



THE BAR OF IRELAND

The Law Library

Submission by Council of The Bar of Ireland to the Legal Services Regulatory Authority in respect of the establishment, regulation, monitoring, operation and impact of multi-disciplinary practices in the State

16th June 2017

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SCOPE OF THE CONSULTATION

In its public consultation notice of the 2nd May 2017 the Legal Services Regulation Authority (the “Authority”) seeks submissions in respect of certain issues relating to Multi-Disciplinary Practices (“MDPs”).

Under the Legal Services Regulation Act 2015 (the “Act”) the term “*multi-disciplinary practice*” is defined as:

“...a partnership formed under the law of the State by written agreement, by two or more individuals, at least one of whom is a legal practitioner, for the purpose of providing legal services and services other than legal services”

Having submitted its initial report (the “Initial Report”) to the Minister for Justice and Equality pursuant to s.119(1) of the Act on the 31st March 2017 the Authority seeks submissions on the establishment, monitoring, operation and impact of MDPs in the State.

Respondents have been directed to Part 5 of the Initial Report and to the general and specific questions set out therein.

INTRODUCTION AND EXECUTIVE SUMMARY

The Council of The Bar of Ireland (the Council) is the accredited representative body of the independent referral Bar in Ireland. The *independent referral bar* consists of members of the Law Library which has a current membership of over 2,200 practising barristers.

The Council welcomes this opportunity to contribute to the public consultation process concerning the establishment, monitoring, operation and impact of MDPs.

The key defining characteristics of the MDP practice model envisaged under the Act are (a) the ownership and control of a practice that provides legal services and non-legal services by *both lawyers and non-lawyers* and (b) the *sharing of fees and income between lawyers and non-lawyers*.

The MDP model envisaged under the Act can therefore be described as the *fully integrated or pure form* multi-disciplinary practice *i.e.* a model of practice that will permit both legal professionals and other persons to form partnerships and to work together for a profit. This is the most radical form of MDP and a model which remains prohibited in many jurisdictions.

The Council notes that where such models have been permitted to operate, in England and Wales for example where legal practitioners and other persons are permitted to form partnerships, the introduction of such models has necessitated the implementation of complex and multi-layered licensing and regulatory regimes. Evidence suggests that in England and Wales the various government agencies, licensing authorities and oversight regulators continue to navigate the practical and the regulatory complexities associated with the *pure* model MDP.

Notwithstanding the fact that members of the Law Library will continue to practice as sole practitioners and will not provide services as employees or partners in MDPs, the Council has considered the arguments made in favour of the introduction of MDPs in the State and has considered the operation of similar practice models in other jurisdictions.

The Council has also given careful consideration to the *risks* posed to clients and to the effective administration of justice inherent in the MDP model *and* to the scheme of regulation that would have to be implemented should MDPs be permitted to operate.

The Council remains firmly opposed to the introduction of MDPs in the State and also firmly of the opinion that any apparent *advantages or benefits* of what is often termed the “*one stop shop*” model of practice are greatly outweighed and overshadowed by the risks, uncertainties and cost associated with the introduction of MDPs:

- It is not clear to the Council how the operation of MDPs in the State can be reconciled with the protection of the core professional principles, values and duties of legal practitioners;
- MDPs pose particular challenges in relation to lawyer independence and conflicts of interest. The Council is concerned that the introduction of MDPs will serve to undermine public confidence in the independence and integrity of the legal profession;
- Consideration of the operation of MDPs in other jurisdictions shows that MDPs present serious challenges in the context of effective regulation and oversight;
- Consequently, the costs associated with complex and multi-layered regulatory structures, necessitated by the regulatory risks inherent in the features of MDPs, will ultimately be borne by clients;
- There is no evidence to suggest that the introduction of MDPs will further the objectives identified in s.13(4) of the Act. In particular the Council is concerned that certain features inherent in MDPs will not serve to protect and promote the public interest,
- Issues relating to client confidentiality and legal privilege remain a serious concern;
- In the absence of strict and robust financial controls, akin to the Law Society of Ireland's Solicitors Accounts regime, the Council is concerned that the introduction of MDPs will not serve to protect or to promote the interests of clients relating to the provision of legal services.

The Council believes that the current structure of the legal system, which sees solicitors and barristers cooperating but ultimately fulfilling different roles brings with it certain clear advantages; from an economic standpoint the *division of labour* offers efficiencies and cost savings; the maintenance of the independent referral bar and the cab-rank rule ensures that solicitors and clients have equal access to a pool of specialist legal expertise; robust regulatory regimes, such as the regime implemented under the Law Society's Solicitor's Accounts Regulations offer clients protection and peace of mind.¹

Perhaps most importantly of all, and for present purposes, the current structure offers clear and undeniable *certainties* with regard to client privilege, confidentiality and conflicts of interest. The Council believes that at the very heart of the MDP model envisaged under the Act are features that have the clear potential to

¹ See also the Council's submissions entitled *Submissions to the Legal Services Regulatory Authority on Certain Issues Relating to Barristers*, 2nd June 2017.

undermine public confidence in the integrity of the legal system, but also to undermine and displace the long established and crucially important protections and certainties.

While the Council notes that certain provisions of the Act attempt to temper the potential risks to clients and to the effective administration of justice, the Council is not convinced that such measures, and in the absence of a complex and multi-layered regime of monitoring and supervision, are sufficient such that the introduction of partnerships between lawyers and non-lawyers could be said to be in the public interest. Further, a clear economic case has not been made out to justify the significant costs associated with the implementation of a new and purpose-built, and necessarily complex, monitoring and supervision regime.

PART 1 – THE CURRENT POSITION

1. All members of the Law Library are independent referral sole practitioners. In the interest of maintaining independence, members of the Law Library may not enter into partnerships, and Rule 7.14 of the Code of Conduct of the Bar of Ireland² provides:

“In the interests of maintaining the independence of the Bar a Barrister as an independent practitioner must not enter into any professional partnership or any other form of unincorporated association or seek to practice the profession through a corporate entity and the Barrister must not enter into any professional partnership or relationship (including the sharing of briefs) with another Barrister.”

2. Members of the Law Library will continue to practice as independent sole practitioners and will not operate within alternative business models, to include MDPs and legal partnerships.

Advantages of the current model

3. Barristers compete directly with each other for a limited pool of work and this exerts a near constant downward pressure on costs. Barristers are obliged to provide an estimate of their fees and clients are therefore encouraged to *shop* around, to take full advantage of the manner in which all barristers compete with each other for work, and to engage the services of barristers *on the client’s own terms*.
4. All members of the Law Library who, pursuant to the cab-rank rule and subject to limited exceptions, are obliged to accept instructions from any client, are available to every solicitor in the State at the present time. The specialist legal services offered by barristers are therefore available to solicitors from all corners of the country, from the largest firms to sole practitioner solicitors.
5. Barristers are currently not exposed to the significant administration costs associated with running MDPs (staff costs, administrative costs, insurance, buildings, costs associated with oversight of the MDP’s accounts etc.). The vast majority of barristers operate from the Law Library in Dublin or from the regional law libraries and while some barristers rent or share office space any costs incurred are a fraction of those associated with running an MDP or running a *full service* practice or firm.
6. This model of practice is relatively low-cost and this flexibility translates into very real benefits to clients and to the wider administration of justice. Many

² Adopted by a General Meeting of the Bar of Ireland on Wednesday 23rd July 2014.

barristers regularly accept instructions on a “*no win no fee*” basis and this in effect operates as a free civil legal aid system. Many barristers also engage in voluntary work.

The core professional duties of barristers

7. Clients currently engage barristers safe in the knowledge that the core professional duties have not been diluted or displaced. Clients can be assured that the legal advice they receive from barristers is independent and is unaffected by considerations of how that advice might impact upon the MDP or other partners or persons in the MDP.
8. Clients instruct barristers safe in the knowledge that their affairs will remain confidential and that communications between barristers and clients are generally, and subject to *long established* and *clearly defined* principles, covered by legal professional privilege.
9. There is a clear and pre-existing ethical framework governing the conduct of barristers where conflicts of duties or conflicts of interest arise. Barristers owe *private* duties the clients and an overriding *public* duty to the court. Barristers do not currently owe duties to third parties such as partners or employers and as such there is little or no potential for barristers to be placed in ethically problematic situations which may upset the delicate balance between the duties owed by barristers to clients and to the court.

PART 2 – MDPS UNDER THE LEGAL SERVICES REGULATION ACT 2015

Basic features

1. Contained in the definition of “*multi-disciplinary practice*” under the Act are a number of key features of this practice model:
 - MDPs under the Act will be *partnerships*;
 - Formed under the law of the State;
 - By written agreement;
 - By two or more *individuals*;
 - At least one of whom is a *legal practitioner*;³
 - And will have as their purpose the provision of *legal services*⁴ and services other than legal services.
2. The partners of MDPs are to be jointly and severally liable in respect their own acts or omissions, those of the other partners and those of the employees of the partnership.⁵ A person may be a partner in an MDP notwithstanding the fact that he or she does not provide legal services, or indeed any other service.⁶ Certain persons are not permitted to become partners in MDPs, to include persons guilty of certain offences, solicitors and barristers who have been struck-off or disbarred⁷ and certain “*unqualified persons*”.⁸
3. MDPs under the 2015 Act are to operate in accordance with a number of statutory provisions. An MDP is obliged to notify the Authority when it intends on providing legal services and when it ceases to provide legal services.⁹
4. MDPs must also appoint a “*managing legal practitioner*”, defined as a partner in the MDP who is a legal practitioner and who shall be responsible for the management and supervision of the provision of legal services by the practice.¹⁰ It is the duty of the managing legal practitioner to ensure that the MDP is operating generally in accordance with the provisions of the 2015 Act.¹¹ The managing legal practitioner is also specifically obliged to ensure that the MDP is managed in such a way to ensure the provision of legal

³ Generally defined under the Act as a person who is a practising solicitor or a practising barrister.

⁴ Defined as “legal services provided by a person, whether as a solicitor or as a barrister”; Section 1(1) of the Act.

⁵ Section 107(1) of the Act.

⁶ Section 107(3).

⁷ See generally s.107(4).

⁸ Section 107(9).

⁹ Section 106.

¹⁰ Section 108.

¹¹ Section 108(3)(a).

services adheres to the professional principles identified in s.13(5) of the Act.¹² The managing legal practitioner has certain additional duties in the context of accounting procedures and the treatment of fees and income.¹³

5. MDPs must have written procedures in place to govern the operation of the practice.¹⁴ Section 112 stipulates that MDPs may only provide legal services once a policy of professional indemnity insurance cover is in place.

Powers of the Authority

6. The Authority may make regulations concerning the operation of MDPs and such regulations may provide for *inter alia* the standards to be observed in the provision by the practice of legal services to clients, the rights, duties and responsibilities of a practice in respect of moneys received from clients, the management and control of the MDP (risk management, financial control) and the maintenance by the practice of records.¹⁵
7. Where the Authority is satisfied that the MDP is operating in breach of a relevant provision of the Act or in breach of any s.116 regulations, the Authority may issue a direction to the MDP or to the managing legal practitioner of the MDP to take certain measures specified in the direction.¹⁶

Fee sharing

8. Both legal practitioner partners and non-legal practitioner partners in an MDP may share in the income and fees generated by the provision of services regardless of whether either or both partners are *legal practitioners* and regardless of whether the services concerned are legal services or services other than legal services.¹⁷ As such the practice model envisaged under the Act permits the sharing of fees between lawyers and non-lawyers.

¹² Section 108(3)(b) of the Act. Section 13(5) of the Act states as follows:

“(5) The professional principles referred to in subsection (4)(f) are—

(a) that legal practitioners shall—

(i) act with independence and integrity,

(ii) act in the best interests of their clients, and

(iii) maintain proper standards of work,

(b) that legal practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and

(c) that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.”

¹³ Section 110(4).

¹⁴ Section 110(1).

¹⁵ See generally s.116.

¹⁶ Section 114.

¹⁷ Section 107(2).

Confidentiality and privilege

9. The Act stipulates that nothing contained in the statutory provisions concerning the obligations of legal practitioners practising as partners or employees of MDPs shall derogate from the obligations, liabilities or privileges of such legal practitioner under the Act or any other enactment or rule of law.¹⁸
10. Specific provisions concerning confidentiality and privilege are set out under s.110 of the Act which concerns the operation of MDPs. Pursuant to s.110(5) legal practitioners (both partners and employees in MDPs) shall not, in the provision of legal services to a client, and in the absence of express consent, disclose the affairs of the client to a partner or employee of the practice who is not also engaged in the provision of legal services to that client.¹⁹
11. While s.110(6) of the Act seeks to preserve the entitlement of persons to inspect the *non-legal services* operations of MDPs (presumably on foot of an order for discovery for example), s.110(7) acknowledges that certain information may be subject to legal privilege:

“Subsection (6) shall not be construed as permitting a person referred to in that subsection to obtain information in the possession of a legal practitioner who is a partner in or employee of a multi-disciplinary practice where that information is the subject of legal privilege.”

Saver for Compensation Fund

12. Importantly, clients of MDPs under the Act will not have the benefit of access to the Law Society’s Compensation Fund scheme which enables clients who have lost funds by reason of the dishonesty of their solicitor to claim on the Compensation Fund.²⁰

¹⁸ Section 109(b).

¹⁹ Section 110(5).

²⁰ Section 113 of the Act provides as follows: *“Nothing in this Part shall be construed as extending the obligation of the Law Society under section 21(4) (as amended by section 29 of the Solicitors (Amendment) Act 1994) of the Solicitors (Amendment) Act 1960 to loss sustained in consequence of dishonesty on the part of a legal practitioner who is a partner in or an employee of a legal partnership or, as the case may be, a multi-disciplinary practice or any clerk or servant of that legal practitioner arising from the provision by that legal practitioner of legal services to a client, where that legal practitioner is not a practising solicitor.”*

PART 3 – THE ARGUMENTS FOR AND AGAINST MDPS

Apparent benefits and advantages

13. The Council believes that when considering whether to permit the establishment and operation of MDPS in the State the Authority should conduct a balancing exercise between any potential gains or advantages to be achieved by and through the introduction of such practice models on the one hand and the risks associated with and challenges posed by their introduction on the other hand. This exercise should be undertaken with reference to the objectives identified in s.13(4) of the Act.

14. The authors of the Initial Report²¹ identify a number of the arguments often put forward to justify the introduction of MDPS,²² to include:

- MDPS promote the *one stop shop* model of practice, and this may lead to a saving of time and cost;
- MDPS promote innovation by allowing legal practitioners to work in partnership with others, and this in turn may result in MDPS offering new types of services;
- The risk profile of MDPS may be reduced due to diversification and access to new clients;
- MDPS may have greater access to funding and capital;
- MDPS may offer clients greater access to legal services, and this may arise particularly in cases where clients may not have identified their particular problem as a *legal issue*. MDPS may therefore new access points for individuals to receive legal assistance.

15. In its November 2013 Regulatory Impact Analysis²³ (the “RIA”) the Department of Justice refers to the observations of the Competition Authority in its December 2006 report.²⁴ In its report the Competition Authority described how a ban on the operation of MDPS prevented the supply of inter-

²¹ Initial Report submitted to the Minister on the 31st March 2017; “*Report to the Tánaiste and Minister for Justice and Equality, Ms Frances Fitzgerald TD from the Legal Services Regulatory Authority regarding Multi-Disciplinary Practices*”.

<http://www.lsr.ie/en/LSRA/s119%20Report%20Final%20April%202017%20pdf.pdf/Files/s119%20Report%20Final%20April%202017%20pdf.pdf>

²² Ibid. at page 15.

²³

<http://www.justice.ie/en/JELR/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf/Files/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf>

²⁴ *Competition in Professional Services – Solicitors and Barristers*, available at:

<https://www.ccpcc.ie/business/wp-content/uploads/sites/3/2017/03/Solicitors-and-barristers-full-report.pdf>

related services which in turn could generate “*synergies*”²⁵ known as “*economies of scope*”.²⁶ The report also observed that where *economies of scope exist* this should result in lower costs to clients.²⁷ It was noted that the prohibition on MDPs also prevents access to the *one stop shop model of practice*. The Council notes of course, and citing concerns regarding *access to justice*, that the Competition Authority did not recommend that barristers be permitted to enter into partnerships with non-lawyers.²⁸

Risks and challenges

16. The authors of the Initial Report also identify the arguments against MDPs. A number of similar issues have been raised by the Council in previous submissions:

- The operation of MDPs could have consequences for client confidentiality and privilege;²⁹
- The potential for the core professional values of independence of legal advice to be undermined is possibly greater in a business in which not all partners are subject to the same professional obligation to discharge their duties to their clients and to the Court, independently of other interests, personal or external;³⁰
- MDPs may face more challenges in relation to conflicts of interest;³¹
- Where partners in an MDP are regulated by a number of different regulators or professional bodies, and are therefore subject to different codes and regulations, difficulties may arise where there is a conflict between codes;³²
- MDPs could lead to a lowering and undermining of client protections in circumstances where certain protections (professional indemnity insurance and the Law Society’s Compensation Fund for example)

²⁵ Ibid. at paragraph 5.115.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid. at paragraph 5.135.

²⁹ Initial Report, at page 16.

³⁰ Ibid.

³¹ In this regard the Initial Report provides *inter alia* at page 16: “MDPs may face more challenges in relation to conflicts of interest, depending on how the ownership of the business is structured. The fear is that circumstances might arise in which partners who are unconstrained by professional obligations put pressure on the legal practitioners in an MDP to conduct business that is not in the client’s interests (a solicitor- client conflict) or to act for competitors (a client conflict).”

³² Ibid.

may not apply to or cover the non-legal services provided by MDPs or indeed the legal services provided by MDPs;³³

- The Initial Report also notes that MDPs may present particular difficulties for barristers generally and for the operation of the cab-rank rule.³⁴

³³ Ibid.

³⁴ Ibid.

PART 4 – THE OPERATION OF MDPS IN COMPARATOR JURISDICTIONS

Introduction

1. The Council notes that the authors of the Initial Report have conducted a comprehensive review of the operation of MDPs in a number of jurisdictions. The Council has also undertaken a review of the operation of MDPs in comparator jurisdictions with a particular emphasis on those jurisdictions where legal services are provided by way of a *split profession* model *i.e.* by barristers or advocates and solicitors. A number of observations are apposite.

Australia

2. The authors of the Initial Report note that while the *Australian model* of non-lawyer practices³⁵ (“NLPs”) permits full rights of audience to those legal practitioners that wish to operate out of alternative business models, all the Australian jurisdictions have continued to require legal practitioners who wish to operate as barristers, to be self-employed.³⁶ In other words, barristers may not become partners or employees in NLPs in Australia.

United States of America

3. The Initial Report notes that in almost every State in the US there remains a near absolute prohibition on non-lawyer ownership and management of law firms and legal practices and a near absolute prohibition on the sharing of fees between lawyers and non-lawyers.³⁷
4. The Council notes that the American Bar Association (the “ABA”) adopted Recommendation 10F in July 2000³⁸ following the completion of a comprehensive review by the ABA’s Commission on Multidisciplinary Practice (the “Commission”) between 1998 and 2000.
5. It is important to understand the context in which Recommendation 10F was adopted. What appears to have framed the MDP debate in North America from 1999 – 2002 was a fear that the traditional practice models would be very quickly subsumed and overtaken by market forces. Commentators have described how one concern that fuelled the MDP debate in North America related to “...*threats, particularly competitive threats from other professionals in the commercial marketplace*”.³⁹ Throughout the 1990s the *Big 5*

³⁵ See discussion of regarding terminology paragraph 31 of the Initial Report.

³⁶ Initial Report at paragraph 39.

³⁷ Initial Report at paragraph 128.

³⁸ Recommendation 10F can be accessed at

http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_recom10f.html.

³⁹ Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values and Reviving the MDP debate in America*, 78 *Fordham L. Rev.* 2193-2244 (2010) at 2198.

accountancy firms⁴⁰ began to expand into what have been described as the “*nontraditional areas of practice*”.⁴¹ In 2000 the number of lawyers engaged by Anderson Legal, KLegal and Landwell (the firms or divisions affiliated with Arthur Anderson, KPMG and PricewaterhouseCoopers respectively) rivalled the number of lawyers employed by the largest global law firms, Clifford Chance and Baker & McKenzie.⁴²

6. The Commission received testimony and submissions from witnesses around the world, to include consumer representatives, lawyers, representatives of the Big 5 accountancy firms, judges, representatives of ABA committees and related entities, insurance representatives, as well as academics in tax, accounting, legal history and ethics.⁴³
7. The ABA emphatically rejected the *pure* MDP model. It did not do so in a vacuum; the concept was rejected in circumstances where market forces appeared to *support* the argument that traditional models of legal practice were soon to become obsolete and where the evidence pointed to a revolution in the legal services sector that would see the Big 5 accounting firms capitalise to the detriment of traditional legal practice.
8. The ABA expressly concluded that the operation of MDP’s would compromise the core values of the legal profession, which it identified as comprising the following elements:

“a. The lawyer’s duty of undivided loyalty to the client;

b. The lawyer’s duty competently to exercise independent legal judgment for the benefit of the client;

c. The lawyer’s duty to hold client confidences inviolate;

d. The lawyer’s duty to avoid conflicts of interest with the client; and

e. The lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

f. The lawyer’s duty to promote access to justice.”⁴⁴

⁴⁰ Arthur Anderson, PricewaterhouseCoopers, KPMG, Deloitte Touche, Ernst & Young.

⁴¹ Paton at 2201.

⁴² Paton at 2201, citing Bryant G. Garth, *Multidisciplinary Practice After Enron: Eliminating a Competitor but Not the Competition*, 29 Law & Soc. Inquiry 591, 592 (2004).

⁴³ For a comprehensive analysis of witness testimony see Laurel S Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, Chapter 2 of *Multidisciplinary Practices and Partnerships: Lawyers, Consultants and Clients*, Stephen J. McGarry, Law Journal Press.

⁴⁴ *Ibid.*

9. In essence, recommendation 10F, which remains in operation to date, recognises that the basic and fundamental features of MDPs (the sharing of fees between lawyers and non-lawyers and the ownership and control of legal practices by non-lawyers) are not possible to reconcile with the core values of the legal profession and that the public interest would not be served by the introduction of MDPs.

Washington DC

10. The Council notes, as is noted in the Initial Report, that Washington DC has permitted the operation of a limited form of MDP. In fact, the Council understands that this is the sole district in the US that permits the operation of this type of practice model.
11. MDPs in Washington DC are only permitted where the sole purpose of the MDP is the provision of legal services. The Council notes that non-lawyers operating in MDPs in Washington DC may only provide non-legal services that are complementary of the legal services provided by lawyers.⁴⁵ It is not permissible for non-lawyers to merely invest in the MDP and not deliver services.⁴⁶
12. The Council notes that one further example⁴⁷ of an MDP operating in Washington DC is the case of *Clearspire*. Clearspire was engaged in the provision of both IT and legal services. Academic commentary indicates that Clearspire was forced to close down in 2014 due to the financial difficulties which it experienced having spent \$5,000,000.00 in two and a half years on research and development.⁴⁸
13. The Council is concerned that the collapse of Clearspire serves to highlight the lack of research which has been undertaken concerning the economic viability of MDP's.

California

14. The possible forms which MDP's may take were considered at length by the California Bar Association's Task Force, which was established to develop models which would allow for MDP's while preserving the legal profession's core values. The models considered include:
- **The Cooperative Model** which would allow for the provision of legal services on a stand-alone basis but in cooperation with other non-lawyer service providers. Lawyers are free to employ non-lawyer

⁴⁵ Initial Report at paragraph 130.

⁴⁶ Ibid.

⁴⁷ See discussion of *Eisenstein Malenchuk LLP* at Box 8 of the Initial Report.

⁴⁸ "Did the cost of legal IT kill Clearspire?" accessed at <http://thetimeblawg.com/2014/06/07/did-the-cost-of-legal-it-kill-clearspire/>.

professionals under the lawyer's control to assist in providing legal services to clients. Lawyers are also free to work with non-lawyer professionals employed directly by clients. Crucially, fee-splitting and co-principal relationships with non-lawyers are prohibited;

- **The Ancillary Business Model** permits a law firm to own and operate an ancillary business entity that renders non-legal services to clients of the law firm and to others. The entities, however, operate on a non-integrated basis. Legal services are provided on a stand-alone basis;
- **The Contract (Strategic Alliance) Model** which contemplates an express agreement between a law firm and a professional service firm setting forth various mutually beneficial terms.⁴⁹

Europe

15. The Council shares the view of the authors of the Initial Report that the picture across mainland Europe in relation to non-lawyer ownership and management of law firms is mixed and nuanced.⁵⁰ The Council has noticed one particular trend in that MDPs appear to operate in the larger European Countries such as France and Germany. In contrast, MDPs remain prohibited in many of the smaller Member States: MDPs are prohibited in Belgium, Denmark, Portugal, Luxembourg, Finland, Austria, Sweden, Czech Republic, Croatia, Slovenia, Estonia, Latvia and Malta.
16. The Council believes that the operation and employment of MDPs in different legal frameworks in Europe shows that their operation and success is highly dependent on the legal framework within which they operate. Where MDPs are permitted they very often exist in limited and sometimes unique forms and structures that are tailored to meet the requirements of the legal services offered in the country's environment to which they relate.
17. For example, the Council notes that MDPs in Spain operate within certain confines and subject to important conditions, to include the condition that the firm's non-legal services should be other professional services which are complementary to those provided by lawyers.⁵¹ Similar restrictions apply in the case of MDPs operating in the Netherlands.⁵²

⁴⁹ The Task Force also considered (a) the *Command and Control Model* which model reflects the situation that currently exists in Washington DC, and (b) the *Fully Integrated Model* which is similar to the MDP model envisaged under the Act.

⁵⁰ Initial Report at paragraph 154.

⁵¹ See discussion at paragraph 175 of the Initial Report.

⁵² *Ibid.* see discussion at paragraphs 170 – 173.

England and Wales

18. The Council notes that the authors of the Initial Report have undertaken particularly detailed analysis of the legal system in England and Wales in the context of alternative business structures (“ABS”) and MDPs.
19. The cost and complexity of regulating ABSs in England and Wales remains a cause of concern for the Council. While it is acknowledged that in recent times efforts have been made to simplify the entry process for the establishment of ABSs and to reduce the regulatory burden upon their operation, the various and numerous professional bodies, regulators and other interested parties continue to attempt to navigate the regulatory complexities.
20. The authors of the Initial Report note that MDPs may encounter particular difficulties in safeguarding client confidentiality and legal professional privilege.⁵³ The Council concurs with this view and believes that the experience of England and Wales illustrates the challenges which may arise in this context.
21. Under the Legal Services Act 2007, where an ABS provides legal services through a lawyer or a person acting “*at the direction and under the supervision*” of a lawyer, privilege shall attach to communications or documents produced in that context.⁵⁴ It is clear, however, that where advice is deemed to have been provided by *another professional* within the ABS, not acting under the direction or supervision of a lawyer, privilege will not extend to those communications.
22. The practical implications of this position are evinced in *R. (on the application of Prudential plc) v. Special Commissioner of Income Tax*.⁵⁵ In that instance, the UK Supreme Court affirmed that legal advice privilege does not extend beyond the lawyer/client relationship to circumstances where tax advisers are engaged in the provision of fiscal legal advice, with the result that a client was not protected from disclosing documents containing such advice.
23. While the Legal Services Act 2007 attempts to clarify the application of legal privilege to advices provided by a non-lawyer within an ABS, it remains to be seen what shall constitute the “*direction*” or “*supervision*” of a lawyer for the purposes of maintaining privilege. The Council is of the view that this issue remains fraught with uncertainty.
24. The Council believes that the experience of England and Wales also offers insight into how a multi-layered regulatory framework, necessitated by the complex and multi-faceted nature of ABSs, can impinge on the clarity that

⁵³ Ibid. see discussion at paragraph 19.

⁵⁴ Legal Services Act 2007, ss.190(3)-(5).

⁵⁵ [2013] 2 A.C. 195.

clients have previously enjoyed in understanding the role of the solicitor and the barrister in providing them with legal advice and representation. In this regard it is noted that the numerous frontline legal regulators in England and Wales deemed it necessary to establish a dedicated website in 2013, clarifying the categories of lawyers available and the services which they are authorised to provide.⁵⁶

25. In circumstances where the licensing of ABSs only began in late 2011, and a small number of these firms are in operation, it is clear to the Council that this model has to date had a very limited impact upon the legal services market in England and Wales and there is therefore a dearth of evidence upon which to evaluate any long-term impact which the model may yet bring to bear. From a purely economic point of view the Council is of the view that it is not at all apparent, albeit on the limited evidence to date, that the introduction of the ABS model has facilitated a reduction in legal costs. This conclusion is supported, for example, by a study commissioned by the Ontario Trial Lawyers Association, which notably “*found no report, by a third party or an ABS, documenting a decrease in the costs of legal services*”.⁵⁷ Similarly, the Council notes that in its December 2016 study of the legal services market, the Competition and Markets Authority (CMA) did not record any consequential fall in legal costs.⁵⁸

26. In fact the Council is of the view that the introduction of MDPs may in fact increase legal fees due to the risk that the high costs of regulating these structures may be passed on to clients. The complexity of the regulatory structure necessitated by the implementation of ABSs remains a concern. In its December 2016 study of the legal services market, the CMA expressed particular concern that “*regulatory costs for authorised providers remain high despite a series of reforms introduced since the Legal Services Act 2007*” and that “*excessive regulatory costs may lead to higher prices for consumers*.”⁵⁹

27. At present, there are a number of regulatory bodies empowered to license ABSs in England and Wales; these include the Solicitors Regulation Authority (the “SRA”), the Bar Standards Board (the “BSB”), the Chartered Institute of Trademark Attorneys, the Chartered Institute of Patent Attorneys, the Council for Licensed Conveyancers, and the Institute of Chartered Accountants in England and Wales (the “ICAEW”). In the context of ABSs which perform both reserved and non-reserved legal services, in particular, the multitude of potentially relevant authorities has given rise to a range of regulatory challenges. As acknowledged by the SRA, these difficulties include: (i) the

⁵⁶ <http://www.legalchoices.org.uk/>

⁵⁷ Professor Jasminka Kaladjdzic, *ABS Research Memo* (1st December 2014). Available at: <http://www.canadianlawyermag.com/legalfeeds/2505/study-questions-access-to-justice-benefits-of-abs.html>.

⁵⁸ Report available at: <https://www.gov.uk/cma-cases/legal-services-market-study>

⁵⁹ Report available at: <https://www.gov.uk/cma-cases/legal-services-market-study>

risk of duplicate and conflicting regulation with varying codes of practice, complaints procedures, client money rules and insurance requirements potentially applying to the same work streams; (ii) confusion for ABS applicants, licensed bodies and clients alike, as to the boundaries and overlap between regulatory regimes; (iii) disputes as to which part of the turnover of an ABS will be subject to which regulators' practising fees; and (iv) restrictions on business models.⁶⁰

28. Whilst a complex licensing process and regulatory structure has long been recognised as a key contributor to the slow uptake of ABS licences in England and Wales, the jurisdiction has yet to realise a proportionate regulatory approach to these entities and reforms are ongoing. The Council notes that, as recently as July 2016, the Ministry for Justice launched a consultation on proposals to further amend the Legal Services Act 2007, with a view to reducing the regulatory burden applicable to ABSs.⁶¹
29. Subsequently, in December 2016, the Legal Services Board announced a survey amongst ABSs, seeking, among other things, to “*know more about... their views on regulation*”.⁶² It is clear to the Council that the question of how to regulate MDPs in an effective, proportionate and cost-effective manner remains a live and acutely complex issue in England and Wales.
30. Further, the Council notes that ABSs have also posed particular difficulties for the Legal Ombudsman in England and Wales (the “Ombudsman”). It is clear that where a firm is authorised to undertake a reserved legal activity, then any reserved or unreserved legal activity which it provides shall fall within the jurisdiction of the Ombudsman.⁶³ Significant uncertainty has arisen, however, as to whether, and to what extent, *non-legal activities* performed by authorised ABSs may fall within the Ombudsman scheme.
31. Arising from this ambiguity, the Ombudsman deemed it necessary to publish a policy statement in September 2014, setting out its “*approach to complaints where the respondent also provides non-legal services*.”⁶⁴ In so doing, the Ombudsman acknowledged that it was operating amidst “*changes in the legal services market which have created conditions making it likely that business and other providers will offer both legal and non-legal services alongside one*

⁶⁰ Solicitors Regulation Authority, *Multi-disciplinary practices: Consultation Paper* (May 2014), p. 5

⁶¹ Minister of Justice, *Legal Services: Removing Barriers to Competition* (July 2016). Available at: https://consult.justice.gov.uk/digital-communications/legal-services-removing-barriers-to-competition/supporting_documents/legalservicesremovingbarrierstocompetition.pdf.

⁶² See “*LSB launches ABS survey*” (8th December 2016):

http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20161208_LSB_Launches_ABS_Survey.html

⁶³ Legal Services Act 2007, s. 128.

⁶⁴ Legal Ombudsman, *Policy statement – approach to complaints where respondent also provides non-legal services* (September 2014). Available at: <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/LeO-policy-statement-approach-multi-disciplinary-providers-Sept2014.pdf>

*another.*⁶⁵ The 2014 policy statement confirmed that the Ombudsman would only accept complaints pertaining to a “*legal service*”, defined by the 2007 Act as a service consisting of, or including, legal activities,⁶⁶ and sought to devise a multi-faceted test for ascertaining whether a service consists of, or includes, a legal activity.

32. The Council believes that the approach of the Ombudsman in England and Wales illustrates that, from a regulatory perspective, the distinction between legal and non-legal activities is in practice difficult to draw. Notably, the Ombudsman introduced its policy test on a pilot basis for a 12-month period, and stated that it would be reviewed thereafter, “*taking into consideration stakeholder views as well as operational experience.*”⁶⁷ The Ombudsman further acknowledged that it would be necessary to exercise discretion on a case by case basis and that other considerations may be taken in to account when seeking to differentiate legal activities from non-legal activities.⁶⁸ Even more striking is the acknowledgement that its “*view of what constitutes a legal service may differ to the views of approved regulators, licensing authorities and the Legal Services Board.*”⁶⁹ In the view of the Council, this underscores the complexity of the distinction between legal and non-legal activities, where performed by an MDP, and the degree of regulatory uncertainty to which this gives rise.

33. Finally the Council notes the observations of the authors of the Initial Report with regard to the role of barristers in MDPs / ABSs in England and Wales.⁷⁰ While a barrister may practice as a manager of or employee of a SRA regulated entity / ABS, the barristers’ practice is confined to the clients of the ABS. Accordingly, barristers operating within MDPs in England and Wales may not operate pursuant to the cab rank rule.

⁶⁵ Legal Ombudsman, *Policy statement – approach to complaints where respondent also provides non-legal services* (September 2014).

⁶⁶ Legal Services Act 2007, s. 164(10).

⁶⁷ Legal Ombudsman, *Policy statement – approach to complaints where respondent also provides non-legal services* (September 2014).

⁶⁸ Legal Ombudsman, *Policy statement – approach to complaints where respondent also provides non-legal services* (September 2014).

⁶⁹ Legal Ombudsman, *Policy statement – approach to complaints where respondent also provides non-legal services* (September 2014).

⁷⁰ The Initial Report provides at paragraph 104: “*The position of barristers is worth noting as there are specific provisions which apply to them. Since the Legal Services Act 2007, barristers of England and Wales are permitted to supply legal services to the public in three different ways: as a self-employed barrister, as an employed barrister or as a manager or employee of a lawyer-only body. Although the Bar Standards Board did not apply to become an approved regulator of entities until 2015, it has been, and continues to be possible for a barrister to become a manager in an SRA regulated legal practice alongside solicitors, other qualified lawyers and non-lawyers. However, in these circumstances, the barrister’s practice is limited explicitly to clients of the ABS.*”

Canada

34. The Council understands that with the exception of Quebec, Ontario and British Columbia each of Canada's provincial and territorial law societies effectively prohibit the operation of MDPs by prohibiting lawyers from splitting, sharing or dividing clients' fees with anyone other than other lawyers.⁷¹
35. Again, in those territories where types of alternative business structures are permitted, it is noted that there are significant restrictions on their formation and operation. While it is argued by the authors of the Initial Report that the model permitted in British Columbia is "*more permissive*" than that provided for under the Act on account of the fact that in British Columbia MDPs can take incorporated form and allow for the participation of corporations and individuals,⁷² it is noted that MDPs in British Columbia may provide legal services to the public which are *supported or supplemented* by the services of another profession, trade or occupation. Essentially, MDPs in British Columbia may provide services that are complementary and ancillary to the legal services provided by the MDP. The Act gives no such precedence to legal services to be offered by MDPs over and above any other non-legal services.
36. Similar restrictions apply in the case of MDPs that are permitted to operate in Ontario⁷³ and in Quebec.⁷⁴
37. The authors of the Initial Report observe (a) that the take-up of MDPs in Ontario has been virtually non-existent and examples of functioning MDPs are very difficult to find⁷⁵ and (b) that there were 40 MDPs registered with the Barreau du Quebec in 2013.⁷⁶ In relation to British Columbia the authors of the Initial Report note as follows:

*"Not surprisingly, given the onerous nature of the rules applying in British Columbia, the take up of this form of business structure has been extremely limited. The introduction of MDPs has therefore had virtually no impact on the legal market in British Columbia."*⁷⁷

⁷¹ "Restrictions on MDPs and Business Organisation in the Legal Professions: A literature Survey" Institute for Corporate Law, Governance and Innovation Policies (ICGI) December 2010.

⁷² Initial Report at paragraph 68.

⁷³ Ibid. See discussion at paragraph 78; Lawyers and paralegals may form MDPs with other *professionals* who practise a profession, trade or occupation that *supports or supplements their practice of law or provision of legal service*.

⁷⁴ Ibid. See discussion at paragraph 87: "...MDPs can contain any individual professionals regulated according to the Quebec Code of Professions or entities wholly formed of those professionals."

⁷⁵ Ibid. at paragraph 79.

⁷⁶ Ibid. at paragraph 88.

⁷⁷ Ibid. at paragraph 75.

PART 5 – ISSUES FOR CONSULTATION AND PART 5 OF THE INITIAL REPORT

Introduction

1. Respondents have been directed to Part 5 of the Initial Report and to the general and specific questions set out therein. The Council is opposed to the introduction of MDPs and accordingly proposes to address the following question posed in the Initial Report: *Should MDPs/non-lawyer ownership of legal practices be permitted in any form in Ireland?*
2. The Council remains firmly opposed to the introduction of MDPs in the State and the Council remains firmly opposed to non-lawyer ownership of legal practices in any form in Ireland. In essence, the Council believes that any apparent *advantages* or *benefits* of this model of practice are greatly outweighed and overshadowed by the risks, uncertainties and cost associated with the introduction of MDPs.
3. The Council is not convinced that the measures in the Act which seek to address a number of the problem areas (conflicts of interest, lawyer independence, confidentiality and privilege), and in the absence of a complex and multi-layered regime of monitoring and supervision, are sufficient such that the introduction of partnerships between lawyers and non-lawyers could be said to be in the public interest.
4. For the reasons outlined in previous submissions,⁷⁸ the Council believes strongly that the current structure of the legal system, which sees solicitors and barristers cooperating but ultimately fulfilling different roles brings with it certain clear advantages for clients and for the wider public; the *division of labour* offers efficiencies and cost savings in the form of competition and flexibility; the maintenance of the independent referral bar and the cab-rank rule ensures that solicitors and clients have equal access to a pool of specialist legal expertise; robust regulatory regimes, such as the regime implemented under the Law Society's Solicitor's Accounts Regulations offer clients protection and peace of mind;
5. The current structure offers clear and undeniable *certainties* with regard to the independence of lawyers, client privilege, confidentiality and conflicts of interest. Put very simply, clients who currently engage the services of solicitors and barristers through the *traditional* practice models (sole practitioners, partnerships between solicitors) do so safe in the knowledge that certain protections are in place in relation to privilege and confidentiality, that the conduct of the legal practitioner providing assistance will be subject to scrutiny under the relevant regulatory regime and that should problems arise,

⁷⁸ See the Council's submissions entitled *Submissions to the Legal Services Regulatory Authority on Certain Issues Relating to Barristers*, 2nd June 2017.

such as the loss of funds due to dishonest conduct, that claims can be made on the Compensation Fund administered by the Law Society. Further, clients can be assured that currently, in relation to barristers and solicitors, a clear and pre-existing ethical framework governing the conduct of legal practitioners where conflicts of duties or conflicts of interest arise exists.

6. Inherent in the MDP model is the *potential* for the dilution or displacement of (a) the core values of the legal profession upon which clients and the courts rely (b) the economic and access to justice advantages of the current system, (b) the certainties and protections that are well established and clearly defined.

Independence

7. The Council has previously submitted in the context of the operation of Legal Partnerships in the State,⁷⁹ that the independence of lawyers is a fundamental right that members of the public have to obtain legal advice from persons who are in no way influenced by or beholden to other persons or entities. Access to independent legal advice acts as a guarantee that a client can be confident that his or her legal advisors are providing legal assistance without fear of interference or sanction.
8. MDPs, by their very definition, will result in a *proliferation of duties*. The Council is concerned that it is not at all apparent how lawyer independence can be reconciled with a partner's duty to operate with a view to a profit insofar as it relates to barristers and their duties to the court and to clients. The Council believes that this is a matter which deserves very close consideration by the Authority.
9. The *proliferation of duties* will see the imposition upon barristers of additional duties and obligations which include a duty to act in the best interests of the MDP. Clients currently receive advice from barristers without having to concern themselves with potential conflicts between the barrister and investors in the MDP, or between the barrister and other employees or partners in the MDP. The Council does not believe that the potential for such conflicts arising is remote or illusory; international experience has shown that conflicts do arise.⁸⁰
10. The Council also adopts its previous submission to the effect that the mere *perception* of conflicts of interest should, in the interest of maintaining public confidence in the integrity of the legal system, be avoided. The Council has previously offered the example in the context of legal partnerships of a client

⁷⁹ See the Council's submissions entitled Submissions to the Legal Services Regulatory Authority concerning the Regulation, Monitoring and Operation of Legal Partnerships, 24th March 2017

⁸⁰ The authors of the Initial Report note the "*pushback*" in the wake of the collapse of Enron; the Initial Report, at paragraph 23.

who engages the services of a partnership barrister in a medical negligence case against a hospital. It was argued that there must be no perception that the barrister's duties to his or her partners, who happen to carry out a large amount of legal work on behalf of the hospital (assuming here that the partnership is permitted to act against the hospital at all) feature in the mind of the barrister dealing with the case. The analogy applies with equal force in the case of MDPs.

11. While it is noted that the Act imposes a duty on managing legal partners to ensure that the business of the MDP is conducted in accordance with the core principles identified in s.13(5)⁸¹ it is not clear how this apparent safeguard will work in practice.
12. In the absence of comprehensive and particularly prescriptive regulations and in the absence of a robust monitoring and supervision regime, the Council believes that the potential risks far outweigh any apparent advantages or benefits inherent in the MDP model.

Economic considerations and access to justice

13. The Council is not convinced that a clear economic argument has been made out such that would justify the establishment of MDPs. While the arguments made regarding the *one stop shop* model are readily understood *i.e.* a client will have access to lawyers, doctors, engineers etc., all of whom operate within one MDP it is not clear whether or not, in the context of litigation in particular, MDPs will in practice be in a position to offer a *one stop shop* service. By way of example, where a solicitor partner in an MDP refers his or her client to a doctor partner, also operating in the same MDP, for the purpose of obtaining a medico-legal report, will the report be admissible as *independent medical evidence*? Under s.107(2) of the Act both the solicitor and the doctor in the above example will be entitled to share the fees and income generated by the case.
14. With regard to *access to justice* the Council believes that the ability of small solicitors' firms and sole practitioner solicitors throughout the State to access 2,200 competing barristers for specialist advocacy services will be necessarily compromised if barristers, solicitors and other professionals band together in MDPs and other business structures.
15. Any such consolidation of legal expertise would inevitably have the effect of reducing the number of independent referral barristers currently available to all solicitors and members of the public and could potentially result in a monopolisation of certain areas of practice. Again adopting an example offered in relation to legal partnerships, a monopoly may very well arise

⁸¹ Section 108(3) of the Act.

where, an MDP specialising in the area of competition law and which includes the most established competition law barristers, solicitors and consultants begins to operate in Dublin. The monopolisation of such legal practitioners and other professionals one MDP may have knock-on effects on access to justice for members of the public, for prices and for entry into the professions themselves. Again, this proposition stands in stark contrast to the current position where the poorest client in the most rural part of Ireland can engage the services of the best advocate at the Bar.⁸²

Privilege and client confidentiality

16. In their dealings with lawyers clients are entitled to have an expectation of confidentiality. Pursuant to long established and relatively clear legal principles, clients can also expect certain communications with their lawyers to be subject to legal professional privilege. The simplicity of the existing model ensures that clients have clarity regarding confidentiality and privilege.
17. The experience of England and Wales shows that the maintenance of legal privilege in situations where clients are advised by multiple professionals of different disciplines is not at all guaranteed. See discussion above regarding *R. (on the application of Prudential plc) v. Special Commissioner of Income Tax*.⁸³
18. The Act provides for certain steps to be taken with regard to the maintenance of confidentiality.⁸⁴ The Act also provides limited guidance in relation to legal privilege.⁸⁵ However, it is not unreasonable to suggest that the introduction of a practice model as radical and novel as the MDP model envisaged under the Act will present difficulties in the context of confidentiality and privilege and that similar issues to those encountered in England and Wales, and which remain unresolved in that jurisdiction, may very well arise in this country.

The cost of regulation

19. As noted by the authors of the Initial Report, the Authority is required to make regulations in relation to the operation and management of MDPs.⁸⁶ The Act offers some guidance in this regard and it is suggested that such regulations may provide for or relate to a number of matters, to include:
 - The professional and ethical conduct of persons providing legal services to clients;
 - Client confidentiality;

⁸² See rule 2.1 of the Code of Conduct of the Bar of Ireland, adopted on the 23rd July 2014.

⁸³ [2013] 2 A.C. 195.

⁸⁴ Section 110(5) of the Act.

⁸⁵ Section 110 sub-sections (6) and (7).

⁸⁶ Section 116 of the Act.

- The provision of information to clients regarding the nature of the duties owed to the client by the practice;
- The rights, duties and responsibilities of the practice in respect of moneys received from clients;
- Management and control;
- The practices' accounting procedures (the types of bank accounts to be opened, the maintenance of accounting records).

20. By virtue of their very nature as businesses offering a range of different services to be delivered by both members of different professions and non-professionals, it can be expected that MDPs will present regulatory challenges that are not currently associated with existing or traditional practice models in the State. As the above list indicates, the establishment of MDPs will necessarily have to be preceded by the introduction of a scheme of regulation that is comprehensive and prescriptive. With regard to the monitoring and supervision of MDPs accounts any regime to be implemented should be at least as robust and comprehensive as the Solicitors Accounts regime administered by the Law Society of Ireland in relation to solicitors' accounts.

21. The Council remains concerned that the potentially significant costs associated with the development and implementation of a *purpose-built* regulatory regime which seeks to govern all aspect of the operation of MDPs will ultimately be passed onto clients of MDPs.

22. In this regards the Council makes two additional observations. Firstly, it is not clear from the November 2013 Regulatory Impact Analysis⁸⁷ whether or not the cost of the implementation of such a regime has been evaluated. Secondly, and in circumstances where members of the Law Library will not operate within MDPs and will remain sole practitioners only those barristers who chose to operate within MDPs could be required to contribute to the costs of operating such a regime.

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<http://www.justice.ie/en/JELR/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf/Files/RIA%20LSRB%20MASTER%20PDF%20VERSION%20PDF%20NOV%202013.pdf>.



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