REFORM OF THE LEGAL PROFESSION

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Executive Summary

The modernisation and reform of the legal profession in England and Wales, still characterised by the split between barristers and solicitors, has been an ongoing issue for the last few decades. Over time, piecemeal reforms have been introduced to the profession so that today there exist a wider range of legal service to the public and much more flexibility in career choice for prospective lawyers. Despite this, calls for further reforms remain and there are some who advocate that England and Wales should complete the process of harmonisation by undertaking full-scale fusion, a model adopted not just by Civilian countries but also many other common-law countries such as the USA, Canada and some states of Australia. Considering changes brought about by the Legal Services Act, the Bar Public Access Scheme and higher rights for solicitors, the issue is more current than ever.

Our paper is divided into three parts. After a brief account of the present set-up, we go on to discuss deficiencies in the professions as they are today. In the third part, various models of reforms are explored, particularly in respect of the education of prospective lawyers and the regulation of current practitioners. Throughout our analysis of the different models, particular attention is paid to three factors: i) improving access to the profession ii) allowing flexibility in switching from one profession to the other and iii) reducing costs and expanding choices for consumers. Our investigation also extends to examine how the legal profession may be differently organised.

Deficiencies in the current system

For both clients and practitioners, the legal system as it stands is in certain respects deficient. Most strikingly, one of the problems can be said to be unique to the English system because of the way our legal profession is organised. Among them is the assumption, reinforced by legal force, that a barrister is a specialist and a solicitor a generalist, which can lead to the bizarre result that an experienced solicitor is protected from liability in negligence by seeking the advice of a less well-qualified barrister. Other issues that we will explore centre around the access to justice: whether it is satisfactory that an ordinary litigant must seek out a solicitor who has obtained higher rights, or else employ a barrister as well thus incurring higher fees; whether safeguards against the ill effects of the “returned brief” have addressed that phenomenon satisfactorily; and whether the current system undermines free legal aid. Finally, it has to be questioned whether the trammels imposed on the careers of many lawyers, who are prohibited from performing certain legal services, can still be justified.

Models for reform

In England and Wales, students effectively have to decide on completion of their law degree or the law conversion course whether they want to be a barrister or a solicitor. This is unsatisfactory for two reasons: it requires students to make up their mind as to what they want to become during an essentially academic law degree, without getting a taste of what actual work is like in the two branches; and, considering the financial uncertainty of the Bar, many students from less privileged backgrounds are potentially deterred from entering the profession.

There are two principal models for reform in legal education: the common qualifying system, which we shall call the ‘Hong Kong model’, and the progressive qualifying system, which we
shall call the 'Scottish model'. The common qualifying system is as the name suggests — a single path to legal qualification for barristers and solicitors; the progressive qualifying system involves all lawyers qualifying as solicitors, and those who wish to become barristers taking a further qualification after a number of years in practice. Our tentative view is that an overarching scheme, which involves barristers and solicitors training together while allowing scope for specialisation along the lines of the Hong Kong model, is preferable.

As to regulation, it is suggested that the current system of having two regulatory bodies — the Bar Standards Board and the Solicitors Regulation Authority — can be challenged in light of changes made to the profession in recent years, particularly given how barristers and solicitors are progressively performing more and more of each other's work. In our analysis, we consider two alternatives: the division of regulatory responsibilities by reference to the nature of the legal service (rather than a practitioner's formal status as a barrister or a solicitor) or the unitary regulation of all aspects of legal practice by one body. References will be made to the Legal Services Act 2007: whilst it addresses some of the drawbacks of the suggested alternatives by introducing a single point of complaints and the supervision of various regulatory bodies by the Legal Services Board, a number of issues are left unaddressed.

Lastly we consider how the professions may be differently organised. We will compare the current model (which we will characterise as partially amalgamated because of recent changes); total fusion; and a third model that falls short of full amalgamation, viz the possibility of being both a barrister and a solicitor at the same time. We also survey the potential impact of Alternative Business Structures (ABSs) under the LSA 2007 on the profession as a whole, which none at the time of writing have been created although just under 100 applications are pending before the SRA.

Our tentative conclusion is as follows: in respect of education, legal education at the vocational stage should be amalgamated; in respect of regulation, we welcome changes introduced by the LSA but have flagged up some issues that remain unaddressed in the course of examining the alternative models; in respect of the organisation of the profession, we are attracted by a more flexible model than the current one but are wary of coming down a particular model pending the coming into force of the ABS regime.
Introduction

The ‘split profession’ is a characteristic feature of the judicial system of England and Wales. Roughly speaking, legal roles are split between barristers, who specialise in advocacy and traditionally held monopoly over rights of audience in the higher courts, and solicitors, whose main job is to manage case work and interact more directly with clients. Moreover, a barrister may usually only be ‘instructed’ by a solicitor, rather than by members of the public; for reasons of access to equal legal representation the ‘cab-rank’ rule further requires barristers to take any work given to them by solicitors --- a barrister may not turn down a client on grounds of conscience.

Present set-up

The two separate legal professions differ in both training and in forms of practice but form an important partnership in casework.

Barristers are members of the Bar and take residence in one of the four Inns of Court --- Gray’s Inn, Lincoln’s Inn, Middle Temple and Inner Temple. Within an Inn, barristers, who are all self-employed and forbidden to form partnerships, practise from ‘rooms’ which are then grouped into Chambers. Traditionally the more respected of the two professions, barristers are principally advocates, experienced and highly specialised, and until recently held exclusive rights to audience in the higher courts. Approximately 10% of barristers are ‘Queen’s Counsels’, the highest position in the profession, and the rest are junior barristers.

Solicitors, by contrast, traditionally only have the right to appear before the lower courts and when dealing with cases in the higher courts their job is to manage the conduct of the litigation. However, since 1990, with the Courts and Legal Services Act, solicitors may obtain rights of audience in the higher courts as well. Unlike barristers, solicitors are not self-employed, usually working in firms, and are instructed directly by the public; if a case requires a barrister it is the solicitor who instructs on his client’s behalf.

An analogy is often drawn between the two legal professions and the medical professions of general practitioner and consultant. A patient first approaches his GP (solicitor) about a problem, and if the GP decides specialist help is required he finds a consultant (barrister) specialising in the ailment from which the patient is suffering. However, if the problem is not sufficiently serious to require a surgeon the GP is qualified to act himself. The important point is that at present the extent of the split between barristers and solicitors is great enough that the two professions have separate training paths and virtually no routes between them. A student who has begun his training to become a barrister may not switch to training as a solicitor unless he starts training from scratch, a situation that shall be expanded on later.

Despite the rigidity of the divide between the barristers and solicitors, proponents of the split...
profession justify it on pragmatic as well as theoretical grounds. It is felt that separating those working on a case into rigidly defined roles encourages specialisation, ensuring that individual lawyers are highly experienced in their own area of expertise, unlike in fusion jurisdictions in which a lawyer may find himself having to balance his casework with his pleading. Moreover, the fact that barristers may not be approached by members of the public directly as well as the fact that having a solicitor allows the barrister to focus solely on developing arguments rather than carrying out casework gives him a greater degree of independence.

On the other hand, arguments in favour of the other extreme --- ‘fusion’ of the two professions --- include more efficient case management and the potential for lower legal costs, a consideration found to be of great importance in the 2004 Clementi Report on legal reform. (Clementi, 2004) Indeed, it is notable that in jurisdictions which do not formally distinguish between barristers and solicitors lawyers often find themselves specialising in one field or the other so some of the objections raised above are perhaps more apparent than real. Fusion would also greatly improve the flexibility of the legal profession and could arguably allow greater access to the profession to poorer applicants who might otherwise be deterred from undertaking long and expensive training programmes, especially since these cannot guarantee acceptance into either the Bar or a firm of solicitors. Fusion, together with other intermediate models, will be explored in fuller detail in the following sections.
Deficiencies in the Current System

In the past 30 years, significant changes have been made to the organisation of the legal profession; in most cases their effect has been to improve the situation for both lawyers and their clients alike. However, in various respects, there remain systematic problems which require addressing. In this section, we shall consider in what way the current system, which retains a division of the profession, remains flawed, first from the client's perspective, and then from that of the lawyer (prospective or practising). Comparisons will also be made with how, if at all, a fused profession may make a difference.

Problems for the Clients

Potential abuse of the assumptions entrenched in the current system

One of the principal arguments in favour of the divided profession has been that the Bar is an essential core of legal experts, who advise the vast body of generalist solicitors when they are confronted with a point of law. While the law still gives recognition to this proposition (in absolving a solicitor from liability where he has acted on the advice of properly instructed counsel (“Davy-Chiesman v Davy-Chiesman and Another,” 1984), it may be argued that this is in the modern world an aberration. The automatic assumption that solicitors are any more “generalist” than barristers in general practice cannot be right, considering the current state of the solicitors’ profession. One for instance can hardly imagine entrusting a large commercial merger to a criminal solicitor, or appointing a corporate lawyer to manage complex criminal litigation.

In fact, it is possible to envisage abuses of the legal force accorded to the above proposition e.g. a solicitor may be able to rely on inexperienced (and cheap) junior barristers to exclude his/her own liability, leaving the client with inadequate legal advice. Leaving this aside, it simply seems odd that young barristers --- most of whom join the profession directly from university, with no actual experience of the law except for the BPTC and one year of pupillage --- should be held out as having greater legal expertise than solicitors of 20 years’ standing. By way of contrast, in a fused profession, lawyers would be employed as consultants not because of their formal membership of either branch of the profession, but because of their professional merits.

Of course, in reality this is only an issue for the less-informed private individuals and small businesses who seek legal advice from small high-street firms. Corporations will generally refer to larger reputable firms with expertise in the relevant fields and contacts with experienced barristers in those fields. Nonetheless, the fact remains that there is significant potential for abuse of the consultative capacity of barristers by unscrupulous solicitors; it would be naive to think that all lawyers will adhere strictly to professional standards.

Access to justice issues

There are a number of other issues in respect of access to justice (a central tenet of the doctrine of the rule of law).

Although solicitor advocates may now represent their clients in all courts (and ordinary solicitors have always been allowed to represent their clients in lower courts), it remains within the
discretion of the solicitor to advise the client to employ a barrister, and in the majority of cases we still find solicitors adhering to old customs and referring advocacy work to a barrister. In such cases, the client must pay for a second lawyer's fee, and often the exact barrister is arranged by the clerk of the Chambers which his/her solicitor has chosen. By contrast, in a fused profession, lawyers could be expected to conduct a case from start to finish: the client would have much more autonomy as to who advises and represents him, and as to the cost of that advice and representation.

Then, there is the problem of the returned brief --- the phenomenon where the initially-instructed barrister becomes unable to act on behalf of the client (generally because of time constraints), and the brief is referred to another barrister. At best, it is disconcerting for a client, coming to court to face an indictable charge or to find out whether their house will be repossessed, to arrive outside the courthouse to find a stranger introducing himself as his barrister and explaining the situation. At worst, the barrister will be ill-prepared and fail to provide the client with the best representation as a result. Punishment, or even mere recognition of his fault, is unlikely.7

Finally, there is the issue that, with ever-decreasing free legal aid from the government8, the tendency will be that only young and inexperienced barristers will plump for representing the impecunious and will cease doing so once they have established enough of a reputation to move on to private work. Thus, the very basis of legal aid --- that everyone has equal access to the best possible legal representation --- is undermined. By contrast, large City law firms have the resources to allow their lawyers to engage in pro-bono work --- it is possible that in a fused profession, experienced advocates in firms (or other alternative structures) would be able to represent the poor as part of their pro-bono activities without having to rely on paltry payments from the State. This however is not necessarily a panacea to the problem but discussions on issues relating to legal aid should be left for another day.

Problems for Prospective and Practising Lawyers

Now we move on to the problems that a split profession present for prospective and current lawyers.

While it is reasonable that some lawyers should specialise in advocacy and legal consultancy, and some in the more business-related aspects of the law, it appears odd that an undergraduate law student (in many cases one who has only just finished his penultimate year) must decide which of those roles he will spend his career performing at such an early stage. While there are now mechanisms for transferring from one profession to the other (often a matter of the absolute discretion of the relevant authority), one cannot be both a solicitor and a barrister. Thus, in general, transferring is not an expansion of one’s career, but rather a new beginning. Although to some extent mitigated by the accordance of higher rights of audience to solicitors who apply for them, the effect of this enforced division is to artificially trammel lawyers with diverse skills into a line of work that prevents them from using all their skills.

Secondly, there is the issue of cost. While many prospective solicitors begin the LPC with a

7 For an account of the Bar’s attempts to mitigate the negative effects of returned briefs, see the Bar Council’s Service Standard On Returned Briefs Agreed With The CPS.
8 This is a particularly current issue: see discussion surrounding the controversial Legal Aid, Sentencing and Punishment of Offenders Bill, currently passing through the House of Lords.
training contract and some sort of stipend (generally the course fees are also looked after), most prospective barristers take the BPTC with no guarantee of a pupillage. Considering the cost of the BPTC (£10,000 to £15,000, for tuition alone (Chambers Student, 2010a)), and that pupillage is very difficult to come by, and tenancy even more so, it is unsurprising that many candidates who would be interested in a career at the Bar are dissuaded from it due to financial concerns.

This should be a serious concern to the Bar, which prides itself on being the legal elite. If those aspiring to the Bar necessarily have to be reliant on either parental support or take out loans for tens of thousands of pounds, then many of the best prospective lawyers will choose to become solicitors instead. This has a doubly-negative effect on the Bar, at once depriving it of the best talents and diverting it to another body of lawyers who stand to supplant it.

Finally, allegations of nepotism (especially in relation to how pupillages and tenancies are awarded) are sometimes made against the Bar, although it cannot be said that law firms are immune from such criticism. However, we do not intend to dwell on this here as this is a broad issue requiring extensive analysis. Moreover, even supposing nepotism is widespread, there is no guarantee that any alternative model will stamp out such practice.

**Concluding Remarks**

For both clients and practitioners alike, therefore, the current system is still in certain respects deficient. Most strikingly, many of the problems are unique to the English system because of the way our legal profession is organised. This suggests that solutions may be found in other jurisdictions where the legal profession is differently organised and the following section is devoted to such investigation.
Models for Reform

Introduction

Having set out the deficiencies of the current system above, we now seek to examine ways of redressing some of them. In our examination, we focus on two particular aspects: the qualification into and the regulation of the legal profession. Our investigation also questions whether the split between barristers and solicitors is still justified and how the profession can be differently organised.

Throughout our analysis and examination of the different models, particular attention is paid to the following factors: (i) improving access to the profession (ii) allowing flexibility in switching from one profession to the other (iii) reducing costs and expanding choices for consumers. In relation to (i), despite advances in recent decades (Passmore, 2010), it is still generally perceived that entry to the legal profession remain exclusive and practitioners are drawn from narrow social backgrounds unrepresentative of the wider society. (ii) concerns mobility within the profession and extends to opportunities for prospective practitioners to change their minds at the vocational training stage. (iii) is a recognition that greater regard should be paid to the interests of consumers which will be served by lower legal costs and the proliferation of choices of legal service.

Background

At present, in England and Wales, prospective barristers and solicitors have to enrol on either the Bar Professional Training Course (BPTC) or the Legal Practice Course (LPC) after graduating with a law degree from university or, for those whose undergraduate degree is not law, after completing the Graduate Diploma in Law (GDL) --- the ‘law conversion course’. On completion of the respective courses, students then go on to undertake either a pupilage (for prospective barristers) or a training contract (for prospective solicitors).

According to the Bar Standards Board, approximately 1700 students takes the BPTC each year but the number of pupillages offered is only about 480. In addition, as students are allowed to seek pupillage for up to 5 years after completion of the course, in any particular year there are over 3000 individuals who are applying for pupillages. (Bar Standards Board, 2012a) With the course fees alone at between £10 000 and £15 000 (Chambers Student, 2010b), this potentially deters students from less advantaged background from even considering a career as a barrister.

By contrast, while LPC course fees are comparable at around £10 000 on average (Chambers Student, 2011), in 2009/2010, 7631 students were enrolled on the LPC course while the number of training contracts available were 4510. (The Law Society, 2010)

At the moment, barristers are represented by the Bar Council and regulated by the Bar Standards Board (BSB), while solicitors, including those given rights of audience, are represented by the Law Society and regulated by the Solicitors Regulation Authority (SRA). There have been calls from some quarters that advocacy work should be exclusively regulated by the BSB and it is arguable that in a similar way direct access to the public afforded to some barristers should be regulated by the SRA.
Education

Current system

In England and Wales, students effectively have to decide on completion of their law degree or the law conversion course whether they want to be a barrister or a solicitor. This is because the BPTC and the LPC have become so specialist that it is not possible for a person who has completed the BPTC to become a solicitor and vice versa. Should a prospective barrister change his mind or is unable to secure a pupillage, he will have to commence afresh and enrol on the LPC.

This is unsatisfactory for two main reasons. Firstly, it requires students to make up their mind as to what they want to become during an essentially academic law degree, without getting a taste of what actual work is like in the two branches. This to a certain extent is mitigated by the plurality of vacation schemes and mini-pupillages law firms and chambers offer nowadays which allow students to find out firsthand what it is like to work in those places for a few weeks over summer. However, students doing the one-year law conversion course may not have the opportunity to go on a vacation scheme or a mini-pupillage before having to decide whether to embark on the LPC or BPTC.

The second objection is more forceful. As stated above, there is currently no possibility of joining the Bar with an LPC or becoming a solicitor with a BPTC. Given the intense competition for pupillages, many students who completed the BPTC and are unable to secure a pupillage are left in a limbo and it is often not feasible financially to start the LPC at that stage. Embarking on the BPTC can thus be an extremely risky decision for many, particularly those who have already incurred substantial student debt and this will necessarily be exacerbated by the increase in tuition fees. This has a major impact on access to the profession, especially the Bar, whose members have long been drawn from narrow social backgrounds. (Sutton Trust, 2005)

Alternative model 1: common qualifying system — the ‘Hong Kong’ model

One may argue that the division between BPTC and LPC is necessitated by the split within the profession but a comparison with how the vocational stage is organised in other common law jurisdictions will show that this is untrue. One prominent example is Hong Kong, a major common law jurisdiction which still steadfastly preserves the split between barristers and solicitors.

In Hong Kong, prospective solicitors and barristers, after their law degree, both have to go through the Postgraduate Certificate in Laws (PCLL). Following that, as in England, prospective solicitors go on to complete a two-year training contract as a trainee solicitor while prospective barristers are only called to the Bar after six months of pupilage and can commence full practice after six more months of pupillage.

To take the example of the PCLL of the University of Hong Kong, one of the three providers of the course in the territory, all takers of its course have to take several compulsory subjects including corporate and property transactions and both civil and criminal litigation, which encompass case analysis, drafting and advocacy elements. In addition, students also take

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9 Although there are other more circuitous routes e.g. first becoming a solicitor and transferring to the Bar once admitted to the Solicitors’ Roll without doing the BPTC or doing the BPTC and being a paralegal for a few years before sitting a transfer test to become a solicitor.
The key point is that the course is flexible enough to enable students to take combination of subjects which will enable them either to qualify as barristers or solicitors, an option not available to English students.

An objection to this model may be that such a relatively ‘generalist’ course is inadequate to prepare students for the solicitors or barristers’ professions. In this connection, it may be noted that the LPC has been criticised as unnecessarily long, often with electives constituting almost half of the course. Also, increasingly, LPC providers are offering accelerated LPCs which only last 7 months, suggesting it is practically possible to fit in enough materials within a year to prepare students for both the Bar and the solicitors’ profession.

In our view, while students who have already secured a training contract or a pupillage or those who are certain about what they want to become should be allowed to specialise as much as they desire at the vocational stage (as is possible under the PCLL in Hong Kong), it should also be open to those who feel unsure to opt for a combination of subjects which will enable them to become either a barrister or a solicitor. To this end, we propose that a common vocational course be introduced. This will go some way towards widening access to the Bar as fewer students will be deterred by the prospect of incurring massive debt with no return on the investment whatsoever. Armed with a common vocational qualification, those failing to secure a pupillage still have the option of entering the solicitors’ profession.

Alternative model 2: progressive qualifying system --- the ‘Scottish’ model

Another model, taken from the civil jurisdiction, also indicates that the historic split between the professions does not necessitate a corresponding split in legal education. The best example of this model is the Scottish system for solicitor and advocate training.

In Scotland, as with the system in Hong Kong which we have just considered, both intending solicitors and advocates will initially undertake the same vocational course. In Scotland this is the Scottish Diploma in Legal Practice (DLP). The 26-week course is intended to give students practical skills common to both professions which includes practice in criminal courts and developing skills for working with private clients. Once again, the course has been designed to allow greater flexibility between the two professions because the six units focus entirely on ‘practical skills required in the legal profession’ (University of Edinburgh, 2011) whether as an advocate or as a solicitor.

At this point, the Scottish system diverges from the system in Hong Kong. Both intending advocates and solicitors who have successfully completed the DLP and who have a Scottish law degree will undertake traineeship with solicitors. Significantly, the traineeship will normally last for two-years for both intending solicitors and advocates. Following the two year traineeship the student will have qualified as a solicitor. It is only after this point that the professional training splits. The intending advocate can at any point apply to the Faculty of Advocates and will have to pass the required exams. He or she will then spend about nine-and-a-half months ‘devilling’ unpaid for an experienced member of the Scottish bar. Essentially, an apprenticeship in

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10 Details can be found on the University of Hong Kong website: http://www0.hku.hk/pcll/fulltime/2012-13%20Regulations%20and%20Syllabus.pdf
11 Advocates have a basic similarity to barristers in the England and Wales legal system. For instance, they will provide specialist legal advice to clients and represent their clients in criminal and civil courts.
12 A breakdown of the course syllabus can be found on The Law Society for Scotland website: http://www.lawscot.org.uk/becomingasolicitor/students/diploma-in-legal-practice
advocacy. Only once this further stage is successfully completed with the solicitor qualify as an advocate.

One might argue that this system of legal education has the clear advantage of flexibility which the more specialised system in England and Wales cannot accommodate. Recent reform in Scotland has re-emphasized the intended, common starting point for training in either profession. The new\textsuperscript{13} distinction between Professional Education and Training Stage 1 (PEAT 1) and PEAT 2 formalizes the split between the DLP and traineeship-part of the qualification route for both professions respectively. However, PEAT as an umbrella term reinforces The Law Society of Scotland’s intention for flexibility in choosing between the professions. Ultimately, the additional training to become an advocate would normally be restricted to less than a year because devilling and its associated exams will take place between eight and nine months. (The Faculty of Advocates, 2011) In comparison, a solicitor in England and Wales who wanted to pursue a career as a barrister would be required to sit the BPTC and successfully complete pupillage: this is less flexible as it would require at least another two years.

However, it might be argued that the apparent flexibility in the Scottish legal education system is belayed by its costs. In England and Wales, the aspiring barrister will undertake a \textit{paid} pupillage as part of his or her vocational training. Although the value of pupillages varies geographically and by the legal practice at the set, devilling at the Scottish Bar is largely unpaid and full time. Therefore, the student in Scotland is left with the costs of training at the Faculty of Advocates and does not have the opportunities of pupil-barristers in England and Wales to fund the course with his or her practice. This conclusion fails to take account of the costs of both courses. The cost of the BPTC\textsuperscript{14} dwarfs the cost of the DLP, at around £7,000 for 2011/12. Additionally, a solicitor intending to be a barrister will already have paid to take the LPC before even paying for the BPTC, whereas a solicitor intending to become an advocate only has to pay fees to the Faculty of Advocates and fees for examinations (currently at £150 for each paper taken). The total costs are far below the costs of the BPTC in England and Wales. (The Faculty of Advocates, 2009) Therefore, the reduced specialism in the Scottish system still has economic advantages compared to our current system in England and Wales. It is not only easier to change profession in Scotland, but there is increased access to both professions by qualifying through one vocational course.

Nonetheless, it is questionable whether the Scottish system accords equality to the professions in principle. If one took an objective evaluation of the system, it seems to create a hierarchical relationship between advocates and solicitors. Being a solicitor could be regarded as a ‘stepping stone’ into pursuing a career as an advocate, because both profession stem from same vocational PEAT course. An advocate could be seen as a better qualified solicitor, because from the PEAT foundation the student essentially pursues an additional course. The divide is clear in practice because an advocate alone has higher rights to appear before a court, whereas in England and Wales many solicitors have the opportunity to gain rights before court. \textsuperscript{15} Unfortunately, we were unable to collect data to evaluate whether there is a valid perception amongst DLP students and practicing lawyers in Scotland. The Scottish focus on vocational practice has also drawn critics from within its ranks. Some have argued that the PEAT course in particular prepares students for practice without establishing other skills and attributes required for the profession. (Matheson, 2011)

In our view, the common vocational starting point for both professions again offers greater

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\textsuperscript{13} Introduced by The Law Society of Scotland in 2011, for the application cycle beginning 2011-2012.

\textsuperscript{14} See the “Introduction” above

\textsuperscript{15} See below: “The Current System”
flexibility and financial viability than the legal education system in England and Wales. However, we question the ranking of the professions. A realistic appraisal of solicitors and barristers in England and Wales would acknowledge that the former has access to many of the rights as the latter: the split in Scotland still remains stark. Although meritocratic ranking in itself should not necessarily be avoided, it is possible that maintaining such a stark divide between the professions would only fan the flames of any preconceptions potential students might have, about the traditional roles and lifestyles of the professions. Furthermore, any attempt to immediately introduce a Scottish-style system in England and Wales would disregard the development in barrister-solicitor relationship, which sees solicitors sharing many of the rights as barristers. An overarching scheme which considers barristers and solicitors training equally and which maintains the flexibility to move between each profession is preferred. We consider the viability of such a scheme below.

Regulation

Current system

Despite the fact that solicitors and barristers are progressively permitted to perform more and more of each other's work e.g. solicitors can now acquire higher rights of audience enabling them to appear before senior courts and barristers are largely permitted to take instructions directly from the public, the regulation of both professions is still based more on their formal status as solicitor or barrister than the nature of their work.

Thus, for example, the Solicitors Regulation Authority (SRA) regulates all solicitors, including those who have qualified as solicitor advocates and appear before courts - the SRA produces a separate Code for Advocacy, which in any event largely models the section on advocacy in the Bar Standards Board (BSB)’s Code of Conduct for barristers. However, major changes to legal service regulation were brought about when the Legal Service Act 2007 (LSA 2007) was enacted. LSA 2007 more fully details the roles of the Bar Council and The Law Society (s.27 LSA 2007) which hold overall responsibility for their regulatory arms BSB and SRA respectively. It also creates an overarching regulatory authority: the Legal Services Board.

It may be questioned whether the current system is satisfactory as there appears to be no reason why the same functions performed by different (in the formal sense) people should be regulated separately, despite the enactment of LSA 2007. There is also the potential risk that this may give rise to divergences if the two regulatory boards do not coordinate with each other as closely as they should. Indeed, it may be further argued that a unitary body regulating the whole legal industry may be preferable to the current system. At the end of this section we will consider the changes to legal service regulation brought about by LSA 2007. We will briefly consider whether the enacted changes address the problems highlighted in this section.

Alternative model 1: Division of regulatory responsibilities by reference to nature of work

From the perspective of consumer protection, where two professionals perform the same work, they should be subject to the same regulation and it is neither here nor there what their actual job

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16 See below: “The Current System”
17 See below: “Legal Professions(s): Possibility to Be Both Barrister and Solicitor”
18 Received Royal Assent 30th October 2007
titles are. The current system where the BSB has exclusive jurisdiction over barristers and the SRA has exclusive jurisdiction over solicitors is thus problematic, particularly given the gradual assimilation of the two professions over the years.

To use a common example, a solicitor advocate can now appear before the higher courts. In terms of the service rendered to a consumer, this is no different from that provided by a barrister. Yet because a solicitor advocate is formally a solicitor, even in performing advocacy work, he/she is subject to regulation by the SRA rather than the BSB, which arguably has more expertise in this area. From a consumer’s point of view, it scarcely makes sense that a solicitor when wearing an advocate’s hat should not be subject to identical rules (and by extension to the same regulatory body) as applicable to his/her barrister counterparts.

In practice, however, the risk of different regulatory rules being applied to identical functions performed by solicitors or barristers may be overstated as continuing dialogues between the two regulatory bodies ensure that the divergence of rules has so far been avoided. Take the example of the cab-rank rule, which stipulates that a barrister is in principle required to act for any client regardless of any personal belief he/she may have formed as to the ‘character, reputation, conduct, guilt or innocence of that person’. (Bar Standards Board, 2012b) In 2009, the BSB argued that the cab-rank rule should extend to solicitor advocates. (Baksi, 2009) The Law Society was initially reluctant on the grounds that solicitors had always been allowed to appear in lower courts without being subject to the rule and there was no reason why this should not be extended to higher courts; it however backed down later and the cab-rank rule is now found effectively replicated in the Law Society’s Code for Advocacy. (Solicitors Regulation Authority, 2003)

A system of mutual trust and cooperation between the regulatory bodies however is not foolproof and it must be emphasised that for a considerable period before the Law Society acquiesced to the BSB’s demand solicitor advocates were indeed subject to different rules from those regulating barristers.

In view of this, there is much to be said for dividing regulatory responsibilities by reference to the nature of the work rather than the formal job title of an individual. As to the question of how such responsibilities should be divided, in our view in principle such allocation should be effected with reference to the relative expertise of either regulatory bodies. To put it in another way, the BSB should be tasked with regulating traditional work of barristers e.g. advocacy while the SRA should be tasked with that of solicitors e.g. direct contact with clients. Naturally, the precise demarcation requires more careful consideration but that is for another time.

Such alternative system, however, also has its drawbacks. Leaving aside the intuitive objection that the ‘Bar’ Standards Board should have jurisdiction over ‘solicitors’ and vice versa, the system requires difficult demarcation of responsibilities, especially considering both professions have changed over the years in so many respects that the notion of ‘traditional work’ may be illusory. There is also the risk of conflicts of jurisdiction between the two bodies. Finally, from the point of view of consumers, such division of responsibilities has the potential of causing unnecessary confusion as consumers are required to acquaint themselves with the respective jurisdictions of the respective bodies in order to complain to the right one.

Alternative model 2: one regulatory body

Arguably, the easy way to deal with many of the objections to having two regulatory bodies with
overlapping responsibilities is simply to merge them and create one central body. This is a neat solution and in our view seems difficult to challenge.

Nevertheless, considering how entrenched the current division of the profession is, it is to be envisaged that any attempt to merge the regulatory bodies will be met with resistance from some practitioners. There may also be a further argument that the retention of two bodies will enable them to be more specialised and thus ensure better regulation. This however has to be weighed against the accessibility and simplicity of having one regulatory body for consumers.

Holding regulators accountable under the Legal Services Act 2007 (LSA 2007)

The Legal Services Board came into existence 1st January 2009 as an ‘umbrella’ supervisory authority that is independent from government. It became operational exactly one year later, and supervises the regulatory powers of ‘approved regulators’ which include the regulatory arms of The Bar Council and The Law Society. The Board supervises ‘reserved legal activities’ (s.12(1) LSA 2007) regulated by bodies like the BSB and the SRA, such as the exercise of rights of audience and the conduct of litigation. The first section in LSA 2007 lists ‘regulatory objectives’ including the protection and promotion of the public interest and interests of consumers, which The Board must uphold in its supervisory role. (s.3 LSA 2007)

The Board can recognise new regulators and direct regulators to take rectifying action if inter alia any of the regulatory objectives have been breached by the approved regulators.

LSA 2007 also creates a single body which manages complaints against all the legal services, including against barristers and solicitors. The Office for Legal Complaints established a Legal Ombudsmen, to whom complaints can be sent by consumers unhappy with the respondent’s legal service and which were not adequately dealt with by the respondent service provider. Disciplinary matters remain solely with the individual regulators like the BSB and the SRA. (s.142 LSA 2007)

The reforms to legal service regulation enacted by LSA 2007 were welcomed by The Law Society (The Law Society, 2007), and the provisions do address some of the issues we have raised in this section. We noted that a model which divided regulatory responsibilities according to the nature of work involved could create unnecessary confusion for consumers, who would have to be familiar with the jurisdiction of each body to correctly address a complaint. The Legal Ombudsmen created by LSA 2007 is the sole gateway for all service complaints whether that service was delivered by a solicitor or a barrister. Indeed, all regulatory bodies are subject to shared duties in a statutory framework which is supervised and upheld by the Legal Services Board. Therefore, it is arguable that maintaining the distinction between the regulatory bodies appreciates the practical expertise each body brings to the regulation of its profession, and LSA 2007 accommodates this partition of regulatory responsibilities by imposing common duties and regulatory objectives.

However, one could argue that LSA 2007 leaves a number of issues unaddressed. For instance, subjecting the BSB and SRA to overarching duties might not guarantee that dialogue that exists

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19 Other Approved Regulators include The Council for Licensed Conveyancers and The Institute of Legal Executives (Sch.4, part 1 LSA 2007), however for the purposes of this report we have only considered the regulation of barristers and solicitors.
20 The provisions governing this area can be found under Part 6 of LSA 2007
21 For instance, a duty to promote the s.1 regulatory objectives (found under s.28)
between the two bodies would continue because both bodies might rely on the stricter rules in LSA 2007 which govern their relationship and duties. From a practical point of view the inflexibility of this approach suggests that relying solely on the LSA 2007 would be unlikely. The problem of trying to demarcate the functions of ‘barristers’ and ‘solicitors’ also remains. LSA 2007 does specify which ‘reserved legal activities’ are regulated by The Bar Council and The Law Society, and details extensively the procedure for altering this list. Nonetheless, it does not indicate how to determine the demarcation and so the question is still left open for debate.

In respect of the issues we raised earlier in this section, when considering alternative models, we are of the opinion that LSA 2007 constitutes a compromise. It accommodates the specialisation of multi-regulatory bodies alongside a neater system and easier access for the consumer, by introducing a single point of complaints and a greater consistency between the regulatory bodies through the supervision by the Legal Services Board.

### Legal Profession(s)

#### Current system

As stated in the first section, England and Wales still formally maintains a split between barristers and solicitors. As early as in the late 1970s, however, there have been calls that the professions should be amalgamated (Hazell, 1979) and significant reforms have since been introduced to the organisation of the legal profession: e.g. higher rights of audience may now be acquired by solicitors after passing an Advocacy Assessment while barristers may now be instructed by members of the public directly under the Public Access Scheme. Indeed, while total fusion of the two professions has not yet taken place, the more accurate way to characterise the current system is one of partial assimilation.

Advantages and disadvantages of maintaining the split have already been examined in the first section and will not be repeated at length here. Generally, those in favour of it points to benefits gained through specialisation while those against it emphasise the potential of lowering legal costs in a total fusion model.

#### Alternative model 1: total fusion

In most Civilian countries, there is not a split in the legal professions corresponding to our division between barristers and solicitors. Indeed, Civilian lawyers are multi-specialist and carry out all functions performed by solicitors and barristers here. This is commonly referred to as the ‘fused profession’ model. Nor is such model peculiar to the Civilian legal traditions, Canada and the United States are prominent examples where the legal profession is fused despite the Common Law origins of their legal systems.

From a consumer’s perspective, as adverted to in the previous section, this enables a consumer to avail him/herself of the exclusive services of one individual rather than having to employ at

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22 Discussed above in relation to the cab-rank rule  
23 Governed by the provisions listed in Sch.6 LSA 2007  
24 E.g. all of Continental Europe  
25 although in countries like France there is a separate category of legal practitioners known as notaires one of whose main functions is to witness signatures on documents
least two different individuals, a solicitor and a barrister. This not only reduces costs but also enables the client to have full control over who represents him from start to finish.

As to how lawyers should be called in a fused profession, the options abound. In Canada, New Zealand and those states in Australia that have a fused profession, they have the title ‘barrister and solicitor’. In America, they are known as “attorneys”. Other alternatives include ‘advocate’, ‘counsel’, and indeed ‘lawyer’ and ‘legal practitioner’.

Alternative model 2: possibility to be both barrister and solicitor

If the objection is that the split between the professions is too entrenched for total fusion to be accepted, at least in the short term, there is a further alternative. At the moment, while routes exist which allow barristers or solicitors to switch from one profession to another, it is not possible for an individual to be both barrister and solicitor.

The notion that one can be both barrister and solicitor may sound odd but in truth, as stated above, under the current system some individuals are already performing functions traditionally regarded as the preserve of the other profession. This suggests that there is no inherent objection to allowing an individual under the English system to perform roles of both barristers and solicitors.

Such model will further promote mobility within the professions and afford greater choices to prospective lawyers. From a consumer’s perspective, apart from the advantages already stated above in discussing the total fusion model, consumers retain a choice to go to a traditional firm of solicitors who in turn will employ a barrister from a chambers to represent them.

Given the novelty of this suggestion in this country, however, difficulties necessarily arise in relation to how and by whom a doubly qualified person should be regulated. There is also the uncertainty as to the kind of structure such a person can operate in.

Model 3: Alternative Business Structures under LSA 2007

LSA 2007 contains provisions for a new system of regularisation of legal services into Alternative Business Structures (ABS). ABSs will in theory carve a new surface on both professions, by introducing the opportunity to form a completely different business entity which can involve which involve non-lawyers or non-legal entities participating in legal service26 by virtue of holding interests, like an equitable stake, in the ASB. (s.72 LSA 2007) ABSs are able to carry out “reserved legal activities”27 but have to be licensed by the Legal Service Board or by an authorized regulatory authority which has been granted licensing powers under s.72 and Sch.10 LSA 2007.

Despite over 92 applications for a license from the SRA, at the date of publication none have been accepted although it is expected that many will have been accepted by the end of February 2012(Rose, 2012). Therefore, it is still unclear how ABSs will actually affect to regularisation of barristers and solicitors and their relationship. Statutorily, legal practitioners like solicitors and barristers will remain legal practitioners in the ABSs and the non-lawyer ‘non-participants’ are

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26 This might be inter alia as a manager of the partnership, as a member, or as a stakeholder or invester.
27 See above – “Regulation: holding regulators accountable under the Legal Services Act 2007 (LSA 1007)”
explicitly obliged by s.90 LSA 2007 to refrain from practice which will substantially contribute to
the licensed ABS from breaching its own duties under s.176 LSA 2007.

ABSs might introduce major structural changes. The addition of outside investment and
ownership could fundamentally change the traditional structures of law firms and chambers.28
Although the majority of barristers are self-employed, ABSs now offer a new chance for
barristers to enter business structures where practice is managed by a non-lawyer. Traditional
partnerships in solicitor’s firms could be restructured ensuring that a non-practitioner could still
share ownership of the firm or remain equitable partner. More radically, ABSs offer non-legal
businesses, like Tesco29, the chance to manage a legal practice under s.72(2) LSA 2007.

Despite these possible changes to professional structure and operation, ABSs have been
supported by many bodies including The Law Society, which was successfully granted licensing
power by the Legal Services Board. (The Law Society, 2011) Indeed, the capital generated by
outside investment could allow legal practices to expand. This is particularly true where
expansion of such firms would previously have been impossible in the current economic climate.
Aside from financial support, management opportunities from a range of corporate bodies
could accommodate the legal practice into the range of services it already offers and run a legal
practice within a general business plan aimed towards a well-established client list. Many have
argued that the new structures will now offer opportunities which were only normally available
to the select QCs or partners in leading commercial firms. (Jones, 2012)

However, many argue that ABSs threaten the present culture of legal practice and should be
treated cautiously. One could argue that the ‘Tesco Law Revolution’(Lind, 2012) would produce
competition which many law firm could not succeed in. It is possible that larger companies
could withdraw from employing traditional law firms and focus on building their own legal
practice for their pre-existing clients. Conversely, there are indications that the Bar, traditionally
independent, has given ABSs a ‘lukewarm’ response with only 18% of barristers in a recent
survey indicating that they would consider working in an ABS. (Geoff Pike, 2011) Therefore, it
seems unlikely that ABSs, at least not initially, will be taken up by practicing barristers and the
current structure of Chambers is unlikely to change dramatically.

We find it difficult to decide whether ABSs will prove to affect the relationship between
barristers and solicitors. ABSs are a new opportunity and offer a structural change whereby
solicitors and barristers could work together in legal practice under control by non-lawyers.
Recognising the changes within the legal profession over the last several years, we welcome
another, alternative opportunity for both members of the profession. However, we are unable to
conclude what their long-term impact will be in practice at this stage.

28 See above -- “Introduction: The Present Set-up”
29 Often cited by ABS critics: “Tesco Law” represents the corporate giant creating a new, one-stop legal service
Conclusion

We propose that the legal education system in England and Wales should have a common starting point for both barristers and solicitors. Having considered different models that could be followed, we consider that an education model similar to Hong Kong’s is preferable. Such a model would ensure prospective lawyers do not have to commit to a profession so early on in their professional training, lead to greater mobility between the professions and, more importantly, reduce the deterrent effect of the high costs associated with a legal education.

As the line between the professions has already blurred, with the rise of solicitor-advocates for instance, it would be unrealistic to adopt the Scottish model whereby all students will first qualify as solicitors as this assumes the maintenance of a rigid divide between advocates and solicitors. Ultimately, legal education is the gateway to the professions and so any prospective changes to the professions should begin with the reform of the educational system. Significantly, changing the gateway to the professions in itself can improve access to becoming a barrister or solicitor.

We believe that any attempt to reform the professional regulatory bodies, by moving towards a single body or distribution according to the nature of work, would be uneconomic and impractical in the current climate. From the consumers’ perspective, holding barristers and solicitors accountable for their work would be easier where there is a single body that would hear all complaints and could deal with “both sides” of the complainant’s case. However, we have already outlined that the recent LSA 2007 reforms help meet this need by creating the new Office for Legal Complaints. Moreover, both the BSB and SRA are now subject to a common statutory framework and are ultimately supervised by the Legal Services Board. The LSA 2007 has thus made effective progress towards a cohesive, regulatory body which still retains expertise in both professions. Although the LSA 2007 still leaves some issues unaddressed, it would be uneconomic and inefficient to reverse these reforms so soon, and it may in practice be very difficult to merge the two bodies suddenly because they are so well-entrenched and intertwined in either profession. Any change will have to come gradually.

All our previous recommendations follow an assumption that the current professional divide between barristers and solicitors is maintained. It can be questioned whether completely merging the professions, or following an intermediate model that we previously considered, would conclusively decide how the new system should be regulated and educated. We believe that the recent statutory reforms and the more gradual changes in legal practice (such as solicitors taking on more advocacy) indicate that the two professions are, slowly, moving towards a merger.

However, both professions have long histories and are firmly rooted in the English legal tradition. Therefore, it may be very risky to attempt to force the two professions together suddenly and ignore the organic and careful progression up to this point; the repercussions of a forced merger or sudden part-merger could also be extensive and costly. It will be interesting to see what role ABSs are going to play in reality, and how this will affect the barrister-solicitor relationship. Indeed, this could indicate how receptive either profession would be to more radical changes. That would however be the call for another paper.
Bibliography


s.12(1) LSA 2007
s.142 LSA 2007
s.27 LSA 2007
s.3 LSA 2007
s.71 LSA 2007