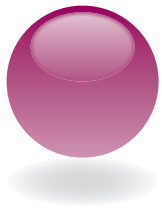

English Legal System

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The legal profession

Learning objectives

By the end of this chapter you should:

- be able to describe the roles of solicitors and barristers in the English legal system;
- be able to identify the basic business models of legal practice and the constraints of such organisations;
- have an understanding of the rules affecting practice as a solicitor or a barrister;
- be able to identify the regulatory organisations overseeing solicitors and barristers and be able to discuss the issues concerning regulation; and
- be able to take part in the debate as to whether the two main branches of the legal profession should be fused into one.

Talking point

'Trucking giant Eddie Stobart enters legal market with barristers' business' was the eye-catching headline in The Lawyer in May 2012. The article explained that the trucking company planned to take advantage of the new opportunities afforded by alternative business structures (ABS) to launch a legal service to connect businesses directly to barristers without having to instruct a solicitor.

The article went on to state 'Stobart Barristers, the new service formed by the Stobart Group, has said it can cut the cost of barristers' services by charging clients a fixed fee and using paralegals instead of solicitors to help prepare a case.' In July 2013 the proposal became a reality when the Law Gazette reported that Stobarts had been granted an alternative business structure licence from the Solicitors Regulation Authority.

The idea of ABS is to open up the provision of legal services to management and input from non-lawyers. An ABS is a regulated organisation which provides legal services, but has some form of involvement from non-lawyers. The non-lawyer input can be either at management level or as an owner, such as an investor or shareholder.

Do you think that this is a good idea? Would you be happy to obtain legal advice via a company primarily known for its haulage business? Would the fact that the ABS is regulated by the Solicitors Regulation Authority influence your decision? Do you think that non-lawyers can add value to the provision of legal services?

Introduction

The past thirty years have seen major changes to legal practice and the legal professions. Some changes have been brought about directly by the professions, and some have been introduced by Acts of Parliament. Others have been necessitated by factors such as the increase in the volume and complexity of laws on the statute books and increased influence of the internet. A number of Acts of Parliament have sought to make legal services more readily available to members of the public and more responsive to the needs of consumers in order to break down barriers to competition to ensure that legal services are obtainable at the best price for the best service. The legislation includes the Administration of Justice Act 1985, which sanctioned licensed conveyancers and ended the conveyancing monopoly of solicitors and the Courts and Legal Services Act 1990, which stated in s.17(1), that the objective was:

> the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing, and probate services) by making provision for *new or better ways* of providing such services and *a wider choice of persons providing them*, while maintaining the proper and efficient administration of justice (emphasis added).

Under this Act, the barristers' monopoly to appear as advocates before the higher courts was ended and solicitors were given the opportunity to gain higher rights of audience.

The Access to Justice Act 1999 continued reforms relating to legal services. In particular it established the Legal Services Commission to oversee legal aid via the Community Legal Service and the Criminal Defence Service. The Legal Services Commission was abolished in April 2013, as a result of provisions in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, and replaced by The Legal Aid Agency which is now responsible for both civil and criminal legal aid and advice in England and Wales. (See chapter 11 on Access to Justice.)

In 2007 the Legal Services Act introduced alternative business structures for lawyers, with the aim of providing benefits for consumers by way of more choice, reduced costs, and greater convenience in accessing legal services. Sections of the Act have come into force on a number of different dates. The provisions in respect to ABS came into force in 2011. Under ABS, non-lawyers are permitted to part-own law firms and, it is hoped, the creation of multidisciplinary practices will lead to legal services and non-legal services being offered in combination. The Act has been referred to as 'Tesco law' because of an expectation, not yet realised, that supermarkets will provide legal services and compete with law firms.

The Legal Services Act also seeks to make the legal profession more accountable and transparent in relation to complaints. The self-regulation of the profession has been replaced by a scheme of independent safeguards. Regulation is undertaken by the Legal Services Board which has as its overriding mandate 'to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system'.

The reforms have generated much comment, both positive and negative, and when studying the legal profession, the reforms should be considered and evaluated. In essence, the discussion revolves around what is 'in the public interest'. Lawyers view this as meaning that a strong independent profession is required with high ethical standards and a high level of expertise: the price being that there must be restrictions and the cost may be high. The opposing view is that public interest requires competition, to improve efficiency, and that control by independent regulation is preferable

to self-regulation. To assess the arguments it is necessary to understand the rules governing the work of the legal profession and how they operate.

9.1 The legal profession

In England and Wales, unlike in many other legal systems, the legal profession comprises two distinct branches: barristers and solicitors. In addition there are other personnel providing legal services, such as licensed conveyancers and legal executives. This chapter will look at these different branches of the legal profession.

9.2 Solicitors

The job description of a solicitor has altered over time but their role has always involved representing individuals and organisations in their dealings with the law. The title of solicitor in the present-day sense was first used in the late nineteenth century.

Traditionally solicitors worked in partnerships, based in local communities, and undertook a broad range of work associated with day-to-day legal concerns: divorce, conveyancing, drafting wills, dealing with criminal and civil litigation. This is still the case with small firms ('high street' firms) but increasingly, solicitors work in large firms and as a result individual lawyers have to specialise in specific areas of the law. Large firms of solicitors ('commercial' firms) have a number of specialist departments, such as company/commercial, property, private client, and litigation. Many areas of the law are complex and the law can change on a daily basis. It is not possible for an individual solicitor to keep up to date with diverse areas of the law, as they may have done in the past, so solicitors have had to narrow their field of expertise and practice. In large law firms, within broad departments, smaller groups of solicitors will work in specialist units. For example, in the company department there may be sub-departments dealing with intellectual property, pensions, banking and finance, and insolvency. The biggest commercial firms have a huge array of specialist areas of expertise. It is instructive to look at the websites of some of the larger legal firms to find out how their business is organised on a departmental basis.

Example

A typical day for a commercial solicitor in a large specialist department

Work can be for a variety of clients or for one major client. A typical day may involve consideration of contractual documents, such as standard terms of business or contracts relating to intellectual

property (e.g. computer software). The work often involves drafting, amending, or negotiating contracts on behalf of a client. The day might start with a client meeting to discuss a contract for software provision, followed by a business development lunch with a local accountancy firm. Business development is a very important part of a modern lawyer's work and involves promoting and marketing the firm to local, regional, and often national or international businesses. Part of the afternoon might be spent meeting colleagues, considering business development issues such as how the current work of the firm in a particular commercial area can be expanded. Throughout the day telephone calls and e-mails from clients will be dealt with as well as the post that has arrived in the morning. At the end of the day, post will be checked and signed to be sent out.

All time spent, both on client matters and on internal administrative tasks is recorded, whether through a computerised time-management clock that runs whilst working on a particular file (used if working in the office) or through time recording, entered manually on the system, for work undertaken away from the office, such as meeting a client at their premises or going to another firm of solicitors for a meeting. Time recording is an integral part of a modern solicitor's day. The data collected forms part of the billing system and is a vital tool to assess how individual lawyers within a firm are performing. Each solicitor will have a yearly target for billable hours, client development, and fees generated.

This account is based on an interview with an experienced commercial lawyer in private practice.

Solicitors may also work 'in-house', that is as employees of a business or other organisation or also may be employed by local or central government. Many large companies and local authorities have their own legal departments and solicitors, as well as acting for the company in legal matters, may also perform other roles, such as company secretary.

An important issue arises out of the growth in the volume and complexity of the law. This has led to the creation of larger law firms, often with branches in a number of cities or countries, and an increasing specialisation in legal practice and the development of expertise. Sole practitioners and smaller 'high street' firms undertake a wide range of work such as conveyancing, drafting wills, administering estates, and the provision of legal advice on a range of issues, such as boundary disputes, employment matters, claims arising from the purchase of faulty goods or services. The main income streams of smaller firms will usually be based on fees from conveyancing and litigation, particularly criminal work. If this income is reduced by competition from larger firms offering the savings generated by economies of scale, then smaller firms may be unable to survive. The work required to deal with small, low value disputes and claims, which may not be of interest to the larger firms, presently dealt with by sole practitioners and 'high street' firms, may therefore be left to pro bono organisations and individuals to deal with themselves.

Thinking point

The presence of law firms on high streets and in local communities is important with regard to access to justice. If large firms, which tend to be based in city centres, prosper at the expense of sole practitioners and smaller, local, firms then access to legal advice will be reduced.

9.2.1 The work of solicitors

Certain areas of work were once 'reserved' to the solicitors' profession. In other words, some types of legal work could only be undertaken on a commercial basis by qualified solicitors. Reserved areas of work included administering a deceased person's estate (probate), conveyancing, and the conduct of litigation. The solicitors' monopoly on conveyancing work was ended in 1985 by the Administration of Justice Act, which amended the Solicitors Act 1974 and created licensed conveyancers. Following the implementation of the Act, licensed conveyancers became entitled to conduct conveyancing transactions for a fee. Information about licensed conveyancers can be found at: **www.conveyancer.org.uk/**.

The Legal Services Act 2007 allows non-solicitors to carry out some types of legal work, subject to authorisation and regulation. By s.12, areas of legal work, 'reserved legal activity', can only be carried out by 'authorised persons' (see s.18) or otherwise 'exempt persons' (see s.19). 'Reserved legal activity' means:

- the exercise of a right of audience;
- the conduct of litigation (see Sch.2) which means:
  (a) the issuing of proceedings before any court in England and Wales,
  (b) the commencement, prosecution and defence of such proceedings, and
  (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).' However, advocacy before a court is not part of the conduct of litigation;
- reserved instrument activity (for example, the preparation of any instrument of transfer or charge for the purposes of the Land Registration Act 2002);
- probate activities;
- notarial activities; and
- the administration of oaths.

(Note: an 'instrument' is a formal legal document in writing and 'notarial activity' is work carried out by a notary public.)

A person may be authorised to carry out a particular 'reserved legal activity' by a relevant approved regulator. As to the meaning of 'approved regulators' see s.20 and Sch.4. 'Approved regulators' include the Law Society, the General Council of the

Bar, the Institute of Legal Executives, the Council for Licensed Conveyancers, and the Chartered Institute of Patent Attorneys.

It will be an offence for a person to carry on a 'reserved legal activity' where a person is not entitled to carry out that activity.

The impact of Part 3 of the Legal Services Act 2007 is to allow individuals other than solicitors and barristers to undertake 'reserved legal activity' provided that they are authorised to do so under the Act.

See further chapter 11, 'Access to justice'.

Some legal services have always been able to be provided by non-lawyers. For example, advisors in law centres and Citizens' Advice Bureaux may give advice on employment, welfare, housing, or relationship issues. The roles played by these other individuals and bodies providing legal services are an important part of the discussion regarding access to justice. When considering the availability of advice to ordinary citizens it is important to consider the services provided not just by legal professionals but also by charitable organisations, pro bono schemes, and non-lawyers (see later).

9.2.2 Representation in court

Solicitors may appear on behalf of a client in certain courts, such as the Coroners' Court, magistrates' courts, and county courts. Solicitors may also represent clients at tribunals. Traditionally, a barrister had to be instructed where a client required representation in the higher courts. However, solicitors may now be awarded higher rights of audience, allowing them to represent clients in some or all of the following higher courts: the Crown Court, the High Court, the Court of Appeal, and the Supreme Court. Solicitors may be accredited for higher rights following the completion of an advocacy assessment based on the Solicitors Regulation Authority Higher Rights of Audience competence standards. There are separate awards for rights of audience for criminal and civil advocacy. Higher rights of audience were introduced by s.31 of the Courts and Legal Services Act 1990, as amended by the Access to Justice Act 1999. Further information on higher rights of audience can be found at: **www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page**.

Thinking point

At the end of 2012 approximately 4,000 solicitors (out of a total number of solicitors with practising certificates in excess of 120,000) had a higher rights qualification. Has this had an impact on competition in relation to the provision of advocacy services?

9.2.3 Sole practitioners and partnerships

The size of a legal firm can vary from one qualified solicitor (a sole practitioner) to firms with a global presence and over 3,000 solicitors. Some solicitors will be partners

in their firm. Partners will be either equity partners, who own a share of the business and therefore are entitled to a share of the profits of the business, or salaried partners who do not own a share of the business and, as the name suggests, are paid a salary. The other solicitors in the firm are referred to as assistant solicitors or associate solicitors (often associate is a title given as a reward after a number of years of service). In a legal partnership formed under the Partnership Act 1890, the partners own the firm: each partner's share of the business depending upon the terms of the partnership agreement. Most firms designate one of the partners to act as managing partner and may also have a partnership committee to deal with the management of the firm.

Other partners may also be given specific roles within the firm, such as being in charge of recruiting trainee solicitors and managing them during their training contract. Assistant or associate solicitors can become partners through selection and promotion by the existing partners of the firm. Sometimes promotion to partnership can involve being asked to contribute capital (money) to the firm. This capital contribution will be reflected in the firms' partnership agreement.

Until 2001, solicitors were only able to practise as sole practitioners or in partnerships (under the Partnership Act 1890). Since the Limited Liability Partnerships Act 2000 was introduced in April 2001, solicitors have been able to form limited liability partnerships (LLPs). An LLP is a legal entity separate from its members. Therefore the LLP can own property, enter into contracts, bring legal proceedings, or have legal proceedings brought against it. In the same way as a partnership under the 1890 Act, the members (partners) of the LLP will usually have an agreement dealing with issues such as management of the business, admission of new members, and so on. Large commercial firms, and some smaller ones, have taken advantage of this opportunity.

Thinking point

Partnership under the 1890 Act or an LLP? One of the key attractions for adopting the new form of business structure is that the LLP is a separate legal entity from its members (the partners) and, as such, has liability for the debts of the business. If the LLP gets into financial difficulties, the partners are not personally liable for the debts. This position contrasts strongly with that of a partnership under the Partnership Act 1890, where each partner has unlimited liability for the debts of the partnership. However, this also means that it is the LLP, and not the individual partners, which owns the firm.

In his report reviewing legal services, published in December 2004, Sir David Clementi recommended that solicitors (and barristers) should be permitted to enter into 'legal disciplinary practices' (LDP). The recommendation was enacted under provisions in the Administration of Justice Act 1985 (AJA) and the Legal Services Act 2007 (LSA), and, as a consequence, amendments were made to the Solicitors Code of Conduct

(the Code) to permit LDPs. An LDP is defined as 'a form of recognised body providing legal services where the owners and managers are not exclusively:

- solicitors of England and Wales
- registered European lawyers
- registered Foreign Lawyers.'

The change was introduced on 31 March 2009, allowing up to 25 per cent of the partners in firm to be non-lawyers. This has allowed barristers, legal executives and other professionals to become partners in law firms.

The Clementi Report is considered in more detail later.

9.2.4 Qualification

Qualification as a solicitor is generally achieved in three stages. The first academic stage is the completion of a qualifying law degree or the graduate diploma in law (GDL), for graduates with non-law degrees, or the Chartered Institute of Legal Executives (CILEX) Professional Qualification in Law. The Law Society and Bar Council prescribe the subjects that must be studied and passed in a qualifying law degree.

Thinking point

At present a qualifying law degree must include the following subjects: constitutional and administrative law, contract law, criminal law, equity and trusts, EU Law, land law, and tort. Why do you think that study of these particular areas of law is viewed as fundamental for all lawyers?

Further detail about the CILEX qualification is included subsequently under the heading, *Legal Executives*. Following successful completion of the academic stage, a student must then enrol on the vocational stage: the legal practice course ('LPC'). This is a one-year course that puts academic legal theory into practice and equips students for their training contract. Following satisfactory completion of the LPC, the practical stage of the training process must be commenced. This is a training contract with a firm of solicitors or local authority. The number of training contracts available is small compared to the number of students successfully completing the LPC and applying for a training contract. Competition is therefore fierce. The training contract is currently regulated by the Solicitors Regulation Authority and lasts two years, during which time the trainee must work in three different areas of practice. For example, a typical training contract at a medium sized firm could include four 'seats': family law, conveyancing, civil litigation, and crime. A minimum level of salary for trainees is also specified by the SRA. At the end of the successful completion of the two-year training period, a trainee is admitted as a fully qualified solicitor.

Critical debate

The traditional training route to become a solicitor takes at least six years. The introduction of fees for undergraduate courses and the fees charged for GDL and LPC courses means that prospective trainee solicitors will have accumulated a great deal of debt before seeking a training contract. There is no guarantee of a training place after completion of the academic and vocational stages of training. Numerous studies and reports have suggested that the system discriminates against prospective lawyers from lower socio-economic groups and ensures that the profession remains the preserve of a narrow section of society. Do you agree?

The Legal Services Board 2010 report 'Barriers to the Legal Profession' can be accessed at, **https://research.legalservicesboard.org.uk/wp-content/media/2010-Diversity-literature-review.pdf**

Once qualified, the Solicitors Regulation Authority requires solicitors to undertake a minimum of sixteen hours per year of continuing education (CPD).

There has been much recent discussion as to whether the qualification route for solicitors is fit for purpose and there have been a number of reviews and proposals for change. The Solicitors Regulation Authority has undertaken a review of the way in which solicitors qualify – the Training Framework Review. The process focused primarily on the training contract period and the format and content of the legal practice course. A number of consultation papers were produced including the Training Framework Review, in July 2001, September 2003, and March 2005.

Despite a number of wide ranging proposals and suggestions for change, no concrete proposals were made and these plans for reform were shelved in 2005. However, the discussion and debate continued as to whether legal education was fit for the demands of the professions in the twenty-first century. On 19 November 2010, the Solicitors Regulation Authority, the Bar Standards Board, and the Institute of Legal Executives Professional Standards body announced a joint review of legal services education and training, the Legal Education and Training Review (LETR). As the introduction to its website states, this 'constitutes a fundamental, evidence-based review of education and training requirements across regulated and non-regulated legal services in England and Wales'.

The review body examined:

- the perceived strengths and weaknesses of the existing systems of legal education and training across the regulated and unregulated sectors in England and Wales;
- the skills, knowledge, and attributes required by a range of legal service providers;
- the potential to move to sector-wide outcomes for legal services education and training;
- the potential extension of regulation of legal services education and training for the currently unregulated sector;

- recommendations as to whether and, if so, how, the system of legal services education and training may be made more responsive to emerging needs;
- suggestions and alternative models to assure (sic) that the system will support the delivery of:
  i. high quality, competitive, and ethical legal services;
  ii. flexible education and training options, responsive to the need for different career pathways, and capable of promoting diversity.

The LETR reported in June 2013. Many legal education providers, and the professions in general, had expected radical proposals for overhauling the provision of legal education; however the final report was generally regarded as a missed opportunity. It was hoped that the review would recommend that a requirement for regular reaccreditation of skills be introduced, as seen in the medical profession, but this was not included. The report did recommend greater emphasis on ethics and client care skills. It also recommended that lawyers should become more reflective practioners and that continued professional development (CPD) should provide 'intentional, meaningful learning' and not just be a box ticking exercise. The report can be accessed at: **http://ow.ly/moZtW**.

9.2.5 The composition of the solicitors' profession

Statistics are published annually by the Law Society. In 30 June 2013 there were 167,457 solicitors on the Roll, i.e. listed as being paid-up and qualified members of the profession. Inclusion on the Roll does not mean that the person can practise as a solicitor: a practising certificate is required in order to do this.; 127,068 of the enrolled solicitors had a practising certificate (76 per cent of those on the Roll). Of those solicitors holding practising certificates, approximately 47 per cent were women and 12 per cent were from minority ethnic groups.

The statistics show that the majority of law firms are relatively small, 86.2 per cent have four, or fewer, partners. Firms with twenty-six partners or more represent 2 per cent of law firms. However, this 2 per cent employ over 40 per cent of solicitors in private practice.

Statistics can be found at: **www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends.law**.

Key point

In seeking to critically appraise any set of circumstances, it is important to have a sound empirical base for your argument. Part of this knowledge might be statistical information. It is worthwhile to look at the statistics to see if trends and patterns can be discerned.

9.2.6 The Law Society and the Solicitors Regulation Authority

The Law Society has traditionally both represented the interests of solicitors and regulated their activities in England and Wales. For example, it has dealt with allegations of misconduct and complaints from the public and also represented solicitors' interests, for example in any consultations with central government. Its powers and duties are set out in the Solicitors Act 1974.

The dual roles, of enforcer and representative organisation, performed by the Law Society were criticised on the basis that there was a potential conflict of interest. Sir David Clementi, in the review of the regulatory framework for legal services (see later), recommended that the roles should be split.

In the light of the recommendations, the Law Society established two regulatory bodies, one dealing with consumer complaints, the Legal Complaints Service, and one governing rule-making and legal education, the Solicitors Regulation Authority.

You can find out more about the Solicitors Regulation Authority at: **www.sra.org.uk/**.

The representative function is still undertaken by the Law Society. Information about the Law Society is found at: **www.lawsociety.org.uk/home.law**.

9.2.7 Complaints about solicitors

If a complaint is made about the standard of work carried out by a law firm or an individual within the firm, the complaint must first be directed to the firm.

All law firms are required to have a designated complaints handler who will try to resolve any client complaints in the first instance. If the client is not satisfied with the outcome of the internal investigation into the complaint they can contact the Legal Ombudsman (LO). The LO was set up by the Office for Legal Complaints, following the 2007 Legal Services Act. The service is free, independent, and impartial and the LO will investigate the complaint to try to assist the parties to resolve the matter. If the matter cannot be resolved informally then a report will be produced which can then be accepted by the parties to the dispute or referred to an Ombudsman for a final, binding decision. Details of the LO can be found at **www.legalombudsman.org.uk/**.

9.2.8 Solicitors Regulation Authority Code of Conduct

All solicitors must act in accordance with the Code of Conduct that governs their behaviour and sets out the manner in which their work must be conducted.

The Solicitors Regulation Authority publishes the conduct guide for solicitors (the SRA Code of Conduct). The rules in this guide set out the duties and responsibilities of solicitors towards their clients and deal with issues such as client confidentiality, conflicts of interest, information to be provided to the client, and complaints procedures.

The latest version of the Code is the SRA Code of Conduct 2011 and the most recent changes were published in April 2013. The new Code is part of a handbook which sets out the standards and requirements which are expected of any individual or body regulated by the SRA. The change in approach from the previous regime, which listed a set of rules, to the new outcomes-focused regulation (OFR) is designed to benefit clients as well as being in the general public interest. The SRA intend that the new Code of Conduct will 'support not only consumers of legal services, but will also support the independence of the legal profession and its unique role in safeguarding the legal rights of those it serves'. The Code comprises of a set of Principles requiring all solicitors to:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow…independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to…clients;
6. behave in a way that maintains the trust the public places in…[solicitors] and in the provision of legal services;
7. comply with…legal and regulatory obligations and deal with…regulators and ombudsmen in an open, timely and co-operative manner;
8. run…business or carry out…role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run…business or carry out…role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

In order to achieve these Principles the Code goes on to list a number of Outcomes that firms and individuals are expected to achieve in order to comply with the Principles, and Indicative Behaviours that demonstrate the sort of conduct expected to establish compliance with the Principles. The handbook and Code of Conduct can be found at: **www.sra.org.uk/solicitors/handbook/welcome.page**. Failure to comply with the conduct rules may amount to evidence of inadequate professional services in the context of a complaint against a solicitor.

9.2.9 Liability of solicitors

When a solicitor is employed by a client, the relationship between them is contractual and each party may be sued should they fail to meet the obligations set out in the contract. Solicitors may also be sued for negligence if loss has been caused to someone to whom they owed a duty of care, such as a client or beneficiaries under a will (see later). The work undertaken must be carried out with the appropriate standard of care and skill.

Example

In *White v Jones* [1995] 2 AC 207, a law firm was sued in negligence by the beneficiaries of a will drawn up by a solicitor employed by the firm. The solicitor had failed to make amendments to the will, as instructed by the maker of it, which would have given a legacy to the beneficiaries. A delay on the part of the solicitor meant that the changes had not been made, and attested to, at the time of the maker's death. Despite the lack of a contractual relationship between the solicitor and the beneficiaries, the beneficiaries were able to bring a claim in negligence for the value of the legacies that they would have received, had the instructions been correctly carried out. In respect to liability in relation to litigation see at 9.3.12.

9.3 Barristers

Barristers are popularly portrayed wearing gowns and wigs, arguing their clients' case in a criminal court, perhaps the most famous depiction being Rumpole of the Bailey in the books by John Mortimer. However, barristers are not just criminal advocates.

They provide specialist legal advice and appear as advocates in both criminal and civil courts on behalf of their clients. Barristers' training focuses on, and reflects, the skills they are required to have to provide this support for clients. Most barristers operate as self-employed individuals, and they work in sets of chambers – essentially a group of barristers sharing premises and administrative facilities. The average set of chambers comprises of about thirty barristers, some of whom may be referred to as 'door tenants'. Door tenants are barristers who do not work full time in chambers, and who pay a reduced rent (sometimes a percentage on any cases coming to them through chambers).

Each set of chambers has a barrister's clerk who is responsible for administering the work that comes to the chambers by negotiating the brief fees and ensuring that the work is given to either the specific barrister instructed or, if no name is specified, to an appropriate advocate. The clerk acts as liaison between the barristers and the instructing solicitors. Part of the job is to organise the diaries of the barristers to ensure that the chambers work is dealt with efficiently. The chief clerk is usually supported by a number of junior clerks and fees clerks (responsible for billing) and, increasingly, by a manager who deals with marketing and human resources issues.

A barrister who is not a member of a chambers may be employed by a company, carrying out legal work for the company or, if employed by a law firm, to represent the solicitors' clients. Employed barristers may conduct litigation. Barristers may also be employed by central or local government or by the Crown Prosecution Service.

9.3.1 'Cab rank' rule

Barristers are subject to what is called the 'cab rank' rule, which means that a barrister must accept any case referred by a solicitor, provided that it is in their area of practice,

they are available, and a reasonable fee is payable. The rationale for the 'cab rank' rule is ethical. It is designed to ensure that all defendants, however unpopular, can be represented in court and it also acts to protect barristers from the anger of the community if they are called to represent someone accused of a terrible crime. In *Arthur JS Hall & Co v Simon* [2002] 1 AC 615, Lord Steyn doubted the effectiveness of the rule. His Lordship said,

> [i]t is a valuable professional rule. But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept.

However the Bar Standards Board has suggested that any step to remove the cab rank rule would result in a major threat to justice. The BSB report can be accessed at: **www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_ paper_28_2_13_v6__final_.pdf**.

9.3.2 Barristers' direct access to clients

Traditionally, barristers could not accept instructions directly from members of the public and had to be instructed by a solicitor on the client's behalf. This restriction was seen as anti-competitive and unnecessarily expensive because the cost of two lawyers was incurred when one would often be sufficient to do the work required.

A scheme was introduced by the Bar Council to allow some clients to instruct barristers directly. The scheme, known as Licensed Access, allows certain organisations, such as firms of accountants, or specific individuals, to apply to the Bar Council to be licensed to instruct barristers directly in an area of law in which those organisations or individuals are thought to have suitable expertise.

In 2004, the Bar Council's Public Access Rules came into force allowing barristers to accept instructions directly from members of the public in mainly civil work. Subject to certain exceptions barristers may not accept instructions from members of the public in the following areas of law: criminal, family, and immigration. The 'cab rank' rule does not apply when a barrister is 'instructed' by a member of the public.

See the Code of Conduct, Annex F2.

9.3.3 Restrictions on partnerships

Bar Council regulations used to prevent barristers from forming partnerships with one another. These rules were criticised by the Office of Fair Trading in a report published in March 2001, *Competition in Professions*.

Following the Legal Services Act 2007, and the introduction of Legal Disciplinary Practices, these rules have now changed. See 9.4.3 for further details.

9.3.4 Qualification

The qualification process for a barrister is similar to that of a solicitor. The academic stage is common to both barristers and solicitors. A qualifying law degree, or a non-law degree and the GDL, must first be successfully completed. Following the completion of the academic stage, the vocational stage must be passed. This is the Bar Professional Training Course (BPTC) which is a one-year course that aims to equip students with the skills and substantive knowledge they will need to practise as a barrister. The areas of study are:

Skills

- casework,
- legal research,
- general written skills,
- interpersonal skills,
- advocacy,
- conferencing,
- resolution of disputes out of court, and
- opinion writing.

Knowledge

- criminal and civil litigation,
- evidence,
- remedies,
- professional ethics, and
- sentencing.

Following completion of the BPTC, further work-based training with a set of chambers is undertaken. This is known as pupillage. A trainee barrister is called a pupil. During the one-year pupillage, the first six months are spent by the pupil observing and assisting his or her supervisor, undertaking legal research, becoming familiar with case papers, and attending court and case conferences. The pupil barrister may also shadow other members of chambers in order to see a wide variety of work. The pupillage supervisor will be an experienced member of chambers who has responsibility for supervising pupils and allocating work to them. A supervisor must be a barrister who has been called to the Bar (been qualified as a barrister) for at least seven years and is registered as a pupil supervisor with the Bar Council.

During the second six months of pupillage, the pupil will work as a barrister conducting his or her own cases, which may include making appearances in court on behalf of a

client. Although still technically under the supervision of the supervisor, pupil barristers at this stage have a large degree of autonomy in the work that they do, although they are still covered by the professional indemnity insurance of their supervisor. When not practising, a pupil barrister will continue to gain experience through shadowing their supervisor. Some pupillages are split, with the six-month periods being spent in different sets of chambers. Although pupillages used to be unpaid, pupil barristers must now be paid a minimum salary of £12,000 by their set of chambers.

It is very difficult to be successful in finding a pupillage because there are many more students completing the BPTC than there are pupillages available. Competition is therefore intense. Following completion of pupillage, most newly qualified barristers will try to secure a tenancy either with the chambers where the pupillage was undertaken or at another set. Tenancy is also difficult to secure and is not guaranteed, particularly in London. The Law Careers Advice Network estimates that only half of the eligible number of pupils obtains a tenancy with a set of chambers in a given year. Following completion of pupillage, a barrister will be responsible for his or her own case load, although some may also continue to assist more senior members of chambers. All barristers in chambers are self-employed and therefore have no guarantee of regular work or a regular income. Average earnings vary according to location, area of law, and experience.

In the same way that solicitors have to carry out CPD, barristers are required to undertake continuing education. By the end of their first three years in practice they are required to have completed a minimum of forty-five hours continuing education in areas such as case preparation and advocacy. After this the requirement is for twelve hours of continuing education per year.

Example

The daily work of a criminal barrister

Perhaps the most exciting element of a criminal barrister's life is its unpredictability. The criminal law is in a state of perpetual flux, and every day is different. There is no such thing as a typical day. The job of a prosecuting barrister is very different from that of defence counsel, and one barrister may be required to act for defendants and for the prosecution, in different cases, on the same day.

Some trials, particularly the most serious ones, are scheduled in the barrister's diary months ahead. Such cases may last several weeks and sometimes several months. On other occasions a barrister will be instructed to prosecute or defend an accused person the night before the trial is to be heard. This might happen if the barrister who had been instructed in the case is delayed in another court in an ongoing case.

On any day a criminal barrister may deal with between one and half a dozen cases. Each set of instructions is known as a brief. Having prepared the papers overnight, or early in the

morning, the barrister will have plenty to do at court before any trials or hearings commence. There may be sentencing hearings; concluding cases where the defendant pleaded guilty or was convicted some weeks before; and meetings with clients and instructing solicitors. If acting for the defence, a barrister will need to explain the likely sentence to the client and the client's family, and take instructions on potential points of mitigation.

Or there may be plea and case management hearings where a defendant will enter a plea of guilty or not guilty. If not guilty, a trial date will be set and the judge will make various orders to 'manage' the case and ensure it is ready for trial at the appropriate time.

On the day of a trial, prosecution counsel will need to check that witnesses are present, ensure all relevant evidence has been served, and then, in court, present the Crown's evidence. Defence counsel may, depending on the circumstances and the weight of the evidence, see if the client wishes to plead guilty to a lesser offence, and if so, try to negotiate this with the Crown prosecutor. If a trial is to take place, the client's instructions will need to be confirmed.

The official court day usually runs from 10 a.m. until 4.30 p.m. After court a barrister may have conferences to advise clients before collecting the next day's work from the clerks and the whole process begins again.

This information is based on an interview with an experienced criminal barrister.

Barristers undertaking civil work tend to make fewer court appearances than barristers working in criminal law; instead they will carry out more paper-based work to give specialist legal advice in writing (known as an opinion) or at a conference with instructing solicitors (with or without the client).

9.3.5 The Inns of Court

There are four Inns of Court: Gray's Inn, Lincoln's Inn, Middle Temple, and Inner Temple. The Inns date back to the fourteenth and fifteenth centuries and there used to be more than four of them. They were first established to provide accommodation and training for barristers and they therefore have a long and colourful history. But their chief function as the professional associations for barristers is to ***call men and women to the Bar.***

> ***called to the Bar:*** *To become a barrister a person must be 'called to the Bar' by one of the four Inns of Court. The prospective barrister attends a 'Call Night' at the Inn and is formally 'called to the Bar' in a ceremony watched by friends and family. The call to the Bar takes place after the successful completion of the BPTC.*

Each Inn is governed by the Masters of the Bench (or Benchers). Benchers are elected from the senior members of the Inn (Queen's Counsel (QCs) or senior members of the judiciary). Students wishing to qualify as barristers must join an Inn before they begin the BPTC and they are required to attend a minimum number of twelve 'qualifying sessions' at their Inn before they can become barristers. Most of these will be completed by a student attending a dinner at the Inn. Each dinner counts as one qualifying session. Dinners are often accompanied by educational events, such as speeches or

debates. Dining is also seen as an opportunity for students to meet practising barristers and senior members of the profession. Qualifying sessions can also be accumulated by attendance at other events, such as education days and advocacy training courses.

You can find out more about the Inns of Court at the websites listed:

- **www.graysinn.org.uk/**
- **www.innertemple.org.uk/**
- **www.lincolnsinn.org.uk/**
- **www.middletemple.org.uk/**

9.3.6 Deferral of call

A student can call him or herself a barrister once called to the Bar: that is having completed the BPTC and attended the requisite number of qualifying sessions at their Inn. This is the case even though the barrister cannot practise because he or she has not completed pupillage. The Bar Council considered that this system should change so that only those who had successfully completed pupillage would be entitled to call themselves barristers. This proposal is known as deferral of call and caused substantial debate amongst members of the Bar and providers of Bar Professional Training Courses. However, despite wide consultation in 2007, the proposals for reform were not implemented and the situation remains that a person who has passed the BPTC and been called to the Bar can call him or herself a barrister.

9.3.7 Queen's Counsel (QCs)

QCs are the most eminent and skilled members of the Bar. QC stands for Queen's Counsel. Appointments to Queen's Counsel are made by Her Majesty the Queen by Letters Patent following recommendation by the Secretary of State (if there is a king on the throne the title is KC or King's Counsel). A QC is often referred to, in colloquial terms, as a 'silk' because they wear silk gowns rather than the basic stuff gown worn by a junior barrister. All barristers, of whatever age or call, are known as juniors if they are not QCs. The purpose of the appointment to the rank of QC is to recognise outstanding ability as an advocate, although the overall legal abilities of an applicant and his or her professional qualities are also important.

The system of appointing Queen's Counsel has been the subject of consultation. In March 2001, the Office of Fair Trading published a report *Competition in Professions*, which questioned the relevance of the rank of QC as far as consumers were concerned, in part owing to the lack of direct access by members of the public to barristers at that time, the criteria used to award the rank of QC, and whether the award served to distort competition by the effective reservation of certain types of work to QCs and the increase in fees once QCs became involved in cases.

In July 2003, the Lord Chancellor, Lord Falconer, published a consultation paper, *Constitutional reform: the future of Queen's Counsel*. The paper sought views on the role of QCs, the advantages and disadvantages of the system, and possible changes to the way in which the rank is awarded. Responses to this consultation were published in January 2004.

Prior to 2005 the appointment system required application to the Lord Chancellor by barristers and, since 1994, solicitors with higher rights of audience. The Lord Chancellor would then recommend suitable applicants be invited to take silk after consultation with fellow members of the Bar, the judiciary, and solicitors. Published criteria were used against which the applicant's abilities were assessed and applicants were compared with existing QCs and other applicants in their area of practice. Those awarded the rank are regarded as leaders of their profession and all those who meet the necessary thresholds are appointed.

Since 2005, the appointment of QCs has no longer been a governmental recommendation but is by the independent Queen's Counsel Selection Panel, established by the Bar Council and the Law Society with the support of the Department for Constitutional Affairs, to administer the application process. A nine-person independent selection panel makes recommendations to the Secretary of State after consideration of individual applications. The Secretary of State cannot remove or add names to those selected by the panel and passes the recommendations to the Queen for approval. Applicants are assessed in relation to seven competences: integrity; understanding and using the law; oral and written advocacy; working with others; and diversity.

The independent nine-member panel includes a lay chair plus two solicitors, two barristers, a judge, and three further lay members.

You can find out more about the appointment of QCs at: **www.qcapplications.org/**.

9.3.8 The composition of the barristers' profession

Statistics are generally published annually by the Bar Council. As at December 2010 (the most recent date that published statistics seem to be available), there were 15,387 practising barristers (self-employed and employed), of which 65 per cent were male and 35 per cent were female.

The total number of chambers was 734, of which 347 were located in London and 387 outside of London. There were 419 sole practitioners and 2,967 employed barristers.

Statistics can be found at: **www.barcouncil.org.uk/about-the-bar/facts-and-figures/ statistics/**.

9.3.9 The Bar Council

The General Council of the Bar (Bar Council) is represents barristers and 'promote[s] [the role of barristers] at the heart of the justice system in England and Wales'. It was founded in 1894 and represents the interests of barristers on a range of matters. In the

same way that the Law Society has been affected by the report of Sir David Clementi on the regulatory review of legal services, the Bar Council has also had to review its regulatory and representative roles. The Bar Standards Board was set up to oversee the regulatory side of the Bar and has a separate membership from that of the Bar Council. The Board deals with issues such as changes to the barrister's Code of Conduct as well as education and training and complaints against barristers. It has set up a number of regulatory committees to deal with these matters.

The Bar Council meets approximately seven times a year. Its members are barristers who represent chambers or court circuits in different parts of the country, or who are elected to the Council. Over 100 barristers are members of the Council. The Bar Council objectives include protecting the public interest and promoting and maintaining adherence to professional principles.

Details about the Bar Council can be found at: **www.barcouncil.org.uk/**.

9.3.10 Complaints about barristers

Prior to 2010 the Bar Standards Board investigated all complaints about barristers. From 6 October 2010, all complaints about barristers must be made to the Legal Ombudsman. As with complaints about solicitors, the Legal Ombudsman will deal with complaints about the service received from barristers. Any complaints about conduct, as opposed to professional service, will be referred by the Legal Ombudsman to the Bar Standards Board because complaints about conduct may amount to professional misconduct. This could include misleading the court or failing to act in a client's best interests, or acting contrary to instructions. Professional misconduct is a serious issue to be dealt with by the BSB and could result in the barrister concerned being disbarred (prevented from practising as a barrister).

9.3.11 Barristers' professional Code of Conduct

The Bar Council publishes a Code of Conduct of the Bar of England and Wales. The latest edition is the eighth, which came into effect in October 2004. It consists of a code of conduct covering issues such as a barrister's duty to the court, rules regarding the acceptance of instructions and confidentiality, and a set of written standards for the conduct of professional work. The latter are intended as a guide to the way in which a barrister should carry out his or her work. The 2004 Code is subject to amendment yearly, although it is still referred to as the 2004 Code. For example, it was amended following the Legal Services Act in 2007 to reflect changes in relation to Legal Disciplinary Practices.

9.3.12 Liability of barristers

The general common law position was that barristers could not be sued in negligence in relation to anything done by them in preparing a case for court, or for any of their

actions in conducting the case in court. This was underlined in *Rondel v Worsley* [1969] 1 AC 191. However, this protection from being sued for negligence was removed in July 2000 following *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. This case involved appeals to the House of Lords by three clients suing their solicitors in negligence. In each case, the solicitors claimed immunity from liability under the common law rule which prevented barristers being sued for negligence, and which had been extended to solicitors in *Rondel v Worsley*, albeit that the rule only related to acts concerned with the conduct of litigation. A majority of the House of Lords panel hearing the case concluded that the arguments relied upon in *Rondel v Worsley* no longer carried sufficient weight to sustain the claimed immunity for either barristers or solicitors, in relation to civil or criminal proceedings.

Example

It is interesting to note the reasons for upholding the immunity for advocates in *Rondel v Worsley* and then to compare this with the reasoning in *Arthur JS Hall & Co v Simons*. In the former case, the House of Lords supported the exemption on the following grounds: a barrister owed a duty not only to the client but to the court: a fear of being sued might impact upon the latter duty. The cab rank rule meant that a barrister could not refuse to represent a client and this principle might be under threat if a client appeared to be likely to sue his lawyer. Immunity existed in relation to judges, lawyers, and witnesses in relation to defamation, so immunity in relation to negligence is necessary to enable advocates to conduct litigation properly. Finally, it is against public policy to relitigate a decided case and a claim for negligence would open up to review the decision in the original case.

In *Arthur JS Hall & Co v Simons* the House of Lords reviewed each reason supporting the advocates' protection from being sued in negligence. It was felt that there was no empirical basis for saying that immunity was needed so that duties owed to the court would be performed. Indeed, performing such duties could not be described as negligent. The cab rank principle, while recognised as desirable, could be circumvented in practice, and in any event had to be balanced against the potential injustice of a litigant suffering financial loss because of an advocate's negligence and being left without a remedy. The immunities in relation to defamation were founded on public policy grounds, seeking to encourage freedom of speech in court to allow the gathering of full information about the issues in the case, the reason for this immunity did not support the position in relation to negligence.

Tellingly, Lord Steyn commented:

> …public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles out its own for protection no matter how flagrant the breach of the barrister. The world has changed since 1967. The practice of law has become more commercialised: barristers may now advertise. They may now enter into contracts for legal services with their professional clients. They are now obliged to carry insurance. On the other hand, today we live in a consumerist society in which people have a much greater awareness of their rights. If they have suffered a

For the Supreme Court and departure from own previous decisions, chapter 5.

> wrong as a result of the provision of negligent professional services, they expect to have the right to claim redress. It tends to erode confidence in the legal system if advocates, alone among professional men, are immune from liability for negligence.

In consequence, the immunity for barristers and solicitor advocates was removed and the House of Lords departed from *Rondel v Worsley*. Although that case was not wrongly decided, the House of Lords held that that due to developments since 1967 the decision no longer reflected public policy.

9.4 Regulation of the professions and reform: The Clementi Review

The basis for all the changes that have come about in the legal professions in the last ten years began following a report published in July 2003, *Competition and Regulation in the Legal Services Market* by the Department for Constitutional Affairs, the regulatory framework in place for barristers and solicitors was criticised as outdated and lacking in accountability. Sir David Clementi was asked to review the regulatory system for barristers and solicitors on behalf of the Department for Constitutional Affairs. The terms of reference for the review were to consider:

> what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector and to recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent and no more restrictive or burdensome than is clearly justified.

Clementi published a consultation paper in March 2004, *Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales*, to which there were 265 written responses.

In the consultation paper, it was argued that the regulatory function and representative functions performed by the Law Society and the Bar Council were in conflict: what is in the best interests of the public might not be in the best interests of lawyers, for example, negotiating fee rates on behalf of their members. Five core functions of regulation were identified in the consultation paper:

(i) **Entry standards and training:** setting minimum standards of entry qualifications usually linked to educational achievement for candidates wishing to become 'qualified'. It also encompasses matters such as continuing professional development.

(ii) **Rule-making:** formulation of rules by which members are expected to work and to adhere.

(iii) **Monitoring and enforcement:** checking the way in which members carry out their work, in the light of the prescribed rules, and enforcing compliance if rules are broken.

(iv) **Complaints:** systems for consumers to bring complaints about providers who have served them poorly, focused on redress to the consumer.

(v) **Discipline:** powers to discipline members where that person is, for example, professionally negligent, or in breach of the professional rules, focusing on action against that individual.

In December 2004, a final report was published, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*.

The report identified three key issues arising from the review. These were:

- concern about the complexity and inconsistency of the regulatory framework and its insufficient regard for consumers' interests;
- concern about the complaints system, both in terms of its efficiency and the principle of lawyers handling complaints against other lawyers; and
- concern about the restrictive nature of business structures within the legal profession.

The main recommendations in the report were:

- the creation of a new Legal Services Board as part of the establishment of a new regulatory framework;
- the creation of a new complaints system via the Office for Legal Complaints; and
- that alternative business structures for members of the legal professions should be established; it was also recommended that legal disciplinary practices should be permitted.

The recommendations have been brought into force and are discussed in what follows.

9.4.1 The Legal Services Board

The Board regulates the Law Society and Bar Council (and other professional organisations exercising regulatory functions in relation to legal professionals, such as the Institute of Legal Executives), and has the power to delegate regulatory functions to such bodies where appropriate. As already discussed these organisations have been required to alter their governance arrangements so that their regulatory and representative functions are separate. The Board also has statutory objectives including the promotion of the interests of the public and consumers.

9.4.2 The Office for Legal Complaints

The Office for Legal Complaints is an independent body, overseen by the Legal Services Board, dealing with consumer complaints against both barristers and solicitors through the Legal Ombudsman. The Legal Ombudsman website summarises the

regime as follow: 'The new Legal Ombudsman replaces organisations like the Legal Complaints Service (LCS) and Bar Standards Board (BSB), who used to deal with legal service complaints. If an organisation such as one of these investigated a complaint and the client wasn't happy with the outcome or the service they received from these bodies, they could ask for their complaint to be independently reviewed by the Legal Services Ombudsman (LSO).'

The Legal Ombudsman is concerned primarily with the service offered by a lawyer. Clearly, there will be cases where poor service is linked with misconduct. In these types of cases, the Legal Ombudsman will still look at the service element of the complaint, but will refer the conduct part to the relevant regulatory body, such as the Solicitors Regulation Authority. Discipline remains the province of the Solicitors Regulation Authority and the Bar Standards Board.

Thinking point

The legal profession has consistently asserted that its independence should be protected. This is particularly important where a citizen wishes to challenge the decisions or actions of government. Any attack on the self-regulation of the professions must be seen in this light. The detail of how the Legal Services Board and the Legal Ombudsman are constituted and the nature of their functions must be evaluated to see if the independence of the legal profession is compromised. What balance has been struck by the Legal Services Act 2007?

9.4.3 Alternative business structures

One of Clementi's main recommendations was to suggest that legal disciplinary practices (LDPs) should be introduced to allow non-lawyers to own and manage law practices and different types of lawyers, such as solicitors and barristers, to work together in law firms for the purpose of providing legal services. An LDP is comprised of different types of lawyer (for example, barristers and solicitors) with a minority of non-lawyers in management posts.

Whilst being in favour of LDPs the Clementi Report identified and addressed a number of concerns. Of particular concern was the situation where the owners and managers of the firm were different. It was important that regulation ensured that inappropriate owners were not allowed to be part of firms and conflicts of interest and 'outside owners [bringing] unreasonable commercial pressures to bear on lawyers which might conflict with their professional duties' were avoided.

LDPs have to be regulated using a 'fit to own' test in respect of non-lawyers owning firms and an LDP would not be able to take instructions on a case where the owner had an interest in the matter. Furthermore, protection has had to be put in place, such as qualified lawyers holding key positions and managers adhering to a code of

behaviour drawn up by the regulatory body. Qualified lawyers have to be a majority in the management group of the business.

In his report, Sir David Clementi explored the possibility of permitting multi-disciplinary practices (MDPs) to be established to bring together lawyers and other professionals to provide a variety of services, both legal and non-legal, for example, a partnership involving solicitors and accountants. MDPs became a reality in 2012, although many believe that LDPs are a more attractive business model.

Thinking point

What do you think are the advantages and disadvantages of allowing multidisciplinary partnerships (a form of alternative business structure)? One difficulty is that lawyers are subject to a code of conduct that would not apply to non-lawyers. For example, how can client confidentiality be protected in such an organisation?

The recommendations in the Clementi report were enacted in the Legal Services Act which received the royal assent on 30 October 2007. Provisions relating to the establishment of the Legal Services Board and the Office for Legal Complaints came into force on 7 March 2008.

Alternative business structures were allowed to exist after 6 October 2011. However, in the interim, the Act did allow limited forms of alternative business structures to be authorised. There are now approximately 300 LDPs, including a very small number with barristers as partners. The Bar Standards Board permits barristers to join LDPs.

Useful information on the Legal Services Act 2007 and its passage through Parliament may be found at: **www.publications.parliament.uk/pa/pabills/200607/legal_services.htm**.

The terms ABS, MDP, and LDP can be very confusing. In the Clementi report LDPs are classified as ABS; however the Solicitors Regulation Authority expressly states that their definition of an ABS *excludes* LDPs. The basic definitions are as follows: (more detail can be found on the SRA website: **www.sra.org.uk/home/home.page**):

- Alternative Business Structure (ABS): a firm with more than 25 per cent non-lawyer managers offering legal services and non-legal services;
- Legal Disciplinary Practices (LDP): a firm whose ownership is comprised of different types of lawyer and a minority of non-lawyers (up to 25 per cent) which carries out legal work. There cannot be any ownership or part ownership of the law firm by non-lawyers who are not managers of the firm;
- Multi Disciplinary Partnership (MDP): a firm, that is also an ABS, that includes ownership or part ownership of the law firm by non-lawyers who are not managers of the firm and which offers a combination of legal and non-legal services.

Key point

When considering the legal profession much useful information and comment may be found in the weekly journals such as *New Law Journal*, the *Solicitors' Journal* and *Counsel*.

9.5 Should the professions of barrister and solicitor be amalgamated?

In many countries the legal profession is not divided as it is in England and Wales. The question as to whether the two professions should be fused is always topical. The traditional and distinct roles of solicitors and barristers are becoming blurred. For example the granting of higher rights of audience to solicitors and the direct access to barristers by some clients leads many to conclude that the two professions should in fact merge. Nevertheless, both the Bar Council and the Law Society have always argued against the idea of a single legal profession. In a March 2001 report, the Office of Fair Trading suggested that the dual structure of the legal profession added unnecessarily to costs but the Bar Council rejected this suggestion in its response to the report, arguing that there were benefits in a split profession.

Benefits of a split profession:

- Barristers do not conduct litigation (as already seen, this is the province of solicitors) so they are able to attain a much higher level of experience and skill in advocacy than would otherwise be possible.
- The detachment of barristers from clients means that a more objective approach may be adopted and this may lead, ultimately, to the time taken to conclude a case being shortened.
- Independent barristers can perform the advocacy and advisory work in which they specialise more efficiently and cheaply than solicitors because barristers' overheads are lower.
- Members of the public do not know what barristers do and have no idea of the specialisms and services offered therefore solicitors are needed to act as intermediaries to guide clients to the most suitable barrister. Solicitors will also be able to assess the quality of service provided by barristers and thus promote competition.
- The dual profession also promotes competition amongst solicitors because small firms of solicitors have access to the specialist legal services provided by barristers and are therefore able to compete with larger firms.
- The public interest lies not only in the promotion of competition but also in 'access to justice and the overriding moral duty of society to pursue the ideal of equality before the law'.

It may be that the reforms made to the professions, together with the organisational changes to the way lawyers work, will inevitably lead to the practical distinction between barristers and solicitors being no longer relevant.

9.6 Legal executives

Legal executives carry out a great deal of the day-to-day work in law firms. Members of the Chartered Institute of Legal Executives qualify as lawyers through a different route to the ones already discussed (see Solicitors and Barristers). To qualify, the Chartered Institute of Legal Executives (CILEX) Professional Qualification in Law must be attained. CILEX represents legal executives, admits legal executives to the profession, and administers the examination process. Legal executives specialise in a specific area of legal practice, such as conveyancing or criminal law and work alongside solicitors. The initial qualification process takes around four years and the academic study is usually undertaken as distance learning or day release whilst the trainee legal executive is working as a fee earner in a law firm. Legal executives are required to have at least five years' experience working in a legal environment under the supervision of a solicitor before they can become a Chartered Legal Executive (FCILEx).

Legal executives may decide to study further to qualify as solicitors by completing the Legal Practice Course. They do not usually have to complete a training contract.

You can find out more about legal executives at: **www.cilex.org.uk/**.

9.7 Licensed conveyancers

A licensed conveyancer is essentially a specialist in property law. Until the 1980s, conveyancing could only be undertaken on a professional basis by solicitors. Since then other people can qualify as licensed conveyancers and undertake conveyancing work. The Council for Licensed Conveyancers is the regulatory body for licensed conveyancers.

You can find out more about licensed conveyancers at: **www.conveyancer.org.uk/**.

9.8 Paralegals

In the increasingly competitive legal jobs market the role of paralegal has taken on an increasing importance. Paralegal used to refer to an unqualified legal clerk, or secretary, who undertook basic legal tasks to assist the qualified members of staff in a law firm. However, many paralegals now have legal qualifications, such as an LPC, and start their legal careers carrying out legal tasks that can range from assisting qualified

lawyers, to handling large case loads. In this way it is hoped that they will eventually secure a training contract. The work is generally very poorly paid. A number of organisations offer paralegal training qualifications for school leavers and there are organisations that paralegals can join such as the Institute of Paralegals and the National Association of Licensed Paralegals.

Summary

- The legal profession in England and Wales comprises barristers, solicitors, and other legal professionals such as legal executives and licensed conveyancers.
- Solicitors can operate as sole practitioners, in partnership with other solicitors, either formed under the Partnership Act 1890 or through a Limited Liability Partnership, or in Legal Disciplinary Practices and Alternative Business Structures.
- Solicitors undertake a wide range of legal work, although those working in large firms tend to specialise in a particular area of law. Solicitors may now represent clients in every court, provided they have completed the necessary training or have sufficient experience to be granted higher rights of audience.
- The Law Society is the body that represents solicitors in England and Wales. The regulatory role that it used to have has been split off since the Clementi Report and the Solicitors Regulation Authority now regulates the profession.
- Barristers give clients specialist legal advice and appear in court on their behalf as advocates. They may be self-employed and operate from a set of chambers, be employed barristers in the public or private sector, or be part of a Legal Disciplinary Practice.
- All barristers must be a member of one of the Inns of Court.
- The General Council of the Bar (Bar Council) is the representative body for barristers. It, like the Law Society, has separated its regulatory and representative functions following the Clementi Report and the Bar Standards Board regulates the profession.
- The Legal Services Act 2007 has changed the way in which solicitors and barristers are regulated and the way in which they practise. The Act establishes the Legal Services Board to oversee both the Law Society and the Bar Council and to establish a new complaints system via the Office for Legal Complaints. The Act also allows solicitors and barristers to operate in alternative business structures which may be owned and managed by non-lawyers.

Questions

1 What do solicitors and barristers do?

2 How would you qualify as a solicitor?

3 Can barristers and solicitors be sued for negligence?

4 What reforms have been introduced to the way in which barristers and solicitors are regulated?

5 What sorts of business structures do barristers and solicitors currently operate under. Which model do you consider to be the most appropriate?

6 Do you consider that the Clementi reforms have gone far enough? What other reforms to the legal professions are necessary or desirable?

Sample question and outline answer

Question

A journalist in the *Economist* noted:

> The original reasons for dividing lawyers into two categories - barristers and solicitors - have long since disappeared, but the distinction remains. In theory the…barristers are supposed to be the specialists in advocacy or in particular areas of the law. The solicitors are, often misleadingly, described as the general practitioners. In fact, some barristers are not specialists, some solicitors are. Some solicitors are better advocates than many barristers.

Is the division in the legal profession between solicitors and barristers still relevant in the twenty-first century, or should the professions be fused?

Outline answer

The introduction should set out what you understand the question to be asking and explain how you will answer it. The question expects you to discuss the differences between solicitors and barristers and the increasingly blurred distinctions between the two professions. You may then want to go on to discuss the advantages and disadvantages of having two branches of the profession before deciding whether you consider that the present division should remain or that the two professions be joined.

The professions of barrister and solicitor are separate and, traditionally, the work they carry out is different. You could outline the differences.

Fusion, in this context, can be defined as a union resulting from combining or merging different elements or parts. Is this the definition you wish to use?

When this was first investigated, by the Royal Commission on Legal Services in 1979 (the Benson Commission), the result was a strong recommendation to retain the two branches. What has happened since that committee reported? The Law Society view is that the legal profession should be similar to the medical profession. In other words all lawyers would have a standard training and then those who wished to specialise could apply to become consultants.

Discuss the fact that the granting of higher rights to solicitors and the opening of access to barristers has, perhaps, led to fewer calls for formal change Advantages/ disadvantages – you could discuss, amongst other issues, the following:

Lower costs – if only one lawyer is needed – however it may be argued that in practice two lawyers are often required: one to do the day-to-day work on the case and the other to represent a party at trial, for example.

Specialisation – using one lawyer prevents duplication of effort however, is it always necessary to have a specialist? Perhaps a lower paid lawyer could do the day-to-day work and call on a specialist for specific, difficult problems (as is the case in the medical profession.)

Advocacy – is it an advantage or a disadvantage that one profession specialises in advocacy?

Think about the roles, read widely, and develop your own views on advantages and disadvantages. Refer to the changes that have come about as a result of the Legal Services Act 2007.

Your conclusion will show that you have answered the question asked and will sum up your final view.

Further reading

The business structure of law firms, at the time of writing, has entered a new phase and the consequences of the advent of ABS, MDPs, and LDPs is not yet clear. It is important to read the legal press and quality newspapers to keep up to date with the changes that are taking place. The following list is a starting point for your reading.

- *Clementi Report of the Review of the Regulatory Framework for Legal Services in England and Wales*: **www.legal-services-review.org.uk/**
  This website includes both the final report and helpful questions and answers about the reporting process.
- Department for Constitutional Affairs 'The Future of Legal Services: Putting the Consumer First' (2005): **http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/legalsys/folwp.pdf**
  This is the white paper containing the proposals for changing the regulation of the legal profession. It is useful to look at this and consider the proposals in the light of the changes that have in fact taken place.
- **Greene, D.** 'Time for a New Model (2012) 162 NLJ 377
  This very readable article outlines the key provisions of the Legal Services Act 2007 and explains how they are being introduced gradually to allow the legal profession to adapt to the changes to regulation and to prepare for alternative business structures. The author considers how the licensing process may develop, the implications for traditional partnerships, and discusses legal disciplinary practices and alternative business structures.

- The Legal Education and Training Review **http://letr.org.uk/**
  This website includes the report, from June 2013, and a wealth of other information, including the literature review that was carried out in preparation for the report. It is a lengthy document, but the executive summary is clear and easy to read.

- **Mayson, S.** 'Something for Everyone' (2007) 157 NLJ 1073
  This article outlines the provisions of the Legal Services Bill 2006, which was enacted in 2007, allowing for lawyers to take part in alternative business structures, which permit the co-ownership of law firms by non-lawyers. It highlights the advantages to lawyers of being involved in 'multi-talented practices' and the ways in which the legal services market may change.

- Office of Fair Trading 'Competition in Professions' (2001): **www.oft.gov.uk/advice_and_resources/publications/reports/professional_bodies/oft328/**
  This report is over ten years old but it provides an interesting starting point to consider the barriers to competition in the legal professions alongside other professions, such as accountancy.

- **Ward, R.** and **Akhtar, A.** *Walker and Walker's English Legal System*, 11th edn, Oxford University Press (2011), chapter 12
  A detailed and clearly written text book to supplement your reading of this chapter.

- Wilberforce Society Report: Reform of the Legal Profession **thewilberforcesociety.co.uk/wp-content/uploads/2012/05/Reform-of-the-Legal-Profession.pdf**
  The Wilberforce Society is a student society at Cambridge University. This is an excellent paper discussing the reform of the legal professions and all of the recent legislation in a very succinct and readable format.

Online Resource Centre

You should now attempt the supporting multiple choice questions available at **www.oxfordtextbooks.co.uk/orc/wilson_els/**.