulated know which regulator is responsible for which activity. Indeed by supporting and encouraging cross-agency working it is hoped that the

new regulatory system will be easier to use and understand by consumers, both internal and external.

Should the Government make a contribution to the cost of regulation?

How will the one off costs of transition to the new framework (some £4 million for the LSB and £9 million for the Office for Legal Complaints) be covered?

10. APIL believes that the regulation of the legal profession is in the public interest, and the costs associated with the establishment of a new regulatory body should be borne by Government. APIL would also highlight the fact that the proposed changes to the regulatory regime in legal services is being imposed by the Government – with little or no desire by the professions for such changes – therefore we suggest that this commitment should be reflected in appropriate funding being provided for the new structure.

Should the Secretary of State have any sanctions available to him over the LSB should it fail to achieve its regulatory objectives?

11. APIL does not wish to comment on this question at this time.

Complaints and discipline – issues

It is intended that the OLC should deal with service issues and refer conduct matters to professional body. But should the OLC also have the ability to delegate the handling of service issues to FLBs where it is content they have acceptable redress arrangements in place?

12. APIL believes that the LSB's role in the complaints process should be limited to auditing the delegated front-line regulators' system of complaints handling. Other than this auditing process - with accompanying sanctions for failure to have satisfactory complaint

handling procedures in place - APIL feels that there is no need for the LSB to be directly involved with the complaints process.

Does there need to be an appeal mechanism for service complaints?

13. APIL believes that the inclusion of an appeal mechanism for service complaints within the new framework would needlessly slow down the system as a whole. While the majority of complainants are genuine, and have a real issue with the service they have received, there is a small minority of clients who will continue pursuing a complaint regardless of whether there is any basis for it. Indeed APIL members report that the presence of an appeal mechanism in the complaints system, and vexatious clients using the appeal mechanism, is one of the primary reasons for the long delays and continuing problems within the current structure – i.e. the Law Society’s Consumer Complaint Service (CCS).

14. APIL re-iterates its proposal that complaints should be separated into different systems in order to reflect the different types of complaints which exist. For example, there is considerable difference between a solicitor failing to return a phone call and a solicitor defrauding his firm of thousands of pounds. A separation of the complaints system will enable each constituent system to function independently and ultimately more efficiently. We therefore propose the following:

- Conduct and disciplinary complaints should be dealt with by the Office of Legal Complaints (OLC). APIL originally suggested that the principle regulator – i.e. the LSB – should deal with this type of complaint, but with its ‘light-touch’ remit and the establishment of a dedicated front-line regulator solely responsible for complaints this stipulation is unnecessary;
- Service level or consumer complaints should be handled directly by the service provider – i.e. the solicitor’s firm or barristers chambers; and finally

- Competence complaints should be referred back to the lawyers' accreditation body if one exists – in respect of personal injury lawyers, in the near future, this may well be APIL.
15. Each of these complaints systems would be individually audited by their respective regulators – i.e. the front-line regulators audited by the LSB, and the individual legal service providers audited by their respective front-line regulator. Part of the auditing process for all the complaints systems will involve strict guidelines about how complaints should be handled, and the standards by which these complaints should be dealt with. In addition, built into these processes, will be a mechanism by which firms or regulators who fail to meet the required standards will be punished via the use of certain prescribed sanctions. In terms of this auditing process, the complaint itself will not be re-examined rather how the complaint was handled within the organisation will be investigated. The front-line regulator would then have the power to discipline members if their service complaints systems did not meet the required standard, and the LSB would be able to punish front-line regulators – possibly with the 'nuclear option' of removing of it regulatory powers – for failing to handle competence and disciplinary complaints correctly.

Should OLC be empowered to provide redress "in all circumstances" (that is FSMA 2000 wording in respect of FOS that includes negligence)?

Should there be any limit on OLC redress awards and what should it be?

16. APIL does not feel it is appropriate for complaints to be redressed via the awarding of money, as the intention of redress is to place a person into the same position which they occupied prior to the problem. Naturally if a person has lost money due to the actions of a legal provider, it is only appropriate for this money to be compensated back to them. With no financial loss, however, any monetary award would either be punitive in nature or would be compensation for the

inconvenience caused to the person complaining. APIL believes that neither of these reasons is suitable, as the primary reason for the complaints system is to ensure that any problem is dealt with quickly and efficiently. If this does not happen, then the legal provider will be audited on its procedures and suitable sanctions would follow. By introducing monetary compensatory awards, APIL feels that the original intention behind redress is fundamentally altered.

17. APIL would not, however, discourage any solicitor found 'guilty' of having poor complaint handling procedures providing a small discretionary payment to an inconvenienced client - in order to recompense them for their troubles - as part of its client care procedure.

How should the OLC be funded (polluter pays)?

18. APIL suggests that the fairest method of funding the OLC is to combine professional indemnity insurance with a polluter pays principle. The OLC would have the option of fining a legal provider as sanction for poor complaints handling. Therefore the profession would pay a yearly professional indemnity insurance fee which would be offset against the amount of money which had been recovered by the OLC from guilty legal providers from the previous year. This would mean that the yearly amount paid by legal providers would fluctuate dependent on the amount of fines recovered from guilty providers.

Should the OLC be subject to LSB control e.g. by approving budgets, appointing/removing Board?

19. APIL considers the OLC to be a designated front-line regulator and should therefore come under the auspices of the LSB, the same as other such regulators – e.g. the Law Society and Bar Council.

The Law Society's Consumer Complaints Service (CCS) is by far the largest complaints handling body (it deals with some 18,000 complaints a year compared to some 400 dealt with by the Bar Council). Sir David Clementi based his costing for the OLC on a re-badging of the CCS. Is that the approach we want to take?

20. APIL is less concerned with the actual structuring of the new OLC as long as it meets the public expectations and achieves the results of effective and efficient complaints handling.

There is no evidence to suggest that existing disciplinary arrangements are not satisfactory. Do we wish to investigate this issue any further?

21. APIL is currently happy with the disciplinary procedures employed by both of the large legal service regulators – the Law Society and Bar Council – as both are effective and are unafraid to impose stiff penalties where necessary.

Should legal services be brought in or out of the regulatory net of the LSB by secondary legislation?

What will be the key criteria for determining which activities should be brought under the regulatory control of the LSB?

Should the LSB have the power to regulate gaps directly - in the absence of an appropriate regulator?

22. APIL is concerned that by allowing such a large amount of discretion on the part of the LSB in terms of what it can regulate, various organisations will be unsure whether they are included in the LSB's remit. This level of uncertainty, and the lack of a definition concerning its remit, will also lead to some organisations falling through the LSB's 'regulatory net' completely. In APIL's response to the Sir David's initial review, we recommended that the LSB should operate under a

definition of legal services. While not an easy task, the presence of such a definition would allow less discretion on the part of the LSB and provide certainty. It would also allow consumer to be satisfied that certain services were covered under the LSB and therefore the same standards would be applicable across the profession to a potentially high standard.

Alternative business structures – issues

Does the Clementi Model provide an acceptable way to facilitate new business structures? What about MDPs?

If so should the legislation require a majority of lawyer control (depending on the ownership structure this could mean Partners or Directors) of alternative business structures?

Should the LSB have powers to sanction non-lawyer partners or directors who behave inappropriately?

Should there be any restrictions on the level of external ownership of ABSs?

Should there be any restriction on the ownership structure of ABSs (e.g. public limited company, limited liability partnership, private limited company)?

Are there any services which we consider it should not be possible for an ABS to provide?

23. APIL suggests that prior to any implementation of Multi-Disciplinary Practices (MDPs), the Government should first assess the effect of introducing Legal Disciplinary Practices (LDPs) into the professional legal landscape. Dependent on the success of LDPs, and with further thought given to outside investment/ownership, the possibility of MDPs should be investigated further.