



Legal Services Regulatory Authority

Multi-Disciplinary Practices

Further Report to the Minister for Justice and Equality, Mr Charles Flanagan TD

29th September 2017

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PART 1: Introduction

- 1.1. Under the Legal Services Regulation Act 2015, the Authority is required to prepare two reports for the Minister on the issue of multi-disciplinary practices. In particular the Authority is obliged to report on the ‘establishment, regulation, monitoring, operation and impact of multi-disciplinary practices in the State.’¹

The First Report

- 1.2. The first report was submitted to the Minister on the 31st of March 2017². That report was intended to provide a basis for the public consultation that was to follow.
- 1.3. The report set out results of research into the position in other jurisdictions and made the following key points:
- a. Whilst there are a growing number of jurisdictions in which non-lawyers were permitted to own law firms, the default position remains that most common law jurisdictions do not permit non-lawyers to enter into partnerships, or fee share with lawyers.
 - b. Within those jurisdictions that have permitted non-lawyer ownership, there is a wide variety of models that have been used.
 - c. All of those models have specific features designed to deal with fundamental issues of lawyer independence and conflicts of interest.
 - d. The MDP models used elsewhere have also removed limitations on the scope of services provided, removed barriers to co-ownership and permitted limitation of liability.
 - e. The overall take up of MDP’s in other jurisdictions has been low.
 - f. There does not appear to have been any difficulties arising in relation to issues of ethics or independence where MDP’s have been established.
 - g. The most common effect of introducing MDP’s has been the impact on the diversity of services available and the ability to bundle services.
- 1.4. Part 4 of the report discussed the likely consequences and impact of introducing MDP’s in Ireland. Part 5 set out general and specific questions that would form part of the consultation process.

The Public Consultation:

- 1.5. Following that report, the Authority engaged in a public consultation in relation to these issues. A public notice was published in the national press and was also sent to

¹ S.119 of the Act.

² A copy of the report is available on the Authority’s website at <http://lsra.ie/en/lsra/pages/reports>

relevant bodies. A copy of the notice is at Annex 1 and a list of the recipients of the notice is at Annex 2.

- 1.6. Five submissions were received from the following organisations:
- a. The Law Society of Ireland.
 - b. The Bar Council.
 - c. The King's Inns.
 - d. FLAC
 - e. CCPC
- 1.7. The Authority is grateful to all of the respondents who took the time to make a submission.
- 1.8. The initial report identified key stakeholders whose views would greatly assist the Authority in considering the various issues involved³. These were as follows:
- The professional bodies, who will need to be closely involved in implementing the MDP model.
 - The Lay Members of the Law Society's Complaints Committee and other similar bodies who may be involved in the detail of complaints handling for other professions.
 - The Competition and Consumer Protection Commission.
 - The Judiciary (perhaps via the Association of Judges in Ireland).
 - Government departments.
 - Consumer interest groups and others who could comment on how access to the market for legal services can be improved.
 - Individual businesses and business representative organisations.
 - Trades Unions, charities and other civil society organisations who might use the MDP model in new ways once they are aware of its potential.
 - The regulators of other professions who may maintain their own barriers to the provision of joint services.
 - Insurers, lenders and other advisers to the legal market whose activities and approaches may support or inhibit the take-up of MDP's.
 - Potential users of the MDP model, whether legal practitioners or non-lawyers interested in entering the legal market and seeking a legal partner.
 - Potential clients of MDP's whether consumer, corporate or public sector.
- 1.9. It can be seen that submissions from many of the identified stakeholders were not received. The Authority is concerned that the absence of the views of many of these key stakeholders could result in recommendations being made in the absence of these key voices.

³ See para. 250 of the initial report.

Objectives of the Authority:

- 1.10. It is important that the objectives of the Authority are stated as they provide the statutory framework for all of the activities of the Authority. The Authority's legislation⁴ specifies that in performing its functions that Authority shall have regard to the following objectives: -
- a. protecting and promoting the public interest,
 - b. supporting the proper and effective administration of justice,
 - c. protecting and promoting the interests of consumers relating to the provision of legal services,
 - d. promoting competition in the provision of legal services in the State,
 - e. encouraging an independent, strong and effective legal profession, and
 - f. promoting and maintaining adherence to the following professional principles: -
 - i. that legal practitioners shall –
 1. act with independence and integrity,
 2. act in the best interests of their clients, and
 3. maintain proper standards of work,
 - ii. that legal practitioners who exercise before any court a right or audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and
 - iii. that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.
- 1.11. The Authority is particularly concerned to ensure that at all times the objectives of the Act, especially as articulated in S 13(4), are to the forefront of its conclusions and recommendations. This is the context in which this report has been prepared and the following recommendations are made.

Key Definitions and Terms:

- 1.12. In this report certain terms have specific meanings. The following is a list explaining the meaning of the most common terms used: -

'Act' means the Legal Services Regulation Act 2015.

'Bar Council' means the Council of the Bar of Ireland which is the representative body for barristers in Ireland. It also regulates barristers⁵.

⁴ Legal Services Regulation Act 2015, S.13(4).

⁵ See www.lawlibrary.ie.

‘Cab-rank Rule’ means the rule of conduct whereby a barrister must accept instructions in any case in the field in which they profess to practice subject to the payment of a proper professional fee. There are exceptions to this rule. For example, where there is a conflict, the barrister has other professional commitments or other special circumstances apply.

‘Client Moneys’ means moneys received, held or controlled by a solicitor arising from their practice as a solicitor, for or on account of a client in any capacity⁶.

‘Code of Conduct’ means the Code of Conduct for the Bar of Ireland, July 2014 edition. Barristers are obliged to comply with this code⁷.

‘Compensation Fund’ means the fund operated by the Law Society to compensate clients of solicitors who have suffered a pecuniary loss due to the dishonesty, in the provision of legal services, by a solicitor.

‘King’s Inns’ means the Honorable Society of King’s Inns which is the body responsible for the training and education of Barristers. It also deals with serious issues of misconduct by barristers referred to it by the Bar Council⁸.

‘Law Society’ means the Law Society of Ireland which is the representative body for solicitors. In conjunction with the High Court and the Solicitors Disciplinary Tribunal it has a role in the regulation of solicitors⁹.

‘Legal Partnership’ or ‘LP’s’ means a business partnership between a barrister and another legal practitioner, who can be either a solicitor or barrister. Such partnerships are not currently permitted but will be introduced by Part 8 of the Legal Services Regulation Act 2015.

‘Legal Practitioner’ means either a solicitor or a barrister.

‘Multi-disciplinary practices’ or ‘MDP’s’ means a business partnership between a legal practitioner and another person, for the purposes of providing legal and non-legal services. Such partnerships are not currently permitted but may be introduced by Part 8 of the Legal Services Regulation Act 2015.

‘Passive investment’ means that an investor in an MDP will not be providing any services themselves, but will be receiving a share of the profits.

⁶ See Regulation 2(1) of the Solicitors Accounts Regulations 2014, (S.I. No. 516 of 2014) for the full definition.

⁷ <https://www.lawlibrary.ie/About-Us/What-We-Do/Regulation/Code-of-Conduct.aspx>

⁸ See www.kingsinns.ie.

⁹ See www.lawsociety.ie.

'Solicitors Accounts Regulations' means the current legislation regulating how solicitors are permitted to hold client moneys¹⁰.

¹⁰ Solicitors Accounts Regulations 2014, ([S.I. No. 516 of 2014](#))

PART 2: Submissions Received

2.1. This part of the report sets out a summary of the submissions received¹¹.

The Competition and Consumer Protection Commission:

2.2. The CCPC is an independent statutory body with a dual mandate to enforce competition and consumer protection law in Ireland.

2.3. The CCPC remains of the view that the introduction of MDP's have the potential to provide end-to-end services which should put downward pressure on costs and provide a greater choice of products and services to consumers.

2.4. The previous findings of the Competition Authority¹² remain relevant and in particular the analysis that not providing for MDP's "prevents professional service providers from catering for clients who have a set of inter-related needs, and from integrating their supply with providers of complimentary services. The prohibition also limits the ability of clients to benefit from a "one-stop shop" and hinders innovations which might otherwise result from the combination of different services, which could allow for new products or services to be developed to the benefit of clients."

2.5. The CCPC was of the view that innovation has not been prioritised to date by providers of legal services in Ireland. The rapid changes being brought about in markets by technology, and with the level of uncertainty being generated by Brexit, it is all the more important for businesses in Ireland to embrace innovative ways of meeting consumer needs. Competition, competitiveness and innovation are key factors in the design of future legal regulatory frameworks.

2.6. There is a unique opportunity for the Authority to consider the overall regulatory approach to legal services with a view to ensuring greater competition within the sector alongside a continued high standard of consumer protection.

2.7. It is important that non-legal professionals are enabled to form and be employed in MDP's with regulatory certainty while ensuring that the consumer is empowered to understand the relationship between the legal and non-legal elements of such a partnership and the duties owed to them. The scope for online resources to guide consumers in this regard should be considered.

¹¹ The Authority will publish the full submissions on its website in due course. These summaries attempt to follow the structure of each submission received.

¹² Competition Authority (2006) 'Solicitors and Barristers Report'

- 2.8. The licencing of price comparison tools would improve the ability of consumers to compare offerings in the market. Such tools could prove to be of value in encouraging competition and innovation between partnerships, alongside assisting consumers in making informed decisions about services offered by them.
- 2.9. The implication of the evidence in the first report to the Minister was that there will be a very low take up of MDP's without the option for partners to limit their liability. The Authority should undertake further analysis on the need for, and the most appropriate model of, liability limitation for MDP's.
- 2.10. It will be critical for the Authority to ensure that the introduction of MDP's should not lead to a diminution of current professional standards and the current standards of consumer protection.
- 2.11. A clear and certain regulatory framework should be established which would allow consumers to have confidence in the MDP structure and provide an easy to use framework for the formation of MDP's. The Better Regulation principles of necessity and proportionality will be important in guiding the process. The Authority should consider undertaking a regulatory impact assessment in relation to these matters.

The Law Society:

- 2.12. The Society is the representative body for Solicitors in Ireland. It is also the current regulator of the profession under the Solicitors Acts.
- 2.13. The Society was of the view that MDP's should not be introduced in this jurisdiction. It was considered that the potential minimal economic or efficiency gains do not outweigh the risks and damage that would be experienced if MDP's were introduced in Ireland.

Suitability and Impact:

- 2.14. The Society considered the suitability and impact of MDP's in Ireland and considered that they were not appropriate for the following reasons:
1. Dilution of expertise in specialised legal areas and difficulties in accessing specialist knowledge.
 2. Undermining of the application of professional rules and standards.
 3. Negative impact on the standard of professionalism and expertise of the legal profession.
 4. Limitations on the Authority to only regulate legal professionals.
 5. Extensive regulatory requirements could deter external investors.

6. Risks to the protection of the public interest and consumers' best interests.
7. Dangers of overregulation including increased regulatory costs and paperwork.
8. Conflicting interests and professional codes of different professionals.
9. Consequences for the protection of legal professional privilege.
10. Threat to solicitor independence and client confidentiality.
11. No demonstrable reduction in legal costs for consumers.
12. No demonstrable increase in quality of legal services and concerns around potential reduction of quality.
13. No demonstrable increase in access to legal services and emphasis on commercial profit and reputation.

2.15. Notwithstanding that conclusion the Society went on to consider the issues relating to the regulation, monitoring and operation of MDP's and made extensive recommendations in relation to those issues.

Regulation:

2.16. In respect of the regulation of MDP's the Society made the following recommendations:

1. Prospective MDP's should be required to provide written notification of a minimum of two months in advance of the proposed commencement date.
2. 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.
3. 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.
4. MDP's 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.
5. 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.
6. If MDP's 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 MDP's.

7. 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.
8. Specific information should be furnished as part of the commencement notification.
9. 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.
10. Consideration should be given to the Authority requiring confirmation from MDP's that they have data protection procedures in place to ensure compliance with the General Data Protection Regulation¹³ as part of the commencement notification requirements.
11. Consideration should be given to the Authority assigning each commencing MDP with a unique identifier number.
12. The Authority should establish a vetting system including qualifying criteria for nonprofessional 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 of penalties on nonprofessional partners for provision of false information to the Authority in their application to be a partner.
13. Consideration should be given to the procedures to be put in place to ensure that MDP's are not used to facilitate organised crime and terrorist financing.
14. 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.
15. Experience obtained by a registered lawyer working in an MDP should count toward the assimilation period under Article 10 of the Establishment Directive¹⁴.
16. MDP's should be subject to the same advertising standards as apply to all other classes of legal service providers under the Act.
17. The Authority should make regulations under section 116(3)(e) of the Act in relation to the naming of MDP's similar in nature to those in place for solicitor firms and the Authority should approve the professional names of MDP's before commencement.
18. The Authority should make regulations in relation to the professional notepaper of MDP's similar in nature to those in place for solicitor firms and the Authority should approve the notepaper of the MDP before commencement.

¹³ Regulation EU 2016/679

¹⁴ Regulation 98/5/EC

19. The Authority should draft regulations in relation to each of the matters under section 116 (a) to section 116 (f) of the Act.
20. MDP's 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.
21. Consideration should be given to access by MDP's 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 MDP's.
22. Consideration should be given to the introduction of regulations prohibiting non-legal practitioner partners of MDP's from obstructing legal practitioners in a practice in meeting their professional obligations whether for the pursuit of monetary or any other non-monetary benefit.
23. The Authority should maintain a register of MDP's 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.

Monitoring:

- 2.17. In relation to the monitoring of MDP's, the Society made the following recommendations:
1. MDP's 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.
 2. Clear and separate definitions of legal services and non-legal services should be introduced for the purpose of the operation of MDP's.
 3. 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 MDP's 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 MDP's, and to protect the fund.
 4. 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 MDP's, which fund would be paid for in its entirety by non-solicitor partners or employees in MDP's.
 5. It should be made clear that the Society retains all regulatory, investigative, enforcement, protective and disciplinary powers in relation to MDP's with solicitor partners and employees as currently exists for solicitor firms.
 6. In the interests of public protection, all MDP's who hold client moneys should be subject to a financial regulatory system at the same level of that in place for solicitor firms.

7. The Authority should be vested with the same regulatory, investigative, protective, enforcement and disciplinary powers in relation to the financial regulation of non-solicitor MDP's as are currently vested in the Society in relation to the financial regulation of solicitor firms.
8. MDP's 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.
9. Consideration should be given to empowering the Authority to deal with complaints against non-legal practitioner partners and employees of MDP's.
10. Consideration should be given to extending the regulatory and disciplinary remit of the Authority to include any non-legal practitioner partners or employees in MDP's, and the Authority should be empowered to disqualify, and impose restrictions on, non-legal practitioner partners and employees in MDP's.
11. 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 MDP's (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.
12. The Authority should put in place guidelines for the closure of MDP's in relation to the distribution and retention of client legal files.
13. MDP's should be required to provide written notification no less than one month prior to cessation in practice.
14. Similar reporting requirements should apply to MDP's in relation to closing accountants' reports when ceasing to provide legal services.
15. MDP's 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.

Operation:

- 2.18. In relation to the operation of MDP's the Society made the following recommendations:
1. Consideration should be given to the creation of qualifying criteria for Managing Legal Partners¹⁵, '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.
 2. 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

¹⁵ See S. 108 of the Act.

should be granted the powers to make an application to the High Court for an order forcing MDP's which do not have an MLP in place to close.

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

The Bar Council:

2.19. The Council is the representative body for barristers in Ireland. It also exercises various regulatory functions in respect of members.

2.20. The Council remains firmly opposed to the introduction of MDP's in the State and is also firmly of the opinion that any apparent advantages or benefits of a "one stop shop" model of practice are greatly outweighed and overshadowed by the risks, uncertainties and costs associated with the introduction of MDP's.

2.21. In particular:

1. It was not clear to the Council how the operation of MDP's in the State could be reconciled with the protection of the core professional principles, values and duties of legal practitioners.
2. The Council was concerned that the introduction of MDP's would undermine public confidence in the independence and integrity of the legal profession.
3. The experience of other jurisdictions shows that MDP's present serious challenges in the context of effective regulation and oversight.
4. The associated costs of regulation will ultimately be borne by clients.
5. There is no evidence that the introduction of MDP's will further the statutory objectives of the Authority.
6. Issues relating to client confidentiality and legal privilege remained a serious concern.
7. In the absence of strict and robust financial controls, the Council was concerned that MDP's would not serve to protect or to promote the interest of clients.

2.22. The Council believed that current structure of the legal system brings clear advantages. The division of labour between solicitors and barristers offers economic benefits from efficiencies and costs savings. The maintenance of an independent referral bar and the cab rank rule ensures that solicitors, and their clients, have equal access to a pool of specialist legal expertise. Robust regulatory regimes, such as that operated by the Law Society provide clients with protection and peace of mind.

2.23. The current system offers clear and undeniable certainties with regard to client privilege, confidentiality and conflicts of interest. The introduction of MDP's would undermine public confidence in the integrity of the legal system and also undermine and displace the long established and crucially important protections and certainties.

The Honorable Society of King's Inns:

- 2.24. The Society is responsible for the training of barristers. It also exercises certain regulatory powers in respect of barristers.
- 2.25. The Society had already made a submission to the Authority in relation to the issue of Legal Partnerships which dealt with many of the same issues such as differing professional codes, independence, the cab-rank rule, the handling of client moneys and a compensation fund. The Society adopted those submissions as appropriate in its response to the issue of MDP's.
- 2.26. In considering whether to recommend the introduction of MDP's the Authority should have constant regard to the objectives of the Act and to the objectives of the Authority set out in S.13(4). The extent to which the introduction of MDP's furthers these objectives must be at the forefront of any consideration of this issue by the Authority.
- 2.27. The importance of protecting the independence of the legal profession cannot be overstated. It is difficult to reconcile, both theoretically and practically, the conflicting interests and duties that would exist in an MDP. This is materially different to a Legal Partnership where all partners are lawyers and would owe a primary duty to the administration of justice.
- 2.28. The Society foresees difficulties in the approaches adopted in other jurisdictions to the issues of independence and conflict of interests. The imposition of lawyer codes on the non-lawyer partners in a MDP is unlikely to be acceptable to those partners or their own professional regulators. The use of contract to address these issues is likely to prove difficult to enforce in practice.
- 2.29. The option of carving-out some areas of practice appears attractive and the risks to the administration of justice would be less acute. The Society suggests that there could be a carve out of 'exercising before any court a right of audience, or conducting litigation in relation to proceedings in any court'.
- 2.30. The duties owing in and commercial pressures flowing from an involvement in an MDP would appear to be incompatible with the principles of independence and the administration of justice. This is why a carve out for litigation should be considered.
- 2.31. The Society is not in favour of excluding barristers from MDP's. Some barristers in an MDP may not wish to exercise their rights of audience. This approach would not deal with solicitor partners who would be able to exercise their rights of audience. It

would be preferable to limit MDP partners from exercising their rights of audience or conducting litigation. This would meet the various objectives of the Act.

- 2.32. It may not be the case that MDP's are in fact able to offer a 'one stop shop' for professional services. For example, accountants in an MDP could not act as expert witnesses in any litigation being conducted by the MDP as they would not be sufficiently independent.
- 2.33. The commercial realities and pressures of operating in a MDP would restrict access by consumers to leading barristers. The current cab-rank rule and the independent sole trader nature of the profession currently enables solicitors, and their clients, access to leading barristers.
- 2.34. Onerous, detailed and thorough measures will require to be introduced and monitored to ensure that client confidentiality is maintained. Such measures may deter non-lawyers from entering MDP's and may also outweigh any benefits of forming a MDP.

FLAC:

- 2.35. FLAC – Free Legal Advice Centre – is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It operates free advice centres, a phone line and provides information via its website.
- 2.36. FLAC noted that in the initial report there was very little focus on access to legal services for marginalised or disadvantaged groups and individuals and the manner in which legal services are provided by independent law centres and other bodies such as the Legal Aid Board and the Irish Human Rights and Equality Commission.
- 2.37. FLAC and other members of the Independent Law Centres Network, currently relies heavily on the cab-rank rule, the independent referral bar and the practice of 'no foal no fee' to gain access to specialist expertise in the relevant area of law at no cost to the client in situations where those clients could not afford to pay fees for barristers.
- 2.38. The optimum delivery of legal services to marginalised and disadvantaged groups require a diversity of delivery of services.
- 2.39. An effective, accessible and sustainable system of legal aid is a core component of the State's human rights obligation of access to justice. FLAC has published reports in relation to the shortcomings in the civil legal aid scheme in Ireland. This context must be taken into account in considering the restructuring of the way in which legal services are delivered in Ireland.

2.40. FLAC draws the Authority's attention to S.42 of the Irish Human Rights and Equality Commission Act 2014 which requires public bodies to have regard, in carrying out their functions, to the need to eliminate discrimination, promote equality of opportunity and protect human rights.

2.41. FLAC recommended that:

1. The potential impact on access to justice for low-income and marginalised groups be assessed.
2. Any assessment must be considered against the backdrop of a civil legal aid system that remains inadequate.
3. The potential impact on the delivery of legal services by bodies such as independent law centres, the Legal Aid Board, the Irish Human Rights and Equality Commission, trade unions and other specialist NGO's should be assessed.
4. Any impact assessment includes an assessment of human rights and equality implications.

PART 3: Discussion and Analysis

3.1. This part of the report contains a discussion and analysis of the key issues arising.

Various Scenarios:

3.2. The Authority considers that it would be of assistance to frame the discussion by setting out various scenarios of situations that could arise in practice. This will identify some of the key issues that are likely to arise in practice as well as providing a context for the discussion that follows.

Scenario 1:

3.3. A retired couple have four children. They wish to set them up in business and also to provide an income for themselves. Their four children are a solicitor, an accountant, an estate agent and a business consultant. The parents and the children set up an MDP to provide legal, accounting, estate agent and business advisory services. The parents invest €250,000 in the MDP which is used to purchase and fit-out a premises. The parents and each child own 20% of the firm and are entitled to an equal share of the profits.

3.4. Each child intends to run their 'own' business under the umbrella of the MDP, but don't necessarily intend to provide services to each other's clients. The parents do not intend to involve themselves in the running of the firm and are happy to receive an income.

3.5. Regulatory issues arising:

1. Passive investment in the firm by the parents.
2. No active management by the passive investor.
3. Non-regulated members of the firm – the parents and the business consultant.
4. Other regulated professionals as members.
5. Little 'bundling' of services to clients.

Scenario 2:

3.6. A newly qualified solicitor wants to set up in practice offering an innovative legal service. Their friend is an IT expert and will look after the IT side of the business. They appear on a television show and succeed in securing funding of €100,000 from an investor for a 20% share in the firm. The investor will participate in weekly management meetings to agree strategy and business decisions. They set up an MDP to provide legal and IT services. They each have a 40% share of the firm and profits.

The legal and IT services are provided together to the clients as a single combined package.

3.7. Regulatory issues arising:

1. Passive investment in the firm by venture capitalist.
2. The investor intends to take a very active part in the management of the firm to ensure profits are maximised and that an appropriate business strategy is adopted.
3. Non-regulated members of the firm – the investor and the IT partner.
4. Complete ‘bundling’ of services to clients.

Scenario 3:

3.8. A husband and wife decide to set up an MDP to operate from their family home. They are a barrister and a GP. They intend to use the ground floor of their house for the GP’s surgery and for the barrister’s office. There is no intention for there to be any overlap of clients.

3.9. Regulatory issues arising:

1. No passive investment in the firm.
2. No non-regulated members of the firm.
3. Other regulated professionals as members.
4. No ‘bundling’ of services to clients.

Scenario 4:

3.10. An accountancy firm wish to expand the services offered to their clients to include a ‘full’ probate service. This will include all legal and taxation issues in relation to estates. They form an MDP with a solicitor who takes a 0.1% share of the firm and a share of the profits based on the amount of probate work the firm will undertake during the year. It is anticipated that this ‘new’ full probate offering will account for 5% of the turnover of the MDP.

3.11. Regulatory issues arising:

1. No passive investment in the firm.
2. No non-regulated members of the firm.
3. Other regulated professionals as members.
4. Complete ‘bundling’ of services to clients.
5. Vast majority of firm’s business is provision of non-legal services.

Scenario 5:

3.12. A solicitor wants to establish a niche practice focusing on compulsory purchase law. They form an MDP with a Planner, an Architect and a Surveyor to provide a

combined service to persons whose land is being compulsorily acquired. This service involves dealing with all aspects of the claim for compensation including the submission of planning reports, valuation reports and dealing with the legal aspects of the claim including Arbitration or court action. Each partner has an equal share of the firm and profits.

3.13. Regulatory issues arising:

1. No passive investment in the firm.
2. Mixture of statutory regulation and self-regulation.
3. Other regulated professionals as members.
4. Complete 'bundling' of services to clients.

Discussion:

3.14. These scenarios shows the various types of MDP's that may exist. There are two potentially significant distinguishing factors. The first is the distinction between lawyers and non-lawyers and the second is the distinction between regulated persons and non-regulated persons.

3.15. The lawyer, non-lawyer distinction is relevant to considering issues that deal with how information received by the lawyer from clients is potentially available to the other members of the firm. This raises concerns in relation to confidentiality, privilege and how client moneys are to be held.

3.16. The regulated, non-regulated distinction is relevant when considering overall risk. If the partners in a MDP are regulated, there is less of a risk compared to a situation in which a partner is not regulated. There may be other considerations arising in relation to multiple regulators having jurisdiction in relation to the one firm and only having powers in relation to certain partners within the firm.

3.17. If membership of MDP's were restricted to regulated persons, it would be the case that the regulatory risks would be reduced as all members would be subject to regulation, albeit not by the same regulator.

3.18. The concern in having a non-regulated person as a member of an MDP is that they would not be subject to sanction for misconduct. Clearly criminal activity could be dealt with in the usual way, but professional misconduct would be outside the regulatory envelope.

Statutory Model of MDP's in the Act:

- 3.19. At this stage it is worth recalling the current proposed statutory framework for MDP's as set out in the Act. This framework is not 'binding' on the Authority as the Authority is tasked with reporting on the establishment, regulation, monitoring, operation and impact of MDP's.
- 3.20. The general laws of partnership apply to MDP's subject to the following modifications:
1. The partnership can only be formed by an agreement in writing¹⁶.
 2. The partners are jointly and severally liable in respect of their own acts and omissions, those of the other partners and those of the employees of the partnership¹⁷.
 3. The provisions in the Act permitting solicitor partnerships and legal partnerships to trade as 'Limited Liability partnerships' is not available to MDP's¹⁸.
- 3.21. Any person, subject to certain exceptions¹⁹, may be a partner of an MDP and they need not provide any services of a legal or non-legal nature²⁰. This permits 'passive' investment in law firms by persons who will not be providing any services.
- 3.22. The Act also suggests a possible model for regulating MDP's by setting out the following detailed provisions:
1. An MDP must notify the Authority before it can begin providing services that include legal services. This notification must be in the form prescribed by the Authority and be accompanied with the required fee. MDP's should then be entered on a register to be maintained and made publicly available by the Authority.
 2. The restrictions on who can be a partner in an MDP are contained in section 107(4). These relate to persons who would not be considered 'fit and proper'.
 3. All MDP's need to have at least one legal practitioner ("the managing legal practitioner") who is responsible for the management and supervision of legal services by the practice.
 4. The MDP must notify the Authority and cease to provide legal services if it does not have a managing legal practitioner in place for a period of 7 days or longer.
 5. The managing legal practitioner must ensure that any legal services supplied are made in accordance with the Act, regulations and professional principles.

¹⁶ S.2 of the Act. Under the Partnership Act 1890, there is no requirement to form a partnership by written agreement.

¹⁷ S. 107(1) of the Act. This appears to be considerably wider liability than that imposed by the Partnership Act 1890 in sections 5, 10 & 11.. For example this section does not appear to limit liability to the acts and omissions of a partner incurred in the ordinary course of business of the firm. It is unclear if this was the intention of the legislature.

¹⁸ S.99 of the Act.

¹⁹ The exceptions relate to persons who would not be considered 'fit and proper' persons to be members of an MDP. Eg. Solicitors who have been struck off, persons with criminal convictions, company directors who have been disqualified from acting etc.

²⁰ S.107(3)

6. The Authority is required to make regulations setting out the standards applying to the provision of legal services through MDP's covering: ethical conduct, confidentiality, information to clients, handling of client money, management and control of the practice, conflict of interest, record keeping, use of name and advertising of the practice. Particular emphasis is also placed on the maintenance of appropriate accounting records by the MDP.
7. The managing legal practitioner is responsible for ensuring compliance with these standards and other legal requirements and remedying defaults.
8. Failure to notify the Authority of a default is a summary criminal offence incurring a fine or 12 months' imprisonment.
9. The complaints scheme applying to legal practitioners also covers all of the legal practitioner partners and employees of MDP's individually.
10. The MDP has to have written procedures in place that ensure compliance and facilitate the managing legal practitioner in fulfilling their obligations.
11. The MDP must put in place arrangements which assure confidentiality, appropriate handling of client money and the maintenance of required levels of indemnity insurance.
12. Clarity over protections and applicable rules through letter of engagement
13. The Act acknowledges that other statutory authorities responsible for regulating other parties in an MDP may have rights of inspection or rights to require information about the non-legal services of the MDP. This however does not impinge of information which is subject to legal privilege.
14. The Authority has the right to require the MDP to take remedial measures ("directions"), and to seek an order from the High Court to require the MDP to suspend or cease providing legal services

3.23. The Authority noted in the initial report that it does not consider this regulatory structure to be binding on the Authority. S.119 requires the Authority to make recommendations relating to the establishment, regulation, operation and monitoring of MDP's. Therefore, the Authority considers it to be permissible and within its statutory remit to propose a different structure to that as set out above.

Overlap with other reports:

3.24. Legal partnerships are a new type of business structure which will be introduced by part 8 of the Act. A legal partnership is a partnership between two legal practitioners where at least one of them is a practicing barrister. Most of the submissions received point out that a lot of the issues that arise for consideration in relation to MDP's also arise in considering legal partnerships.

3.25. The Authority has recently reported to the Minister in relation to legal partnerships and it is worth setting out here the conclusions contained in that report.

3.26. In its report²¹ of the 31st of July 2017, the Authority reached the following conclusions:

1. The three issues being considered by the Authority, legal partnerships, multi-disciplinary practices and issues relating to barristers, cannot be dealt with separately. The issues are inter-locking to a considerable extent and require to be viewed and considered as a whole.
2. The three public consultations engaged in so far may not have generated adequate feedback from all key stakeholders.
3. The new business models provided for in the Act cannot be safely introduced prior to the inspection, complaints and disciplinary regime as set out in parts 3 and 6 of the Act being introduced.
4. The lack of suitable accommodation was a major barrier to the effective delivery of the ambition of the Act, which cannot be met without the necessary staffing resources.

3.27. On foot of the those conclusions the Authority set out the steps that it would be taking in preparation for the introduction of legal partnerships at the earliest possible date as follows:

1. Report to the Minister in relation to the issues relating to barristers before the end of September per Section 120 of the Act.
2. Engage in a direct consultation exercise to obtain the views of all key stakeholders in relation to Legal Partnerships, Multi Disciplinary practices, and Issues Relating to Barristers.
3. Continue to prepare for the introduction of the investigatory, complaint and discipline functions of the Authority.
4. Continue to put in place the necessary personnel, premises and resources required for the Authority to fulfil its mandate.

3.28. There are several issues that are required to be dealt with in the context of Legal Partnership that are also of relevance to MDP's. These would include:

1. The possibility of access to client moneys by non-solicitors.
2. The potential impact on the current solicitors compensation fund.

Issues Considered in the Consultation:

3.29. Part 5 of the initial report set out eleven general questions that formed part of the consultation process as well as several specific questions under the headings of regulation, monitoring and operation of MDP's. This part of the report will largely follow that taxonomy.

Questions Posed in Initial Report:

²¹ See <http://lsra.ie/en/lsra/pages/reports>

3.30. The following eleven general questions were posed in the initial report

- (i) Should MDP's/non-lawyer ownership of legal practices be permitted in any form in Ireland?
- (ii) If yes, what would be the key objectives of introducing MDP's? How should success in achieving the desired outcomes of introducing them be measured?
- (iii) What impact do you think non-lawyer ownership in general could have in Ireland on: (a) Legal Costs, (b) the provision of legal services to consumers, and (c) the access of persons to legal practitioners?
- (iv) What impact do you think that the model for MDP's proposed in the Act could have in Ireland on: (a) Legal Costs, (b) the provision of legal services to consumers, and (c) the access of persons to legal practitioners?
- (v) If you think that MDP's should be introduced in Ireland, are there any ways in which you would change the model suggested by the Act? (e.g. allow for limited liability MDP's? Limit or extend non-lawyer ownership? Carve out certain areas of work or types of practitioner (e.g. barristers)?
- (vi) What sort of MDP model (if any?) would be of most interest to legal practitioners in Ireland?
- (vii) What sort of MDP model (if any) would be of most interest to consumers?
- (viii) What sort of MDP model (if any) would be of most interest to potential non-lawyer partners in MDP's?
- (ix) Could an MDP model be successfully introduced without any limitation of liability option?
- (x) Should the emphasis be placed on subjecting MDP's to the exact same requirements that are imposed on legal practitioners running traditional law firms, or should the Authority seek to develop a risk based approach which would apply a different standards regime to MDP's?
- (xi) Should there be a single approach to all MDP's or would it be reasonable to differentiate between types of MDP's? Should any such distinctions be based on who services are being supplied to? Or on the nature of the suppliers (e.g. whether lawyers are the majority owners and managers or not?)

- 3.31. The report also posed specific questions in relation to Regulation, Monitoring and Operation of MDP's.

Discussion of Questions Posed:

- 3.32. The Authority is mindful of its statutory objective to promote competition in the provision of legal services. Clearly one way to achieve that objective is to permit as wide a variety of business structures as possible. Whether such models are successful will largely be for the market to determine. However, such an expansive approach could conflict with another of the Authority's objectives, to protect the interests of consumers.
- 3.33. The provision of legal services is different to the provision of other services. This is because of the fundamental importance of the rule of law within society²². Private legal transactions may appear to be solely of relevance to the parties involved. However, persons and businesses entering into legal transactions need to know that the rights and duties arising are capable of enforcement in the courts with appropriate sanctions and remedies available for any breaches arising.
- 3.34. In this way, there is a substantial public interest in ensuring that legal services are provided in a way that supports the proper and effective administration of justice. This justifies the substantial regulation of lawyers in all aspects of their practice from their necessary qualifications, the business models permitted, the quality of the service they provide, the management of their firms to the content of the services that they may provide.
- 3.35. Therefore, the Authority considers it necessary and appropriate to determine whether the introduction of MDP's to the Irish market will support the proper and effective administration of justice in Ireland.

Balancing consumer protection and promotion:

- 3.36. The protection of consumers of legal services is also an objective of the Authority. This requires a balance to be struck between protection and promotion of consumer's interests. If consumers are exposed to a higher degree of risk this may result in a reduction in legal fees. So, for example, an abolition of compulsory professional indemnity insurance for lawyers could be seen as promoting the interests of consumers²³. However, it could also be seen as failing to protect consumers from loss due to the negligence of their lawyer.

²² See the recent UK Supreme Court judgment in *Unison* for a discussion of the issue. [2017] UKSC 51

²³ The Authority is not proposing the abolition of compulsory insurance but is simply using it as an illustrative example.

- 3.37. The Authority is required to make a determination as to where the balance lies between these two potentially conflicting objectives.
- 3.38. The lack of input from consumers themselves during the consultation process has made this task all the more difficult. It is challenging to consider what level and type of risk consumers are willing to bear in their dealings with their lawyers in the absence of any input from consumers themselves. It is possible for the Authority to consider that there are some risks that consumers should not bear, even if some consumers may be willing to do so. Returning to the compulsory insurance example, the Authority is fully capable and entitled to conclude that allowing lawyers to practice without insurance is too great a risk to consumers irrespective of the views of certain consumers themselves.

Take up by the legal profession:

- 3.39. The Authority considers that any MDP model that may be introduced should be one that would be utilised by the profession. This is because of the substantial resources that the Authority will be required to devote to the establishment of the regulatory framework around MDP's. These scarce resources would be wasted if the model introduced is not taken up by the profession and could be better utilised elsewhere.
- 3.40. The Authority is concerned that the lack of responses to the consultation could be evidence of an absence of any unmet market need for MDP's. If the market does not appear to require or desire such a business model to be provided, then it is unlikely to be taken up by the profession. Alternatively, as with all new offerings, it may be the case that the market is simply unaware of the benefits that may be realised by MDP's until they are actually commenced. Once again, the lack of responses to the consultation makes any determination difficult to reach.

Experience of other jurisdictions:

- 3.41. The initial report set out the Authority's consideration of the experience of other jurisdictions in introducing MDP's. The consultation did not provide any additional information that would cause the Authority to revise the conclusions reached²⁴. For this second report, the more relevant conclusions that are common to most, if not all jurisdictions, would be as follows:-
1. The rate of take up by the profession was slow.
 2. Limited liability is a feature of MDP's.
 3. The market share of MDP's is very small.

²⁴ See para. 179 – 180 of the initial report.

4. There have been no reports of difficulties arising in terms of ethical behaviour and standards being maintained.

3.42. These conclusions of the experience in other jurisdiction suggest that ethical concerns can be adequately dealt with via appropriate regulatory mechanisms.

3.43. Of greater concern is the lack of uptake of MDP's to any significant extent in any other jurisdiction. There does not appear to be any common factor that it is possible to identify which would ensure the success of the MDP model in Ireland.

Limited Liability:

3.44. The Authority is concerned that the fact that MDP's cannot avail of limited liability will likely make them less attractive models of practice. It is unclear from the legislation why MDP's will not be permitted to limit their liability as a matter of policy. It may be due to the fact some of the likely members of an MDP may themselves be members of professions which do not permit limited liability, such as Accountants.

3.45. MDP's would also be in 'competition' with the other legal service business models which can trade as limited liability entities. As such there would appear to be an asymmetry in the ability of the new business models to avail of limited liability.

Protecting confidentiality and privilege:

3.46. It is an objective of the Authority to promote and maintain adherence to the professional principle that the affairs of a client be kept confidential²⁵. This issue does not arise in the context of legal partnerships to any great extent due to the fact that legal partnerships only consist of solicitors and barristers. It is of concern with MDP's as they permit non-legal practitioners to be a member of the partnership.

3.47. The submissions received emphasised the importance of client confidentiality and legal professional privilege in the provision of legal services. Reference was made to the academic discussions of the potential conflicts that could arise as well as the views of various bar councils and law societies.

3.48. The concern is that non-legal partners would have different priorities to the legal partners. Those priorities may be business related or may arise from their obligations under their own professional codes of conduct. There is potential for a conflict between those priorities and the professional obligations of the legal partner.

²⁵ See section 13(4)(f).

- 3.49. An initial point to be made is that client confidentiality is not a concept confined to the legal profession. Many, if not all, of the other professions have similar obligations to keep the dealings of a client confidential²⁶.
- 3.50. Therefore other professionals entering into MDP's will be fully aware of the importance of client confidentiality and will be well used to observing their own ethical requirements in keeping the affairs of client's confidential. They will also be bound by their own codes of conduct and subject to disciplinary action for any breaches that may occur.
- 3.51. From the initial report it can be seen that some jurisdictions have dealt with this issue by restricting non-legal ownership to below 50% thereby ensuring that the legal partners have a majority in the decision making process.
- 3.52. The model set out in the Act provides a statutory requirement that the non-legal partners or employees must not induce or cause a legal practitioner to provide legal services otherwise than in compliance with the Act.
- 3.53. Where a partner of an MDP is not a member of a regulated profession there is a regulatory 'gap' and associated risk in respect of such persons.
- 3.54. Responsibility for ensuring that such persons observe the requirements of maintaining client confidentiality would rest with the 'managing legal practitioner'. Were any breaches to be committed by the non-regulated partner, the managing legal practitioner would appear to be liable for the breach under section 108(3). That section requires them to ensure that the practice is managed so as to ensure that the provision of legal services is in accordance with the Act. That suggests that the managing legal practitioner could be subject to disciplinary proceedings for any breach, but the other partner would not be subject to any disciplinary proceedings by the Authority.
- 3.55. There is also the possibility of a MDP losing its authorisation to operate should such a breach persist. This could occur where the Authority would specify, under s. 114, that certain measures be taken to ensure compliance with the Act. Failure to do so may lead to the Authority applying to the High Court for an order suspending or ceasing provision of legal services by the MDP²⁷.

²⁶ See for example section 140 – 'Confidentiality' - of the Code of Ethics of the Chartered Accountants Regulatory Board. Available at <https://www.charteredaccountants.ie/Professional-Standards/Bye-laws-and-Regulations/Ethics/Code-and-standards>

²⁷ See sections 114 & 115.

3.56. The Authority also notes that currently solicitor partnerships employ non-solicitors in a variety of roles. Such persons may have full access to confidential client information. Those persons are not regulated and any breach of confidentiality by them is not capable of sanction by the Law Society.

3.57. The Law Society deals with this issue in its 'Guide to Good Professional Conduct'²⁸. Section 4.5 deals with 'confidentiality in the solicitor's office' and covers issues such as:

1. Shared accommodation
2. Electronic records
3. Service providers
4. Off-site storage
5. Staff of solicitor
6. Family law files
7. Confidentiality of deed of Enduring Power of Attorney.

3.58. In relation to staff, the guide states that

“The duty to protect clients’ privilege and the duty to keep the affairs of clients confidential extends to the staff of a solicitor. It is recommended that staff should be informed of their responsibility to refrain from disclosing to any unauthorised party anything they learn in the course of their employment and that this should be acknowledged by them in writing. This duty, imposed on each member of the staff of a solicitor, is not terminated by the determination of the retainer of the solicitor by a client, by the completion of the matter in question or by the termination of the employment of the member of staff.”

3.59. Such a duty could also be imposed on the non-legal members of an MDP.

3.60. Several submissions also raised issues in relation to the impact of MDP's on professional legal privilege²⁹. The concern is that there is a doubt as to whether information given by a client to a non-legal member of an MDP would attract legal professional privilege or not.

3.61. It should be noted that MDP's do not permit non-legal persons to provide legal services. Therefore, it should be clear when the MDP is providing legal services and when it is providing non-legal services.

²⁸ <https://www.lawsociety.ie/globalassets/documents/committees/conduct-guide.pdf>

²⁹ This is a rule of evidence that generally exempts confidential information, given by a client to their lawyer, from being subsequently furnished to other parties.

- 3.62. If the MDP is providing a ‘bundled’ service – eg auctioneering and conveyancing services - to a client in respect of a single transaction, there is the potential for the client to be unclear as to whether a particular aspect of the service they are receiving is a legal service or not. This raises the possibility of a client furnishing information to an MDP in the mistaken belief that it attracts privilege when it would not.
- 3.63. Another example would be a MDP that provides legal and accounting services. A client engages the MDP for the purposes of dealing with the Revenue Commissioners in respect of a potential tax liability. There is an obvious overlap here between legal services being provided – eg interpretation of the Tax Acts – and accounting services – the preparation of accounts or calculation of the correct liability. How is a client of the MDP to know when they are dealing with the MDP in connection with the legal service or the accounting service?

Passive Investors:

- 3.64. Perhaps the greatest risk of conflict in this area would arise from passive investors in MDP’s. The proposed statutory model would permit persons to invest in an MDP and share in the profits, but take no active part in the provision of services. This is commonly called ‘passive’ investment.
- 3.65. Presumably such persons would be investing in an MDP in a similar way that a person would invest in any other business. However, the conflict could arise where, for example, the business plan to be adopted by the firm is not as focused on maximising profit as would be the case were it not a legal firm.
- 3.66. It appears to the Authority that an approach that structures the voting rights within an MDP so that the legal partners are a majority is a much stronger mechanism to protect the professional obligations of the legal partners than a statutory provision.
- 3.67. It is unclear how the statutory provision is to be enforced against the non-legal owner. If it is to be via criminal sanction, that could be seen to be excessive and may deter non-legal partners from entering into MDP if it would potentially place them in criminal jeopardy as a result of a business dispute.

Legal Costs:

- 3.68. It appears to the Authority that the greatest potential for savings for consumers would arise where services that are currently provided by separate firms within a single transaction could all be provided by an MDP. The example from Scotland where estate agents and lawyers provide a single service to clients shows how a consumer buying or selling their house could avail of the services of an MDP for both estate agency services and conveyancing services.

- 3.69. That model of 'bundled' service delivery assumes that there are not increased regulatory costs to be borne by MDP's that might off-set any potential savings to be made.
- 3.70. Absent the 'bundled' approach to service delivery, the potential for reduction in legal costs would have to come from innovations in the delivery of legal service, shared overheads etc.

Regulation of non-legal MDP members and/or services:

- 3.71. The fundamental objective of the Authority is to regulate the provision of legal services in the State. Therefore it appears to the Authority that there is force in the argument that it should not undertake the regulation of the non-legal members of MDP's.
- 3.72. On a practical level, the legislation provides a key mechanism to effect this, by requiring that the accounts of an MDP be divided between the provision of legal services and non-legal services.
- 3.73. The risk in adopting such an approach is that the non-legal members of an MDP would not be subject to sanction for 'misconduct'. However, such members could only engage in 'misconduct' in the provision of non-legal services. If those non-legal services are regulated by another regulator, they would be subject to sanction by that regulator. If those services are un-regulated, that would appear to be a matter for the Oireachtas to determine whether they should be regulated.
- 3.74. A concern with such an approach is that due to the joint liability of members of an MDP for the actions of each other, all members would wish to have a sufficient degree of control over the firm. Whilst the Act provides for separate accounts to be kept for legal and non-legal matters, there is no prohibition on non-lawyers having control over such accounts. This would mean that they are, in effect, holding client moneys.
- 3.75. The converse situation is also relevant where the legal member could be 'holding' the client moneys due to their control of the non-legal account. For example accountants and estate agents frequently hold client moneys.
- 3.76. Once again the impact of dishonesty by a non-legal person on the statutory compensation fund requires to be considered. If the non-legal person causes a loss of client moneys from the 'legal' accounts of the firm, should that client be entitled to claim on the compensation fund? What of the situation where the legal member dishonestly causes a loss to a client from the non-legal accounts of the firm. Should a client be entitled to claim from the compensation fund in those circumstances?

- 3.77. As with legal partnerships, there are several approaches that can be taken and which can be roughly grouped as follows:-
1. Exclude MDP's from the compensation fund.
 2. Extend the compensation fund to cover dishonesty by all members of the MDP.
 3. Establish a new compensation fund for MDP's.
 4. Exclude non-legal members of an MDP from the compensation fund.
 5. Exclude the non-legal accounts of the MDP from the compensation fund.
- 3.78. It should be noted that the issue of the compensation fund is also being considered within the context of legal partnerships. As stated earlier, consideration of that issue by the Authority is ongoing and no final conclusions have yet been reached.
- 3.79. The approach adopted for legal partnerships will guide the approach to be taken in relation to MDP's.

Split the Operations of MDP:

- 3.80. One possibility to mitigate this risk would be to effectively split the operation and regulation of the MDP between the provision of legal services and the provision of other services.
- 3.81. The provision of legal services may only be offered by legal practitioners. This is not changing in an MDP. Such persons are regulated by the Authority in the normal way. Therefore that part of the MDP would effectively operate in the same way as a legal partnership. The Act already provides for separate accounts of an MDP to be prepared in respect of the legal services provided by it and the other services provided.³⁰
- 3.82. This option does present difficulties in relation to the management of the firm and the joint liability of partners. A non-legal partner of an MDP will be liable for the debts and liabilities of the firm in the normal way. If the operation of the firm is to be split so that the non-legal partner does not have access to confidential information relating to the legal clients of the firm, this could expose them to certain liabilities without providing them with the necessary access to maintain control.
- 3.83. It should also be noted that whilst the Act provides for a 'managing legal practitioner', the Partnership Act of 1890 explicitly provides that all partners are entitled to 'take part in the management of the partnership business.'³¹ If the Authority were to restrict access of non-legal partners to information of a

³⁰ Section 110(4)

³¹ See section 24(5) of the Partnership Act 1890.

confidential nature, a balance would have to be struck to ensure that any such regulations would not prevent such partners from exercising their statutory right to take part in the management of the firm.

- 3.84. This issue also applies to the other non-legal professional partners. Say that a solicitor and an accountant set up a MDP to offer legal and accounting services. Under this option, the accountant partner would be prevented from access to confidential information on the legal clients of the firm. However, the reciprocal arrangement should also apply in that the solicitor partner should not have access to confidential information in relation to the accounting clients of the firm.
- 3.85. This could complicate attempts to avoid conflicts of interest arising. Confidential information relating to clients can extend to the fact that they are a client of the firm. Therefore, there is the possibility of a solicitor partner taking on a legal client to sue the accounting client of the accounting partner without there being a mechanism to avoid such conflicts without divulging confidential information to the other partner.

Regulated persons v non-regulated persons:

- 3.86. Another possibility would be to have separate regulations relating to 'regulated' partners and 'non-regulated' partners. A regulated partner would be one who was subject to regulation by their own profession which imposed similar ethical obligations to that of the Authority on legal practitioner.
- 3.87. Regulated partners would be permitted to have access to confidential information relating to clients on the basis that they are subject to their own professional code in relation to their ethical obligations in respect of such information. Any breaches can be dealt with by their own professional bodies.
- 3.88. Un-regulated partners would not be permitted such access on the basis that they have no enforceable ethical obligations in respect of such confidential information.

Membership of MDP's:

- 3.89. There is also the possibility of restricting membership of MDP's to regulated persons.
- 3.90. As stated above, if membership were restricted in this way all the members of MDP's would be regulated. Therefore the associated risks arising relating to un-regulated members does not arise for consideration.

- 3.91. It appears to the Authority to be less than optimal for different members of a single firm to be regulated by multiple regulators each with a limited jurisdiction in relation to parts of the services provided by the MDP.
- 3.92. This could cause particular difficulties where ‘bundled’ services are being provided and it is unclear whether the service comes within the legal or non-legal service.

Conclusions:

- 3.93. The purpose of this part has been to discuss the issues that arose from the consultation. It can be seen that several broad themes emerged.
- 3.94. A fundamental question is whether the Authority should adopt a restrictive approach to MDP’s by specifying who can be a partner in an MDP and what services they can provide. Such an approach could provide regulatory certainty by setting the parameters of the type of organisations that the Authority would be required to regulate.
- 3.95. However, such certainty could come at the price of innovation. The capacity to innovate in the delivery of legal services within the structure of an MDP would be better facilitated by fewer restrictions on the members and services to be provided. Instead of focusing on the structure of an MDP the Authority would regulate key elements of their operation. For example, the Authority would specify, amongst other matters, the insurance requirements, the advertising rules and the codes of practice under which they could operate. As long as the MDP complied with these regulatory requirements, they would be free to offer their services to the market in whatever innovative or more efficient way they considered advantageous.
- 3.96. As with any new business structure or economic model, there is a great deal of uncertainty as to how it might operate in practice. The Authority may have a particular view of the type of MDP’s that are likely to be formed which may prove to be erroneous. There is also the possibility that the Authority may expend considerable scarce resources on a perceived regulatory risk that never arises in practice.
- 3.97. These considerations serve to emphasise the importance of the Authority hearing from all the key stakeholders in the process.

PART 4: Recommendations

Recommendation 1: The Authority's resources are currently focused on the introduction of Legal Partnerships, Limited Liability Partnerships and the commencement of the complaints function of the Authority at the earliest possible date. The subject of MDP's will be further considered after the introduction of these new business models and the commencement of the other important functions of the Authority under the Act.

- 4.1. The Authority would have liked to have received submissions from a broader range of stakeholders including reference to specific professions e.g. accountants, architects and engineers, in order to provide a sufficient evidentiary basis on which to make informed decisions on the establishment, regulation, monitoring, operation and impact of MDP's.
- 4.2. The Authority has already reported to the Minister, as part of the ongoing preparations for the introduction of Legal Partnerships, that it will be engaging in a direct consultation exercise with all key stakeholders. The Authority considers that if those consultations provide additional information and provide a sufficient evidential basis to support the establishment of MDP's, the Authority will revisit the issue.
- 4.3. The focus of the Authority's resources should firstly be directed towards the introduction of Legal Partnerships, Limited Liability Partnerships and also towards the commencement of the complaints and other important functions of the Authority as set out in the Act.
- 4.4. The introduction of these new business models should assist the Authority in further considering the issue of MDP's.