

# LAW SOCIETY SUBMISSION

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## **SUBMISSION ON MULTI-DISCIPLINARY PRACTICES**

**LEGAL SERVICES REGULATORY AUTHORITY**

**16 June 2017**

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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## 1. Introduction

- 1.1. The Legal Services Regulatory Authority (“the Authority”) was established in accordance with section 8 of the Legal Services Regulation Act 2015 Act (“the Act”) to regulate the provision of legal services by legal practitioners and to ensure the maintenance and improvement of standards in the provision of such services in Ireland.
- 1.2. The Authority submitted an Initial Report to the Minister for Justice and Equality on 31 March last in relation to the establishment, regulation, monitoring, operation and impact of multi-disciplinary practices (MDPs) in the State (“the Authority’s Report”), as provided for under section 119(1) of the Act. Following this, the Authority has invited written submissions in relation to MDPs as part of a public consultation process. The Law Society of Ireland welcomes the opportunity to participate in the public consultation process by way of this submission and also other possible consultation approaches including information sessions and roundtable discussions as set out at para. 251 of the Authority’s Report.
- 1.3. The Society welcomes, in particular, the acknowledgment in the preliminary conclusion of the Authority’s Report that it may, following the public consultation process, recommend that MDPs should not be introduced. It is also pleased to note the recognition in the Executive Summary of the Report that the mere presence of suggested regulatory arrangements within the Act does not preclude the Authority from recommending that MDPs should not in fact be introduced.
- 1.4. Section A of this submission will address the overarching questions, set out at para. 252(i) and (iv) of the Initial Report, as to
  - (i) whether MDPs/non-lawyer ownership in any form should be permitted in Ireland and;
  - (ii) the impact that MDPs could have if introduced, in terms of:
    - (a) Legal costs;
    - (b) The provision of legal services to consumers, and;
    - (c) The access of persons to legal practitioners.
- 1.5. Section A of the submission will explore the question of whether MDPs are an appropriate business structure for the Irish legal system. In doing so, it will consider

the experience of other jurisdictions and their rationale for permitting or denying the operation of MDPs. Secondly, this section will examine the effect that MDPs, if introduced, could potentially have on a number of critical areas, namely legal costs, the provision of legal services and access to legal services. It is intended that the submission will provide the Authority with a crucial insight into how MDPs might impact legal practitioners and the wider public in Ireland and assist them in determining the most appropriate final recommendation to the Minister.

- 1.6. The Society's conclusions on the overarching questions set out in para. 251(i) and (iv) of the Authority's Report are set out in Chapters 3 and 4 and the Society urges the Authority to conclude, as the Society has, that the complexities, difficulties and dangers associated with MDPs militate against their introduction into the Irish legal services market.
- 1.7. While holding to its view that MDPs are an inappropriate form of business structure for the Irish legal services market, Section B of the submission will seek to address, where possible, the specific questions as set out in the Authority's Report. In particular, Section B sets out the regulatory matters that should be considered if MDPs are permitted in future.

## 2. Executive Summary

- 2.1. While the Society appreciates that legal services must change and progress, such innovation must be balanced and proportionate to the possible gains to be achieved. It must ensure the integrity of the administration of justice as well as protecting the consumer. Clearly, any radical changes to the Irish legal landscape need to be carefully considered and fully examined to determine whether it is in the best interests of the public and in the interests of justice. Section A of this submission encompasses the primary considerations of the Society and suggests that the introduction of MDPs both generally and as outlined in the Act would pose too high a risk to the protection of access to justice and the interests of clients. Where innovations undermine and potentially compromise clients' ability to access legal assistance or advice, then serious consideration must be given to the viability and rationality of such an approach.
- 2.2. On balance, the Society considers that the potential minimal economic or efficiency gains do not outweigh the risks and damage that would be experienced if MDPs were introduced to Ireland. Ultimately, the Authority must consider what the objectives are if a decision is made to introduce MDPs to the Irish legal market – will it provide a more streamlined cost effective legal services industry or will it prioritise economic gain, perhaps ahead of the public interest and the administration of justice?

### Section A – Suitability and Impact

#### **Recommendation**

The Authority should recommend that MDPs are not appropriate for the Irish legal services market and should not be introduced for a variety of reasons as follows:

- )] Dilution of expertise in specialised legal areas and difficulties in accessing specialist knowledge
- )] Undermining of the application of professional rules and standards
- )] Negative impact on the standard of professionalism and expertise of the legal profession
- )] Limitations on the Authority to regulate legal professionals only
- )] Extensive regulatory requirements could deter external investors
- )] Risks to the protection of the public interest and consumers' best interests
- )] Dangers of overregulation including increased regulatory costs and paperwork
- )] Conflicting interests and professional codes of different professionals

- )] Consequences for the protection of legal professional privilege
- )] Threat to solicitor independence and client confidentiality
- )] No demonstrable reduction in legal costs for consumers
- )] No demonstrable increase in quality of legal services and concerns around potential reduction of quality
- )] No demonstrable increase in access to legal services and emphasis on commercial profit and reputation

2.3. Notwithstanding the Society's belief that MDPs should not be introduced in this jurisdiction, the Society has also addressed the additional questions posed by the Authority as to the procedure for regulation, monitoring, and operation of MDPs. These questions include, *inter alia*, commencing practice, identification of unsuitable persons as partners, implication for professional indemnity requirements, regulation of non-legal partners, fee-sharing and contingency issues, client protection, sanctions, cessation of an MDP and ethical standards.

The following recommendations reflect the Society's view on the potential regulatory issues that would arise should the Authority move to authorise the introduction of MDPs into the Irish legal services market.

**Recommendation 1 – Notification of commencement**

Prospective MDPs should be required to provide written notification of a minimum of two months in advance of the proposed commencement date.

**Recommendation 2 – Power of the Authority in relation to commencement applications**

The Authority should be granted the power to refuse to grant an MDP permission to commence, grant permission to commence subject to specified conditions, or grant unrestricted permission to commence. The Authority should be required to provide the MDP with written reasons for the decision, and the MDP should have a right of appeal to the High Court.

### **Recommendation 3 – MDP commencement notification**

The MDP commencement notification to the Authority should not be deemed to be received until a properly completed notification form with the required accompanying documentation and full payment of fees (if any) is received by the Authority.

### **Recommendation 4 – Written commencement authorisation from the Authority**

MDPs should be prohibited from commencing the provision of legal services until such time as written commencement authority is issued by the Authority, and received by the MDP.

### **Recommendation 5 – Good standing of MDP partners**

All professional persons proposing to be partners within an MDP should be required to provide the Authority with a certificate of good standing from their professional bodies as part of the commencement notification.

### **Recommendation 6 – Suspended and struck-off solicitors**

If MDPs are to be introduced, it should be made clear that the Society's existing powers under the Act prohibiting suspended and struck-off solicitors from engaging in any work in any capacity involving or in connection with the provision of legal services, and prohibiting persons from employing or remunerating struck-off or suspended solicitors for legal services, until granted written permission by the Society, extends to solicitors in MDPs.

### **Recommendation 7 – Suspended and struck-off professionals**

Consideration should be given to suspended or disqualified persons from other professions being restricted from becoming a partner or engaging in any work in an

MDP until granted permission by their regulatory body.

### **Recommendation 8 – Commencement information**

The following information should be required as part of the MDP commencement notification to the Authority:

- a) the full name of the MDP;
- b) the MDP's place or places of business;
- c) details of the proposed legal and non-legal services to be provided by the MDP;
- d) contact details for the MDP including phone, fax, email and website;
- e) the proposed date of commencement of the MDP;
- f) for recommencement notification for closed MDPs, the date of cessation of the MDP;
- g) details of the MDP's professional indemnity insurance including insurer, date of commencement and cessation of the insurance, broker details, policy number, and minimum level of cover;
- h) the names of the partners of the MDP, their commencement dates as partners and their professional qualifications (if any);
- i) the name of the managing legal practitioner for the MDP, their date of commencement and their qualifications;
- j) the names of all legal practitioners and professionals in the MDP, including their commencement dates, job titles, professional qualifications, and relevant regulator;
- k) confirmation that the legal practitioner partners and legal practitioner staff are practising solicitors and/or barristers;
- l) details of legal practitioner(s) to contact in case of a distressed closure;
- m) historic data on the MDP such as previous names, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), previous insurance details, and details of any preceding or succeeding partnerships.

#### **Recommendation 9 – Professional indemnity insurance**

A proposed MDP should be required to provide documentary evidence of their professional indemnity insurance from their insurer or broker, including dates of commencement, participating insurer details, broker details, minimum level of cover and confirmation that the cover meets the prescribed minimum terms and conditions.

#### **Recommendation 10 – Data protection procedures**

Consideration should be given to the Authority requiring confirmation from MDPs that they have data protection procedures in place to ensure compliance with the General Data Protection Regulation (Regulation EU 2016/679) as part of the commencement notification requirements.

#### **Recommendation 11 - Firm numbers**

Consideration should be given to the Authority assigning each commencing MDP with a unique identifier number.

#### **Recommendation 12 – Qualifying criteria for non-professionals**

The Authority should establish a vetting system including qualifying criteria for non-professional persons who wish to become a partner in an MDP which could include matters such as reviewing employment history, checking criminal history, current and previous directorships of any companies, undischarged bankruptcy in any jurisdiction, personal insolvency arrangements and any unsatisfied judgements against the individual. Consideration should be given to the imposition on penalties of non-professional partners for provision of false information to the Authority in their application to be a partner.

#### **Recommendation 13 – Organised crime and terrorist financing**

Consideration should be given to the procedures to be put in place to ensure that

MDPs are not used to facilitate organised crime and terrorist financing.

**Recommendation 14 – Jurisdiction of the Authority over non-legal practitioners**

Legislation should be enacted to allow the Authority to exercise jurisdiction over non-legal partners in an MDP. Consideration should be given to the introduction of an annual MDP licence or certificate, with fees from same being used to pay for the cost of MDP regulation by the Authority.

**Recommendation 15 – Registered European lawyers**

Experience obtained by a registered lawyer working in an MDP should count toward the assimilation period under Article 10 of the Establishment Directive.

**Recommendation 16 – Advertising**

MDPs should be subject to the same advertising standards as apply to all other classes of legal service providers under the Act.

**Recommendation 17 – Professional names**

The Authority should make regulations under section 116(3)(e) of the Act in relation to the naming of MDPs similar in nature to those in place for solicitor firms and the Authority should approve the professional names of MDPs before commencement.

**Recommendation 18 – Professional notepaper**

The Authority should make regulations in relation to the professional notepaper of MDPs similar in nature to those in place for solicitor firms and the Authority should approve the notepaper of the MDP before commencement.

**Recommendation 19 – Regulations under section 116**

The Authority should draft regulations in relation to each of the matters under section 116 (a) to section 116 (f) of the Act.

**Recommendation 20 – Professional indemnity insurance**

MDPs that have solicitors should be required to maintain the same professional indemnity insurance standards as solicitor firms including minimum level of cover and minimum terms and conditions.

**Recommendation 21 – Assigned risks pool and run-off cover**

Consideration should be given to access by MDPs with solicitor partners to the assigned risks pool and run-off fund, and the creation of an assigned risks pool and provision of run-off cover to non-solicitor MDPs.

**Recommendation 22 – Undertaking by non-legal practitioner partners**

Consideration should be given to the introduction of regulations prohibiting non-legal practitioner partners of MDPs from obstructing legal practitioners in a practice in meeting their professional obligations whether for the pursuit of monetary or any other non-monetary benefit.

**Recommendation 23 – Register of MDPs**

The Authority should maintain a register of MDPs on their website and a physical register should be made available to the public for inspection during office hours at no cost to the applicant with the following information:

- a) the full name of the MDP;
- b) the MDP's place or places of business;
- c) details of the proposed legal and non-legal services to be provided by the MDP;
- d) contact details for the MDP including phone, fax, email and website;

- e) the commencement date of the MDP;
- f) the cessation date of the MDP if closed;
- g) the recommencement and cessation dates of MDPs that have closed and reopened;
- h) details of the MDP's current professional indemnity insurance including insurer name and contact details, date of commencement and cessation of the insurance, policy number, and minimum level of cover;
- i) the names of the partners of the MDP, their commencement dates as partners and their professional qualifications (if any);
- j) the name of the managing legal practitioner for the MDP, their date of commencement and their qualifications;
- k) the names of all legal practitioners and professionals in the MDP, including their commencement dates, job titles, professional qualifications, and relevant regulator;
- l) confirmation that the legal practitioner partners and legal practitioner staff are practising solicitors and/or barristers;
- m) historic data on the MDP such as previous names, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), previous insurance details, and details of any preceding or succeeding partnerships.

#### **Recommendation 24 – Provision of information to clients**

MDPs should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms, including information on legal costs and professional fees, complaints procedures, access (if any) to a compensation fund, and professional indemnity insurance

#### **Recommendation 25 – Definitions of 'legal services' and 'non-legal services' in relation to MDPs**

Clear and separate definitions of legal services and non-legal services should be introduced for the purpose of the operation of MDPs.

#### **Recommendation 26 – Amendments to section 113 in relation to the Society's**

## Compensation Fund

Section 113 should be amended to include necessary protections for the Society's compensation fund to ensure that the exposure of the fund in relation to MDPs is solely limited to claims arising from acts of dishonesty directly carried out by a solicitor in the provision of legal services. Detailed rules should be put in place in primary legislation to determine the fund's liabilities in relation to MDPs, and to protect the fund, including the following:

- a) The percentage of the loss paid by the Society's compensation fund, where all partners are found jointly and severally liable for losses suffered due to dishonesty, should be proportionate to the percentage solicitor partnership of the MDP.
- b) Where loss has been sustained as a result of the combined activities of more than one party, one of which is a solicitor, the Society should consider the role of each contributing portion of the loss primarily attributable to the acts of the solicitor, as opposed to that portion which is primarily attributable to the acts and/or omissions of non-solicitors. The Society may make a grant on a *pro-rata* basis in accordance with its assessment of the importance of each contributing factor in the loss, or may reject an application in its entirety if the Society is of the opinion that the loss was primarily due to other factors rather than the solicitor's conduct.
- c) The Society may refuse a grant in a case where it assesses that the loss was primarily attributable to an act or default by a solicitor in the course of provision of a service which, in the opinion of the Society, is a service other than a legal service, or an activity not regulated by the Society.
- d) The Society shall be entitled to determine what constitutes the provision of a legal service or a non-legal service and shall not be bound by any interpretation by the MDP, MLP or in any letter of engagement.
- e) With regard to claims arising from the provision of legal services by MDPs, payment of grants from the Society's compensation fund by the Society shall

be discretionary, and claimants shall not have an enforceable legal right.

**Recommendation 27 – Establishment of MDP compensation fund**

Consideration should be given to the establishment and maintenance by the Authority of an MDP compensation fund to compensate clients who have suffered pecuniary loss due to the dishonest actions of non-solicitor partners or employees in MDPs, which fund would be paid for in its entirety by non-solicitor partners or employees in MDPs.

**Recommendation 28 – Powers of the Society in relation to solicitor MDPs**

It should be made clear that the Society retains all regulatory, investigative, enforcement, protective and disciplinary powers in relation to MDPs with solicitor partners and employees as currently exists for solicitor firms.

**Recommendation 29 – Financial regulation of MDPs**

In the interests of public protection, all MDPs who hold client moneys should be subject to a financial regulatory system at the same level of that in place for solicitor firms.

**Recommendation 30 – Powers of the Authority in relation to financial regulation of non-solicitor MDPs**

The Authority should be vested with the same regulatory, investigative, protective, enforcement and disciplinary powers in relation to the financial regulation of non-solicitor MDPs as are currently vested in the Society in relation to the financial regulation of solicitor firms.

**Recommendation 31 – Annual confirmation of professional indemnity insurance**

MDPs should be required to provide the Authority with confirmation of professional indemnity insurance cover on an annual basis, and the Authority should be empowered

to make an application to the High Court to close down any MDP which fails to provide such cover within any time limit prescribed.

**Recommendation 32 – Complaints against non-legal practitioner partners and employees of MDPs**

Consideration should be given to empowering the Authority to deal with complaints against non-legal practitioner partners and employees of MDPs.

**Recommendation 33 – Regulation of non-legal practitioner partners and employees of MDPs**

Consideration should be given to extending the regulatory and disciplinary remit of the Authority to include any non-legal practitioner partners or employees in MDPs, and the Authority should be empowered to disqualify, and impose restrictions on, non-legal practitioner partners and employees in MDPs.

**Recommendation 34 – Distressed closure of MDPs**

Consideration should be given to the procedures to be put in place in the event of a distressed closure of an MDP, including seeking specific information from MDPs (such as home addresses, phone numbers and emails of MDP partners), a requirement for each MDP to appoint an emergency legal practitioner contact who has agreed to assist with the wind-down of legal matters in an MDP in the event of a distressed closure, and procedures to deal with and safeguard client files and moneys.

**Recommendation 35 – Client files**

The Authority should put in place guidelines for the closure of MDPs in relation to the distribution and retention of client legal files.

**Recommendation 36 – Timescale for cessation notifications**

MDPs should be required to provide written notification no less than one month prior to cessation in practice.

**Recommendation 37 – Closing accountants’ report**

Similar reporting requirements should apply to MDPs in relation to closing accountants’ reports when ceasing to provide legal services.

**Recommendation 38 – Funding regulation of MDPs**

MDPs should be levied, either by entity or each individual in the MDP, with annual fees to pay directly for the entirety of their own regulation.

**Recommendation 39 – Qualifying criteria for MLPs**

Consideration should be given to the creation of qualifying criteria for MLPs, a requirement to obtain the approval of the Authority to appoint an MLP, and empowering the Authority to refuse to approve the appointment of an MLP.

**Recommendation 40 – MDPs practising without MLPs**

Any MDP without an MLP should be immediately and automatically deemed to be inactive and prohibited from providing legal services of any kind until they provide confirmation to the Authority that an MLP is in place. The Authority should be granted the powers to make an application to the High Court for an order forcing MDPs which do not have an MLP in place to close.

**Recommendation 41 – Data sharing procedures**

Robust data sharing procedures should be put in place between the Authority and relevant professional regulators in relation to professionals working in MDPs.

## Section A – Suitability and Impact

### 3. Should MDPs in any form be introduced to Ireland?

- 3.1. Increasingly, a number of jurisdictions are exploring new forms of legal business structures including that of MDP/non-lawyer ownership. As recognised in the Authority's Report, this has in no way become the norm and in fact such structures only account for a small proportion of the total market for legal services. Further, in those jurisdictions embracing MDPs, there is great variety in the models used and a huge divergence as to the basis for introducing them. MDPs are one of a number of innovative business structures which are often termed alternative business structures (ABSs) incorporating various elements of non-lawyer ownership or management offering legal and other services.
- 3.2. The Act provides for the possibility of introducing a new type of MDP or non-lawyer ownership allowing for potential structures such as those involving another regulated professional, a non-regulated professional or a passive investor. Importantly, external investors must be an individual and cannot be a corporate body as set down in section 107(8) of the Act. Under section 2 of the Act, an MDP 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".
- 3.3. Currently, Ireland only permits solicitors to practice as sole practitioners or in partnerships with other practitioners while barristers are sole traders. The Act however provides for the operation of legal partnerships including those between barristers and solicitors. The Authority conducted a public consultation and submitted a report to the Minister for Equality and Justice on 31 March 2017, about how it should exercise the power granted to it under section 116 to regulate and monitor legal partnerships, as well as how those partnerships should operate in practice.
- 3.4. Ultimately, in that Report, the Authority recommended that relevant provisions of the Act pertaining to legal partnerships should not be commenced until it is satisfied that the necessary consultations have been conducted and regulations and other essential

measures prepared. The Authority has committed to an intensive period of review and further consultation and will next report to the Minister on the issue of legal partnerships no later than 31 July 2017. Evidently, the Authority is aware that any major changes to the Irish legal market must be carefully researched and considered before any far-reaching decisions are made.

- 3.5. The Society in its submission of February 2014 to the Minister for Justice, Equality and Defence on the draft Bill observed that, if MDPs were introduced, they would likely involve “partnerships of smaller, less regulated businesses whose respect for an independent solicitor might be less than necessary to protect client interests.” The Society was and remains concerned that the business structure of MDPs could result in a dilution of expertise in specialised legal areas and in turn a failure to follow professional standards and to uphold the best interests of the client e.g. by referring them to an advisor within the MDP rather than a more suitable external advisor. This reflects the observations within the Authority’s Report at para. 9 that “more flexibility into how lawyers practise could undermine the application of professional rules and standards...”.
- 3.6. The provision of legal services is a crucial service, one founded on core principles and performed by trained professionals with the necessary expertise, knowledge and skills. If MDPs were allowed in Ireland, it could have a huge impact on the standard of professionalism and expertise of the legal profession which could bring about a significant dilution of the codes of conduct and professional practice in legal services.
- 3.7. In the Clementi Report, which examined the legal services regulatory framework in England and Wales, the issue of regulatory reach was considered “the most fundamental” and observed that the Legal Services Board would have no jurisdiction outside of legal services. Similarly, the Authority would be placed in a similar position with its jurisdiction limited only to regulation of the legal profession, which would cause difficulties in ensuring the effective regulation of MDPs.
- 3.8. Current models of practice would be monumentally impacted by a far-reaching and uncertain regulatory reach which would likely go hand in hand with the introduction of MDPs to the Irish legal market. Specifically, the Clementi Report highlighted the added complexity that would exist if MDPs were to operate, particularly where no profession held a majority ownership in the business. As the Authority’s Report at para. 109 notes

the Legal Services Act 2007 itself identified MDPs as a potentially difficult entity to regulate.

- 3.9. A further concern regarding MDPs is that of pricing sole practitioners and other small firms out of the market. This will be addressed in greater detail in the section relating to legal costs. A situation could arise where a number of MDPs are formed that can provide legal services in a manner and at a price with which sole practitioners and SMEs would be unable to compete. It is unlikely that sole practitioners and smaller SMEs would possess the necessary resources to compete with MDPs, nor be in a position to attract potential investors. This could have a detrimental impact on consumer choice, particularly for those consumers based in rural areas, with less access to larger firms who are predominantly Dublin based.
- 3.10. In qualitative research into ABSs undertaken by the Solicitors Regulatory Authority (SRA), some participant firms noted that certain requirements could be off-putting to outside investors, who are not familiar with requirements within the legal field. For example, in British Columbia, as the Authority's Report itself observes at para. 69, the onerous and restrictive nature of the rules and regulations applying to what they term non-lawyer owned legal practices (NLPs) has resulted in little or no uptake of the new business structures.
- 3.11. The SRA also undertook a consultation in 2014 in relation to MDPs and the Law Society of England and Wales expressed their opposition to legal work being subject to different regulators. The SRA proposed that services carried out in an MDP that were not reserved legal activities would not need to be regulated by the SRA, once they were subject to suitable external regulation. In essence, the Law Society of England and Wales is concerned that "the protections available to the consumer are unclear" and that "different regulation may give rise to similar dangers to a lack of regulation". Nick Robinson, a leading academic from Harvard's Centre on the Legal Profession, who undertook quantitative research within the context of non-lawyer ownership, has warned of the danger that a new regulatory regime might bring. He submits that a regime "that embraces an ideology of deregulation or competition too strongly will gloss over new hazards or unduly dismiss old values worth supporting...and regulation may become less susceptible to capture by interests inside the legal professions, but more susceptible to capture by actors outside of it."

- 3.12. A further lesson to be learned from the experience of England and Wales as recognised in the Authority's Report at para. 100 are the dangers of overregulation. The Legal Services Act 2007 created an incredibly complex framework of regulation that resulted in significantly increased regulatory costs and considerable paperwork for practitioners. The Society is mindful that any changes to the legal regulatory framework must be carefully considered in terms of costs and practical implications for practitioners. The system must be effective and efficient but not so unduly burdensome or costly as to inhibit the efficient provision of legal services to the public.
- 3.13. The Society considers that it is important to recognise the risks that lie in bringing together the differing professional rules and codes amongst different professions. The Act provides under section 110 that MDPs must have written procedures in place to which all partners and employees are subject, to ensure that legal services are provided in accordance with the Act, regulations and professional principles under section 13(5) of the Act.
- 3.14. Notwithstanding, this does not negate the fact that other employees and professionals within the MDP may be largely motivated by economic gain rather than concerned with serving the best interests of the client. Such potentially damaging impact has been found in the research undertaken by Robinson. In examining Australia, the UK and the US, he found that enterprises that have commercial and not only legal interests "are more likely to have conflicting and potentially adversarial interests to their clients." It is perhaps of note that, while Scotland passed legislation in 2010 to permit the operation of MDPs, no agreement has been reached with the Government as to how licensing of such structures will be governed. The Authority's Report at para. 127 suggests that this may be due to potential conflicts in extending licensing for individual solicitors to entities and due to a possible clash of rules between different regulated professionals.
- 3.15. The difficulties of different professions working together was considered by the European Court of Justice (ECJ) in the landmark ruling of Case C-309/99, *J.C.J. Wouters et al. v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577. The ECJ held that a ban on MDPs between lawyers and accountants was legal. In doing so, the ECJ endorsed the rules of the Bar of the Netherlands that outline the duties for the proper practice of the legal profession, namely "the duty to act for clients in complete independence, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy". The Court also found that "by contrast, the

profession of accountant is not subject, in general, and more particularly in The Netherlands, to comparable requirements of professional conduct”.

- 3.16. Serious concerns also arise in relation to legal professional privilege and the impact that MDPs might have on the protection of privilege in the context of legal services. Currently, legal professional privilege is keenly protected under Irish law and, together with confidentiality, is the bedrock of the administration of justice and the rule of law. Liz Heffernan in her text, *Legal Professional Privilege*, comments on the widespread debate around legal professional privilege in the context of increasing reform of the legal profession. In particular, she notes that “dramatic reform” has taken place in the UK with the introduction of MDPs and suggests that “[c]learly a reform of this kind, if eventually introduced [in Ireland], could have profound consequences for the lawyer-client relationship and, by extension, legal professional privilege.”
- 3.17. Furthermore, as noted within the Clementi Report, one of the difficulties facing MDPs is a lack of clarity for clients as to whether legal professional privilege would apply only where legal matters had been discussed with a legal professional or whether it would apply to all matters dealt with by the MDP. Other professionals, such as accountants who have a duty to provide an objective report on accounts, are clearly not subject to the same rules or legal codes as legal professionals. Such objectivity could be threatened by the obligation to preserve privilege. As the finding in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* (Case C-550/07 P) demonstrated, legal professional privilege is strictly interpreted even in situations where legal professionals are involved. In that instance, the ECJ found that internal communications of company employees with in-house counsel were not legally privileged within the context of competition law investigations by the European Commission.
- 3.18. This raises a very important question as to how professionals who are regulated by very different codes can work together in a coherent and effective manner that would uphold the interests of their clients. Notably, the Law Society of England and Wales in their practice note on ABSs specifically refer to the potential risks that an ABS structure might bring to a firm. These include how non-lawyers may impact on the culture of the firm, the level of understanding of non-lawyers of solicitors’ obligations and how the structure might affect the firm’s business plan. Clearly, despite the fact that ABSs have

been embraced in our neighbouring jurisdiction there remains concerns around the inherent risks present in introducing such structures to established legal firms.

- 3.19. The Council of Bars and Law Societies of Europe (CCBE) have previously expressed serious apprehensions regarding co-operation between lawyers and persons outside the legal profession, likening the essential nature of the independence of a lawyer to the impartiality of a judge. In their Position Paper on MDPs, they concluded that “the problems inherent in integrated co-operation between lawyers and non-lawyers, with substantially differing professional duties and different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded.” Further, it should also be noted that difficulties might arise where non-professionals who become partners in a MDP could have no code of conduct or regulatory body to monitor their standards and professional conduct. This is all the more concerning when we consider that the Authority is restricted only to the regulation of the legal profession.
- 3.20. It should be noted that, at the outset of the process of drafting the legislation when at Bill stage, the Society in its February 2012 submission to the Minister for Justice, Equality and Defence, explicitly recommended that “all provisions in the Bill with regard to MDPs should be removed.” Further, the President of the Law Society, Mr Donald Binchy, in the October 2012 edition of the Law Society Gazette, noted that the then Minister for Justice, Alan Shatter did not appear open to the Society’s suggestion that MDPs should be the subject of a study to assess whether or not they should be permitted.
- 3.21. While the Society welcomes the fact that the Authority is conducting a consultation process in addition to having conducted its own study into MDPs, it remains of the view that MDPs should not be introduced into Ireland. This is based upon genuine concerns around protecting the public interest and ensuring that the legal profession maintains a gold standard in terms of professional calibre and codes of conduct. This appears to reflect the remarks made at para. 8 of the Authority’s Report that the public interest “is the most important justification for regulation of the legal market”. While the interpretation of what the public interest actually entails varies considerably, it undeniably encompasses professional ethics, trust and integrity.

## 4. Impact of MDPs in Ireland

- 4.1. The Society submits that the potential impact of introducing an MDP, in general terms as well as that envisaged within the framework of the Act, should be carefully reviewed and considered before any decision is taken by the Authority, on whether or not MDPs should be introduced to Ireland. The Society is of the view that the information set out below demonstrates that the introduction of MDPs to Ireland would undermine the integrity of the administration of justice and pose an unwarranted risk to the public interest.

### **(a) Legal costs**

- 4.2. One of the main justifications often given for the introduction of MDPs and other ABSs is the belief that MDPs will result in a reduction of legal costs for the consumer. However, a review of empirical evidence in both Australia and England and Wales does not fully support this contention. An empirical review commissioned by the Ontario Trial Lawyers Association and conducted by Professor Kalajdzic, did not reveal a correlation between the introduction of MDPs, particularly those involving non-lawyer ownership, and reduced legal costs or indeed access to justice. The review explored whether ABSs, specifically non-lawyer ownership, improved access to justice. It should be noted that section 107(2) of our Act provides that fees or other income arising from the provision of services, including legal and other services, may be shared with partners in an MDP.
- 4.3. Another of the main arguments in favour of permitting non-lawyer ownership is that they will enable the adoption of ABSs including MDPs, which will in turn give a competitive advantage that will enable firms to offer lower prices to consumers. However, the Kalajdzic review found, that while non-lawyer ownership may help achieve ‘economies of scale’, this does not necessarily provide access benefits in areas where they are most needed. The review found that, in the UK the evidence illustrates that “there is now greater access to justice for motor injury cases to the detriment of other types of claims” and that the same pattern can be seen in Australia. This is substantiated further by the empirical investigation led by Robinson, which concluded that non-lawyer ownership in Australia “has made few inroads into anything but the personal injury, consumer, social welfare (disability) and mental health law (malpractice) fields.”

- 4.4. Notably, the Kalajdzic review found that “[n]ot all ABSs are profitable, however; in the UK, Co-Op Legal Services suffered a £3.4 million loss in the first half of 2013, another £5.1 million in the first half of 2014, and a total of £14 million over 18 months.” In addition, Professor Kalajdzic found that it was impossible to say whether any cost-savings initiatives were in fact passed down to the client and she found “...no report, by a third party, or an ABS, documenting a decrease in the cost of legal services.”
- 4.5. FLAC argued in their submission on the Legal Services Regulation Bill 2011 that the legislation could in fact potentially increase costs. They stated that MDPs may in reality reduce access to lawyers and increase the cost of access to legal representation. It suggested that this will be most intensely felt by non-commercial and occasional users of legal services who will no longer be able to effectively access and engage specialist services. As the Authority’s Report notes at para. 116 in the context of England and Wales, there has been little impact on costs for consumers and legal service fees appear to have continued to rise, albeit with a growing trend also towards fixed fee prices.
- 4.6. FLAC also contended that the introduction of ABSs, including MDPs, will very likely see specialists absorbed into large firms where they will be bound by the terms of the partnership. In turn, this will mean that there will be a much smaller pool of firms for consumers to choose from which will effect a decrease in competition. In this regard, FLAC submitted that the Authority should be mandated to examine whether partnerships or MDPs or any other alternative structures are in fact in the “interests of access to justice and in the interests of the general public”.
- 4.7. The Authority’s Report notes at para. 211 that, even with the most radical MDP models, they “have had limited effect yet on legal costs” and cautions that any proposal to introduce them should not be simply on the basis of the potential cost savings. Equally, any such savings could not just be at the firm level and it would have to ensure that any such efficiencies would trickle down and benefit the consumer. It is a matter of balance but the Society considers that the current model set down in the Act does not provide the opportunity for significant costs savings that could then be passed on to the client.
- 4.8. Significantly only 10% of consumers in the Law Society of Ireland 2016 consumer survey listed reasonable fees as the basis for choosing a solicitor. Instead, it would appear that Irish consumers of legal services in the majority tend to choose solicitors on

the basis of reputation or prior knowledge, i.e. recommendation or family solicitor and therefore are much more concerned with skill, integrity and expertise.

- 4.9. At para. 217 of the Authority's Report, it notes that a consumer poll commissioned by Lexis Nexis in 2010 found that the most important factors when choosing a lawyer were specialised knowledge of the legal issues and ability to explain the issues. While cost was next in line in terms of importance, clearly consumers would seem to place greater emphasis on expertise and interpretation/communication skills. This reflects the findings of the SRA in their research into consumer attitudes that found that consumers look for an established and experienced provider they can trust and that cost is a secondary consideration.

**(b) Provision of legal services to consumers**

- 4.10. As outlined above, FLAC expressed their concern about the impact that the introduction of ABSs, including MDPs, might have on consumers' ability to access legal services. At present, occasional specialist legal services can be easily and fairly accessed by consumers. However, it suggests that the introduction of MDPs and other ABSs would reduce access and decrease competition in the legal profession.
- 4.11. Significantly, the Kalajdzic review found that motivating factors for regulatory change reflect the cultural context in which such decisions are made, i.e. whether for economic/competition reasons or to advance access to justice. As the Society has already outlined, it is crucial that the Authority considers the impetus for introducing MDPs into the Irish market. Robinson has found that, in those jurisdictions where the motivation for introducing MDPs was more economically based, there was a probable effect on professional principles and ethics.
- 4.12. Another argument commonly made in support of non-lawyer ownership is that it leads to a better quality of legal services. While evidence has been found that supports the claim that some lawyers operate more ethically in these environments, there is "none that proves non-lawyer ownership of firms results in a higher quality of legal service". Furthermore, Robinson's research suggests that non-lawyer ownership may lead to "the systemization of more dubious business practices that undermine the quality of legal services as firms scale, attempt to create efficiencies, and their work culture is less tempered by the professional norms that lawyer ownership may bring." It is worth

noting that Robinson also found that there is some evidence that ABSs in the UK receive more complaints from clients than non-ABS firms.

- 4.13. Thus, available empirical evidence does not support the claim that law firms who are not under traditional legal ownership necessarily provide a better quality of legal service due to their business structure. Notably, in jurisdictions such as New Zealand, where there is limited scope for certain business arrangements, MDPs are prohibited. This is set down under s. 7(3) of the Lawyers and Conveyancers Act 2006 which states that income sharing between lawyers and non-lawyers is strictly prohibited. The paramount concern expressed by the Law Society of New Zealand in prohibiting multi-disciplinary arrangements is “the protection of clients” and to ensure that clients are in no way misled or unsure. Further, it recommends that lawyers need to be aware of any risks in relation to legal professional privilege in respect of advices given to clients. Clearly, such an approach prioritises the protection of client interests and recognises the inherent risks in allowing the operation of MDPs.
- 4.14. As noted above, the Law Society’s own 2016 consumer survey found that consumers were mostly concerned with knowing a solicitor or at least having a recommendation before choosing the right solicitor for them. While MDPs may offer the possibility of a one-stop shop that provides a variety of services under one roof, the specialist and valued expertise of personal solicitors and sole practitioners could be compromised if profit and not the consumer is put first. This is particularly relevant for those practitioners based outside Dublin and not practising in larger commercial firms.
- 4.15. The Society reiterates its view that market research demonstrates that consumers are primarily concerned with the quality and standard of legal service that is being provided. If MDPs were to be introduced, the change in business structure and the resulting impact upon professional principles, *inter alia*, might affect the standard of legal service that consumers currently enjoy. The Society submits that the inherent risk in undermining the currently high standard of legal service available to consumers by introducing MDPs to the market overrides any potential benefits that might be experienced.

### **(c) Access of persons to legal practitioners**

- 4.16. The Authority's Report does not deal in any great detail with the matter of access to legal practitioners. However, as stated above the Society considers that, while MDPs might bring the benefit of a one-stop shop where all the clients' needs could be looked after under one roof, consumer information illustrates that for clients choosing a solicitor the most important factor is the reputation and integrity of the practitioner and not merely convenience or even low cost.
- 4.17. The Kalajdzic review also explored whether ABSs, specifically non-lawyer ownership, improved access to justice. In this context, access to justice was interpreted to include "tackling systemic and institutional barriers to justice, as much as changing billing structures or offering new technologies for disseminating legal information". In summary, it found that, from the experiences of Australia and the UK, there was "very limited empirical support for this contention" and that "there is no data documenting a decrease in the cost of legal services or the rate of self-representation."
- 4.18. It also found that there was nothing to suggest that ABSs in Australia and the UK, specifically non-lawyer ownership, improved access to justice or reduced legal costs. Access to justice did not appear to be a factor in creating these ABSs as there was no accessible data available in relation to this. It should be borne in mind that the motivation for such changes in regulatory and business practices did not necessarily spring from a commitment to improve access to justice. Instead as the review reveals, such reform was driven by hopes of increased competition and innovation, rather than any agenda to improve access to, or delivery of, legal services.
- 4.19. Furthermore, Robinson in his research highlighted the concerns around undercutting the altruistic foundations of the legal profession through increased focus on investors' targets and less focus on pro bono work or cases carrying reputational risks. This could have a significant impact on the ability of clients to access legal advice and assistance. It might also mark a shift in emphasis away from being a good law firm or lawyer available to serve the public interest to one concerned with commercial reputation and profits. Robinson also observes that even those consumers who would benefit from accessing legal services often do not interpret themselves as requiring a legal service or do not wish to access it due to psychological/cultural barriers. The introduction of MDPs would not necessarily result in changing this.

## 5. Summary

- 5.1. The Society's conclusion is that MDPs, in any form, should not be introduced to Ireland. If the Authority did consider it appropriate to recommend the introduction of MDPs, the Society submits that the evidence of the potential harm far outweighs the negligible benefits. As the Authority's Report itself notes at page 8 of its Executive Summary, the introduction of an increased variety of business structures is only one way of attempting to improve the functioning of the legal market.
- 5.2. As outlined earlier in the submission, research from other jurisdictions indicates that the regulation of MDPs and other forms of non-lawyer ownership can pose serious challenges. Where regulation is restrictive and onerous, e.g. in British Columbia and Ontario, the uptake on such new structures is almost negligible and little is gained from their introduction as a result. In contrast, in countries that have relaxed regulation and made it easier for firms to become MDPs, such as in England and Wales, the Law Society there have expressed serious concerns about the protection of consumers and the uncertainty around varying regulators over different legal and non-legal services.
- 5.3. Further, the Society is of the view that the introduction of legal partnerships will provide sufficient flexibility and innovation in the legal market to ensure significant competition and growth. It is of note that the Authority in its Report to the Minister on legal partnerships recognises the dangers of introducing new structures to the legal services market, at para. 106 where it warns of the risk of prematurely introducing legal partnerships before a coherent and comprehensive regulation structure is in place. Similarly, the Society considers that the decision of whether to introduce MDPs must be carefully and extensively considered before any lasting steps are taken to change the Irish legal services market.
- 5.4. The Society submits that the Authority should reflect carefully and consider the complexities, difficulties and dangers that introducing MDPs to Ireland would involve and recommends that MDPs are not an appropriate solution for the Irish legal market.

### **Recommendation**

The Authority should recommend that MDPs are not appropriate for the Irish legal services market and should not be introduced for a variety of reasons as follows:

- J Dilution of expertise in specialised legal areas and difficulties in accessing specialist knowledge
- J Undermining of the application of professional rules and standards
- J Negative impact on the standard of professionalism and expertise of the legal profession
- J Limitations on the Authority to regulate legal professionals only
- J Extensive regulatory requirements could deter external investors
- J Risks to the protection of the public interest and consumers' best interests
- J Dangers of overregulation including increased regulatory costs and paperwork
- J Conflicting interests and professional codes of different professionals
- J Consequences for the protection of legal professional privilege
- J Threat to solicitor independence and client confidentiality
- J No demonstrable reduction in legal costs for consumers
- J No demonstrable increase in quality of legal services and concerns around potential reduction of quality
- J No demonstrable increase in access to legal services and emphasis on commercial profit and reputation

## Section B – Potential Regulatory Issues

### 6. MDP provisions

- 6.1 The initial report of the Authority in relation to the establishment, regulation, monitoring, operation and impact of MDPs which was submitted to the Minister for Justice on 31 March 2017, sets out a number of specific questions in relation to MDPs which the Society endeavours to answer in this Section of the submission.
- 6.2 As a consequence, this Section covers a range of issues including an overview of MDP provisions under the Act, regulation of MDPs, commencement and cessation requirements for MDPs, registration of non-legal partners, advertising issues, professional names, professional indemnity insurance, fee sharing, register of MDPs, monitoring of MDPs, saver for the Society's compensation fund, access to client funds, regulation of non-legal partners and employees of MDPs, funding regulation of MDPs, operation of MDPs, and public confidence in MDPs.
- 6.3 Chapter 7 of this submission provides a broad overview of the current provisions relating to MDPs under the Act.

#### **Regulation of MDPs**

- 6.4 Chapter 8 of this submission addresses queries relating to regulation of MDPs as raised by the Authority in their consultation paper including issues relating to commencement procedures for MDPs, information requirements for non-lawyer partners in MDPs, registration of non-lawyer partners in MDPs, registered European lawyers, advertising, professional names, professional notepaper and websites, regulations for the operation and management of MDPs, professional indemnity insurance requirements, fee sharing and contingency fees, and a register of MDPs.
- 6.5 With regard to commencement of MDPs, Chapter 8 of this submission considers the introduction of a timescale for prior written notification of commencement to the Authority, empowering the Authority to refuse to grant permission for an MDP to commence, only deeming commencement notifications as received when full application form and fees (if applicable) are received by the Authority, prohibiting

MDPs from commencing until they receive written permission to commence from the Authority, requiring the provision of certificates of good standing for professional partners in MDPs, prohibition on struck-off or suspended professionals from working with MDPs without the prior written approval of their regulatory bodies, commencement information that should be sought by the Authority, provision of professional indemnity insurance confirmation documentation on commencement, confirmation of data protection procedures, and issuing each MDP with a unique reference identifier number on commencement.

- 6.6 With regard to information requirements for non-lawyer partners in MDPs, the submission sets out the Society's recommendation that qualifying criteria and a vetting system for non-professional partners in MDPs be introduced, together with sanctions for the provision of false information to the Authority.
- 6.7 The Society also recommends that consideration be given to procedures being put in place to ensure that MDPs are not used to allow those persons involved with, but never convicted of, organised crime and terrorist financing, to engage in the provision of legal services.
- 6.8 With regard to the registering of non-legal partners in MDPs, Chapter 8 of this submission sets out the Society's recommendation that the Authority's regulatory jurisdiction should be extended to include non-legal practitioner partners and employees in MDPs.
- 6.9 With regard to registered European lawyers, the Society can see no reason why experience obtained by a registered lawyer working in an MDP should not count towards the assimilation period under Article 10 of the Establishment Directive.
- 6.10 Chapter 8 of this submission also sets out the Society's recommendations in relation to advertising, professional name requirements, professional notepaper and websites, and regulations for the operation and management of MDPs should be similar to those in place for solicitors.
- 6.11 With regard to general professional indemnity insurance requirements and MDPs, consideration is given to the level of insurance cover, access to and establishment of the assigned risks pools and run-off funds. Consideration is also given to fee sharing,

contingency fees, and a recommended undertaking that non-lawyers in MDPs would not obstruct legal practitioners in meeting their professional obligations.

6.12 Chapter 8 of this submission also sets out the information which the Society recommends should be captured in any register of MDPs.

### **Monitoring of MDPs**

6.13 Chapter 9 of this submission addresses the queries raised by the Authority in their submission document in relation to the monitoring of MDPs, including matters such as MDPs and client protection, a saver for the Society's compensation fund, client moneys matters, sanctions for non-lawyers, cessation of MDPs, and funding the regulation of MDPs.

6.14 When considering how MDPs should be treated in relation to client protection, Chapter 9 of this submission addresses issues such as the provision of information to clients, access to client moneys, financial regulation of MDPs, annual confirmation of insurance details, complaints process, and consequences for breaches of the Act and regulations.

6.15 Issues relating to section 113 of the Act in relation to the saver for the Society's compensation fund, and the definition of legal services are explored in depth in Chapter 9 of this submission due to the Society's strong view that the provisions relating to such matters under the Act are inadequate and constitute a risk to the Society's compensation fund and the public. The Society proposes the introduction of clear and separate definitions of legal services and non-legal services for the purpose of the operation of MDPs, the introduction of detailed rules to determine the liability of the Society's compensation fund in relation to MDPs, and that consideration be given to the establishment and maintenance of a separate MDP compensation fund.

6.16 With regard to sanctions on non-lawyers in MDPs, the Society proposes that consideration be given to extending the Authority's regulatory powers to include non-lawyer partners and employees in MDPs, and that the Authority be empowered to disqualify, and impose restrictions on, non-lawyer partners and employees.

- 6.17 With regard to cessation of MDPs, consideration is given under Chapter 9 of this submission to distressed closures of MDPs, run-off cover, client files and moneys, timescale for cessation notifications, and provision of closing accountants' reports.
- 6.18 Chapter 9 of this submission also sets out the Society's arguments in relation to the funding of the regulation of MDPs, with the recommendation that MDP regulation be self-funded by way of imposition of an annual levy on MDPs.

### **Operation of MDPs**

- 6.19 Chapter 10 of this report addresses queries raised by the Authority in their consultation document in relation to managing legal practitioners ("MLPs"), compliance of non-lawyer employees and partners with professional principles and other related regulations and acts, requirements by other agencies to inspect the offices of MDPs, and public confidence in MDPs and whether other provisions may be required.
- 6.20 With regard to MLPs, Chapter 10 of this submission explores the use of MLP terminology, proposes the introduction of qualifying criteria for MLPs and granting the Authority power to approve or reject nominated MLPs, and sanctions against MDPs practising without MLPs in place.
- 6.21 Proposals are put forward in relation to data sharing procedures between the Authority and relevant professional regulators in relation to professionals working in MDPs.
- 6.22 Consideration is given in Chapter 10 of this submission as to whether MDPs, if introduced, should be restricted to partnerships between legal practitioners and other regulated professionals.
- 6.23 Finally, the Society notes that only reserved legal services (litigation, probate and conveyancing) are restricted to being provided by legal practitioners. Non-reserved legal services can be provided by non-legal practitioners (including bodies corporate) and such legal providers are entirely unregulated. In light of this, it remains to be seen what legal services niche it is expected that MDPs will fill that are not already

occupied by solicitors, barristers, in-house solicitors, or unregulated providers of non-reserved legal services.

## 7. MDP provisions

- 7.1 Under the Act, MDPs are 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, for the purpose of providing legal services and non-legal services.
- 7.2 Legal practitioners are defined under the Act as practising solicitors and practising barristers. However, it should be noted that a reference to ‘legal practitioner’ under the Act also includes references to persons who formerly practised as solicitors or barristers.
- 7.3 MDPs under the Act are subject to greater primary legislative control than any of the other new structures proposed under the Act. This chapter sets out a broad overview of this legislative structure as set out in Part 8 of the Act.

### **MDPs and professional codes**

- 7.4 Under section 102 of the Act, legal practitioners are permitted to provide legal services as partners in, or employees of, MDPs. Professional bodies are not permitted to prevent or restrict a legal practitioner who is a member of the professional body from working with or doing business with a legal practitioner providing legal services in an MDP.

### **Complaints against legal practitioners in MDPs**

- 7.5 Section 103 makes it clear that persons may make a complaint to the Authority in respect of legal practitioners who provide legal services as partners or employees of an MDP.

### **Commencement and cessation of MDPs**

- 7.6 Section 106 of the Act deals with commencement and cessation of MDPs. It requires MDPs to provide the Authority with written notification that the MDP intends to commence providing legal services, or intends to cease providing legal services. The

MDP cannot commence providing legal services until it has provided the Authority with the required written notification. If the MDP has ceased providing legal services, it cannot recommence providing legal services unless it provides the Authority with a written notification of same.

- 7.7 The Authority has the power to set out the form of the written commencement and cessation notifications, and may prescribe fees for same.

### **Partners in MDPs**

- 7.8 Section 107 of the Act deals with the requirements for partners in MDPs and sets out which persons may, or may not, be partners in MDPs.

- 7.9 Each partner in an MDP will be jointly and severally liable, and partners in MDPs can share fees and income regardless of the type of service provided and whether the partner is or is not a legal practitioner.

- 7.10 A person may be a partner in an MDP even if they do not provide any legal or non-legal services.

- 7.11 The following persons are prohibited from acting as partners in MDPs and it is an offence for such persons to act as partners in an MDP without the permission of the High Court:

- a) any person against whom a High Court order has been made in accordance with section 85(7) of the Act including persons restricted to providing legal services as employees, persons suspended from practice as a legal practitioner, and persons struck off the roll of practising barristers or roll of solicitors;
- b) any unqualified persons, which refers to solicitors not qualified to practise within the meaning of the Solicitors Act 1954 due to the solicitor (in any jurisdiction) being struck-off the roll of solicitors, suspended from practice, having their practising certificate application refused, having their practising certificate suspended, or giving the High Court an undertaking not to practise;

- c) disbarred barristers who have been disbarred in any jurisdiction (other than those voluntarily disbarred in order to be admitted as a solicitor);
- d) persons who have a declaration or disqualification order against them under the relevant sections of the Companies Act 2014<sup>1</sup>;
- e) persons convicted on indictment of an offence, and persons convicted of an offence involving fraud, dishonesty, breach of trust, money laundering or terrorist financing<sup>2</sup>;
- f) persons who are undischarged bankrupts in any jurisdiction;
- g) persons convicted outside the State for an offence consisting of acts or omissions that, if done or made in the State, would constitute an offence triable on indictment; and
- h) persons disqualified in another State from being directors or secretaries of bodies corporate or an undertaking.

7.12 The High Court has the power under the Act to allow some persons, who are prohibited under the Act, to be partners in an MDP.

7.13 No person, other than an individual, may invest in an MDP. As such, bodies corporate may not become partners, or invest in, an MDP.

### **Managing legal practitioner in an MDP**

7.14 Section 108 sets out the requirement for each MDP to have at least one managing legal practitioner (“MLP”).

7.15 An MLP is a legal practitioner partner in the MDP who has responsibility for the management and supervision of the provision of legal services by the MDP as set out

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<sup>1</sup> Sections 819, and Chapters 4 and 5 of Part 14 of the Companies Act 2014

<sup>2</sup> Within the meaning of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

in Section 108, including compliance with notification requirements, regulations made under the Act and adherence to professional principles.

7.16 The MLP is required to notify the Authority of any compliance breaches that have not been rectified within 14 days, and it is an offence for the MLP to fail to notify the Authority of said breaches.

### **Obligations of legal practitioners in MDPs**

7.17 Acts or omissions of legal practitioners who are partners or employees of MDPs can amount to misconduct under section 50 of the Act.

7.18 Legal practitioners who are partners or employees of MDPs are under the same obligations, liabilities and privileges as all other legal practitioners under the Act, or any other enactment or rule of law.

### **Operation of MDPs**

7.19 Section 110 sets out the rules for the operation of MDPs under the Act including written compliance procedures for employees and partners with the Act, regulations made under the Act, and directions of the MLP.

7.20 The section sets out the MLP's obligations with regard to separation of accounting records, fees and bank accounts for legal and non-legal services provided by the MDP.

7.21 Legal practitioners in MDPs are prohibited under the section from disclosing the affairs of their client to any other partner or employee of the MDP without the express consent of the client.

7.22 Provision is made under the section for information to be provided to persons inspecting the MDP, and legal privilege protections are included.

## **Letter of engagement**

7.23 A client engaging the legal services of an MDP must be provided with a letter of engagement under section 111 of the Act. This requires defining the nature of both the legal services and non-legal services to be provided to the client. The letter of engagement is also required to specify the legal services for which the client may make an application to the Society's compensation fund for reimbursement if there is dishonesty by the solicitor causing financial loss to the client.

## **MDPs and professional indemnity insurance**

7.24 MDPs are prohibited under section 112 of the Act from providing legal services unless the MDP has the required professional indemnity insurance in place<sup>3</sup>.

## **Saver for the Law Society's Compensation Fund**

7.25 Section 113 makes it clear that claims cannot be made on the Society's compensation fund<sup>4</sup> in relation to loss sustained by a client due to the dishonesty of any partner or employee of an MDP who is not a solicitor.

## **Power of Authority to specify measures**

7.26 The Authority is given specific powers in respect of MDPs under section 114 of the Act. The Authority may issue directions to the MDP or the MLP to take specific measures if it is satisfied that certain provisions or regulations have not been complied with. This includes the power to direct an MDP to appoint an MLP. The MDP and MLP have a right of appeal to the High Court in relation to directions of the Authority.

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<sup>3</sup> In accordance with regulations made under section 47 of the Act, and section 26 of the Solicitors (Amendment) Act 1994

<sup>4</sup> Under section 21(4) of the Solicitors (Amendment) Act 1960, as amended by section 29 of the Solicitors (Amendment) Act 1994

## **Applications to the High Court for suspension or cessation orders for MDPs**

7.27 Section 115 provides the Authority with the powers to seek an order from the High Court requiring an MDP and/or MLP to comply with a direction of the Authority, or an order suspending an MDP from providing legal services or directing an MDP to cease providing legal services.

7.28 There is a right of appeal under the section for the MDP and/or MLP to the Court of Appeal.

7.29 The Authority is required to publish a notice regarding any orders made under section 115.

## **Regulations on operation of MDPs**

7.30 The Authority is empowered to make regulations on the operation and management of MDPs under section 116 of the Act. This includes regulations relating to matters such as the professional and ethical conduct of persons providing legal services, client confidentiality, provision of information to clients on duties owed to them by the MDP, obligations with regard to client moneys, management and control of MDPs, risk management, financial control, conflicts of interest, compliance with the Act and regulations, maintenance of practice records, regulation of practice names, and regulation of advertising by MDPs.

## **Register of MDPs**

7.31 Under section 118 of the Act the Authority is required to maintain a register of MDPs which is made available to the public for inspection free of charge. This will require the Authority to periodically review and update the information on this register.

## 8. Regulation of MDPs

8.1 The following chapter deals with queries raised by the Authority as part of this consultation process in relation to the regulation of MDPs. The Society's primary focus in this matter is on solicitor MDPs, i.e. MDPs which have solicitor partners or employees.

### **How automatic should the procedure be for commencing practice as an MDP?**

8.2 The Authority will need to consider certain matters before allowing any proposed MDPs to commence. There should be in place strict procedures which any proposed MDP must follow in order to be authorised to commence in business. Failure to put these in place may lead to unintended regulatory consequences which could be difficult to rectify, and which would compromise the protection of the public.

8.3 Under section 106 of the Act, MDPs are required to provide written notification of commencement to the Authority. They are also required to provide written notification to the Authority of cessation of the provision of legal services. The Authority has powers to set out the form of the notification required and the applicable fee that may be prescribed (if any).

8.4 However there are a number of key powers and requirements not defined under the Act that should be considered by the Authority. These matters are considered below and may be the subject of regulations to be made by the Authority.

8.5 Consideration needs to be given to the powers of the Authority in relation to commencement of MDPs, commencement notification requirements, good standing (or otherwise) of partners of proposed MDPs, professional indemnity insurance confirmation, data protection procedures, and unique MDP identifiers.

### **Timescale for prior notification of commencement**

8.6 The notification requirement under section 106 of the Act does not include any definitive timescale for the prior notification of commencement. This could cause significant administrative difficulties for the Authority.

- 8.7 For example, an MDP could send in a written notification with one day's notice to the Authority, requiring an immediate review and response from the Authority. This will not allow the Authority sufficient time to conduct the necessary investigations to ensure that the application meets required standards, and the Authority is not likely to have the resources to provide an immediate response.
- 8.8 As such, it is the recommendation of the Society that prospective MDPs be required to provide written notification of commencement a minimum of two months in advance of their proposed commencement date.

#### **Recommendation 1 – Notification of commencement**

Prospective MDPs should be required to provide written notification of a minimum of two months in advance of the proposed commencement date.

#### **Permission to commence**

- 8.9 While the Act includes a requirement for prior written notification of commencement to the Authority, the Act does not empower the Authority to decide whether or not an MDP should be permitted to commence.
- 8.10 As such, if there are circumstances under which the Authority feels that an MDP should not commence, the Authority does not have the power to prohibit the MDP from commencing providing legal services.
- 8.11 Section 49 of the Solicitors Act 1954 (as substituted and amended<sup>5</sup>) sets out the circumstances under which the Society can refuse to issue a solicitor's practising certificate or issue a practising certificate subject to specified conditions. The solicitor has a power of appeal to the High Court.
- 8.12 The Authority should have a similar power to refuse to grant an MDP permission to commence, grant the MDP permission to commence under specific conditions, or grant an MDP unrestricted permission to commence.

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<sup>5</sup> Section 49 of the Solicitors Act 1954, as substituted by section 61 of the Solicitors (Amendment) Act 1994, as amended by section 2 of the Solicitors (Amendment) Act 2002

- 8.13 If the Authority refuses to grant permission to commence, or grants permission subject to specified conditions, the Authority should set out in full the reasons for its decision. The MDP should have a right of appeal to the High Court.
- 8.14 While the Act gives the Authority the power to prescribe the form and fee for the written notification of commencement, it does not give the Authority the express power to refuse permission for the MDP to commence if the form of notification is not in compliance with the parameters set out by the Authority, and if the prescribed fees have not been paid in full.
- 8.15 Where a solicitor applies to the Society for a practising certificate, an application is not deemed as being received by the Society until a properly completed application form and full payment of fees are received by the Society. If an incomplete application is received, it is returned to the applicant setting out the reasons why it was not processed.
- 8.16 Similarly, it is the recommendation of the Society that a notification of commencement not be deemed to be received by the Authority until a properly completed notification form with all required accompanying documentation, and full payment of fees (if the Authority decides to charge fees for such notifications) are received by the Authority.
- 8.17 Additionally, the legislation should provide that an MDP may not commence providing legal services until such time as written permission is provided to the MDP from the Authority granting permission for the MDP to commence.
- 8.18 Such amendment would grant the Authority the necessary power to ensure that an MDP meets all requirements before it can commence providing legal services, in the interests of protection of the public.
- 8.19 In the interests of clarity, it may be worth changing the commencement notification requirement to a commencement application, to make it clear that the permission of the Authority is required to commence, and that the Authority has the power to refuse the application.

**Recommendation 2 – Power of the Authority in relation to commencement applications**

The Authority should be granted the power to refuse to grant an MDP permission to commence, grant permission to commence subject to specified conditions, or grant unrestricted permission to commence. The Authority should be required to provide the MDP with written reasons for the decision, and the MDP should have a right of appeal to the High Court.

**Recommendation 3 – MDP commencement notification**

The MDP commencement notification to the Authority should not be deemed to be received until a properly completed notification form with the required accompanying documentation and full payment of fees (if any) is received by the Authority.

**Recommendation 4 – Written commencement authorisation from the Authority**

MDPs should be prohibited from commencing the provision of legal services until such time as written commencement authority is issued by the Authority, and received by the MDP.

**Good standing**

8.20 Solicitor partners in the proposed MDP should be required to provide a certificate of good standing from the Society confirming that, as at the date of the certificate, the solicitor is in good standing in that a search of the disciplinary records of the solicitor discloses no orders of findings of misconduct or reprimands to the discredit of the solicitor, and no restrictions exist on the solicitor's practising certificate that would prohibit them from acting as a partner in an MDP.

8.21 Where a solicitor has orders of findings of misconduct or reprimands to the discredit of the solicitor, they are issued with a certificate of standing, which provides details of the misconduct or reprimand. The Authority can then decide if it wishes to permit the solicitor to be a partner in the MDP.

- 8.22 The purpose of this recommendation is not to limit partnership of MDPs only to solicitors who are in good standing, but rather to ensure that the Authority has all information that it needs on the disciplinary history of a solicitor in order to make an informed decision on the matter.
- 8.23 Other professional persons who wish to become partners of MDPs should equally have to produce confirmation of good standing from their respective professional bodies. This would place all professional partners on an equal footing and would help maintain standards for the protection of the public.
- 8.24 Consideration should also be given to whether the Authority should be empowered to seek and be provided with information from An Garda Síochána on whether partners in an MDP (whether legal practitioners, professionals, or non-professionals) have been convicted of an offence, rather than depending on self-reporting of the applicant partners.

**Recommendation 5 – Good standing of MDP partners**

All professional persons proposing to be partners within an MDP should be required to provide the Authority with a certificate of good standing from their professional bodies as part of the commencement notification.

**Suspended and struck-off solicitors**

- 8.25 The Society notes that under section 107(4) of the Act there is a prohibition on a number of different persons from being partners within an MDP. This includes suspended and struck-off solicitors, as well as solicitors who have given undertakings not to practise.
- 8.26 Suspended and struck-off solicitors are also prohibited from engaging in any work in any capacity involving or in connection with the provision of legal services until granted permission by the Society under the provisions of section 63 of the Solicitors Act 1954, as substituted by section 21 of the Solicitors (Amendment) Act 1994. Persons are also prohibited from employing or remunerating suspended or struck-off solicitors in relation to the provision of legal services without the written permission of

the Society in accordance with section 60 of the Solicitors Act 1954, as substituted by section 20 of the Solicitors (Amendment) Act 1994.

8.27 In the interests of public protection, it is recommended that it be made clear that such restrictions also extend to suspended and struck-off solicitors seeking employment in MDPs.

8.28 Equally, the Authority may wish to consider restricting the persons who have been suspended or otherwise disqualified from another profession from becoming a partner or engaging in any work in an MDP until granted permission by their regulatory body.

**Recommendation 6 – Suspended and struck-off solicitors**

If MDPs are to be introduced, it should be made clear that the Society's existing powers under the Act prohibiting suspended and struck-off solicitors from engaging in any work in any capacity involving or in connection with the provision of legal services, and prohibiting persons from employing or remunerating struck-off or suspended solicitors for legal services, until granted written permission by the Society, extends to solicitors in MDPs.

**Recommendation 7 – Suspended and struck-off professionals**

Consideration should be given to suspended or disqualified persons from other professions being restricted from becoming a partner or engaging in any work in an MDP until granted permission by their regulatory body.

**Commencement information**

8.29 It is the view of the Society that the information set out in the following recommendation should be sought as part of the commencement notification for MDPs to allow the Authority to make an informed decision on whether the MDP has met the commencement requirements, and whether to grant the MDP unrestricted permission to commence:

### **Recommendation 8 – Commencement information**

The following information should be required as part of the MDP commencement notification to the Authority:

- a) the full name of the MDP;
- b) the MDP's place or places of business;
- c) details of the proposed legal and non-legal services to be provided by the MDP;
- d) contact details for the MDP including phone, fax, email and website;
- e) the proposed date of commencement of the MDP;
- f) for recommencement notification for closed MDPs, the date of cessation of the MDP;
- g) details of the MDP's professional indemnity insurance including insurer, date of commencement and cessation of the insurance, broker details, policy number, and minimum level of cover;
- h) the names of the partners of the MDP, their commencement dates as partners and their professional qualifications (if any);
- i) the name of the managing legal practitioner for the MDP, their date of commencement and their qualifications;
- j) the names of all legal practitioners and professionals in the MDP, including their commencement dates, job titles, professional qualifications, and relevant regulator;
- k) confirmation that the legal practitioner partners and legal practitioner staff are practising solicitors and/or barristers;
- l) details of legal practitioner(s) to contact in case of a distressed closure;
- m) historic data on the MDP such as previous names, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), previous insurance details, and details of any preceding or succeeding partnerships.

### **Professional indemnity insurance documentation**

8.30 Under section 112 of the Act MDPs are prohibited from providing legal services unless there is in force a policy of professional indemnity insurance which complies with regulations made under section 47 of the Act and section 26 of the Solicitors (Amendment) Act 1994 (if applicable).

- 8.31 Accordingly, any MDP that involves solicitors will come under the remit of the Society and will require professional indemnity insurance on the same minimum terms and conditions that apply to solicitors' firms.
- 8.32 Solicitors' professional indemnity insurance cover is provided to the firm and not provided to the individual solicitor. As such, the Society's professional indemnity insurance requirements would naturally have to extend to the entire MDP as an entity.
- 8.33 It is the recommendation of the Society that MDPs be required to provide documentary evidence of their professional indemnity insurance from their insurer, including dates of commencement, participating insurer details<sup>6</sup>, broker details, minimum level of cover, and confirmation that the cover meets the prescribed minimum terms and conditions. The date of cessation of any other preceding MDP may also be required.
- 8.34 It should be noted that the indemnity period for solicitor firms, with the exception of solicitors' firms with variable renewal dates, runs from 1 December to 30 November the following year. Brokers are required to provide confirmation of cover through the Society's online portal within 3 working days of 1 December annually. Any firm which fails to provide the required confirmation of cover in the required format will be subject to an application by the Society to the High Court to close the firm down.
- 8.35 The Authority may wish to consider having a similar electronic notification system whereby the broker can confirm to the Authority on an annual basis that the required professional indemnity insurance for the MDP is in place.

**Recommendation 9 – Professional indemnity insurance**

A proposed MDP should be required to provide documentary evidence of their professional indemnity insurance from their insurer or broker, including dates of commencement, participating insurer details, broker details, minimum level of cover and confirmation that the cover meets the prescribed minimum terms and conditions.

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<sup>6</sup> Participating insurers are those insurers who have signed the Participating Insurers Agreement with the Society for that indemnity period. Only participating insurers are permitted to write mandatory professional indemnity insurance for solicitor firms. Top-up cover (that is insurance cover over and above the minimum terms and conditions) is not regulated

## **Data protection policies**

- 8.36 The Authority should be satisfied that a proposed MDP has appropriate policies in place that address the matter of data protection for clients. The General Data Protection Regulation (Regulation EU 2016/679) (“the GDPR”) is due to commence on 25 May 2018. It is likely that by the time MDPs are commenced (if at all) the GDPR will be in force. It would be prudent for the Authority to require MDPs before they commence practice to confirm that the MDP has systems and procedures in place that are compliant with the GDPR.
- 8.37 The GDPR places an onus on any organisation that receives, processes or controls data to understand the parameters of what they can do with that data, how long they can hold it and the rights of individuals to access their data.
- 8.38 An MDP will, for example, require the unambiguous and informed consent of any client concerning what data will be obtained, the reasons it will be obtained, how it will be used, how long it will be retained, whether it will be disclosed to third parties and their right of access to that data.
- 8.39 Data controllers will require satisfactory methods of security for the data they retain. The GDPR requires controllers of data to report any data breaches they become aware of within 72 hours to the Data Protection Commissioner. The GDPR has heavy penalties and the fines can be up to and including 4% of global turnover or €20m, whichever is the larger.

### **Recommendation 10 – Data protection procedures**

Consideration should be given to the Authority requiring confirmation from MDPs that they have data protection procedures in place to ensure compliance with the General Data Protection Regulation (Regulation EU 2016/679) as part of the commencement notification requirements.

## **Unique identifier numbers**

8.40 Every solicitor firm that opens is given a firm number by the Society, as a unique identifier for that firm. Such identifier is used in all regulatory matters pertaining to the firm, including practising certificate applications, regulatory letters, investigations, matters that are before committees and cases before the Solicitors Disciplinary Tribunal and High Court.

8.41 Consideration should be given to the Authority assigning a unique MDP reference number to each MDP on commencement of the MDP to act as an identifier for same.

### **Recommendation 11 - Firm numbers**

Consideration should be given to the Authority assigning each commencing MDP with a unique identifier number.

## **What level of information requirements on non-lawyer partners in MDPs would be proportionate?**

8.42 There are two classes of non-legal practitioner partners in MDPs, namely professionals and non-professionals. Different information requirements may be required for each type.

8.43 It is easier to obtain information on professionals seeking to become partners in MDPs, as each profession has its own regulator. As such, consideration should be given to the type of information that would be appropriate to seek from each class of professional, including whether such professionals are permitted under the rules of their own regulatory body to provide services through an MDP structure.

8.44 It is easier to vet legal practitioners and other professionals who wish to become partners in an MDP, as such information can be provided and verified by the relevant professional regulator.

- 8.45 From a regulatory point of view, it is also easier to deal with professional partners in MDPs in the event of serious misconduct, as they are regulated persons who are subject to the disciplinary regime of their own regulator.
- 8.46 However, MDPs are not just limited to partnerships between legal practitioners and other professionals. Non-professional individuals are also permitted to act as partners in MDPs.
- 8.47 The Authority may wish to consider establishing qualifying criteria for those persons who are not professionals and wish to become partners in MDPs. This could include criteria such as requiring the person to be of good character and repute.
- 8.48 The Authority could consider having some form of a vetting system for non-professionals who wish to become a partner in an MDP which could include reviewing employment history, checking criminal history, current and previous directorships of any companies, undischarged bankruptcy in any jurisdiction, personal insolvency arrangements and any unsatisfied judgements against the individual.
- 8.49 It is noted that such information is likely to be required as part of the self-disclosure commencement notification. However, the Authority have very little recourse against a non-professional who fails to disclose this information as part of the commencement requirements, compared to the recourse available against legal practitioners and other professional partners as regulated professionals.
- 8.50 A declaration form for non-legal partners which imposes onerous penalties for false declarations could also be considered, similar to the system for MDPs in Quebec as mentioned in the Authority's report on MDPs. When making an application to be registered as an MDP in Quebec, non-lawyer partners must identify their professional body and make a signed declaration that they will respect the professional obligations of the lawyers in the MDP. While ownership of MDPs in Quebec is restricted to regulated professionals, this model requiring a signed declaration could be extended to non-professionals for MDPs in this jurisdiction. Legal practitioners and professional partners can be penalised for such false declarations through the regulatory system.

8.51 There is also a concern that MDPs could be set up with partners who are involved with, but have never been convicted of offences relating to, organised crime or terrorist financing. While legal practitioners currently may have clients who are involved in such matters, MDPs offer a unique opportunity for such persons to become business partners of legal practitioners. This raises serious concerns about conflicts of interest for legal practitioners, money laundering issues, and potential misuse of confidential client information by such partners. Procedures need to be put in place to ensure that MDPs do not become an avenue for those involved in organised crime and terrorist financing to become involved in the provision of legal services.

8.52 Given that there is joint and several liability for all partners within an MDP, it would be in the best interests of the other partners to conduct their own investigations on prospective partners prior to any application to commence to ensure that they are not putting themselves in potential jeopardy.

**Recommendation 12 – Qualifying criteria for non-professionals**

The Authority should establish a vetting system including qualifying criteria for non-professional persons who wish to become a partner in an MDP which could include matters such as reviewing employment history, checking criminal history, current and previous directorships of any companies, undischarged bankruptcy in any jurisdiction, personal insolvency arrangements and any unsatisfied judgements against the individual. Consideration should be given to the imposition on penalties of non-professional partners for provision of false information to the Authority in their application to be a partner.

**Recommendation 13 – Organised crime and terrorist financing**

Consideration should be given to the procedures to be put in place to ensure that MDPs are not used to facilitate organised crime and terrorist financing.

## **Should the non-legal partners be registered in some way with the Authority?**

- 8.53 Under the Act, the Authority has specific jurisdiction over legal practitioners. That jurisdiction does not extend itself to persons who are not legal practitioners. However, as the Authority will require a register of MDPs, they will require registering all partners of any given MDP.
- 8.54 It will need to be set out, perhaps by way of primary legislation, what jurisdiction the Authority should have over non-legal partners in an MDP. Failure to do so may result in a regulatory lacuna leaving non-legal partners free from any effective oversight by the Authority.
- 8.55 Consideration could be given to the model of regulation of personal insolvency practitioners (“PIPs”). There are a range of regulated professionals, and non-regulated persons that can become PIPs. All PIPs are under the regulatory remit of the Insolvency Service of Ireland, including non-professional PIPs. Where a PIP is a member of a regulated profession, the PIP is subject to the regulation of both the Insolvency Service of Ireland and their own professional regulator.
- 8.56 If this model is adopted, the Authority would have regulatory power over all partners and employees in MDPs, by virtue of the fact that they work for an MDP. As such, each partner in an MDP would become a regulated person under the remit of the Authority.
- 8.57 Consideration could be given to the introduction of an annual MDP licence or practising certificate that all partners and employees of MDPs are required to obtain, on application to the Authority and payment of a fee. Such licence or certificate could be refused, or issued subject to conditions by the Authority, or be suspended by order of the High Court, similar to the practising certificate procedures in place for solicitors. The licence or certificate fee, payable to the Authority, could be used to defray the cost of regulation of MDPs.

<b>Recommendation 14 – Jurisdiction of the Authority over non-legal practitioners</b>
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Legislation should be enacted to allow the Authority to exercise jurisdiction over non-legal partners in an MDP. Consideration should be given to the introduction of an annual MDP licence or certificate, with fees from same being used to pay for the cost of MDP regulation by the Authority.

**Are there any particular issues that arise in relation to registered lawyers i.e. lawyers using the Establishment Directive?**

8.58 The Society sees no reason why experience obtained by a registered lawyer working in an MDP should not count towards the assimilation period under Article 10 of the Establishment Directive.

**Recommendation 15 – Registered European lawyers**

Experience obtained by a registered lawyer working in an MDP should count toward the assimilation period under Article 10 of the Establishment Directive.

**Would advertising and naming requirements require any particular attention?**

**Advertising**

8.59 It is noted that under section 116(3)(f) of the Act the Authority may make regulations in relation to the advertising by MDPs of the services provided. Currently solicitor firms are limited in the type of advertising they are permitted to undertake.<sup>7</sup> This does not mean advertising is prohibited by solicitors but the advertisements they publish are subject to restrictions.

8.60 For example an advertisement shall not contain words or phrases such as “no win no fee”, “no foal no fee”, “free first consultation”, “most cases settled out of court”, “insurance cover arranged to cover legal costs” or other words or phrases of a similar nature which could be interpreted as meaning that legal services involving contentious business would be provided by the solicitor at no cost or reduced cost to the client.

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<sup>7</sup> Solicitors (Advertising) Regulations 2002

- 8.61 Other expressions with the same or similar meaning are equally prohibited. Such expressions include but are not limited to: ‘complimentary consultation’, ‘complimentary case evaluation’, ‘no bill until you win’, ‘our service won’t cost you a penny’, ‘we will fund your case’, and ‘a solicitor cannot advertise to act on a no win no fee basis, however solicitors can act on this basis. This can be discussed by phone, email or in a meeting’.
- 8.62 Solicitor firms are restricted from promoting litigation and from encouraging legal actions in relation to personal injury claims. It is recommended that the limitations on advertising that currently exist for solicitor firms extend to the advertising of the legal services provided by MDPs. This would ensure that solicitors in MDPs are not gaining an unfair competitive advantage over other solicitors, and would discourage practices such as ambulance chasing and claims harvesting.
- 8.63 The Authority may wish to consider allowing MDPs to advertise the nature of the legal services provided whilst maintaining the current restrictions to prevent inducing people to take legal actions in relation to personal injury claims.
- 8.64 Advertising requirements of MDPs should be subject to standards set by the Authority under section 116 of the Act. It should be borne in mind that such standards should not be set at a level any lower than currently exist for solicitor firms as this would confer an unfair competitive advantage on MDPs.

#### **Recommendation 16 – Advertising**

MDPs should be subject to the same advertising standards as apply to all other classes of legal service providers under the Act.

#### **Professional names**

8.65 Under section 116(3)(e) of the Act the Authority may make regulations in respect of the names that may be used by an MDP.

8.66 With regard to professional names, consideration should be given to the introduction of similar rules as exist for solicitor firms<sup>8</sup>. Under these regulations, a solicitor is required to obtain the written consent of the Society for any professional name which is not the name (or one of the names) of the former or present principals of the firm. The application to the Society must include the name sought and the reason for the name.

8.67 The Society may refuse permission to use a professional name if the name could reasonably convey to solicitors and/or non-solicitors generally any one or more of the following meanings:

- a) a meaning likely to bring the solicitors' profession into disrepute or which is in bad taste or which reflects unfavourably on other solicitors;
- b) a meaning that the solicitor or firm of solicitors concerned has specialist knowledge in any area of law or practice superior to that of other solicitors;
- c) a meaning that the normal business of the solicitor or firm of solicitors concerned has more extensive geographical coverage than it actually has; and/or
- d) a meaning otherwise misleading to clients, potential clients or the wider public or otherwise contrary to the public interest (stating how the name is misleading or otherwise contrary to the public interest).

8.68 It is the recommendation of the Society that the Authority makes regulations under section 116(3)(e) in relation to the professional names of MDPs that are no lower in standard than exist for solicitor firms. The MDP should be required to meet all requirements of the Authority with regard to approval of their professional name before commencement. To allow lower standards may offer a competitive advantage to a certain class of legal providers, allow names which are misleading to the

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<sup>8</sup> In accordance with the Solicitors (Professional Names/Notepaper) Regulations 1996 (S.I. No. 178 of 1996)

professions and the public, or allow names that bring the legal professions into disrepute.

#### **Recommendation 17 – Professional names**

The Authority should make regulations under section 116(3)(e) of the Act in relation to the naming of MDPs similar in nature to those in place for solicitor firms and the Authority should approve the professional names of MDPs before commencement.

#### **Professional notepaper**

8.69 Consideration should also be given to rules with regard to professional notepaper content for MDPs.

8.70 The Society regulates<sup>9</sup> the information that must be contained, and the information prohibited, in the professional notepaper of solicitor firms. As part of the commencement requirements for solicitor firms, the firm is required to provide a copy of their professional notepaper, which is reviewed for compliance.

8.71 It is the recommendation of the Society that the Authority seeks similar powers in relation to the professional notepaper of MDPs to ensure that they meet the same professional standards as other legal providers, and do not contain incorrect or misleading information for the protection of the public.

8.72 MDPs should be required to provide a copy of their proposed headed notepaper with their commencement notification, and such notepaper should meet the standards prescribed by the Authority.

8.73 Consideration should also be given to introducing regulations in relation to websites of MDPs, which could set out information that must be contained in the websites.

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<sup>9</sup> Solicitors (Practice, Conduct and Discipline) Regulations 1996 (S.I. No. 178 of 1996)

### **Recommendation 18 – Professional notepaper**

The Authority should make regulations in relation to the professional notepaper of MDPs similar in nature to those in place for solicitor firms and the Authority should approve the notepaper of the MDP before commencement.

### **Regulations for operation and management of MDPs**

8.74 Section 116 of the Act sets out the Authority's powers to make regulations in respect of the management and operation of MDPs including the following matters:

- a) the standards to be observed in the provision by the practice of legal services to clients, including standards relating to:
  - (i) the professional and ethical conduct of persons providing legal services to clients;
  - (ii) the obligation of such persons to keep the affairs of clients confidential;
  - (iii) the provision of information to a client in relation to the duties owed by the practice to him or her;
- b) the rights, duties and responsibilities of a practice in respect of moneys received from clients;
- c) the management and control of the practice so as to ensure that:
  - (i) the standards referred to in paragraph (a) are at all times observed;
  - (ii) it has in place appropriate systems of control, including systems for risk management and financial control;
  - (iii) where, in the provision by it of services, a conflict of interest or potential conflict of interest arises, this is dealt with adequately and in accordance with any relevant code of conduct or professional codes;
  - (iv) its obligations under this Act and regulations made under it are complied with;
- d) the maintenance by the practice of records;

e) the regulation of the names that may be used by a practice;

f) the regulation of the advertising by the practice of its services.

8.75 It is recommended that the Authority should draft regulations in each of the above matters before the possibility arises of allowing the commencement of MDPs in the State. This will require the consideration of penalties for breaches of those regulations and ensuring such regulations do not conflict with the requirements of professional partners or employees of MDPs in relation to their own professional regulatory regime. MDPs should be held to the same standard as other legal providers to ensure that an unfair competitive advantage is not conferred on MDPs.

**Recommendation 19 – Regulations under section 116**

The Authority should draft regulations in relation to each of the matters under section 116 (a) to section 116 (f) of the Act.

**What might be the implications of MDPs for professional indemnity insurance requirements? How does this relate to section 47 of the Act?**

8.76 Under section 112 of the Act an MDP must not provide legal services unless they have in force a policy of professional indemnity insurance. The Authority has the power to make regulations in relation to professional indemnity insurance for MDPs under section 47 of the Act, other than in relation to practising solicitors in such partnerships. As such, the power of the Society in relation to professional indemnity insurance regulations made under section 26 of the Solicitors (Amendment) Act 1994 extends to MDPs which involve solicitors.

8.77 It should be noted that solicitors' professional indemnity insurance cover is provided to the solicitor firm, rather than to each individual solicitor. As such, the Society's professional indemnity insurance requirements would extend to the entire MDP rather than just to the individual solicitor within the MDP.

- 8.78 Allowing lower insurance standards for MDPs would confer an unfair competitive advantage at the cost of public protection.
- 8.79 Under the Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016 (S.I. No. 534 of 2016) solicitor firms are required to have insurance with a minimum level of cover of €1.5m for each and every claim. This minimum level of cover should have to be extended to all MDPs in the interests of client protection.
- 8.80 It is the view of the Society that MDPs with solicitor partners or employees should be required to meet the same professional indemnity insurance requirements, including minimum level of cover and minimum terms and conditions as solicitor firms are currently required in order to safeguard the same level of protection for clients.
- 8.81 Further discussions between the Authority and the Society will need to take place in relation to the implications of solicitor MDPs for current professional indemnity insurance regulations and access to the assigned risks pool and run-off fund. The exact interaction between the current professional indemnity insurance system and MDPs is a complex issue, and will require detailed consideration.
- 8.82 The assigned risks pool is an insurer of last resort and provides solicitor firms with insurance where the firm is unable to obtain insurance cover in the open market in any given year. There would need to be defined parameters for access to the assigned risks pool by solicitor MDPs which should be set out in regulations.
- 8.83 The run-off fund provides run-off cover which is free at point of entry to all eligible ceasing solicitor firms. Consideration will need to be given as to the circumstances (if any) under which an MDP with solicitor partners or employees would have access to the run-off fund.
- 8.84 Consideration will need to be given to the establishment of an assigned risks pool and run-off fund (or other run-off cover provider) for MDPs which do not have solicitor partners or employees.

- 8.85 The Authority is required to make regulations under section 47 of the Act in relation to professional indemnity insurance required to be maintained by practising barristers, legal partnerships, MDPs and limited liability partnerships that do not involve practising solicitors. This will require the Authority to engage with eligible insurers to establish satisfactory minimum terms and conditions that should apply to MDPs which do not have practising solicitors.
- 8.86 Consideration will need to be given by the Authority to the mechanism by which MDPs without solicitor partners obtain professional indemnity insurance, including whether such cover should be provided by the market, or through a master policy.
- 8.87 It should be noted that the professional indemnity insurance premiums for MDPs may be significantly higher than those for solicitor or barrister firms, particularly where there are non-professional partners due to the (probable) perceived higher risk profile. Professional partners, including legal practitioner partners, are subject to regulation, inspection and disciplinary measures by their regulatory bodies. If non-professional partners are not subject to similar levels of regulation, the insurers may view this as a much higher underwriting risk. Such higher premiums could translate into higher costs for the consumer. As such, it is in the interest of the public and the profession to hold MDPs to a similar regulatory standard as all other legal providers under the Act.

**Recommendation 20 – Professional indemnity insurance**

MDPs that have solicitors should be required to maintain the same professional indemnity insurance standards as solicitor firms including minimum level of cover and minimum terms and conditions.

**Recommendation 21 – Assigned risks pool and run-off cover**

Consideration should be given to access by MDPs with solicitor partners to the assigned risks pool and run-off fund, and the creation of an assigned risks pool and provision of run-off cover to non-solicitor MDPs.

## **Fee sharing and contingency fees**

- 8.88 Under section 62 of the Solicitors Act 1954 there is a prohibition on sharing fees with non-solicitors and rewarding non-solicitors for the introduction of business. The objective of the prohibition on sharing fee income is to ensure the proper, independent practice of the solicitors' profession free from undue influence.
- 8.89 Section 107(2) of the Act provides that a partner in an MDP may share with another partner fees or other income arising from the provision of legal services or other services. It is noted from the Authority's initial report that a number of jurisdictions do not allow legal practitioners to share fee income with non-legal practitioners.
- 8.90 Both solicitors and barristers owe a duty to represent their clients to the best of their ability and with absolute independence. This requires them to perform their functions without fear or favour to any other person. However, in any MDP the non-legal practitioner partners are not subject to the same rules concerning professional conduct. The non-legal practitioner partners are likely to have differing sets of priorities than those of solicitors and barristers.
- 8.91 Non-lawyers who have invested money in a partnership are likely to prioritise seeking the greatest return on their investment. Pressure may be placed on legal practitioners to attract more lucrative matters and to dispense with matters that are less profitable to the MDP. The possibility of increased pressure on legal practitioners to generate greater profits may come at the expense of justice for clients, professional standards, protection of the public, and the legal practitioner's duty to the client and the courts.
- 8.92 This could potentially lead to a reduction in pro-bono work as MDPs become more focused on profits than the administration of justice. Non-lawyer partners in MDPs may be reluctant to take on pro-bono work rather than focusing on profitable endeavours.
- 8.93 This could also lead to an increase, rather than a decrease, in legal fees through MDPs, as such structures are more likely to be focused on profit for partners.

8.94 As noted above, solicitors are not allowed to advertise on the basis of “no foal, no fee” or in other such manner that suggests clients may take litigation at no cost to themselves. Solicitors are also prohibited from charging clients on the basis of a percentage of any financial award or settlement made in any given case.

8.95 The Authority may consider introducing regulations prohibiting non-legal practitioner partners of an MDP from obstructing legal practitioners in a practice in meeting their professional obligations, whether for the pursuit of monetary or any other non-monetary benefit.

**Recommendation 22 – Undertaking by non-legal practitioner partners**

Consideration should be given to the introduction of regulations prohibiting non-legal practitioner partners of MDPs from obstructing legal practitioners in a practice in meeting their professional obligations whether for the pursuit of monetary or any other non-monetary benefit.

**Register of MDPs**

8.96 Under section 117 of the Act, the Authority is required to maintain a register of MDPs as notified to the Authority, and remove the name of any MDPs that have notified the Authority of their cessation. The register must be made available to the public for inspection free of charge. The legislation does not specify the information that should be included in this register.

8.97 The Society maintains a register of practising solicitors which is a list of all solicitors who currently hold a current practising certificate. The register is available to the public on application free of charge and contains the following information:

- a) the full name of the solicitor;
- b) the solicitor’s place or places of business;
- c) the solicitor’s date of admission to the roll of solicitors; and
- d) the details of the solicitor’s PII.

- 8.98 The register of practising solicitors is available for inspection during office hours without payment by the public on application. The Society also makes available information on all solicitors with current practising certificates through the Society's website.
- 8.99 It is the recommendation of the Society that the register of MDPs be made available to the public through the Authority's website. The Authority may wish to consider having a physical register made available to the public for inspection during office hours at no cost to the applicant.
- 8.100 It is the recommendation of the Society that a reciprocal notification requirement be set up between the Authority, the Society and the Bar of Ireland, requiring the Authority to notify the Society and the Bar of Ireland of any amendments to the register of MDPs, and the Society and the Bar of Ireland being required to notify the Authority of any amendments to the roll of solicitors, register of practising solicitors, and roll of practising barristers where the legal practitioners are in MDPs.
- 8.101 With regard to the information that the register of MDPs should include, the Society would recommend making available the information referred to in recommendation 23 below.
- 8.102 The Authority may wish to consider the disciplinary history of any professional person in the partnership being contained within the register. Such history should only be advertised where reprimands, fines or findings of professional misconduct have been made against a professional within the MDP which has not been cancelled by any appeals process.
- 8.103 If the decision is made that MDP partners are all regulated persons under the remit of the Authority, and are required to hold an annual MDP licence or practising certificate, consideration should be given to the maintenance of a register of practising MDP partners.

**Recommendation 23 – Register of MDPs**

The Authority should maintain a register of MDPs on their website and a physical register

should be made available to the public for inspection during office hours at no cost to the applicant with the following information:

- a) the full name of the MDP;
- b) the MDP's place or places of business;
- c) details of the proposed legal and non-legal services to be provided by the MDP;
- d) contact details for the MDP including phone, fax, email and website;
- e) the commencement date of the MDP;
- f) the cessation date of the MDP if closed;
- g) the recommencement and cessation dates of MDPs that have closed and reopened;
- h) details of the MDP's current professional indemnity insurance including insurer name and contact details, date of commencement and cessation of the insurance, policy number, and minimum level of cover;
- i) the names of the partners of the MDP, their commencement dates as partners and their professional qualifications (if any);
- j) the name of the managing legal practitioner for the MDP, their date of commencement and their qualifications;
- k) the names of all legal practitioners and professionals in the MDP, including their commencement dates, job titles, professional qualifications, and relevant regulator;
- l) confirmation that the legal practitioner partners and legal practitioner staff are practising solicitors and/or barristers;
- m) historic data on the MDP such as previous names, previous places of business, previous partners (including commencement and cessation dates), previous legal practitioner employees (including commencement and cessation dates), previous insurance details, and details of any preceding or succeeding partnerships.

## 9. Monitoring of MDPs

### How should MDPs be treated in relation to client protection?

- 9.1 While the Authority has the power under section 116 of the Act to make regulations regarding MDPs, regulations made by the Society in relation to solicitors equally apply to both solicitor employees and solicitor partners in MDPs.
- 9.2 It is the view of the Society that MDPs should be held to the same standards as other legal service providers in relation to client protection, including in relation to provision of information to clients, access to client moneys, access to a compensation fund to compensate for loss due to the dishonesty of the legal services provider, professional indemnity insurance requirements to compensate clients for negligence of the legal services provider, complaints process for MDPs, and consequences of breaches of the Act and regulations.

### Provision of information to clients

- 9.3 It is the view of the Society that MDPs should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms. This includes information on legal costs and professional fees, complaints procedures, insurance details, and access to the Society's compensation fund (if available) or any other compensation fund established, in the interest of protection of the public.

#### **Recommendation 24 – Provision of information to clients**

MDPs should have the same requirements and obligations with regard to the provision of information to clients as are in place for solicitor firms, including information on legal costs and professional fees, complaints procedures, access (if any) to a compensation fund, and professional indemnity insurance

## **Compensation Fund and definition of legal services**

- 9.4 The Society maintains a statutory compensation fund to compensate clients of solicitors who have suffered pecuniary loss by reason of dishonesty by a solicitor in the provision of legal services. Solicitors are required to make an annual contribution towards the cost of the fund through their practising certificate fee, whether or not the solicitor holds client moneys.
- 9.5 The Society's compensation fund serves an important public protection function and is significant in terms of public confidence and restitution to clients of solicitor who have suffered loss due to the dishonesty of their solicitor. Loss due to negligence of a solicitor is covered by professional indemnity insurance.
- 9.6 The Society's compensation fund will be accessible to clients of MDPs in relation to pecuniary losses suffered by reason of dishonesty of a solicitor only in an MDP in the provision of legal services. There would be no means of access to the fund by clients who suffer losses through the dishonesty of non-solicitors in an MDP.
- 9.7 It is appreciated that the purpose of section 113 is to provide protection for the Society's compensation fund by ensuring that claims cannot be made against the fund for dishonesty on the part of a non-solicitor who is a partner in, or employee of, an MDP. However, it continues to be the view of the Society that this section does not provide adequate protections for the Society's compensation fund against claims arising from the provision of legal services by MDPs.
- 9.8 It should be borne in mind that the Society's compensation fund is a legally enforceable compensation scheme in this jurisdiction, and should only be liable for dishonest acts resulting in loss carried out directly by a solicitor in the provision of legal services.

- 9.9 Under the Act, each partner in an MDP will be jointly and severally liable. Each MDP is required to have at least one MLP<sup>10</sup> who shall be responsible for the management and supervision of the provision of legal services by the practice.
- 9.10 If a solicitor is a legal practitioner partner in an MDP, and any other non-solicitor partner commits fraud, it could be argued that the Society's compensation fund should be held liable for providing compensation for the total loss due to the fact that all partners in the MDP are jointly and severally liable.
- 9.11 In addition, if one of the non-solicitor employees of the MDP commits fraud, a claim could be made on the Society's compensation fund on the grounds that the dishonesty was by a servant or clerk of the solicitor arising from the solicitor's practice as a solicitor.
- 9.12 If both a solicitor and non-solicitor partner in an MDP commit fraud, there is a danger that the Society's compensation fund could be made completely liable to compensate for the loss.
- 9.13 There is a danger that, even if a solicitor has only the slightest involvement in a transaction that involves fraud, there could be an exposure to the Society's compensation fund. This is particularly true given the difficulty in clearly differentiating between legal and non-legal services.
- 9.14 Legal services are defined under section 2 of the Solicitors (Amendment) Act 1994, as substituted by section 45 of the Investor Compensation Act 1998, as:

*"...services of a legal or financial nature provided by a solicitor arising from that solicitor's practice as a solicitor, and includes any part of such services: and for the avoidance of doubt, includes any investment business services provided by a solicitor who is not an authorised investment business firm."*

- 9.15 Legal services are defined under section 2 of the Act as:

*"...legal services provided by a person, whether as a solicitor or as a barrister";* and

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<sup>10</sup>Managing legal practitioner

*“...a person provides legal services as a solicitor where he or she acts as a solicitor, as that term is construed under the Solicitors Acts 1954 to 2011.”*

- 9.16 Both definitions are quite nebulous and do not contain any definition of financial services. This would lead to difficulty for both the MLP and the Society should a claim arise on the Society’s compensation fund, in deciding what constitutes legal services and what constitutes non-legal services, and could have serious and significant repercussions for both the MLP and the Society.
- 9.17 The MLP is required to deal with the provision of legal services separately to the provision of non-legal services by an MDP, in particular in relation to client moneys, accounts and accounting records, fees and letters of engagement. The distinction between legal services and non-legal services may come down to a matter of interpretation on the part of the MLP, which may not be in agreement with the interpretation of the client, the Society, the Authority or the courts.
- 9.18 Take, for example, a multi-disciplinary team advising on valuations of the company, contingency liabilities etc. Certain courses of action will be necessary to minimise capital gains tax, VAT, stamp duty, and corporation or income tax liabilities. Taxation advisors may direct or advise that certain actions be taken, but the actual execution of that course of action will be carried out by the legal practitioner. Trying to distinguish between the provision of legal services and the provision of non-legal services, especially considering that the definition of legal services includes the provision of financial services, would be extremely difficult.
- 9.19 Similarly, there may be cases where non-solicitors in an MDP may direct or advise that certain actions be taken. There is a risk that a solicitor in the MDP may execute that course of action without being aware that it is fraudulent. The actual responsibility for the fraud rests with the non-solicitor but, given the solicitor’s involvement in the case, a claim may still be made against the Society’s compensation fund.
- 9.20 Given that the definition of legal services includes services of a financial nature, the Society’s compensation fund may be deemed to be liable for services which the solicitor is authorised to provide, but are actually provided by non-solicitors in the MDP.

- 9.21 As the distinction between legal services and non-legal services is not always clear, the extent to which dishonest misappropriation is attributable to a solicitor where other non-solicitor partners or employees are involved will be difficult for the Society to decide, and is likely to be subject to legal proceedings.
- 9.22 Claims may also be made against the Society's compensation fund arising from a dishonest act by a solicitor in an MDP in relation to the provision of a non-legal service.
- 9.23 It should be noted that, under these provisions, despite the greatly expanded exposure to the Society's compensation fund, only solicitor partners and employees of MDPs are required to pay into the Society's compensation fund. The MDP itself does not contribute to the fund but is expected to benefit from it.
- 9.24 In addition, there is a lack of clarity for clients of MDPs as they will not know to what extent they are protected against fraud, particularly where a piece of work is carried out by a multi-disciplinary team.
- 9.25 The additional exposure to the Society's compensation fund set out above is unacceptable and unsustainable, and the protections in place under section 113 are not sufficient.
- 9.26 It is the recommendation of the Society that clear and separate definitions of legal services and non-legal services be introduced for the purpose of the operation of MDPs.
- 9.27 It is the recommendation of the Society that section 113 be amended to include necessary protections for the Society's compensation fund to ensure that the exposure of the fund in relation to MDPs is solely limited to claims arising from acts of dishonesty directly carried out by a solicitor in the provision of legal services. Detailed rules should be put in place in primary legislation to determine the fund's liabilities in relation to MDPs, and to protect the fund, including the following:
- a) The percentage of the loss paid by the Society's compensation fund, where all partners are found jointly and severally liable for losses suffered due to

dishonesty, should be proportionate to the percentage solicitor partnership of the MDP.

- b) Where loss has been sustained as a result of the combined activities of more than one party, one of which is a solicitor, the Society should consider the role of each contributing portion of the loss primarily attributable to the acts of the solicitor, as opposed to that portion which is primarily attributable to the acts and/or omissions of non-solicitors. The Society may make a grant on a *pro-rata* basis in accordance with its assessment of the importance of each contributing factor in the loss, or may reject an application in its entirety if the Society is of the opinion that the loss was primarily due to other factors rather than the solicitor's conduct.
- c) The Society may refuse a grant in a case where it assesses that the loss was primarily attributable to an act or default by a solicitor in the course of provision of a service which, in the opinion of the Society, is a service other than a legal service, or an activity not regulated by the Society.
- d) The Society shall be entitled to determine what constitutes the provision of a legal service or a non-legal service and shall not be bound by any interpretation by the MDP, MLP or in any letter of engagement.
- e) With regard to claims arising from the provision of legal services by MDPs, payment of grants from the Society's compensation fund by the Society shall be discretionary, and claimants shall not have an enforceable legal right.

9.28 In order to ensure equity for clients of MDPs who do not have right of access to the Society's compensation fund, consideration should be given to the establishment and maintenance of an MDP compensation fund by the Authority, which fund would be paid for by non-solicitor partners and employees in MDPs, to compensate clients who have suffered pecuniary loss due to the dishonesty of a non-solicitor partner or employee in an MDP.

**Recommendation 25 – Definitions of ‘legal services’ and ‘non-legal services’ in relation to MDPs**

Clear and separate definitions of legal services and non-legal services should be introduced for the purpose of the operation of MDPs.

**Recommendation 26 – Amendments to section 113 in relation to the Society’s Compensation Fund**

Section 113 should be amended to include necessary protections for the Society’s compensation fund to ensure that the exposure of the fund in relation to MDPs is solely limited to claims arising from acts of dishonesty directly carried out by a solicitor in the provision of legal services. Detailed rules should be put in place in primary legislation to determine the fund’s liabilities in relation to MDPs, and to protect the fund, including the following:

- a) The percentage of the loss paid by the Society’s compensation fund, where all partners are found jointly and severally liable for losses suffered due to dishonesty, should be proportionate to the percentage solicitor partnership of the MDP.
- b) Where loss has been sustained as a result of the combined activities of more than one party, one of which is a solicitor, the Society should consider the role of each contributing portion of the loss primarily attributable to the acts of the solicitor, as opposed to that portion which is primarily attributable to the acts and/or omissions of non-solicitors. The Society may make a grant on a *pro-rata* basis in accordance with its assessment of the importance of each contributing factor in the loss, or may reject an application in its entirety if the Society is of the opinion that the loss was primarily due to other factors rather than the solicitor’s conduct.
- c) The Society may refuse a grant in a case where it assesses that the loss was primarily attributable to an act or default by a solicitor in the course of provision of a service which, in the opinion of the Society, is a service other than a legal service, or an activity not regulated by the Society.

d) The Society shall be entitled to determine what constitutes the provision of a legal service or a non-legal service and shall not be bound by any interpretation by the MDP, MLP or in any letter of engagement.

e) With regard to claims arising from the provision of legal services by MDPs, payment of grants from the Society's compensation fund by the Society shall be discretionary, and claimants shall not have an enforceable legal right.

#### **Recommendation 27 – Establishment of MDP compensation fund**

Consideration should be given to the establishment and maintenance by the Authority of an MDP compensation fund to compensate clients who have suffered pecuniary loss due to the dishonest actions of non-solicitor partners or employees in MDPs, which fund would be paid for in its entirety by non-solicitor partners or employees in MDPs.

#### **Access to client moneys**

9.29 Under the Act, solicitors in MDPs continue to be under the regulatory remit of the Society, including obligations under the solicitors accounts regulations. Such solicitors constitute a risk to the Society's compensation fund, and so the Society must continue to have the same primary functions of investigation and enforcement in relation to accounts regulations. Solicitor MDPs holding client moneys would also be subject to existing annual reporting accountant's reports requirements.

9.30 In the interests of protection of the public, all MDPs which hold client moneys, including non-solicitor MDPs, should be subject to accounts regulations and requirements as vigorous as those in place for solicitor firms who hold client moneys, and should be subject to investigation to ensure compliance with the relevant regulations.

9.31 This would require the establishment of a financial regulatory system to the same level as that in place for solicitor firms, with all of the same powers afforded the

Society under the Solicitors Acts 1954 to 2011 in relation to such regulation. This would include the establishment of a team of forensic investigating accountants, and a regulatory committee to deal with breaches of the Act and regulations. The Authority would need to be granted all relevant enforcement, protective and disciplinary powers in relation to same as are currently held by the Society.

**Recommendation 28 – Powers of the Society in relation to solicitor MDPs**

It should be made clear that the Society retains all regulatory, investigative, enforcement, protective and disciplinary powers in relation to MDPs with solicitor partners and employees as currently exists for solicitor firms.

**Recommendation 29 – Financial regulation of MDPs**

In the interests of public protection, all MDPs who hold client moneys should be subject to a financial regulatory system at the same level of that in place for solicitor firms.

**Recommendation 30 – Powers of the Authority in relation to financial regulation of non-solicitor MDPs**

The Authority should be vested with the same regulatory, investigative, protective, enforcement and disciplinary powers in relation to the financial regulation of non-solicitor MDPs as are currently vested in the Society in relation to the financial regulation of solicitor firms.

**Annual confirmation of professional indemnity insurance**

9.32 As set out in Chapter 4 of this report, MDPs are required under the Act to hold professional indemnity insurance.

9.33 Solicitors firms are required, through their brokers, to confirm their professional indemnity insurance on an annual basis through the Society's online professional

indemnity insurance portal within 3 working days of the commencement of the indemnity period each year (1 December). If a firm fails to provide confirmation of cover, the Society can make an application to the High Court for the firm to be closed down until such time as confirmation of insurance cover has been provided.

9.34 MDPs should also be required to provide confirmation of cover on an annual basis to the Authority, to ensure that the MDP is meeting its requirements to practise, and the insurance details in the register of MDPs is up to date.

**Recommendation 31 – Annual confirmation of professional indemnity insurance**

MDPs should be required to provide the Authority with confirmation of professional indemnity insurance cover on an annual basis, and the Authority should be empowered to make an application to the High Court to close down any MDP which fails to provide such cover within any time limit prescribed.

**Complaints process**

9.35 It is noted that, under the Act, legal practitioners in MDPs are subject to the same complaints system as all other legal practitioners. It is important that Part 6 of the Act setting out the new complaints and disciplinary system should be in full force and effect before MDPs are introduced, to ensure that there is an enforcement mechanism against legal practitioners in MDPs.

9.36 Consideration should be given to empowering the Authority to deal with complaints against non-legal practitioner partners and employees in MDPs. There is a concern that, if non-legal practitioner partners and employees are not subject to a regulatory regime, there are no consequences for breaches of the Act by such persons.

**Recommendation 32 – Complaints against non-legal practitioner partners and employees of MDPs**

Consideration should be given to empowering the Authority to deal with complaints against

non-legal practitioner partners and employees of MDPs.

### **Consequences for breaches of the Act and regulations**

9.37 Breaches of the Act and regulations by legal practitioners in MDPs should be treated the same as breaches by legal practitioners providing legal services other than through MDPs, with regard to regulatory, disciplinary, enforcement, and protective actions that may be taken against same.

9.38 Regulatory and disciplinary action should be in relation to the individuals in the MDP, rather than against the MDP as an entity. Each legal practitioner in the MDP should be responsible for ensuring that they comply with the Act and regulations made thereunder. With regard to financial regulation, while the MDP as a whole is investigated, responsibility for any breaches of the accounts regulations should lie with the partners in the MDP.

### **How could sanctions be imposed on non-lawyers engaged in MDPs in cases of serious breach?**

9.39 It is noted from the Authority's initial report that the Solicitors Regulation Authority in England and Wales and the Singaporean LSRA both have powers to impose sanctions on both non-lawyers and the entity as a whole. However, it must be noted that these powers derive from legislation authorising the relevant bodies to take disciplinary action against the non-lawyers.

9.40 The Act does not confer the Authority with any powers over persons who are not legal practitioners and any attempt to hold them to account under the Act could be considered to be *ultra vires* the Authority's powers.

9.41 This creates a situation where there are no consequences for non-legal practitioner partners and employees of MDPs for breach of the Act or regulations, which leaves the MDP structure open to misuse and puts the public at risk.

- 9.42 The Authority would have no power to deal with non-legal practitioner partners or employees of MDPs regardless of the extent of their criminality or breaches of the Act. For example, a non-legal practitioner partner or employee may have misappropriated client moneys and the Authority would not have the power to remove the individual from the MDP, prohibit them from providing services through the MDP, or prohibit them joining another MDP.
- 9.43 It is the view of the Society that the Authority's regulatory powers in relation to legal practitioners should be extended in primary legislation to cover all non-legal practitioner partners and employees in MDPs in the interests of public protection. Such individuals would then become regulated persons and be subject to obligations and regulations under the Act. It would also empower the Authority, if appropriate, to disqualify a non-legal practitioner partner or employee from working in or with an MDP, or impose restrictions on a non-legal practitioner partner or employee.
- 9.44 Consideration could also be given to empowering the Authority to impose monetary fines on non-legal practitioner partners and employees of MDPs who breach provisions of the Act and regulations made thereunder.

**Recommendation 33 – Regulation of non-legal practitioner partners and employees of MDPs**

Consideration should be given to extending the regulatory and disciplinary remit of the Authority to include any non-legal practitioner partners or employees in MDPs, and the Authority should be empowered to disqualify, and impose restrictions on, non-legal practitioner partners and employees in MDPs.

**Are there any particular concerns in relation to the cessation of an MDP?**

- 9.45 Certain matters should be considered in relation to the cessation of MDPs including distressed closures, run-off cover, matters relating to client files, and closing accountants' reports.

## **Distressed closures**

- 9.46 It is the recommendation of the Society that specific information should be sought from MDPs to deal with situations of emergency closure, such as death of legal partners, abandonment of practice, or regulatory intervention which results in closure by order of the High Court.
- 9.47 Such information should include home addresses, phone numbers and emails for all of the partners of the MDP, as well as an emergency legal practitioner contact who has agreed to assist with a wind-down of the legal matters of an MDP in the event of an emergency closure.
- 9.48 The Authority should give some consideration to how to deal with the legal client files and client moneys of MDPs that are closed due to regulatory intervention, abandonment and unforeseen circumstances such as death, as such files and moneys are the property of the client and not of the MDP.

### **Recommendation 34 – Distressed closure of MDPs**

Consideration should be given to the procedures to be put in place in the event of a distressed closure of an MDP, including seeking specific information from MDPs (such as home addresses, phone numbers and emails of MDP partners), a requirement for each MDP to appoint an emergency legal practitioner contact who has agreed to assist with the wind-down of legal matters in an MDP in the event of a distressed closure, and procedures to deal with and safeguard client files and moneys.

## **Run-off cover**

- 9.49 The Society has made recommendations in relation to provision of run-off cover for MDPs that cease in recommendation 21 of this report.
- 9.50 Consideration does need to be given to the provision of run-off cover for MDPs, and the terms of such cover. It should be kept in mind that solicitor MDPs are subject to

the Society's professional indemnity insurance rules, and consideration needs to be given to whether such MDPs would have access to the Society's run-off fund.

## **Client files**

- 9.51 Some thought should be given to how to deal with the legal client files of closed MDPs. In an ordinary wind-down of a solicitor practice, solicitors must divest themselves of files and should distribute client files to the clients' newly nominated solicitors. Under no circumstances can a solicitor who is not practising hold on to any client files, including closed files.
- 9.52 Where a solicitor firm ceases, the principals are required to provide the Society with information in relation to the distribution of live and closed files, and to provide written confirmation that all live files have been forwarded to new solicitors nominated by the clients by a specified date.
- 9.53 Solicitors should ensure that the closed files are returned to clients where appropriate or have same held in storage which is accessible to a practising solicitor. The Society requires notification of the identity of the practising solicitor who has access to the closed files so that, in the event that the Society is contacted by a former client, the Society can direct the client to the practising solicitor who has access to the closed file.
- 9.54 In the event that clients do not take up their closed files, the files should be held in storage for the appropriate limitation periods under the statutes of limitations in the event that proceedings are issued against the solicitor on any given file.
- 9.55 All wills in respect of the closed firm are required to be transferred to another solicitor firm or returned to clients. Solicitors often inform their local bar association or colleagues of their cessation from practice and inform them of arrangements being made in respect of wills. Such information should also be provided to the Society.
- 9.56 Solicitors ceasing practice are issued with the Society's requirements with regard to retention and destruction of client files.

9.57 It is the recommendation of the Society that the Authority put in place guidelines for the closure of MDPs in relation to the distribution and retention of client legal files.

**Recommendation 35 – Client files**

The Authority should put in place guidelines for the closure of MDPs in relation to the distribution and retention of client legal files.

**Timescale for cessation notification**

9.58 Under section 106(2) of the Act, the MDP is required to provide a written notification of cessation to the Authority.

9.59 However, unlike the commencement notification under section 106(1), the cessation notification is not required to be provided to the Authority in advance of the MDP ceasing to provide legal services.

9.60 This could result in an MDP being closed for weeks or months without the Authority being aware of same, and with the register of MDPs listing the MDP as live.

9.61 As such, it is the recommendation of the Society that MDPs be required to provide prior notification of cessation not less than one month in advance of the date of cessation to the Authority.

9.62 Provision for emergency cessations, such as cessation due to death or illness of a partner, appointment of a partner as a judge, county registrar or other such role, or forced closure due to High Court order, should be built into the requirements as noted above.

**Recommendation 36 – Timescale for cessation notifications**

MDPs should be required to provide written notification no less than one month prior to cessation in practice.

## **Closing accountants' report**

- 9.63 Solicitor firms that hold client moneys are required to file an annual prescribed reporting accountants' report in relation to client moneys held. They must confirm that they have complied with the solicitors accounts regulations for the financial year covered by the report. This must be filed with the Society within 6 months of the date of the stated financial year end of the firm.
- 9.64 When a solicitor firm closes, it is required to file a closing reporting accountants' report to the date that they cease to receive, hold, control or pay client moneys. This report is required to be filed with the Society within two months of the date of cessation of the firm reflecting nil balances on the client account(s).
- 9.65 It is the recommendation of the Society that similar reporting requirements be put in place as part of the cessation notification of legal services by MDPs. This requirement may need to be considered in circumstances where an MDP closes the legal side of the practice but the remainder of the practice still trades.

### **Recommendation 37 – Closing accountants' report**

Similar reporting requirements should apply to MDPs in relation to closing accountants' reports when ceasing to provide legal services.

## **Funding regulation of MDPs**

- 9.66 Under the Act, it appears that the legal professions are expected to fund the regulation of MDPs in its entirety, despite that fact that MDPs are partnerships of legal practitioners and non-legal practitioners.
- 9.67 It is the view of the Society that it is unfair, unreasonable, and unrealistic to expect the legal professions to fund the regulation of structures where there may be little legal practitioner involvement, given that MDPs are only required to have one legal practitioner partner.

9.68 In the case of MDPs, which may be predominantly made up of other professionals, such as accountants, or non-professional business partners, it is hardly reasonable to expect the legal professions to pay for the regulation of such structures which benefit, but have no apparent cost, for other professions or business investors.

9.69 It is the strong recommendation of the Society that MDPs should be levied with annual fees to pay directly for the entirety of their own regulation. Such fees may be paid by the MDP as an entity, or by way of an MDP licence or practising certificate required to be held by each individual in an MDP. This way both legal practitioners and non-legal practitioners involved in MDPs pay for the regulation of MDPs in proportion to their involvement.

**Recommendation 38 – Funding regulation of MDPs**

MDPs should be levied, either by entity or each individual in the MDP, with annual fees to pay directly for the entirety of their own regulation.

## 10. Operation of MDPs

### **Is “Managing Legal Practitioner” the best terminology?**

- 10.1 MDPs under section 108 of the Act must have a managing legal practitioner (“MLP”) who shall be responsible for the management and supervision of the provision of legal services by the practice. The Act requires that an MDP that fails to have an MLP for a period of 7 days or longer shall notify the Authority of that fact and cease to provide legal services until such an MLP is appointed. It is the view of the Society that the terminology is appropriate given the responsibilities of the MLP.
- 10.2 The MLP in an MDP has the same responsibilities as principals of solicitor firms. The MLP would require that all legal services in the MDP are undertaken in accordance with the professional principles set out under section 13(5) of the Act.
- 10.3 The Act is silent on the matter of who should be considered a suitable person to be an MLP for an MDP. Given the responsibilities that will attach to the position of MLP, it is recommended that the Authority give some consideration as to qualifying criteria for such a position. Otherwise a newly qualified legal practitioner with little or no post qualification experience could establish themselves as an MLP.
- 10.4 The Authority may also wish to consider the introduction of a requirement for MLPs to be nominated to, and approved by the Authority, and for the Authority to have the power to refuse the appointment of an MLP. This is particularly important where an MLP may have proved inadequate to the task in another MDP, or has a disciplinary record which would indicate that such MLP would constitute a risk to client moneys and protection of the public.
- 10.5 An MDP that ceases to have an MLP should, in effect, be similar to a solicitor firm that ceases to have a principal, insofar as the legal part of that MDP should immediately and automatically be considered inactive and be prohibited from providing legal services of any kind until a new MLP is appointed. Notification should be given to the Authority and insurers of the MDP of the practice’s inactive status.

10.6 An MDP may need to consider having contingency plans in place for the incapacity or unavailability of the MLP. This should be considered in regulations to be made by the Authority under section 116 of the Act to ensure the continuity of legal services for clients.

**Recommendation 39 – Qualifying criteria for MLPs**

Consideration should be given to the creation of qualifying criteria for MLPs, a requirement to obtain the approval of the Authority to appoint an MLP, and empowering the Authority to refuse to approve the appointment of an MLP.

**What should be the sanction if an MDP fails to have an MLP?**

10.7 As stated above, the MLP in an MDP would in effect be akin to a principal in a solicitor firm. Solicitor firms without a principal in place are considered inactive and are precluded from providing legal services, unless a practice manager is appointed and approved by the Society.

10.8 Solicitor firms are required to have at least one practising solicitor principal. Where a solicitor principal is suspended, struck-off or otherwise deemed to be non-practising, the firm is automatically deemed to be inactive, and cessation procedures are put in place. As such, taking disciplinary action against a solicitor principal can, in certain cases, result in the forced closure of a solicitor firm.

10.9 The Authority should consider seeking similar powers against MDPs with respect to the MLP. MDPs which do not have an MLP in place should be immediately and automatically deemed to be inactive and be prohibited from providing legal services of any kind until they provide the necessary confirmation to the Authority that an MLP is in place.

10.10 If an MDP continues to provide legal services without an MLP in place, the Authority should have the power to make an application to the High Court forcing the MDP to close.

#### **Recommendation 40 – MDPs practising without MLPs**

Any MDP without an MLP should be immediately and automatically deemed to be inactive and prohibited from providing legal services of any kind until they provide confirmation to the Authority that an MLP is in place. The Authority should be granted the powers to make an application to the High Court for an order forcing MDPs which do not have an MLP in place to close.

#### **Would it be proportionate to require all partners and employees of the practice to comply with professional principles and other related regulations and Acts?**

10.11 As matters currently stand, the Authority has powers over legal practitioners that ensure they comply with professional principles, regulations and Acts. The Society also retains certain powers over solicitors under the Solicitors Acts and in particular in relation to the solicitors accounts regulations.

10.12 As set out in recommendation 33 of this report, it is the view of the Society that it would be proportionate to require all legal practitioners, either partners or employees, in an MDP to comply with professional principles, related regulations and Acts as the Authority will have jurisdiction over these persons. The Authority may impose sanctions against legal practitioners who breach professional principles, regulations and Acts or take disciplinary action against them.

10.13 The Society has recommended that the regulatory remit of the Authority be extended to cover all partners and employees in MDPs, both legal practitioners and non-legal practitioners, for the protection of the public.

10.14 However, extending the regulatory responsibilities to non-legal practitioners in MDPs should not confer such persons with the same powers and rights of legal practitioners in MDPs.

## **What other agencies might need to inspect the offices of an MDP?**

- 10.15 Other agencies that may need to inspect the offices of an MDP would have to include agents of the regulatory bodies of any other professionals within the MDP, including the Society for solicitors in MDPs.
- 10.16 In effect, regulation of professionals in MDPs will be a form of co-regulation between the Authority and the relevant professional regulators for the non-legal practitioner professionals in MDPs. This is similar to the structure in place for personal insolvency practitioners.
- 10.17 Data sharing procedures will need to be put in place to ensure the timely sharing of relevant data to and from the Authority and any other regulatory bodies. This could include matters where findings of professional misconduct are made against a non-legal practitioner or where sanctions are imposed.

### **Recommendation 41 – Data sharing procedures**

Robust data sharing procedures should be put in place between the Authority and relevant professional regulators in relation to professionals working in MDPs.

## **Public confidence in MDPs – Are there any other provisions that might be required?**

- 10.18 It is uncertain at this time what appetite there is among the public for the introduction of MDPs. If there is a demand by the public, it is uncertain at this time what form of MDPs would be demanded.
- 10.19 It may damage public confidence in MDPs to allow unregulated non-professional persons to become partners as there may be no real and effective regulation of those persons.
- 10.20 In relation to the list of persons that are prohibited from being partners in MDPs under the Act, consideration should be given to granting the Authority some flexibility to

refuse to permit a person to become a partner in an MDP on reasonable grounds not listed under the Act.

10.21 As mentioned previously in this submission, extensive and appropriate probity and fitness requirements for non-legal practitioner partners should be introduced for the protection of the public. While it is acknowledged that it may, to some extent, be possible for the Authority to make regulations in this regard, the absence of any framework in the primary legislation for a probity test causes serious concern that any such regulations could be easily challenged on vires grounds.

10.22 Given the difficulties associated with non-professional partners of MDPs, it remains the Society's stated position that, if MDPs are to be introduced, that such structures should be limited to partnerships between legal practitioners and other regulated professions. This would fit the ethos of what an MDP is supposed to be, namely a multi-disciplinary practice, rather than a vehicle for unqualified persons to provide legal services.

10.23 It is worth noting that non-solicitors are permitted under Irish law to provide non-reserved legal services (including bodies corporate). Only reserved legal services such as litigation, probate and conveyancing are restricted to being provided by legal practitioners. Companies are permitted to, and do, provide non-reserved legal services in this jurisdiction, such as employment law and immigration legal services, and such persons or bodies are unregulated. As such, it remains to be seen what purpose the introduction of MDPs into this market would serve.

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