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# Regulating the Legal Profession for the 21st Century

## A Consultative Document

This is a consultative paper prepared and distributed by the Chamber of Advocates Malta to its members for the purpose of consulting its members on the future regulation of the legal profession.

Chamber of Advocates
The Law Courts
Valletta- MALTA
www.chamberofadvocates.com

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# REGULATING THE LEGAL PROFESSION FOR THE 21ST CENTURY



## *A CONSULTATIVE PAPER ISSUED BY THE CHAMBER OF ADVOCATES*

### 1. INTRODUCTION

This is a consultative paper prepared by the Chamber of Advocates on the future regulation of the legal profession. References to the legal profession in this document are to be construes as references to the professions of advocate/lawyer and do not therefore include the professions of Notary Public and Legal Procurator. Since this is a document promoted and prepared by the Chamber of Advocates it was thought fit to restrict its reach to the profession represented by the Chamber. It is however inevitable that in some areas in this paper, the Chamber will express views and make proposals that could have an impact on each of the professions of Notary Public and Legal Procurator, most notably in the discussion on Reserved Legal Services. The objective is to make proposals for an *ad hoc* law to regulate the legal profession in a manner that is more conducive to addressing the demands of the profession in the 21st century; that takes account of the developments in the profession over the last few years as well as the changing economic, social and technological environment; that consolidates the professional values of integrity, probity, competence, skill and diligence with a view to ensure the highest standards of professional conduct expected of us by clients and the public generally.

The effort is focused on refreshing the traditional values of the profession whilst heightening the need for higher levels of professional competence and knowledge as the hallmarks of a profession that is to withstand the challenges of an increasingly demanding society and thus re-structuring the profession in a manner that meets the challenges of the changed environment in which the profession is exercised - with a view to creating a profession that embraces those values effectively within the context of external pressures hitherto unknown to the local profession. This effort therefore should not be mistaken as an exercise in merely addressing the increased negative public perception of the profession generally, although this is also a matter that needs to be fully addressed. The ultimate aim is to devise a regulatory framework that respects the independence and autonomy of the legal profession, which ensures that the professional and ethical standards of the profession are indeed adequate and relevant to deal with the issues of a modern society and to regenerate the credibility of the profession and its members as a whole. This is the ultimate rationale underlying the exercise that in turn should lead in the medium to longer term in addressing, albeit indirectly, the public perception issue.

The Chamber invites members to make submissions on the proposals contained in this document by the 15th October, 2008. The Chamber will be organising a full day forum where these proposals together with any submissions made by members will be discussed in greater depth. The Chamber is also currently finalising a draft bill that encapsulates the proposals set forth in this document, subject to such amendments that may be made following consultation. It is expected that after full consultation with the profession the Chamber will then commence consultations with the Minister of Justice, the opposition spokesman for justice affairs and other constituted bodies in the hope that the proposals will achieve as high a degree of consensus as possible.

Submissions should be addressed to:

The Secretary
Chamber of Advocates
The Law Courts
Valletta
Fax: 2122 3904
Email: info@avukati.org

## 2. THE OVERALL OBJECTIVE

### *2.1 The need for a thorough evaluation – projecting the profession in the 21st Century*

There is a need to invest some thinking time in reviewing the whole profession from the time that law students spend at University working towards their law degree, how they are awarded their warrant, how they do articles, to how we conduct ourselves during our professional lives. This analysis, with the input of everyone concerned, should lead to a useful discussion on setting ourselves the proper objectives that need to be addressed.

Once we have been given the opportunity of addressing the matter we now need to ensure that this Act is the tool that should project the profession in the 21st Century. Indeed, we need to make sure that this Act will address the issues of regulating the profession within the context of the ever changing demands being made of it. Addressing these issues involves understanding the nature of the changes that the profession has already undergone and which we expect the profession to continue to sustain in the foreseeable future. It is therefore also the time that we understand in a comprehensive and detailed manner the external pressures that the profession will have to sustain going forward in what has become the practice of law in a global village. A process that has been accelerated by Malta's membership in the EU and the consequent promulgation of regulations allowing lawyers qualified and authorised to practice in other Member States to practice law in Malta under their home-state qualification and nomenclature.

### *2.2 Aligning the profession to the economic, social and juridical reality*

This should also be an exercise in enhancing public credibility in the profession and of evidencing to the powers that be that we are truly a serious outfit that has not only the willingness but also the resources and the competence to take on the task of proper self-regulation – unless we can show this, it is unlikely that anyone would acknowledge any regulatory powers of the Chamber.

It is important that any changes to the regulatory framework of the profession would bring to the fore a relevant change within the profession that is in line with the economic, social and juridical transformation that has been experienced by Malta. This transformation has been radical and the restructuring of the profession cannot but meet the new demands of such a radical transformation. Without a real and substantive reform that would signify a complete regeneration of the profession we would only be making a disservice to our profession by deepening the gap that already exists between the state of our profession and the social and economic reality of Malta. Other professions, notably the accounting profession has so much headway in this area – that we now need to take bolder steps that would bring us in line with the realities around us.

### *2.3 The Public Interest Dimension – Core Values*

We should not forget the public interest dimension of our profession which requires the guarantee of the highest possible levels of independence and autonomy of the profession as a whole and its individual constituent parts. The rules guaranteeing independence and autonomy of the profession should not be self-serving – in that

they are not and should not be construed as establishing a privileged professional class but rather of ensuring that lawyers have the right tools to be able to perform their functions within a changing society.

Our professional values have for centuries been characterized by the probity and integrity of the lawyer. In the current day and age these are simply not sufficient on their own. One of the elements that should characterize the new reformed profession is a high level of professionalism and competence – that together with the traditional values should create the lawyer of the future.

Skill and competence are not simply an issue that should distinguish one lawyer from another. Clients and the public generally should legitimately expect that once a lawyer is practicing in the profession he has the level of skill and competence that would enable him to undertake the tasks required of him in a professional manner. It is only at higher and more specialized levels that skill and competence should become a distinguishing feature between different members of the profession.

It is certainly a relic of the past to even consider it a possibility that one could enter the profession and remain a practicing member of it irrespective of whether he actually practices the profession or not; and irrespective of whether it constitutes his essential livelihood or whether he merely exercises the profession marginally. The complexity of the economic and juridical organization of modern society and the technicality that is required for an efficient and effective understanding and knowledge of laws – of its nature requires that the profession is only exercised by those who are properly qualified and competent and that it is to the profession that they dedicate themselves either exclusively or predominantly. Anything short of that would be to render a disservice to the profession as a whole and the public generally.

The lawyer must be, but must also be perceived to be an expert of the law and should constitute the appropriate guide to the public as to the significance of the law and its application as well as in the exercise of their rights. The modern view therefore is an accentuation of the levels of professionalism that are required of the profession – which must see their inception at the formative years at University and during *prattika,* which also bring to the fore the importance of Warrant examinations and which should continue throughout the practicing years of a lawyer's professional life

## 3. THE GENERAL THRUST – THE CHANGING FACE OF THE PROFESSION

### *3.1 The Internal Pressures*

#### 3.1.1 The need to be self critical

We have, regrettably, over the past years experienced a significant lowering of standards within the profession which has inevitably led to a loss of confidence in the profession as a whole and in a tainted public perception of lawyers generally. It is time that that we are self critical and actually admit that the standards of integrity, competence, skill and ethics shown by some colleagues have in most cases sustained this loss in reputation and credibility. We might wish to console ourselves either that this is not the case or that this is merely a reflection of the society we live in where values that were considered to be of paramount importance some years back have become decreasingly important in the minds of fresher lawyers. But this would be of little effective consolation and will do absolutely nothing to enhance our image and public perception. It is time to face the stark reality around us and to cease closing the Nelson's eye on our own deficiencies, using our reputed eloquence to defend our position,

which in some aspects has become objectively untenable.

Recent episodes of misconduct or publicly perceived misconduct by Advocates and other eminent members of the legal profession are not only evidence of the dissipation of once crucial values but have further fuelled a negative perception by the general public of the profession. Certainly they have not helped our image. This is becoming an endemic issue that needs to be addressed by the profession if we are to reclaim any of the profession's reputation and perception in the eyes of the general public and our clients. A profession that has for centuries been based on the trust and confidence of clients is risking today of being perceived with scepticism and mistrust.

#### 3.1.2 An outdated regulatory regime

The regulatory framework currently in place (or rather the absence of it) has until some years back served its purpose in ensuring compliance by Advocates and other members of the legal profession with generally accepted principles of conduct becoming of a lawyer.

The informality of that arrangement that depends on the censure by the Chamber, in the few occasions that that has happened, seems to have withstood the test of time but only until such time as the number of Advocates practising the profession was a manageable one, where advocates truly shared common ethical values and high standards of integrity, where one was known to all the rest and where the personal knowledge of advocates could be relied upon to act as sufficient censure to bring those of us who ventured too far, in line. Today, this is long passe', the requirements and the dangers of practising law today, in some areas more than others, can no longer be regulated in an informal, almost club-like, environment. We need to meet the exigencies of the profession today and in the future with the right tools, the correct approach and suitable measures that can adequately deal with the issues that are of fundamental importance in repositioning the profession on the strong footing that will enjoy the prestige that can only be the consequence of the high levels of probity, integrity and competence.

#### 3.1.3 The need for a strong legal profession

A strong, credible and respected legal profession is a must in any civilised democracy and it is therefore also a matter of public interest that the legal profession's strength, credibility and integrity are sustained through all means possible. Professional integrity and competence are central for the profession to retain a robust position within society.

With a profession growing in increasing numbers annually, with a changing economic and social environment around us where some advocates seem to mistakenly deal with their profession purely as a business and where ethical values and standards of integrity are no longer as common between members of the profession as they used to be – there is a cogent case for a different form of regulation of the profession. The idea of continued informal self-regulation as the exclusive manner of regulation, although possibly appealing, can no longer guarantee the proper regulation of the profession.

#### 3.1.4 The Chamber of Advocates – reform a must

The Chamber of Advocates, on its own and as currently set up, does not have the necessary powers of enforcement, the necessary recognition in statute or the required resources to enable it to act as the tough regulator that is necessary to deal with the continuing demands from the profession and the day to day problems that we encounter. Indeed, we have already seen the establishment of the Committee for Advocates and Legal procurators under the Commission for Administration of Justice Act,

a body established by statute that has taken over responsibility for matters of misconduct by the profession. Indeed an acknowledgement, tacit or otherwise that the outdated form of club regulation could no longer work.

Over the years the profession has changed significantly in the context of a unified profession where lawyers are involved both in pure advocacy as well as in advisory and consultative roles. Whilst historically lawyers have been regulated, albeit informally, with respect to their role as advocates in court, there has been very little if any *ad hoc* regulation of a lawyer's conduct in his advisory and consultative role. There are, of course, historical reasons for this. Advocacy has for centuries been the corner-stone of the profession and by far the predominant activity for any lawyer. Clients called upon their lawyers only when they required recourse to court and most of the advisory tasks undertaken by lawyers concerned advice with respect to litigation itself.

The role of any lawyer today goes far beyond the classical advocate litigating in court. Indeed the numbers indicate that there are by far more of our peers involved in either advisory/consultative roles or in employment than there are lawyers predominantly involved in litigation. The increasing number of lawyers in employment as in-house counsel is another feature that has evolved within the profession that may need to be addressed in a particular manner.

One of the corner-stones on which reform is to be based is a reform of the Chamber of Advocates itself. The Chamber can no longer be effective in the modern day and age if it is to remain a **club** having jurisdiction only on members, and where membership is voluntary. The role of the Chamber as the recognised professional body has a significant regulatory role to play within the profession that can only be properly conducted if it is given the appropriate status at law, the necessary powers as well as the means to fund the required resources and establish itself as an efficient and effective body. Its role is to assist in the regulation of the profession by being the catalyst for new ideas and the source of new rules and regulations modelled on the needs of the profession but also of enhancing the profession's image and creating the necessary level of credibility in the regulatory framework that should hopefully provide a higher level of positive public perception in the profession as a whole.

It is the belief of the Chamber that it would be somewhat futile to convince the powers that be that the Chamber should be the exclusive body regulating the profession in the public interest, particularly once there already exists an independent statutory body such as the Commission for the Administration of Justice provided for in the Constitution. We should not project this law as an attempt at the glorification of the Chamber or an attempt by the Chamber to get a statutory grasp over the profession in the interest of the profession itself. Rather we should project ourselves, and effectively act, as favouring a mixed approach where the Commission will have the role of the ultimate regulator of the profession in the public interest and the Chamber as the recognised professional body having a significant representation on the Committee for Advocates and Legal Procurators of the Commission.

It is therefore proposed that we need a structure that would work – both in having a regulatory framework that properly and adequately regulates the profession in practice and also by ensuring that the profession is prepared to accept outside regulation thus instilling the confidence of outsiders and the general public in the competence, probity and integrity of the profession.

## 3.2 The External Pressures

### 3.2.1 What are the principal external pressures?

The external pressures create as cogent an argument for a different form of regulation as the internal pressures. It can only be to the profession's huge disadvantage if we simply disregard external pressures and international developments that are bound to have an impact on us, whether in the short, medium or long term. I shall hereunder mention just a few:

The EU freedom to provide services is already with us. It is not a matter which we can have a say on – it is here right now. Indeed, Mr Kraus a qualified German lawyer authorised to practice law in Bavaria, is entitled to be registered as a legal professional in Malta and can provide all of the services any Maltese qualified lawyer can simply by being registered with the competent authority In this case the competent authority is the President of the Republic. All he has to show is that he is duly qualified lawyer in Germany. Multiply that by another 26 EU member states (of course not Malta) and there you are – the repercussions are easy to understand. This matter is regulated by the Mutual Recognition of Qualifications of Legal Professions Regulations[1] promulgated under the authority of the Mutual Recognition of Qualifications Act. Clearly, Joe Borg can go to Germany and practice there as an *Avukat*.

The authorities have already legislated about a significant aspect of our profession without even considering any form of consultation with the chamber – indeed an acknowledgement of our lobbying strength, credibility and ability to contribute to the general discussion (or lack of them), indeed a further acknowledgement that we are simply a push over. We continue to confirm our inadequacy by not even having reacted whether formally or informally. We have simply accepted the position, inevitable though it is, without having tried to influence the manner and timing in which the whole measure was implemented. Unless we take the necessary measures, radical and challenging as they may be, we shall remain an inadequate outfit – a voice *whispering* in the wilderness as far as the rest are concerned and only being able to moan and cry out loud within our own ranks, which is really a futile exercise.

Other pressures are building most of which are EU driven and over the introduction of which, in some form or other we have little or no control. We must however be a force that can influence at least the form, manner and timing in which they are introduced. Some of these pressures are mentioned hereunder:

(i) competition law pressures that would consider the current prohibition of multi-disciplinary firms as anti competitive. The U.K., traditionally one of the most conservative jurisdictions has already introduced a draft bill that will allow what are being termed ABS – Alternative Business Structures which would see different professions amalgamating into a partnership to provide professional services including legal services;

(ii) the Morgenbesser principle whereby would be lawyers who are not finally qualified as a member of a legal profession, can request access to legal training;

[1] SI 12.17

(iii) the Spainish Engineers case which implies that partial practice rights might also be possible;

(iv) the acceleration through the Sorbonne – Bologna process of the structural alignment of higher education of cross-border co-operation and trans-national practices;

(v) the increase in mixed law courses from more than one member state;

(vi) the co-ordination of common core principles of conduct rules on a pan-European scale.

In the context of these pressures and the consequent loss of autonomy that will become inevitable in these soon to be realities the Chamber needs to react, needs to pull its socks up and become an important player able to influence the decision makers, indeed it needs to be part of the decisions that will have an impact on the future of our profession. We need to prepare ourselves and our colleagues for a changing environment and therefore the need for structured and co-ordinated training of lawyers and law students is a must that cannot be disguised or downplayed.

### 3.2.2 Other external pressures

The membership in the EU is not the only, albeit probably the most significant single factor, that is bringing the profession under pressure. The increased momentum of international business being handled by lawyers in Malta is another factor that needs to be considered. This creates both a threat and an opportunity for the profession. We have seen a huge growth of international work being handled from Malta – there is certainly an opportunity for local lawyers to develop their knowledge base and to be exposed to the manner in which the international market operates and to be sensitised to the demands on quality and service delivery at international levels. This is considered beneficial in that the cross-fertilization of ideas and the exposure to the demands of international clients should improve the level and quality of service provided by local practising lawyers to the benefit of the local consumer as well. Unless the profession is able to react to these pressures in an adequate manner and make the quality leap that is necessary – then we shall lag behind other professions or worse still try to provide the services without the necessary knowledge and skills which will simply defeat the object of creating more international work.

## 4. THE REGULATORY STRUCTURE

### 4.1 Introduction

The Regulatory structure that is being proposed in this report has basically three fundamental pillars.

**The Minister** – the Minister will remain the interface of the profession with the political dimension. The role of the Minister however would remain a residual one. It is contemplated that the Minister will only act, in granting the Warrant and subsequently only in suspending or revoking a warrant, on the advice of the Committee. The Minister will also have the role as the appointing authority of "Approved Regulators" for the profession on the recommendation of the Committee.

**The Commission and the Committee** - the committee will have a central and pivotal role in the regulation of the profession in the public interest. It would have the function of acting as the buffer between the professional body, the profession and the general public. In addition the Committee will also be the body acting as an appeal body in the case of a member of the profession who feels aggrieved by a decision of the Chamber, for

instance in the non-renewal of a practising certificate. It will be the principal rule making body for the profession and the body that, as is currently the case, determines issues of misconduct within the profession. The committee will also be endowed with another role namely that of recommending to the Minister the "Approved Regulators" for the legal profession, such as the Chamber in the case of lawyers, the College of Notaries in the case of the Notarial Profession etc.

**The Chamber** – the Chamber will be the professional body recognised by statute as representing the profession and the designated Approved Regulator for lawyers. Its role would be fundamentally to maintain a 'Roll' of practising lawyers and issue practising certificates. Another role for the Chamber would be to act as a major catalyst of rule making and professional regulation. Before it is authorised as an Approved Regulator the Chamber must satisfy the Committee that it has the necessary Regulatory arrangements in place to ensure the proper regulation of the profession it purports to regulate. The Chamber should also have the function to investigate any complaints of misconduct referred either by the Committee on the complaint of a consumer against a member of the Chamber or by a complainant himself. In this respect, the Chamber as the stalwart of the standards of the profession should have the role to investigate such complaints and report to the Committee on whether there are sufficient grounds sustaining the complaint that would justify the complaint so that disciplinary proceedings before the Committee be conducted. In such disciplinary proceedings the Chamber would then act as the prosecutor in conducted the hearing before the Committee.

### 4.2 The Approach

What is being proposed is, briefly, the following:

4.2.1 The approach to regulating the profession should take heed of both the internal and external pressures facing the profession, whilst at the same time ensuring that the profession still retains the desired level of independence and autonomy, fundamental values that have accompanied the profession throughout its history. This calls for a flexible regulatory structure that whilst entrenching the base regulatory framework allows scope for change and adjustment to change within the parameters of set rules. Indeed, this is, or at least could be a model that can be adopted for other members of the legal profession including Notaries and Legal procurators.

4.2.2 In practice, the approach would be for the law to determine the basic regulatory structure and would regulate the appointment of the Regulators – in the case of lawyers it would establish the role of the Chamber of Advocates and the basic regulatory framework within which it should regulate the profession. It would determine *de minimis* regulatory arrangements that the Chamber has to put in place in order to be recognised as the designated regulator of the profession.

4.2.3 The law would also provide for:

- a list of reserved legal services that can only be provided by authorised persons – namely persons that are duly recognised and regulated by the Chamber in the conduct of their profession;
- the introduction of more accountability both of the chamber as regulator and of lawyers as service providers;
- Residual powers of the Minister to intervene in specific circumstances in the public interest;
- Penalties; and other administrative provisions.

### 4.3 The Roles of the Players in the regulatory regime

4.3.1 As already stated, the three main pillars of the regulatory framework will be the Minister, the Committee and the Chamber. It is crucial to examine how these are expected to operate between them and to determine their exact roles.

4.3.2 The Minister as the person having the political responsibility should ultimately retain overall regulatory responsibility. That responsibility would imply that the Minister would be the person that according to law would designate the regulator for the profession. The law would determine the exact parameters of the conditions that the Chamber shall have to satisfy in order to be able to take on the new responsibilities of regulator of the profession. The Minister shall have to be satisfied that the Chamber has the necessary arrangements in place and the necessary resources in place to enable it to discharge its functions properly. In addition he would have the residual power to intervene in specific circumstances where the protection of the public interest would dictate such intervention.

4.3.3 It is also proposed that the Minister, rather than the President of the Republic would be the competent authority to issue warrants to lawyers that would enable them to practice law. This would be done on the recommendation of the Chamber as the day-to-day regulatory and professional body for lawyers.

4.3.4 The Commission for the Administration of Justice and the Committee for Lawyers will retain its current function and role and principally this will remain dealing with issues of discipline and the suspension and revocation of warrants.

4.3.5 The Chamber would be the day-to-day regulator. This is the area that shall require significant change and work, if we are to ensure that it will meet any reasonable criteria to properly act as regulator of the profession. The Chamber of Advocates, on its own and as currently set up, does not have the necessary powers of enforcement, the necessary recognition in statute or the required resources to enable it to act as the tough but fair regulator that we need to deal with the continuing demands from the profession and the day to day problems that we encounter. Indeed, we have already seen the establishment of the Committee for Advocates and Legal procurators under the Commission for Administration of Justice Act, a body established by statute that has taken over responsibility for matters of misconduct by the profession.

4.3.6 It is envisaged that the structure would be such that the legal profession will fall within the jurisdiction and under the authority of the same committee. The committee will have as its prime task the determination of the regulatory arrangements that the Chamber as the body responsible for day-to-day regulation of the profession will make the necessary arrangements for proper regulation. In the event that it fails to do so, then the Committee will be the residual regulator of that profession as a default.

4.3.7 As part of the task of approved regulator under the proposed Act, the Chamber would then have to make detailed rules and regulations that would have the force of law for the regulation of the profession. Those rules and regulations would require the approval of the Committee before they become effective.

### *4.4 Qualifications to become part of the Profession*

4.4.1 There is certainly a cogent argument for regulation of the profession in the public interest. Any regulation should therefore also ensure that any person who can provide

certain services which, in the public interest should only be provided by persons who are duly qualified and meet certain fit and proper criteria.

4.4.2 The main highlights of the law would be the following

(1) No person shall practice the profession of advocate or practice law in Malta or provide legal services in Malta unless that person is in possession of a duly issued warrant and his name is inscribed in the Roll to be maintained by the Chamber.

(2) Any contravention of the above would be a criminal offence;

(3) The warrant would be issued by the Minister on the recommendation of the Committee.

(4) A person shall only qualify for the issue of a warrant by the Minister if he satisfies all of the conditions set forth hereunder:

(a) he is of full legal capacity;
(b) he has been inscribed in the Roll;
(c) he is a citizen of Malta or of a Member State or is otherwise eligible to work in Malta under any other law;
(d) he has obtained the academic degree of Doctor of Law (LL.D.) in accordance with the provisions of the Statute of the University of Malta, or such other degree as the Minister after consultation with the Chamber may from time to time prescribe by regulation under this Act; or a comparable degree from such other competent authority in accordance with the principles of mutual recognition of qualifications, after having studied law in Malta or in a Member State; and
(e) he possess full knowledge of the Maltese language as the language of the Courts of Justice of Malta.

(5) The warrant would only be issued if the Chamber is satisfied that the applicant for a warrant would have duly applied for inscription in the Roll and meets the criteria necessary to be admitted to the profession. Accordingly, inscription in the Roll is a prerequisite for the practice of law. The Chamber would only be bound to accept an application if it is satisfied that the applicant meets certain criteria (discussed later);

(6) Once a warrant is issued it would entitle the holder thereof to practise law in Malta for a year. Thereafter that person shall require a renewal of a practising certificate issued by the Chamber if it is satisfied that there are no reasons why such person is no longer *fit and proper* to practise law.

(7) Inscription in the Roll would be for a year and would have to be renewed against the payment of the prescribed fee and the continued satisfaction of the Chamber that the advocate is still fit and proper to practice law and the profession of advocate. Once renewal of the inscription is obtained then a new practising certificate will be issued by the Chamber.

(8) Inscription in the Roll and a practising certificate can be suspended or cancelled for reasons of misconduct.

## 5. ENTERING THE PROFESSION.

### 5.1 Introduction

5.1.1 This is the first point of contact that a new graduate should have with the Act. Becoming a member of the profession needs to be updated to take cognizance of our past experiences and the demands of the legal profession today.

5.1.2. First of all we need to be clear as to what we are going to regulate and why.

5.1.3. This brings to the fore the issue of definitions of terms such as Advocate and what, in practice, are the activities that need to be regulated. It is suggested that the regulation of the profession has and should have one ultimate objective namely to give the general public the necessary sense of comfort and confidence that only people who are fit and proper to undertake the practice of law are duly authorized so to do and that anyone else who is not so authorized would be committing a criminal offence if he either does so or purports to do so or even holds himself out as doing so. Indeed that it is wrong for any person to provide legal services to the public unless he has the proper skills to do so.

### 5.2 Definitions

It is proposed that this be dealt with in the following manner:

5.2.1 **Definition of Advocate or Lawyer (possibly both)** as a person who has a warrant issued to him under the Act;

5.2.2 **Definition of Practicing Advocate** as a person who, apart from having the warrant is inscribed in the Roll and has been duly issued with a practicing certificate to practice law in Malta;

5.2.3 **Definition of Legal Services:** the Chamber is currently working on a list of reserved legal activities or legal services that would be reserved only to practising advocates. These currently centre around three fundamental matters:

- the provision of legal advice;
- the drafting of contracts or agreements that purport to create legal rights and obligations between third parties.
- The right of audience before judicial tribunals.

5.2.4 This approach is a radical departure from the traditional stance where lawyers have been required to hold a warrant only with respect to having rights of audience before judicial tribunals. It is the view of the Chamber, however, that the legal services provided to the public today goes far beyond the provision of appearance in court or other tribunals and of advising clients with respect to litigation. It is consistent with the introduction of new more rigorous requirements for the conduct of the profession it is just as important that the provision of such services are covered by the same rigorous standards. The general public should expect, and legitimately so, that legal services are provided by professionally qualified, competent and skilful people who are adequately and consistently regulated. It would be short-sighted and incoherent, particularly in an environment that has sustained huge external pressures from other professions (and other non-professionals) purporting to be qualified to provide legal services, that only legal services that are provided with respect to the judicial process will be regulated.

5.2.5 This is not an attempt at creating a closed-shop in the provision of legal services – but rather an attempt to ensure, in the public interest that, only persons who are adequately trained and who have the necessary levels of competence and skill, as well as person who are subject to the same regulatory standards that can provide legal services.

5.2.6 There are obviously inherent difficulties in taking this forward, particularly in determining an exhaustive list of legal services. Indeed, the Chamber is aware that whilst it needs to keep in mind the public interest and the general well-being of the profession by cultivating high standards of professionalism, competence, and integrity – we also need to be aware of the way that the legal profession has developed and take into

account a number of issues that would need to be addressed. The following are some of those issues:

5.2.6.1 A revision of the position of the notary public may be necessary in order to ensure that notaries would still be able to perform their duties in the drafting of contracts without falling foul of the provisions of the law but at the same time upholding the standards of competence, skill and professionalism in the provision of legal services that the proposed law sets for lawyers. It would be a simple enough exercise to carve out of the rule that notaries, like lawyers would be able to draft contracts, even when these do not take the form of a public deed[2]. It is the view of the Chamber that Notaries should however only be exempted from the rule that would require a practising advocate to draft contracts and agreements for remuneration in the case of public deeds and that the drafting of private writings would remain the sole jurisdiction of lawyers. The underlying rationale for this is the nature of notaries as public officers, a matter referred to later. Another thorny issue relates to whether they should be able to provide legal advice.

5.2.6.2 The Chamber believes that this is a matter that needs to be fully discussed with the College of Notaries before any final view can be taken, and the Chamber intends to enter into discussions with the College on these matters. The Chamber's current position is that whilst notaries receive the same training as lawyers at University, so that they receive the same academic qualifications and are therefore equipped, at least initially, to provide the same services as lawyers – it would be inconsistent that notaries would be allowed to provide legal advice in the absence of a regulatory framework that would guarantee to the public the same standards as the proposed law guarantees with respect to lawyers. Indeed with the introduction of more structured *"prattika"* spanning a term of two years, with a warrant exam which would test the candidate not only with respect to the laws of procedure but also with respect to their competence in the substantive law - the present position with respect to the equivalence between lawyers and notaries will have changed drastically. In addition, the introduction of the proposed law that would require on-going compliance to rules of conduct by lawyers and to ensure continued levels of professionalism and competence will further widen the gap. In this context it is believed that notaries should be able to provide the same legal services as practicing advocates only if they comply with the same or equivalent standards and will be subject to the same rigors of regulation.

5.2.6.3 This brings to the fore the conceptual issue of Notaries being public officers. This is yet another matter that needs to be evaluated in the light of the pressures this time on the notarial profession. The Notarial profession has for centuries been considered as a unique profession in that a Notary is simultaneously a *libero prfessionista* and a public officer. A special figure within the legal profession generally that has the role of giving public faith to documents, a role delegated to notaries by the state. That role is clearly and unequivocally set out in article 2 of the Notarial Profession and Archives Act, Chapter 55 of the laws of Malta.

***Can a notary choose when to act as a public officer? In other words,***

[2] These proposals do not contemplate any change to the position that public deeds will remain the exclusive realm of notaries.

***should a notary have the ability to act as advisor ex parte when, for instance, he is not acting as the receiving notary?***

Ethical issues may and indeed do arise in the dichotomy of acting at times as a public officer and at others in a consultative capacity, and they are not of easy resolution.

There can be little, if any doubt that as a receiving notary publishing a deed, the notary is a public officer and cannot act *ex parte* – it is intrinsic in the role of the notary to be above the parties with the independence and impartiality that such a role requires. However even in this role notaries are sometimes required to provide advice to the parties on how to structure contracts/deeds; or in drawing up wills in estate planning and succession. The Chamber believes that in the areas where notaries have traditionally been the practicing their profession they should be allowed to provide independent advice to the parties, but not on an ***ex parte*** basis. This would mean that if in the course of drawing up a will a notary is asked for advice of how best to dispose of one's assets after death by a testator – the notary should be able to provide such advice. Likewise, if in the course of publication of a deed of sale of immovable property a notary is asked by the parties to provide advice as to the legal position – he should be able to inform the parties of the legal consequences and implications of taking one as opposed to another course of action, but he should not advise one party on what he would consider to be the most suitable course of action for that party – that should be considered as *ex parte* advice – that a notary public should not venture to undertake.

5.2.6.4 The Chamber feels strongly that in a professional capacity a public officer should not be able to choose when he acts as a public officer and when not to so act – once a profession endows a member of that profession with the privilege of public office then that is a state of fact which ought to be respected at all relevant times, namely whenever that person is exercising his profession. Accordingly, it would be untenable for a Notary as a public officer, and who is perceived by consumers of legal services as a public officer with the guaranteed levels of independence and impartiality – to act in a professional capacity which is inconsistent with public office. It is therefore the Chamber's view that Notaries should only be able to act as receiving notaries and in undertaking the functions ascribed to them by law under section2 of Chapter 55 of the Laws of Malta. Those functions do not include the provision of legal advice to consumers on an *ex parte* basis.

5.2.6.5 It is in line with the above that the role of Notaries should be delineated to ensure that the consumer is clear in his mind – that whilst practising lawyers act *ex parte* notaries cannot do so and that they can and should legitimately expect from Notaries the highest level of level impartiality and independence.

5.2.6.6 The Chamber is also aware however of the way in which the market for legal services has developed over the past 20 years or so. Indeed, it would be useless if one were not to take heed of a predominant practice that has emerged within the notarial profession where notaries, notwithstanding the obvious incompatibility with their roles as public officers, feel comfortable to act in a consultative capacity on an *ex parte* basis. This is a practice that in the view of the Chamber should be curtailed – it is certainly not in line with the role of the notary whether as that has been classically perceived nor in accordance with the parameters established by article 2 of Chapter 55. In addition, it creates confusion in the minds of the consumers of legal

services as to the role of the notary as a public officer.

5.2.6.7 The position of legal procurators also needs to be addressed. The Chamber believes that the role of legal procurators within the judicial system is a somewhat outdated one and almost a relic of a tradition that today adds no particular value, whether to consumers or to the efficiency of the judicial process. In this context it is the Chamber's firm view that unless there can be shown a compelling need for legal procurators – in a way that would really add value to the whole system and above all to consumers, their position ought to be completely re-thought. If there is empirical compelling evidence to show that the role of the legal procurator should remain then that role should not include the provision of legal advice and the drafting of contracts but should be limited to the rights of audience before the inferior courts and tribunals.

5.2.6.8 Other exemptions will need to be specifically carved out. One exemption that needs to be considered is the provision of advice in connection with tax and fiscal matters – which particularly in companies is so intimately connected to the accounting treatment of certain transactions that it may well be that accountants and accounting firms can and should be allowed to provide such advice.

5.2.6.9 The right to represent clients before the superior courts of Malta or any other tribunal (save of LPs) set up by virtue of a law that gives a right of audience to Advocates should, of course, remain a reserved legal service. Other services may well be considered as meriting to be considered as reserved for practicing Advocates. Members are urged to make submissions in this regard for due consideration and inclusion in the proposed bill.

5.2.7 **Definition of the words to practice law in Malta** - as the ability to practice the profession of Advocate and provide legal services in and from Malta.



### 5.3. The Warrant and the nomenclature *ADVOCATE*

In terms of the proposed Act becoming an Advocate requires simply the issue of the Warrant by the State that would certify that the holder thereof has followed a course of study required to have the basic qualification to practice law in Malta. Anyone having a warrant would be able to use the nomenclature and designation Advocate or similar.

### 5.4 The Roll and the Practising Certificate

5.4.1 The warrant alone however would not entitle its holder to practice law. Indeed, in addition to the warrant, a person must have a practicing certificate to be able to qualify as a practicing lawyer or advocate. This would follow inscription in the *Roll of Practising Advocates,* basically a register maintained by the Chamber of Advocates that would certify, on an on-going basis, that the person is a fit and proper person to practice the profession of advocate in Malta. For the sake of this paper this shall be referred to as the Roll.

5.4.2 The rationale behind this requirement is that whilst a warrant holder can, and probably should be entitled to the designation Advocate – he might well not be practicing the profession at all, either as a matter of choice or because he is temporarily

suspended from so doing due to misconduct or other reasons that will be discussed later. [3]

5.4.3 Entry in the Roll for the first time, which as referred to above is a fundamental prerequisite to the issuance of a warrant, would require an assessment on the part of the Chamber that the applicant for inscription is a fit and proper person. An understanding of the fit and proper criteria is crucial. The Chamber would have to evaluate applicants in connection with criteria that would render them appropriate to provide legal services and practice law in Malta.

5.4.4 The criteria need to be the hallmark of every practicing lawyer - and should address both the good name and reputation of the profession generally as well as the needs and legitimate expectations of the general public using our services. It is therefore proposed that the assessment necessary here would be made on the basis of the following criteria:

5.4.4.1 that applicants for inscription have shown to the satisfaction of the Chamber the required level of competence, skill and proficiency of the law and the practice thereof and for this purpose should be required to be duly examined and approved by an examination board chaired by the Chief Justice or a Judge delegated by him, and two representatives of the Chamber being Practising Advocates of not less than seven years' experience who under their signature issue a certificate attesting that they have found the applicant to possess the required levels of competence, skill and proficiency in the law and the practice thereof to enable him to become a Practising Advocate. This would include not only a proficiency examination in the laws of procedure but also in the substantive laws – consistent with the designation of new reserved legal services that also require competence, skill and proficiency in the substantive elements of the law;



5.4.4.2 that applicants would have followed a traineeship with a Practising Advocate (having at least 5 years experience) for a period of at least two years. It is strongly suggested that this is an area where we need to be somewhat prescriptive. The way that a good number of lawyers do *prattika* is simply useless. A system of registration with the chamber of graduates/under-graduates doing prattika and of the names of Practising Advocates with whom they undertake prattika should be introduced. In addition, we need to have a system where a practising lawyer cannot have more than two or three different students undertaking a proper traineeship. This would enable the Chamber to monitor the whole system. By time the Chamber should also have regulations setting out what areas *prattika* should entail. In short, this area needs to become a regulated area since it introduces for the first time a University graduate to the real life of practising law and needs to be taken extremely seriously. In addition, whilst the Chamber would not prescribe when articles can commence, it is only articles that would have taken place after the successful end of the course of studies in law at the University that would be taken into account for the purpose of the proposed law. This would mean that on the basis of the law course as structured at the moment after the successful end of the fifth year of studies.

5.4.5 that the Chamber is satisfied of the ethical standards of applicant;

[3] See Page [-]

5.4.6 that the Chamber is satisfied of the known levels of probity and integrity of the applicant; and

5.4.7 such other criteria as the Chamber may from time to time consider necessary or pertinent to ensure that the applicant will act honestly, fairly, competently, proficiently and with due care, skill and diligence in the interest of his client and to ensure that the applicant will uphold the integrity, good name and reputation of the profession as a whole.

### 5.5 Other Conditions

Inscription in the Roll would of course be subject to certain conditions, fundamentally the continuing satisfaction throughout the practice of the profession of the criteria required to get the first inscription. This would also be subject to the payment of such annual fees as may be prescribed. Accordingly, the Roll will be revised every year and updated with the names of new entrants to the profession as well as of those retiring from practice, but also with the names of those who may have been suspended or cancelled. A copy of the Roll would be delivered to the Chief Justice and the Committee. On the basis of the updated Roll, Practising Certificates would be issued.

### 5.6 Maintenance of the Roll and Issuance of Practising Certificates

It is further suggested that the Chamber, as the recognized professional body, should be the body that maintains the Roll and issues the practicing certificates and that inscription in the Roll should be the basis upon which a practicing certificate is issued. However, there could be cases where the Committee may feel that on the basis of information available to it that a person does not satisfy the criteria required for inscription in the Roll and accordingly would not be eligible for a practicing certificate. It is suggested that this level of residual discretion should be maintained by the Committee, as a buffer having residual powers. This, it is believed would lend further credibility to the system.

### 5.7 Renewals of Inscriptions in the Roll & Fees

One important aspect that may require some further discussion or thought is that it is contemplated that the renewal of inscriptions would be made subject to a fee. It is the committee's strong belief that we cannot have a strong profession without a strong Chamber as the professional body representing the profession. However, a strong chamber requires resources and funding – organizing the Chamber on the levels that are required for the Chamber and the profession as a whole to take on the challenges of the future is no mean feat. There is very little that the Chamber can do in enhancing its credibility as a proper professional body unless it gets itself organized and properly resourced. It is therefore imperative that the Chamber has a revenue stream that could sustain its proper organisation, management and administration. On the other hand it needs to show that it is providing its members with a service. The proposal being put forward is that rather than rely on fees from membership – which in any event is optional – the Chamber would charge a fee for renewal of inscriptions in the Roll and the issuance by the Committee of a Practising Certificate. This does not mean that practising advocates should be made to finance the inefficiencies of the Chamber, accordingly the Chamber should not have *carte blanche* in changing these fees. The structure should contemplate a cap which on a regular basis could be increased on an inflation related index – but which would require the consent of the Minister if that cap were to exceed an inflation related increase. Accordingly, we need to undertake a proper analysis to cost the whole exercise of managing a revamped Chamber – duly organised and properly managed – in order

to be in a better position to negotiate a cap on the fees.

## 6. PRACTISING THE PROFESSION

### 6.1 Introduction

The next area that requires regulation is throughout the practice of the profession. This area will deal with the following issues:

**(a) How renewals of inscriptions in the Roll and the Practicing certificates are handled;**
**(b) the instances when inscription is to be or may be refused by the Chamber; and**
**(c) the instances when a valid practicing certificate may be suspended.**

Most of these provisions are mechanic in nature and a look at the proposed law is sufficient to understand the thought behind them. There are however issues , particularly relative to the points mentioned in (b) and (c) above that may require further discussion as to the grounds for refusal or suspension. There are two separate instances that I have identified which may need to be addressed separately namely those where the Chamber is bound not to renew the inscription and those where the Chamber is endowed with a discretion as to whether to renew an inscription.

### *6.2 When renewals are to be refused.*

The following are the instances being proposed and in which the Chamber would have no discretion and therefore would have to decline an application for renewal of an inscription in the Roll, namely where an applicant for renewal:

- has been suspended from practice and the period of suspension has not expired;
- has been invited by the Chamber to give an explanation in respect of any matter affecting his conduct, he fails to give the Chamber an explanation in respect of that matter which the Chamber regards as sufficient and satisfactory, and has been duly notified by the Chamber that he has so failed;
- he has been adjudged bankrupt or has entered into a composition with his creditors;
- he has contravened an order of the Chamber or the Committee in connection with discipline or ethics;
- he has not paid the prescribed fees;
- he has been the subject of a final judgement or court order against him and he fails to discharge the judgement or order within eight (8) weeks from the date that it was given.

Clearly, these need not be the only grounds for non-renewal – they are simply the ones that are being proposed and the council invites further discussion and submissions that may enhance the above or possibly create other grounds.

### 6.3 When a valid inscription and Practising Certificate may be suspended

This would follow the instances mentioned in 1.1, obviously with the exceptions in paragraphs (a), (b) and (e). We may also need to add some instances where the Committee or the Chamber would have decided on a suspension pursuant to disciplinary action.

### 6.4 Rules of Conduct

In addition, it is debatable whether rules of conduct ought to be included in primary legislation or whether these should be

included in Chamber rules or Committee Rules. Again the Chamber would favour a mixed approach.

Whilst certain fundamental general principles ought to be enshrined in primary legislation other more detailed rules ought to be the object of regulations either made by the Chamber or the Committee. This latter point again requires a fully blown discussion in its own right.

### 6.5 Principles that are to be enshrined in primary legislation:

6.5.1 Being in Business or undertaking other activities incompatible with the practice of law.

It is the general view of the the Chamber that as a general principle being in business is incompatible with being a practicing advocate. The committee is aware that this might be a controversial view, but it is still one that it believes ought to be actively considered and pursued if we really want the public perception of the profession to improve. We have probably all come across situations where lawyers enter into business deals with their own clients, others were lawyers pre-empt deals they have knowledge of through their clients. These are possibly the situations which are most conspicuous and certainly most damaging to the reputation and the good name of the profession. There are other members of the profession who although do not practice any of the above mentioned activities are well into doing business whether in their own name or through corporate vehicles of which they are shareholders and directors. Indeed, at times their activities in the business world tend to make them known much more than their exploits within the profession.

6.5.2 It is the Chamber's belief that the approach to doing business and the approach to conducting oneself properly in the profession require a different state of mind, a different approach. It is as unacceptable that one undertakes the profession with the same state of mind as undertaking business just as it is difficult to segregate oneself from one when doing the other. Although it could be argued by some that they *wear different hats* when undertaking each of the activities – the argument remains weak and is unlikely to be a cogent one in the public eye. We need to send a message, loud and clear to one and all, that practicing the profession is a full time task – there is no room for diligent, skilful and competent professionals who deal with their profession on the side – that is when they are not earning their livelihood from business. More importantly –the rules of ethics and the standard of probity and integrity dictated by the professional values embraced by a practising lawyer are certainly different from those that businessmen are used to.

6.5.3 In practice, admittedly it will be difficult to determine when is doing business incompatible with the practice of law. It is easy to say in each case – but we still need to identify when that is. Clearly, what the Chamber firmly believes should be prohibited is the active involvement by practising lawyers in business, whether in their own personal names or through such entities as lawyers can be creative enough to set up and employ. It is not the intention not to allow lawyers to invest their hard earned savings or their family's patrimony in the case of succession, indeed this would be unfair and disproportionate to the aims that are to be achieved.

6.5.4 The principal thrust is not that lawyers cannot enjoy their patrimonies and enhance them, but rather to avoid practising lawyers from being involved in the direction and management of businesses whilst also practising law. It is obviously the prerogative of each individual Advocate to decide whether he wishes to practice law or manage a business – he can certainly decide to do the latter – what he should not expect is that the

Chamber issues or renews a practising certificate.

6.5.5 There will certainly be situations that would warrant an exemption from the above prohibition and the Chamber seeks the contribution of its members to make submissions also in this regard.

### *6.6 General Rules of Conduct*

6.6.1 The general principle that all Practicing Advocates ought to practice their profession with dignity, decorum, integrity, diligence, competence and skill compatible with the protection of the good reputation and name of the profession as a whole ought to be enshrined in primary legislation.

6.6.2 The Chamber would then be authorised by the Act from time to time make such rules and to issue such guidelines as it may consider appropriate to Practising Advocates with respect to the professional practice, conduct of the profession, discipline, and to ensure that Practising Advocates exercise their profession. The process that is currently being contemplated is that any such rules or changes thereto would be promulgated by the Chamber directly but would only come into effect after they have been notified to the Minister, the Chief justice and the Committee and neither of them would have objected to the promulgation of such rules with a period of say 30 days from the date on which they are notified.

6.6.3 Another general principle that is proposed to be enshrined in primary legislation is that a Practicing Advocate shall not reward, or agree to reward, an unqualified person for legal services introduced by such person to the Practicing Advocate. Any agreement in contravention of this principle shall be void. The Act would provide for disciplinary action for any practicing Advocate found guilty of conducting himself in this manner.

6.6.4 Another principle to be enshrined in principal legislation is the rule prohibiting Quotae Litis. This needs to be clearly defined in that the rule should prohibit an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. The " *Pactum de quota litis* " does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer.

## *7.* RULE MAKING POWERS

As highlighted above it is a moot point as to whether the appropriate rule making body ought to be the Chamber or the Committee. There is however no doubt that the Act would have to provide for an entity to make rules and regulations in connection with the better implementation of the Act and with respect to the professional practice and conduct of Practising Advocates and Advocates as well as their discipline. So far we have the code of ethics that is given statutory force through Section 101A of the Constitution and the Commission for the Administration of Justice Act. Surprisingly the Constitution only provides for the promulgation of a code or codes of ethics but not any further rule making power. On the other hand the Commission for the Administration of Justice Act defines code of ethics as *a code or codes of* ***conduct*** *made under section 101A.* The Act itself then does not provide for any further rule making power of either the Commission or the Committee.

There can be little doubt that the proposed Act needs to provide for wide rule making powers that will be necessary for the detailed regulation of the profession. There would be three contenders for this power, the Minister, the Chamber and the Committee. Each of them has an important role to play and their respective roles are important, accordingly each of them ought to be involved, in varying degrees. The Minister as the person that has to take the political responsibility for the legislative instrument in the public interest ought to be the person who finally endorses the rules and places them on the table of the House. He would however act soley in accordance with the recommendations of the Chambere after the latter has, on issues of ethics and discipline, consulted the Committee. This is the position reflected above.

## 8. CONTINUED PROFESSIONAL DEVELOPMENT

8.1 It would be anachronistic to make proposals for a new legal framework to regulate the profession without dealing with the issue of continued professional development by lawyers of their professional competence. Today, there is no rule which would even generically require a lawyer to keep himself updated with changes in the law. The absence of any prescriptive statement that a lawyer is required to keep himself abreast of developments in the law and that he should conduct himself professionally and diligently is unacceptable. Indeed, a simple generic statement of that nature would itself be unacceptable.

8.2 The continuous and turbulent modernization of laws and the introduction of new rules renders keeping one self updated absolutely necessary, and requires us to attribute to professional development of lawyers a significant role for a new professional discipline. Just think of the new company law reforms, fiscal legislation that is continuously the subject of change, the spate of new legislation being churned by Brussels in all sectors, public procurement regulation, planning and development legislation and environmental laws not to mention the laws of procedure. The list would probably be interminable.

8.3 Years back having a good grasp of the codes a Maltese lawyer would know 75% of the laws – but we are today in a day and age when laws and regulations no longer have the stability they once had, but everything changes and is even projected to change, such that quest to keep abreast of these changes is and must be an incessant one. It is evident that lawyers need to be given the opportunity of fully understanding all of these updates and changes – but lawyers need also to understand that it is in their interest that they remain at the fore-front by maintaining high levels of professional competence and skills. It is the view of the council that the significance of continued professional development is such that it requires prescriptive rules making it obligatory. We need to win the presumptuous attitude of those lawyers who, because they became lawyers ages ago think they still now it all – the indolence of us all who are today constrained to study new developments in an occasional manner – as and when the need arises. Continued professional development should be a must for all – it is the only way forward that would allow lawyers in the 21st century to provide a level of service to their clients which is sustained by the values of real professionals with skill and competence apart from the traditional values of probity and integrity.

8.4 The idea is to have a gradual introduction of mandatory CPD over time so that within the medium term anyone wishing to retain a practicing certificate would have to show that he has undergone a number of hours of continued professional development. Continued Professional Development is not an examination based system but rather an attendance based

system of continued education in matters and areas approved by the Chamber. Like any other reform this is expected to meet resistance fuelled by the traditional lethargy of changing what we know – but also with few, if any substantive and sustainable arguments that could detract from the absolute need of CPD.

## 9. EMPLOYED LAWYERS WORKING OTHER THAN IN LAW FIRMS

9.1 This is a number of lawyers that over the past 10 years has grown tremendously. So far we have only tried to regulate their position in a haphazard way and possibly in an unsatisfactory manner. The introduction of this act however should provide us with the opportunity of having a proper discussion of the issues and to resolve this matter satisfactorily.

9.2 The position today is that a lawyer who is employed other than in a law firm can only provide his legal services to his employer and his employer cannot provide legal services to third parties through the intervention of a lawyer employed with him. This position is sustained on the basis that I) an employee can only provide his services to his employer accordingly he may advise his employer on a number of legal issues, that is exactly why an in-house lawyer is employed; and ii) a non-lawyer cannot by employing a number of lawyers exercise the profession of a lawyer when he is not a lawyer himself, and the provision of legal services by an employer through employed lawyers would be exactly that.

9.3 This is a position that is respected in a number of quarters but flagrantly breached in others. The Committee believes that it is time that this position is reviewed with an open mind to see whether the demands of the profession today are such as would require a change in this position or a re-affirmation of it. If, after due consideration, it is determined in the best interests of the profession and the public that the current position be maintained than we need to ensure that it is respected. If on the other hand we deem it appropriate that the position should change then we need to determine how.

**9.4 The situation, in the view of the chamber, revolves around the question of who in effect is providing the legal service. Is the lawyer employed the person who is effectively providing the legal service or is it his employer?**

9.4.1 An analysis of the circumstances and contractual relationship is necessary. Under normal circumstances the lawyer is employed with a view to provide legal services to his employer and certainly not for the employer to use the services of the lawyer to provide legal services to the public or to the employers' clients. If one were to allow the latter position it would signify that any person having the financial ability to employ as many lawyers as he can would be allowed to run a law practice. This is clearly not a desirable effect for the better management of the profession nor in the general public interest. This is an issue that will again be discussed with respect to Law Firms and to the limitation of liability.

9.4.2 It is the belief of the Chamber that whilst lawyers in employment other than with law firms is a phenomenon that has increased and should be further encouraged, it should not signify that the employers of those lawyers should be considered as having the ability to provide legal services.

9.4.3 Indeed the test should remain that the provider of the legal services in these instances is the person:

9.4.3.1 who takes the responsibility for the service provided in the context of the independence and autonomy required by lawyers; and

9.4.3.2 Seeks and obtains payment therefor.

In the event that the employed lawyer is not the person who directly takes the responsibility for the service provided and is not the person who receives the remuneration therefor – then in the absence of a valid practicing certificate the employer should not be able to provide such services.

9.4.4 It is axiomatic that a lawyer in providing advice to clients requires the level of independence and autonomy that are intended to ensure the provision of the best advice to the client in the client's own best interest. The autonomy and independence of a lawyer in giving an opinion or in providing advice or any other service cannot and should not be conditioned or influenced by considerations other than the best interests of the client and the lawyer's firm and studied view on the matter. It cannot and should not therefore be conditioned or influenced by considerations that a lawyer's employer may himself, not being subject to same strict rules of conduct as a lawyer, consider appropriate.

9.4.5 This view is consistent with the requirement in the proposals that any person who is to provide legal services in Malta shall be required to have a practicing certificate.

## 10. LIMITATION OF LIABILITY & PROFESSIONAL INDEMNITY

### 10.1 Introduction

Of the many risks that lawyers face in their day-to-day practice the nightmare of every lawyer is a client claim for damages that could simply wipe him out and bankrupt him. In view of the nature of the work that most lawyers undertake on a day to day basis this might not have been perceived as a real threat – however with the value of commercial transactions reaching unprecedented heights and with the exposure of Maltese lawyers to international clients and business transactions – this is no longer the case.

### 10.2 Review of the traditional position

10.2.1 There is certainly a cogent argument to be made for a review of the traditional position. The issue is the attainment of the right balance between the expectations of the client and the public generally and the independence and autonomy of the lawyer in the practice of his profession. A client legitimately expects to be serviced by a competent, skilful and knowledgeable lawyer, whom he can trust to take care of his business in a professional manner – accordingly it is also a legitimate expectation of the client that if the lawyer does not perform his duties in accordance with those expectations and causes damage to his client – he ought to be compensated.

10.2.2 Conversely, whilst the lawyer should feel duty bound to provide his services at the expected levels of competence and skill – he should not be expected to place all his life-savings and wealth at risk – each and every time he takes on an engagement. The independence and autonomy of lawyers should not be conditioned by the threat of bankruptcy all the time – on the other hand lawyers should be responsible towards their client for damages sustained by virtue of the lawyer's inadequacy.

10.2.3 Ultimately, the client is not or at least should not be after bankrupting the lawyer but rather after being properly and adequately compensated. This matter can and should therefore be handled through insurance. What is being proposed is that lawyers and law firms could limit their liability to their clients up to an amount to be determined provided that they take out Professional Indemnity Insurance to cover

such an amount. This would guarantee the compensation to the client on the one hand and hedge against a lawyer's bankruptcy on the other. Clearly, the two would go together so that a lawyer would only be able to limit his liability if and only to the extent of the professional Indemnity cover.

### 10.3 Proposals

In this context there is a case to be made for lawyers being able to cap their liability for damages to clients with a number of protections for the client. The following is being proposed:

10.3.1 Lawyers should not be allowed to cap their liability in any manner for wilful misconduct and gross negligence – in this respect they should remain fully and completely liable to their clients;

10.3.2 Lawyers should however be able to cap their liability for simple negligence by contract. It should be possible for lawyers to enter into a contract of engagement or retainer with a client whereby the lawyer and the client agree to limit the liability of the lawyer for any damages that the client may incur or sustain by virtue of the lawyer's negligence. Clearly, any such limitation of liability should be an express limitation in the contract.

## 11. ALTERNATIVE PRACTICE STRUCTURES - LAW FIRMS – MULTI DISCIPLINARY FIRMS

### 11.1 Introduction

There is no empirical study that shows the most popular model of practicing law in Malta. It is however safe to suggest that the sole practitioner has traditionally been, and probably remains, the predominant model in which lawyers exercise their profession today, although the external economic pressures that need to be faced going forward are such that would militate towards more pooling of resources. In some cases this has taken the form of different lawyers in sole practice sharing office space and possibly central secretarial resources, or general administration expenses – in a chamber like approach, but with no real ties in either practice management or profit sharing. These latter situations have been a natural extension of the sole practitioner.

### 11.2 The Market in Malta

In this context the market for legal services in Malta has not faced any regulatory issues dealing with the ownership and management of other structures through which lawyers practice law. Over the last twenty, but certainly over the last 10 years we have seen associations of lawyers setting themselves up as formal civil partnerships where lawyers practice law under a firm name, with very real ties and profit sharing schemes, and which employ a number of other lawyers within those firms. These structures have traditionally been constituted in the form of civil partnerships under the provisions of the Civil Code. Our regulatory regime does not contemplate the regulation of law firms as a species differently from the lawyers that constitute its membership, and we have therefore so far retained a regulatory structure driven by individual regulation. There is no publicly available information on the number of law firms that practice law in Malta as a partnership or other form of association – nor any information on how these firms are owned, managed and of their internal control systems dealing for instance with clients' money, how they deal internally with potential conflicts of interest. The rules that apply to individuals may not be easily extendible, although certainly adaptable to a partnership situation. There is no doubt that a cogent case to be made for the further strengthening of such associations as they should provide models for more efficient service delivery to clients, an increased knowledge base that should provide higher

levels of specialization where necessary and above all economies of scale that should provide competitive pricing of legal services in a more liberalized environment.

In the year 2008 we are still discussing the regulation of law firms, when the rest of the profession in Europe is today discussing, and most discarding, the Multi-Disciplinary Firm – prompted by EU pressures on access to the market for the provision of legal services. We shall therefore have to make this culture leap all at once, and deal with both the introduction and recognition of law firms as well as to come to terms with a discussion of Multi-Disciplinary firms. This is yet another area where in view of the profession having lagged behind in the evolution and development of an updated regulatory structure – now finds itself having to make a bolder move in updating its regulatory framework.

Notwithstanding the evident time lag in regulating these structures, there is no doubt that there are lawyers who have established practices in partnership with other lawyers and who practice the profession as firms, under one firm name and which are managed in a corporate fashion. The time lag therefore is a matter of regulation rather than the initiative and enterprise of lawyers themselves, or at least some, who have abandoned the more classical models in favour of models that provide a well-organized professional set-up that is better placed to meet the demands of clients in the 21st century. With the exposure of Malta to more international work, this development was inevitable and it is not unlikely that with more international clients requiring the input of Maltese lawyers – the trend towards higher levels of organization and better service delivery channels will be sustained. The local market, itself also exposed to international pressures and experiences is also changing – most notably in business circles with Maltese clients resorting to the services of lawyers in other jurisdictions becoming familiar with the way in which lawyers in other jurisdictions provide legal services – legitimately expect us to provide similar levels of service, within a reasonable cost and fee structure.

The Chamber is of the view that these phenomena need to be adequately regulated so that clients dealing with associations of lawyers and law firms can understand the concept and have the comfort that these partnerships are also regulated entities.

However, the Maltese market for legal services also has own idiosyncrasies that other markets may not have. Indeed, there is clearly the need to ensure the continued existence of the smaller practices and the sole practitioner – there is certainly a social value in retaining such practices and in ensuring that within the overall compliance of professional standards of competence and ethical standards smaller practices can thrive. However, smaller practices will remain subject to the overall economic and other pressures surrounding the rest of the profession and the rest of society, and will therefore have to find the necessary resources to ensure that they can adapt to a changing economic and social environment.

### *11.3 The Chamber-Like Approach*

This is an approach whereby a number of independent lawyers associate themselves with a view to sharing administrative resources, in their practice of law and the provision of legal services. They remain completely independent one of the other in the management of their individual practices; they do not share fees or profits/losses and simply make a contribution to a centralized pool of expenses. Typically they would share office space, secretarial services, para-legal services, office equipment etc.. No formal arrangements of partnership would however exist which would entitle one lawyer to share

fees with another lawyer, nor would they provide for a profit sharing scheme.

This is a model that the Chamber feels would contribute towards ensuring that smaller practices and sole practitioners can meet the challenges of the future. This model provides a combination of individual lawyer independence and autonomy whilst also providing for economies of scale on the management of the practice by allowing the sharing of expenses on centralized resources, which could assist a sole practitioner in not overburdening himself with fixed costs that his practice may not sustain. This is a model that in Malta has been traditionally looked upon favourably by lawyers and a model with which we are all familiar.

From a purely public interest perspective there is one issue that needs to be closely looked at and regulated. Clients resorting for legal services to a lawyer operating within this model or structure should be clear that he is being serviced by that particular lawyer and the fact that he is visiting him in an office with a number of other lawyers, should not be allowed to give the impression that any of the other lawyers are jointly liable with the lawyer servicing him, when that is not the case. Accordingly, issues such as the practicing of the profession under one brand or name by outfits adopting this model need to be properly evaluated.

In this regard the Chamber is of the view that lawyers adopting this model to practice their profession should not be able to practice under one brand or name and should avoid giving the impression that they are a firm, unless they intend to share the liability of a possible client claim. Accordingly any Chamber-Like model or arrangement where lawyers purport to provide legal services as a firm under joint liability[4], would be opening themselves up for such joint liability to their clients. Under this model, for instance lawyers should not be allowed to operate joint client accounts to hold client moneys, they should not be allowed to use one letterhead unless it appears on the face of it that there is no joint liability between the lawyers forming part of this arrangement.

Each lawyer would, of course, remain individually regulated under the proposed Act and answerable individually to the Chamber and the Commission.

### *11.4 Law Firms*

The term "Law Firm" is not a legal term of art and does not itself denote a recognized legal form. Generally, law firms are an association of lawyers whose sole object in forming such an association is the provision of legal services. They would normally be characterized by:

- The contribution of capital from the members constituting it;
- the joint liability of its members for any claim against the partnership[5], and

[4] See Limitation of Liability above

[5] Subject to what is stated with respect to limitation of liability and Professional Indemnity Insurance

- the sharing in the profits/losses in pre-determined or determinable shares.

Law firms have traditionally taken the form of civil partnerships in terms of the Civil Code. The absence of any other appropriate form available under our law has probably been the catalyst in pushing law firms to adopt this legal form.

### *The Legal Form*

11.4.1 The Chamber is of the view that any legal form, whether in existence or yet to be established, which a law firm should take should in any event be characterized by the following important features:

(a) The contribution of a minimum amount of capital by the members;
(b) The creation of a legal person which is separate and distinct from the members establishing the firm, such that the assets and liabilities of the firm would constitute a separate patrimony to that of the members;

(c) The common management of the practice of the firm;

(d) The sharing of profits and losses by the members;

(e) The unlimited liability of the firm for all claims lawfully made against it but the limited liability of the members constituting its ownership, subject to adequate professional indemnity insurance.

11.4.2 All these are features which with some amendment could fall to be regulated within existing structures of the civil partnership or the association of persons under our Civil Code. The Chamber is also of the view that the profession should vie away from the business form of a limited liability company, particularly in view of the conceptual difference from the exercise of a trade or business to that of exercising a profession. The issue of limitation of liability is an issue that has already been discussed above, the only issue that is new in establishing the legal form would be that prior to registration as a partnership/association, for the members of a firm to be allowed the privilege of limited liability they would be required to show evidence that adequate professional indemnity insurance is taken out.

11.4.3 That Civil Partnerships and associations of persons already enjoy the benefit of distinct legal personality is certainly not a new feature. Jurisprudence in the first case and the law in the second have clearly established this. Accordingly, this requires a different regulatory approach that would shift away from the purely individual basis of regulation of lawyers to a mixed approach of both individual and firm-based regulation.

11.4.4 In the first instance a law firm would be required to be registered with the Chamber in an appropriate roll for this purpose. Such registration would endow the law firm with a practicing certificate, thus enabling its members to practice law within the ambits of the firm and under the name of a firm. This would be an additional requirement to that imposed on individual lawyers to have a practicing certificate.

11.4.5 There are several issues that arise with respect to firms, not least of which are issues of ownership and issues of management.

### *Ownership Issues*

11.4.6 Had this matter to be discussed some ten or possibly even five years back, there would be no issue in determining it. In our

conceptual frame of mind it is inconceivable that non-lawyers could be or become partners in a law firm, indeed – it's quite obvious that only lawyers can be part of the ownership structures of law firms. We are however, not ten or five years ago – but in 2008 and there is no doubt that the matter cannot be so easily dispensed with. With EU pressures on access to the market for legal services we simply cannot avoid a full discussion of having non-lawyers owning an interest and becoming partners in law firms.

11.4.7 We are here not in the realm of the multi-disciplinary firm but strictly within the realm of a law firm – namely an organization that has as its **sole object** the provision of legal services.

11.4.8 In the light of our ethical rules today that a lawyer cannot share fees with a non-lawyer it is quite clear that a law firm, which as stated above, presupposes the sharing of profits/losses, cannot have a non-lawyer as one of its partners/members. This is an old rule based on principles that possibly never contemplated law firms and how they work today, as well as the principle that in view of the ethical standards required of lawyers and which are not shared by non-lawyers it would be inappropriate to allow a non-lawyer to share in the fees of a lawyer. It is the Chamber's view that this rule needs to be re-visited in the light of modern requirements and challenges but only to the extent that would not prejudice the maintenance by lawyers of professional and ethical standards.

11.4.9 The Chamber is of the view that law firms, even in the modern day and age, should remain essentially about the practice of law and the provision of legal services. Whilst there is much that can be said about allowing non-lawyers to become members in a law firm, both at an ownership level as well as at a management level, it would seem that there is no particular pressure to open up at this stage the ownership structure of law firms to non-lawyers. In any event the Chamber would find no objection in principle if a non-lawyer, adopting ethical and professional values similar to those of the legal profession, would become a member of a law firm. There are however issues of ownership and management of law firms in such cases that would need to be addressed and the Chamber is of the view that whilst at each of these two levels law firms could be allowed to invite non-lawyers this should only be allowed if there can be a guarantee that the professional and ethical standards that are the hallmark of the profession are not in any way prejudiced.

11.4.10 There are various ways in which this can be achieved. The Chamber's proposal in this paper is that in the absence of any particular pressure on the ownership structure of law firms being opened up to non-lawyers, it would add no value for this step to be taken at this stage. In the event that following consultations it appears that there is a cogent case for the opening up of law-firms to non lawyer ownership, then this would only be acceptable to the Chamber if:

11.4.11 The ownership structure of law firms would be able to allow non-lawyers as partners or owners within the firm as long as the predominant part of the ownership will remain with practicing lawyers, and to this extent it is suggested that:

(a) such non-lawyers would only be allowed a 25 per cent stake in the ownership of the law firm with the remaining 75 per cent to be held by lawyers; and
(b) The responsibility for the overall management of the law firm and for compliance by the law firm with regulatory standards is to be vested in one or more lawyers. Non-lawyers would be allowed to have management roles within law firms, including that of partners subject to the limitations in (a) above.

11.4.12 This would not only open up the ownership structures of law firms to non-lawyers, albeit to a limited extent but it would also allow non-lawyers to become managers within law firms thus possibly rendering law firms more attractive employment propositions for non-lawyers – who would be able to see a proper career path within a law firm even if they are not themselves lawyers. These should always remain people employed by law firms for that firm's better management and not for law firms to provide non-legal services to the consumer.

11.4.13 Opening up the ownership structures of law firms to non-lawyers can be perceived as creating a risk that inappropriate owners would be introduced within law firms. The fiduciary relationship that is created between lawyers and their clients is to some extent unique and it should therefore be considered as such. There are no doubt several examples where the ownership structure of certain businesses is controlled and closely regulated because of a similar fiduciary relationship with customers, banks and ISA license holders are such an example. It is therefore crucial that only *"fit and proper"* persons would be able to form part of the ownership structure of law firms.

11.4.14 One other concern that the Chamber has duly considered is the possibility that outside owners could bring undue commercial pressures to bear on lawyers which potentially could conflict with their ultimate professional and ethical standards. This is a real concern that needs to be addressed frontally, not only to ensure that it is eliminated but also to ensure that there is no public perception of such risk. It is with these concerns in mind that the Chamber would seek to have regulations that would address this concern. The following are some of the proposals:

(a) At the ownership level lawyers remain in predominant control of law firms (75%-25% rule) – this should ensure that the underlying culture of the practice of law will remain intact and that the core values of practicing law are not in any manner prejudiced;
(b) In addition at the ownership level, the Chamber is of the view that it would be pre-mature at this stage to allow just anyone to become a part owner and it would restrict this level to other regulated professions that share similar professional values to lawyers, such as accountants and architects;
(c) At management level, one or more lawyers should be the persons entrusted with the overall direction and responsibility for the management of the law-firm. The persons so nominated and registered with the Chamber as such cannot be changed without the consent of the Chamber.
(d) Practicing lawyers would be in a majority by number in the management group;
(e) Practicing lawyers would continue to have the same professional duty to their client and to the court as at present;
(f) Outside owners cannot interfere in individual client matters or have access to client files or other information about individual matters;
(g) A law firm cannot take instructions on a case from a client where an outside owner has an adverse interest in the legal outcome;
(h) all partners and managers whether lawyers or otherwise would have to adhere to a Code of Practice agreed with the Chamber.

The Chamber, aware that there could possibly be differing views on the matter, believes that at this stage of the evolution of

the profession and in the absence of any empirical evidence to suggest that there are any market pressures to open up the ownership structures of law firms there is no imminent and particular need for the liberalisation of such ownership. However, if following consultation there is evidence to suggest that it would be beneficial to the profession and the consumer of legal services that liberalising the ownership structure of law firms would create beneficial results in the market, then the Chamber's view is that this should be done cautiously and within the limited and regulated parameters set out above.

### *The Multi-Disciplinary Firm*

11.4.15 This is a different proposition. What distinguishes a multi-disciplinary firm from a law firm is that the former does not have as its sole object the provision of legal services but the provision of legal services as one of a number of other services, such as accounting, auditing, tax, management consultancy etc.. From its inception it is designed to provide a number of professional services, which include legal services. It is not yet clear whether there is the demand for such entities at the level of the consumer of legal services or whether there is a case to be made for them as providing more efficient and holistic approach to matters.

11.4.16 What is certain is that there are several issues that arise in these creations. The first such issue is one of regulatory reach. Whilst in this document proposals are being made for a better regulation of the legal profession, at least that of lawyers, with the creation of a completely new regulatory infrastructure aimed at regulating the profession – there is very little that the Chamber as regulator of the profession can do with respect to other professions – they are simply not within its jurisdiction and completely outside its reach. There is little if any doubt that before multi-disciplinary firms can take shape and be properly regulated in the manner that each of the independent professions should be – collaboration between regulators is a must. Even then issues will certainly arise as to which professional body ought to take the lead in regulating such firms.

11.4.17 The principal conceptual concern of the Chamber with multi-disciplinary firms is really those firms where the provision of legal services is not the predominant practice of that firm and worse still where the provision of legal services is just a marginal service to the wide array of services that could be provided by such a firm. In these situations practicing lawyers would find themselves in great difficulty to influence decisions that could well be motivated by reason other than the lawyer's standards of ethics and professional rules, crystallizing the issues of conflict to a greater degree. This concern is further compounded by the lack of transparency in the eyes of clients and the public generally as to whether the same rules and professional standards applied across the board with the firm or whether each part of the practice was in effect providing a service under different rules or guidelines. The legal privilege of confidentiality is probably the example that would best make the point.

11.4.18 Clearly one way of dealing with this is to ensure that the legal practice within the multi-disciplinary firm would be ring-fenced in a way that would be autonomous and independent from the rest, possibly a legal entity in its own right with only a sharing in profits and losses at the ownership level.

11.4.19 In the absence of full regulatory collaboration, it seems that ring-fencing the law practice would potentially be the only viable solution that would address the concerns already discussed in this paper with respect to the law firm.

11.4.20 This requires further discussion and the Chamber invites members to make submissions on these issues and to raise any concerns that they may have, apart from identifying any advantages that multi-disciplinary firms may provide within the context of a small market such as Malta. It is the Chamber's view that further study should be made on the desirability of the multi-disciplinary firm going forward – further research should be conducted with respect to whether there is any demand for such firms in the market and it would not be amiss if surveys with clients and constituted bodies were conducted to have more empirical data available that would enable the Chamber to take a firm view on the matter.

11.4.21 It is therefore in this light that the proposal of the Chamber is that the the proposed regulatory framework is a bold first step – and that it would be appropriate to first evaluate the impact of it on the profession as a whole and the manner in which this would affect the practice of law, and how the Chamber will evolve in its new regulatory and professional role, before any decision is made with respect to multi-disciplinary firms that would require a regulatory collaboration which is as yet unknown.

## 12. CONCLUSION

This consultative paper is aimed at first articulating the thoughts and views of the Chamber on the issues considered to be more relevant in the regulation of the profession and in creating a wider discussion on the need to regulate the profession in a manner that is conducive to meeting the challenges that practising law today inevitably creates. It is therefore in this spirit that the Chamber makes these proposals and it is in this light that the Chamber seeks the submissions of members so that the discussion on regulation of the profession can be conducted in an informed manner by all.