

## **The Economic Organisation of the Faculty of Advocates**

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**and**

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## **Introduction**

This Report summarises the results of an independent research project on the economic position of the Faculty of Advocates commissioned from the School of Law, The University of Manchester. The research was commissioned by the Dean and Faculty Officers to assist the Faculty in evaluating any proposed legislation on the organisation and regulation of legal services in Scotland following on from the *Report of the Research Working Group on the Legal Services Market in Scotland* (RWG) and in the light of the significant changes in the regulation and organisation of legal services in England & Wales contained in the Legal Services Bill then before the UK Parliament.

The research was carried out by Professor Frank H Stephen, Professor of Regulation, and Dr Angela L Melville, Lecturer, School of Law, University of Manchester. The analysis and conclusions reached are those of the research team. They have been arrived at independently of the Faculty and its Officers who are not bound by them. Under the contract for this research the researchers will be free to publish the research in due course.

The researchers are grateful to the Faculty Officers for providing the funding for this research and to the Officers and members of the Faculty and Advocates' Clerks and staff of Faculty Services who agreed to be interviewed on a confidential basis.

## **Purpose of the Research**

This research is designed to provide an economic analysis of the position of the Faculty in the market for legal services in Scotland and, in particular, whether the Faculty's rule against partnerships has an anti-competitive effect in that it restricts the business structures through which legal services may be provided. This restriction, along with others, was the subject of a 'super complaint' by *Which?* to the Office of Fair Trading under Section 11 of the Enterprise Act 2002. It was also subject to analysis by the Research Working Group on the Legal Service Market in Scotland (RWG, 2006, paragraphs 8.1 – 8.24). A preliminary economic analysis by one of the present authors (Frank H Stephen) is contained within the RWG's Report. This emphasised the importance of economies of scale, economies of scope, economies of specialisation and the benefits of risk spreading in evaluating the choice of business structure in which a legal professional might choose to practise were that choice not restricted by professional rules. In considering the putative choices open to an advocate in such circumstances it was argued that account had to be taken of the benefits in these respects which arose from the Faculty Library and from the operation of Faculty Services Ltd. The potential benefits from risk spreading and economies of scope arising from partnership would then have to be considered as would the benefits of specialisation (both in advocacy and in area of law) which might be available to a sole practitioner advocate. It was concluded that the magnitude of this trade-off was purely speculative in the absence of empirical evidence. It was further suggested that this might be an area where empirical research was needed (para. 8.18). The present project undertakes such research.

It was not envisaged that the present project would be able to identify precise quantitative magnitudes for each of the effects mentioned above, given the resources and time available for this project. It has been possible, however, to indicate the extent to which factors such as specialisation apply to the work of individual advocates of different levels of seniority. It has also been possible to explore the factors which led individuals to choose the bar as a career rather than qualifying as a solicitor. Of particular significance in this respect are the motivations of those advocates who have practised as solicitors prior to being called to the bar. These individuals are also in a position to indicate the costs which they incurred in

making this change. In addition financial information was provided by Faculty Services Ltd on the costs to advocates of providing the services of advocates' clerks etc.

The collation of this information, including the experiences of members of the Faculty, provides a firmer basis than has been available to independent researchers for evaluating the relative magnitude of the factors outlined above which would impact on the optimal choice of practise organisation for advocates.

### **Research Method**

The primary means of gathering the information has been by interview. Most of these were carried out at Parliament House. However, it was necessary to conduct some interviews by telephone. In total 28 interviews were carried out. These were not a random sample but structured in order to get an appropriate mix of Seniors, recent intrants, gender and age mixes and an appropriate number of advocates who had practised as solicitors before being called to the bar. The selection of interviewees was made by the research team and appointments arranged through the appropriate clerk. The sample of interviewees included 8 silks and 20 Juniors (including 8 who had been called since 2000). Nine interviewees were females and 19 male. Fourteen had previously practised as solicitors. In addition one Faculty Office Bearer was formally interviewed while others had brief discussions with one of the research team<sup>1</sup>. The Chief Executive of Faculty Services Ltd and 7 clerks were interviewed. One of the researchers also observed clerks carrying out their work as well as members of the Faculty in consultation with each other in Parliament House and the Library.

Members of the Faculty were informed by the Dean that the research was being carried out at the request of the Faculty Office Bearers. The interviews were semi-structured in format with the interviewer using topic guides (one for advocates and one for Clerks). The topic guides are included in Appendix I. With the interviewee's consent, each interview was recorded for later transcription.

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<sup>1</sup> It proved difficult to arrange more extensive interviews with more office bearers at the time the field work was being conducted.

## **Summary of Main Findings**

### **Growth of Size of Faculty**

- Membership of the Faculty of Advocates has grown significantly over the last 35 years. In 2006 it was 3.8 times that of 1973. The number of solicitors in Scotland holding practising certificates in 2006 was 2.8 times that in 1973.
- The ratio of solicitors in Scotland to advocates has fallen over this period from 30:1 to 21.5:1
- The relative increase in the number of advocates since 1973 was higher than that of the Bars of England & Wales and Ireland until 2003. However, by 2006 the relative growth of the Bar in Ireland significantly exceeded that in Scotland and in England & Wales.

### **Determinants of Practice Organisation**

- A legal practitioner's free choice of practice organisation will be influenced by economies of scale, economies of specialisation, risk spreading and economies of scope

#### **Specialisation**

- Advocates may benefit from economies of specialisation in court room advocacy and in area of law
- Areas of special interest indicated by advocates on their stable web pages suggest that about one-third of advocates have no area of specialisation. This is likely to be an underestimate of the degree of specialisation.
- Those indicating areas of special interest often indicate multiple areas. More than one-third of those indicating specialist areas identify five or more such areas.
- The most frequently cited areas of specialisation are criminal trials, commercial, professional negligence and personal injury. Each was named by just over 20% of advocates
- Those indicating criminal trials as a special interest indicate a smaller number of areas than those indicating commercial matters as a special interest
- Interviews with advocates suggest that whilst some have specialised practices there is a fear of being pigeon-holed
- A number of interviewees suggested that the size of the jurisdiction did not permit a high degree of specialisation

### **Risk Spreading**

- Advocates spread risks by avoiding being pigeon-holed and maintaining a reputation for reliability
- Vast majority of Intrants are now coming from the ranks of solicitors and thus are voluntarily giving up the risk sharing benefits of partnership

### **Economies of Scale**

- Many of the benefits of cost sharing and economies of scale of partnership are available to advocates through Faculty Services Ltd and through the other collective facilities of the Faculty

### **Redistributional Effects of Income-based Subscriptions**

- The method of paying for the clerking and billing services of FSL provides a small element of risk sharing as it is based on a percentage of income rather than the actual costs of clerking and billing. Thus those advocates working in areas with lower fee generating prospects bear a lower share of costs and those with lower amounts of work bear lower costs
- Data on the distribution of fee income across the whole Faculty suggests that this effect may be quite important
- Comparison of the average fee income and number of fee notes across stables also suggests a small degree of net income smoothing

### **Effect on Costs of Advocates' Partnerships**

- A significant number of small partnerships between advocates outside FSL could have the effect of increasing the costs of those who remain even if they increased the net incomes of those who formed the partnerships. This would depend on the minimum efficient scale of FSL (i.e. the number of transactions necessary to reach the minimum average cost).

### **Transfer between Branches of the Legal Profession in Scotland**

- The vast majority of Intrants to the bar in Scotland in recent years have previously practised as Solicitors in Scotland. This suggests that Intrants view the increased risks associated with independent practise at the bar to be compensated by benefits (such as increased specialisation and autonomy).
- The educational requirements for acceptance as a 'devil' are almost identical to those for a traineeship as a solicitor. This reduces the cost of transfer between the two branches of the legal profession in Scotland as compared to transfer between the two branches in England & Wales.
- The Faculty's prohibition on 'mixed doubles' acts as a barrier to the choice between practise as an advocate and practise as a solicitor-advocate being based solely on individual preferences on the balance between risk, specialisation and autonomy. Were this prohibition to be removed the prohibition on partnership would not be a significant impediment to competition between the branches of the legal profession in Scotland.

## Economic Organisation of Advocates

Advocates in Scotland provide court-based advocacy in the higher courts and opinions on complex legal matters outside the courts. These services are provided by advocates as self-employed sole practitioners. They are precluded from forming partnerships with each other or with any other person in respect of their professional practice as an advocate by paragraph 1.2.4 of *The Guide to Professional Conduct of an Advocate*. The Office of Fair Trading<sup>2</sup> (OFT) and others<sup>3</sup> have argued that this prohibition on partnerships is detrimental to competition in legal services and to the public interest. It is seen to restrict an advocate's choice over the organisational form under which these services are provided. Before turning to the analysis of this restriction on the business organisation of advocates we first describe some trends in the number of advocates over the last thirty or so years in order to place the subsequent analysis in context.

### *Number and growth of advocates*

There were some 460 practising member of the Faculty of Advocates in 2006. This compares with almost 10,000 solicitors in Scotland holding practising certificates. Table 1 shows the number of practitioners in the two professions at various times over the last thirty years. The number of advocates has grown from 121 in 1973 while the number of solicitors

**Table 1:**  
**Number of Advocates and Solicitors**  
**in Practice in Scotland**

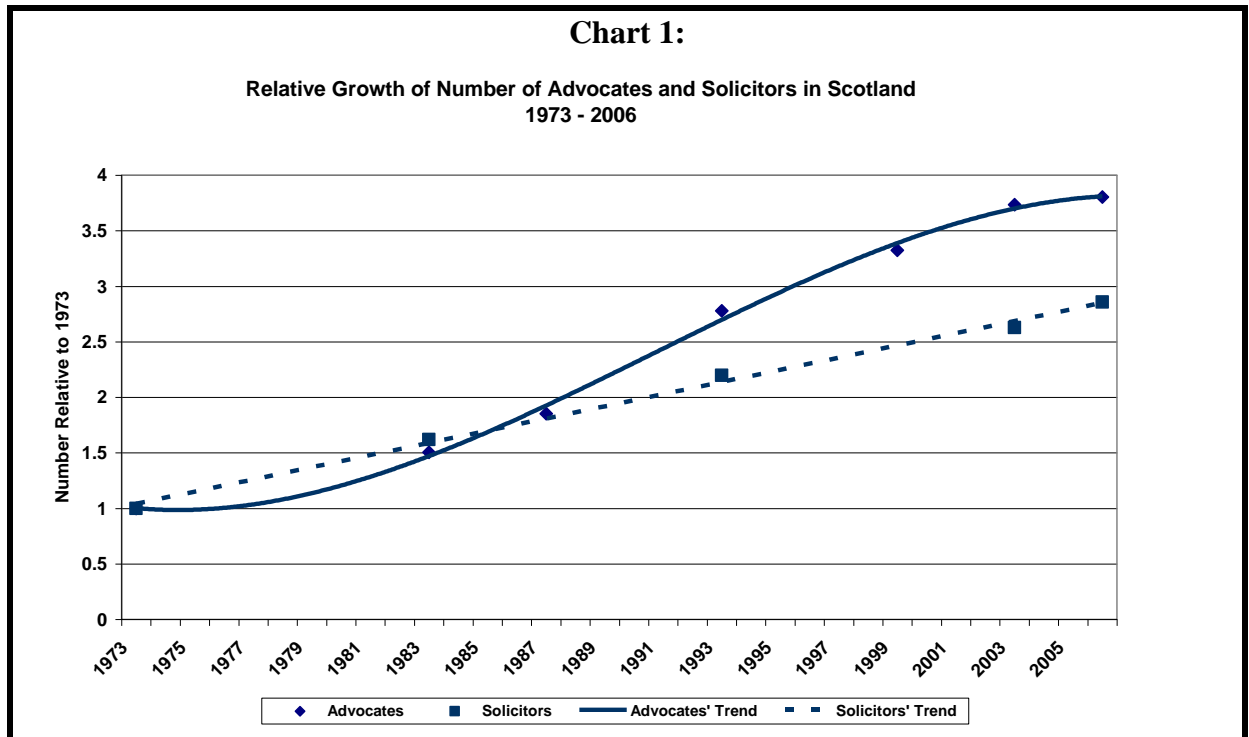
	1973	1983	1993	2003	2006
<b>Advocates</b>	121	182	336	452	460
<b>Solicitors</b>	3472	5620	7629	9120	9919

has grown from 3,472. Chart 1 illustrates the relative growth of the two branches of the legal profession in Scotland over the three intervening decades relative to the number in 1973. As the chart shows the number of advocates has grown more rapidly than the number of solicitors from the 1980's. The number of advocates in 2006 was 3.8 times that in 1973 while the number of solicitors in Scotland had only risen by just over 2.8 fold.

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<sup>2</sup> Report of Research Working Group on Legal Services in Scotland (2006), p. 88

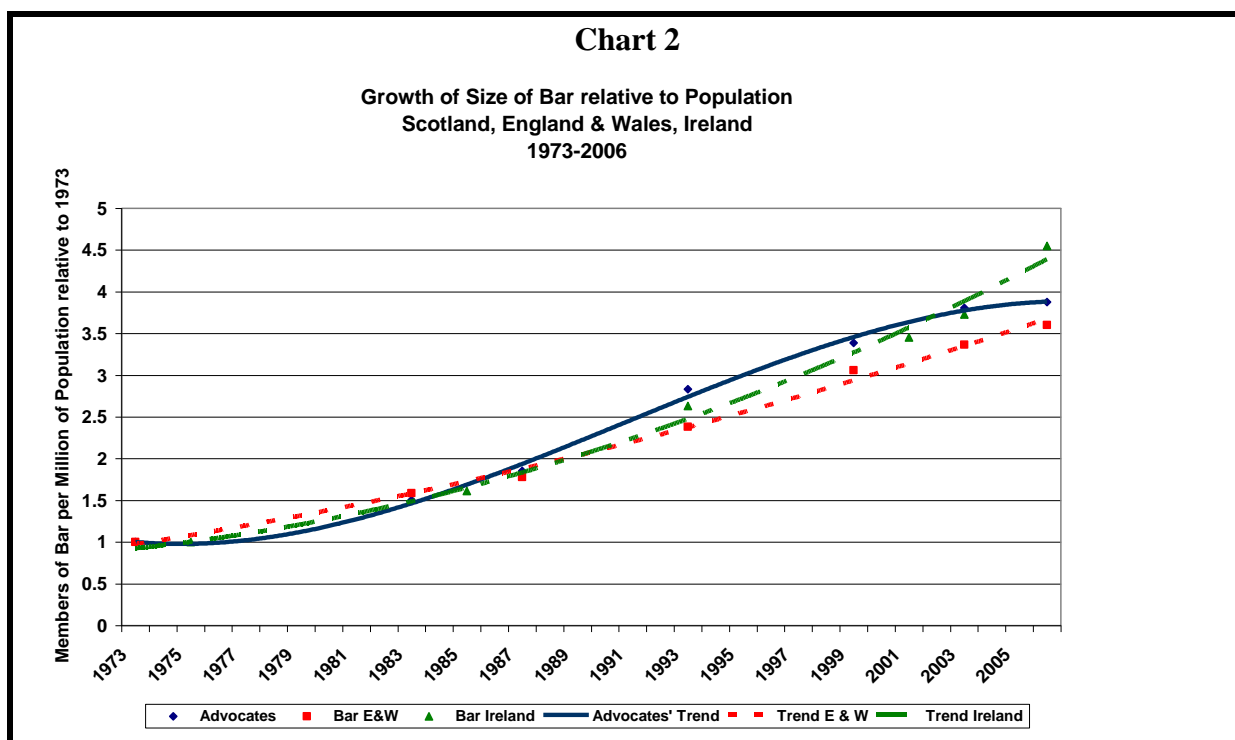
<sup>3</sup> e.g. *Which?* in its 'super complaint'.



The trend growth in the number of solicitors has been a steady 5.8% of the number in 1973 per annum. The trend growth in the number of advocates has been less smooth as shown by the non-linear trend line in Chart 1. The relative growth in the number of advocates was much greater between 1983 and 2003 (at over 11% of the number in 1973) than that for solicitors. Growth in the number of advocates has slowed down since 2003.

The growth in the number of advocates between 1973 and 2006 is compared to that of the Bar in England & Wales and in Ireland in Chart 2<sup>4</sup>. Given the differences in the populations of the three jurisdictions what is compared here is the size of the bar relative to population (i.e. members of the bar per million of population). As the chart illustrates over the period the relative growth of the Scottish Bar has been greater than that of England & Wales (8.7% of the 1973 figure per annum as compared to 7.9%). However, the growth of the bar in the Republic of Ireland was greater (11.5%), once adjustment is made for changes in population. The Scottish Bar's relative growth to 2003 was in fact greater than that for Ireland (9.4% of the 1973 figure per annum as compared to 8.8%). However, the Irish Bar's growth has been increasing over the period studied. The absolute size of the Irish Bar rose between 2003 and 2006 by 22%. The comparable increase for Scotland was 1.8% and for England & Wales 7%.

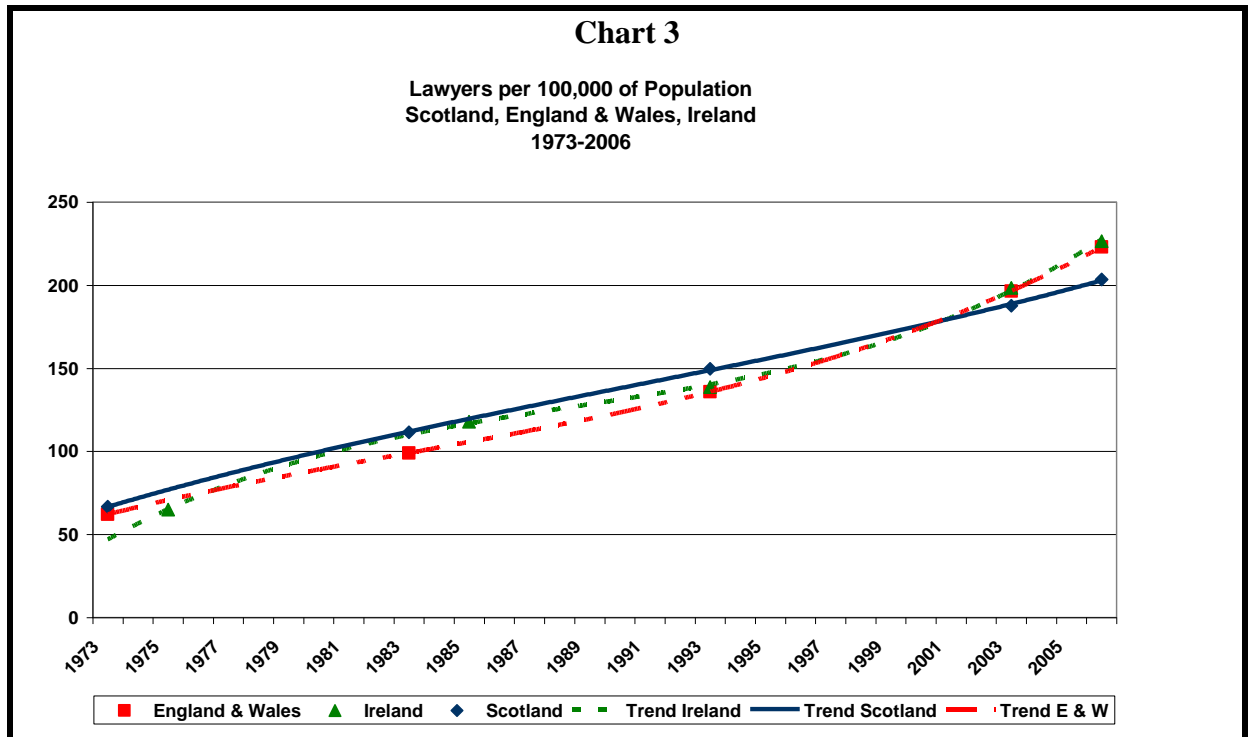
<sup>4</sup> The relevant populations are taken as at the preceding census i.e. 1971, 1981, 1991 and 2001. The number of barristers in Ireland for the earlier years was extracted from INDECON, *INDECON's Assessment of Restrictions in the Supply of Professional Services*, Report prepared for the Competition Authority, Dublin, 2003 whilst for more recent years the data was supplied by Bar Council of Ireland. The base year for Ireland is 1975 rather than 1973. The figure for barristers in England & Wales has been obtained from the General Council of the Bar. Scottish figures have been supplied by the Faculty.



It should be noted that the number of barristers relative to population in England & Wales and in the Republic of Ireland is higher than the number of advocates relative to population in Scotland. This may in part be attributable to historic differences in the rights of audience of the different branches of the legal profession in the different jurisdictions. Solicitors in Scotland have traditionally had more extensive rights of audience in the courts than their counterparts in England & Wales. On the other hand, solicitors in Ireland have formally had the same rights of audience as barristers since 1971 but the ratio of barristers to solicitors has been about 1:4.5 over this period. However, the INDECON (2003) report for the Irish Competition Authority states (at paragraph 5.6) that few solicitors plead in the High Court or the Supreme Court.

The ratio of barristers to solicitors in England & Wales has fluctuated around 1:8 over the last 30 years. In 2006 it was almost exactly the same as in 1973 (8.7) having risen since 1993 (7.9). The ratio of advocates to solicitors in Scotland over the same period has fallen from around 1:30 in 1983 to 1:21.5 in 2006. That in Ireland has fallen from 1:5.1 to 1:4.3 between 1973 and 2006.

Notwithstanding the differences across the three jurisdictions in the sizes of the two branches of the legal profession, the number of lawyers (solicitors and barristers/advocates) in practice relative to population was broadly the same in all three jurisdictions in 2003 as illustrated in Chart 3. From 1973 to 2003 the number of lawyers relative to population had been higher in Scotland than in England & Wales and for most of the period had been higher than in Ireland. The number of lawyers in Scotland per 100,000 of population had risen to just over 200 by 2006, whilst that in England & Wales had continued to rise to 223 and that in Ireland to 226.



The rise in the legal profession in Scotland has been much smoother than that in either England & Wales or in Ireland. Thus although the numbers in the other two jurisdictions have grown more rapidly over the last three years than in Scotland, past experience suggests that there is likely to be a slow down in future in the other two jurisdictions. The growth of the number of lawyers in Scotland is, of course, dominated by the growth in the number of solicitors since the bar is less than 5% of the number of lawyers. As Table 1 and Chart 1 illustrate, the solicitors' profession has grown more slowly than the bar since 1983.

The rise in the number of advocates has been accompanied by a rise in the fee income generated by members of the Faculty. Data supplied to the researchers by FSL shows the growth in the Fees collected over the last decade. This is summarised in Table 2.

**Table 2**

YEAR	NO. OF SUBSCRIBERS	FSL COMMISSION	FEES COLLECTED*	FEES COLLECTED PER SUBSCRIBER
1996/97	376	8.00%	£34,378,847	£91,433
1997/98	380	8.00%	£36,978,667	£97,312
2004/05	461	7.50%	£56,130,102	£121,757
2005/06	460	7.50%	£55,921,979	£117,570
2006/07	460	7.50%	£56,800,000	£123,478

Note: \* In 2006 prices

Not only has the real value of fees collected by FSL increased between the mid 1990s and recent years but the average value of fees per subscriber has risen. The commission charged by FSL has fallen between the two decades.

#### *Factors influencing choice of business organisation*

The literature of economics has analysed the factors which influence the structure of business and other organisations when their owners are free from restrictions on their choice. The insights from this literature are used in this research to identify those factors which would be likely to influence the choice of organisation which advocates would make were they not restricted by the Faculty through *The Guide to Professional Conduct of an Advocate*. An outline of such an analysis was provided to the Research Working Group on the Legal Service Market in Scotland by Professor Frank H Stephen and incorporated in the Report of the Group. In the present context the issue crystallises as to the choice between sole practise and practise in a multi-lawyer organisation such as a partnership. The factors which would be likely to influence this choice include whether economies of scale, economies of scope and economies of specialisation may be captured by a multi-lawyer form of organisation together with a capacity to spread risks.

In his submission to the RSWG on this matter Frank Stephen argued that:

Every introductory textbook in economics lists sources of *economies of scale*. Principal among these are those emanating from the more efficient use of capital and specialisation of labour. The former of these is doubtful in the case of legal services, at least where it is physical capital that is involved. The physical capital requirements of legal services are quite small and are likely to involve limited economies of scale. Access to appropriate reference works and case reports may be the exception here. Legal services are essentially human (rather than physical) capital intensive.

Provision of legal services through a group practice organisational form allows *specialisation* of lawyers in particular areas of law, with the consequence of lowering the cost of providing services. Multi-lawyer firms will also benefit from economies of scale in the use of non-lawyer support staff who themselves may also become more specialised (and thus efficient). Practices of lawyers with different specialties have the further benefit of *risk spreading*. Different specialisations may face different business cycles and thus fluctuations in specialist income may be smoothed across the group of specialists. The absence of risk spreading may lead to a higher fee being charged for each case. Furthermore, *economies of scope* may exist when a client has a range of legal service needs which can be serviced by specialists within the firm or when a legal problem has dimensions involving a range of specialisms. Economies of scope mean that the services required by an individual client may be provided at a lower cost in a single firm than by separate specialist firms. Economies of scope are available to the sole practitioner but in the multi-lawyer firm they are combined with economies of specialisation. The more complex the issues the more likely that specialists will dominate because the benefits of economies of specialisation outweigh the economies of scope to the sole practitioner. Lower costs associated with economies of scale, economies of scope and the benefits of risk sharing in the multi-lawyer firm are likely to lead to multi-lawyer firms dominating where they are permitted and there is unimpeded competition between organisational forms.

The present research is a first attempt to assess whether this argument is valid with respect to advocacy services in Scotland. This assessment is achieved by an examination of the current practices of advocates in Scotland who while independent practitioners have the opportunity, through access to the Faculty Library and by subscribing to Faculty Services Limited, to obtain some of the advantages of multi-lawyer practice while retaining the incentive effects of sole practice. In assessing these factors we have drawn on publicly available information on advocates' practices available from the Faculty's web site, financial data on the aggregate incomes of stables of advocates provided to us by Faculty Services Limited, the incomes

derived by advocates with criminal defence practices published by the Scottish Legal Aid Board and interviews with individual members of the Faculty, their Clerks and Faculty Officers.

### *(1) Specialisation of Advocates*

Advocates may benefit from specialisation in two ways: in court room advocacy; in specific areas of the law. It is reasonable to suppose that successful lawyers whose practice is predominately in court advocacy will acquire superior skills in that area over those who spend only a small part of their practise carrying out such work. Interviews with advocates suggest that they are acutely aware that the development of their practice depends on how solicitors assess their performance. Furthermore many of our interviewees who had previously practised as solicitors commented that it was the increased opportunity to appear in court which attracted them to the bar. The implication being that even as a litigation solicitor there was insufficient opportunity to practise advocacy skills. In a partnership of advocates there would be less time available to the extent that advocate partners devoted time to managing the partnership. The greater the number of partners the more likely this management function could be carried out by employees of the partnership and the more time advocates would be able to devote to advocacy but see the discussion of economies of scale below.

Skill levels and thus economies are also likely to be improved through specialisation in area of law. However, the small size of the jurisdiction imposes a limit on the degree of specialisation. Information on the degree of specialisation of advocates was obtained from the web pages maintained by the stables. These indicate areas of 'special interest' to individual advocates. About one third of advocates do not indicate any area of special interest<sup>5</sup>. The remaining two thirds of advocates indicate a wide range of 'special interests' and many indicate a number of them.<sup>6</sup> The distribution of number of areas of specialisation are summarised in Chart 4.

Of those advocates listing areas of special interest more than a third indicated five or more areas. The most frequently cited areas of special interest each draw just over 20% of all advocates and include criminal trials, commercial, professional negligence and personal injury. The split between criminal trials and civil matters is not totally complete but those indicating criminal trials as an area of special interest, on the whole, have fewer other areas of interest. More than 50% of criminal trial specialists indicate three or fewer areas of special interest. Indeed, 40% of criminal trial specialists cite criminal appeals as a second area of special interest and around one third cite fatal accident inquiries. On the other hand, of those indicating commercial law as an area of special interest only 26% had three or fewer areas of special interest. On the whole it would appear that the criminal bar is relatively more specialised than the civil bar.

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<sup>5</sup> However, it should be noted that among those not listing any area of special interest are around half of the 10 highest earners from criminal legal aid who might be regarded as criminal trial specialists.

<sup>6</sup> One advocate lists twelve areas of special interest.

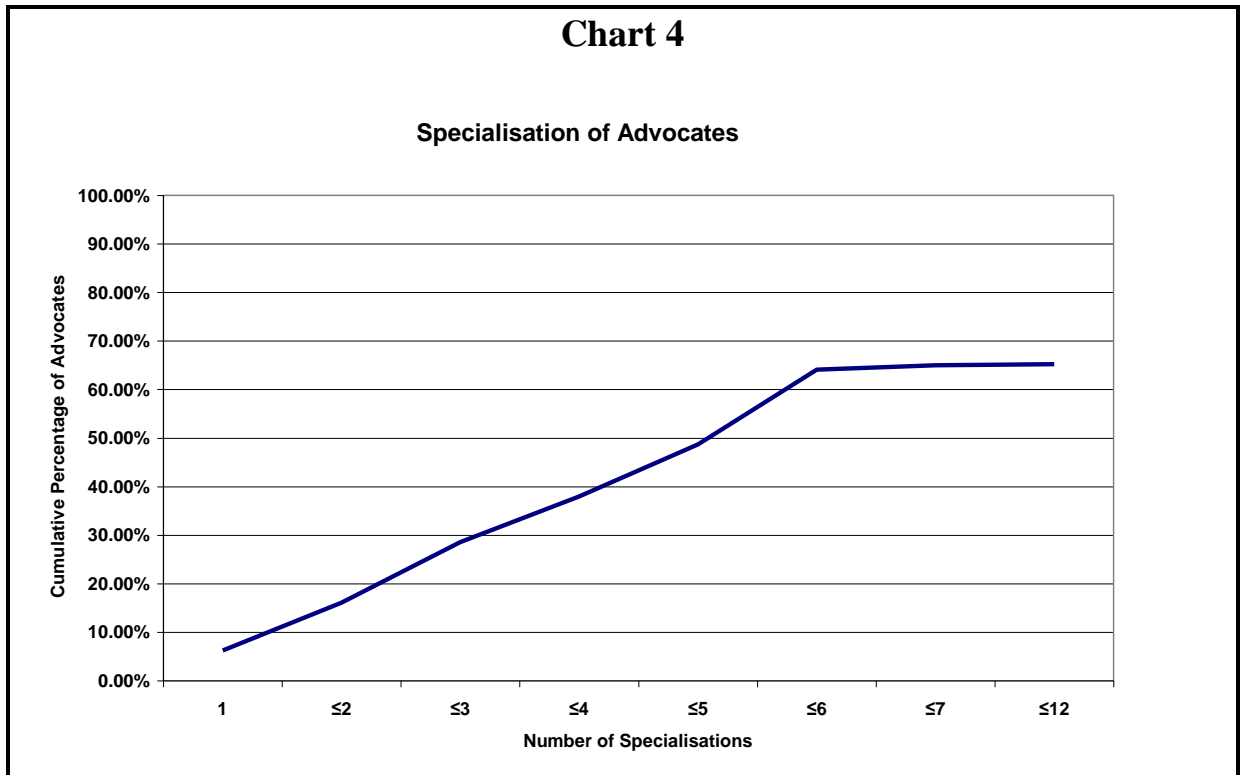
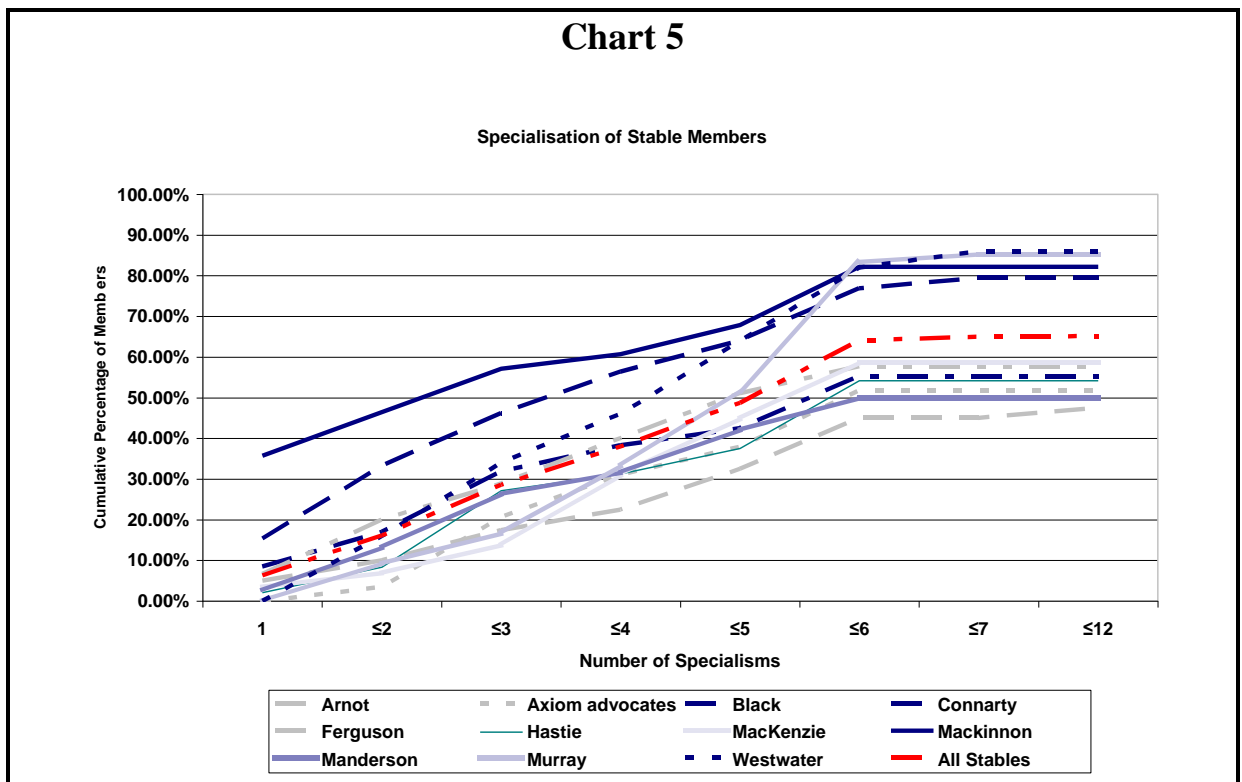


Chart 5 summarises the degree of specialisation across stables in terms of percentage of members of each stable with different numbers of areas of special interest. The two most specialised stables on this evaluation are predominately criminal stables. In each of these more than 50% of the members have three or fewer areas of special interest.



The listing of interests of members of the Faculty, of course, does not reveal the relative amount of time spent on each area of the law by each advocate. However, the interviews with members of the Faculty and Clerks provide further insight on this matter. A theme running through a number of the interviews was the need to avoid being 'pigeon-holed'. Whilst this was in some views related to a desire to avoid largely routine work it was more often seen as necessary in order to maintain a steady flow of work (i.e. risk spreading) from a range of solicitors. As one interviewee stated:

I am not very specialised. The Scottish bar as a whole is not very specialised. There are areas that I don't do, criminal law, family, planning tribunals. I won't do these but I will cover the remaining areas of civil litigation. There are only a handful of very specialised advocates in Scotland. The limits on specialisation are due to: 1) it is a small centre. There is not enough specialised work to keep you busy, 2) it is a small bar, and there are demands on you to do all sorts of work. Solicitors want advocates that they know. They want a limited number of advocates, who they know and trust. Contacts are important.

Another interviewee who did mainly civil litigation also argued that less specialisation arose from the limited size of the market. He/she did not wish to be pigeon-holed and did some legally-aided family law work which was remunerative. There was also the need to ensure that solicitors who made direct approaches were kept happy even if a particular case was not attractive because the solicitor could be a source of future work. One interviewee simply stated 'In Scotland, advocates tend to be more generalists.' This was also emphasised by one of the Clerks who was interviewed.

The previous experience of advocates as solicitors was seen by some interviewees as a key determinant of specialisation. Some interviewees used their own career to exemplify this. Others made more general observations:

People's work comes from people they know. So from the people of my year, if I look around, I see, for example, one person who does very little other than family work, as she specialised in that when she was a solicitor for a couple of years after qualifying as a solicitor. And somebody else, who has decades, a couple decades, of experience as a commercial solicitor, and does very little but commercial work. And someone who has been a solicitor for 10 or 15 years in crime, and only does crime. So if one has acquired a specialism already, one will be known in that field, and so one will start a specialised practice.

Others argued that specialisation should be seen as in very broad areas, often referred to as niches:

I mainly do commercial litigation, within that, I do property litigation, commercial property litigation. It isn't really a specialisation, more one niche among several. You build up a body of knowledge. I do partnership litigation, which is also a niche field.

Another interviewee also talked in similar terms:

I am quite specialised. I only do personal injury and professional negligence work. They are broad fields and so technically I am not that specialised, but I meant broadly. If I was asked to do a criminal case I would probably say that it was outside my expertise..... I think about expertise in blocks, like matrimonial work, commercial, personal injury. I have done many accident cases, accident claims don't cause me any problems. Mostly I do pursuers medical negligence. I find it difficult and challenging work. We all have a rough idea of what type of work people do, but we have our own areas, expertise in which we specialise.

The interviews on the whole do not suggest a high degree of specialisation by area of law but rather more broad groups of areas or niches. To some extent it is specialisation in advocacy that dominates. However, specialisation by area of law would appear to be more likely where an advocate has come to the bar after a significant period of practise as a solicitor.

## *(2) Risk Spreading*

Running counter to the benefits of specialisation is the need for many advocates to maintain a steady income when demand in specialist areas may fluctuate over time. Not being specialised spreads risk. As reported above some advocates talked about not being pigeon-holed and others about the Bar in Scotland being too small for a high degree of specialisation. Clerks indicate that much work which came into their stables was for named advocates but some work is 'blank work' and is usually

....just for small appearances, something that might just come to the court in the morning, something done by orders, anyone could do it, but it has to be done by an advocate. New calls have access to this type of work which they can cut their teeth on. You also need to make sure that they have contacts with agents. If they have devilled with someone, then the agent might have got to know them and might ask for them. Some will already have a reputation as an experienced solicitor.

Both clerks and advocates stressed the sense of insecurity felt by advocates if their workload became light. All advocates, regardless of experience, said that they get nervous when the work is light for a month.

You get very, very, very nervous when the diary starts to look empty. When they start to not get as many instructions as a few months ago. But it is a feast and famine sort of job. Any of them who have been here for any length of time knows that. One month you can be looking at a diary which is virtually empty, then next month you have so much work you don't know what to do with it.

When asked if clerks helped advocates during times of light workloads, they replied that they would pass-on work to an advocate who had free time in their diary, but only if that advocate "could do the work". Some clerks admitted that they are also mindful that they do not recommend an advocate who will potentially damage the clerk's reputation. The clerk's reputation is determined by whether the solicitor was satisfied with the service provided by an advocate that they recommended, and so they are very reluctant to recommend an "unreliable" and "non-credible" advocate. Unreliable advocates were described as those that did not complete work on time. Also clerks were reluctant to recommend an advocate if they were unfamiliar with their work – ie a newly called advocate. They would pass-on some minor cases, but generally do not provide newly called advocates with much of a hand to develop their referral base. There has been a tradition among clerks to 'pass-on' work outside their stable. However, the recent moves towards devolution of stables is influencing attitudes of clerks:

On the other side, if we don't have the expertise then we are always willing to refer them to another stable. We have always done that. But that is now changing. Some stables are not so keen to refer out, they are not as outward looking. They are starting to keep work within their stables. It is important to us that we are the first port of call, that they come to us first, and 90% of the work we keep within the stable, but after that we will refer out to another stable.

Spreading the risk of income fluctuation is seen to be largely in the hands of individual advocates themselves through keeping a general element to their practice. Partnerships between advocates would not necessarily solve this problem unless they occurred across broad areas of specialisation. The increasing tendency of stables to become specialised (broadly speaking) suggests that this is unlikely. Furthermore, within large law firms there is always a tension between partners with different income generating capacities on whether partnership income should be based on a seniority principle or according to income generation<sup>7</sup>.

Whilst it is commonplace for those, such as the OFT, who support the introduction of partnerships among advocates to argue that partnership would allow greater risk spreading among advocates, not so much recognition is given to the fact that the overwhelming majority of Intrants to the Faculty in recent years have come from the ranks of the solicitors profession. Of the three most recent intakes 86% were on the solicitors roll.<sup>8</sup> These are frequently experienced solicitors, including partners, who are voluntarily foregoing the benefits of risk sharing to become advocates. The risk in becoming an advocate is somewhat mitigated by the reputation and contacts which the Intrans have built up as a solicitor. Indeed, of the 2007 intake only one out of seventeen Intrants was not on the solicitors' roll. Many of them, especially partners, have built up savings which sustain them through their period as a devil and in the early period of practise as an advocate. Interviews with advocates explored, *inter alia*, their motivation in coming to the Bar and their experience in trying to establish a practice.

A number of the interviewees who had been litigation solicitors suggested that they came to the bar in order to spend more time in court rather than 'managing litigation':

I came to the bar because it was an opportunity to appear in court more often. I was increasingly managing litigation rather than appearing in court. It was all management and no law.

Another expressed the matter more forcefully:

...I finally made the decision in light of practical experience, when I was a litigating solicitor. It is easy to get seduced by the big firms, they offer you a big package, you can earn a lot, and then you have a mortgage, a family, it can be difficult to get out of that.... The problem with working in a large solicitor firm as a litigator, you become a manager. Most litigators cannot justify time away from their office, a whole day away, or a whole week, is not feasible. There is a tendency to push you towards taking a narrow range of case, which I didn't like. In Scotland, advocates tend to be more generalised. As a solicitor, there is a lack of control, even as a partner in a large practice. Solicitors, even partners, are glorified 'employees'.

This frustration with partnership in a solicitors' firm was repeated by others:

I always thought that I would go to the bar at some point because of the independence of it. But when I sort of got into working and became a partner, the money was quite good, I felt that the income and the security was more important and that is what kept me there. But luckily in the last couple of years of being a partner..... I found that being in partnership

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<sup>7</sup> The classic discussion of these issues can be found in R J Gilson and R H Mnookin, 'Sharing Among the Human Capitalists: An Economic Inquiry into Corporate Law Firms and How Partners Share Profits', *Stanford Law Review*, vol. 37, 1985, 313-392.

<sup>8</sup> Of the eight not on the solicitors' roll, three had been called to the Bar in England & Wales and one was an employed solicitor in England & Wales.

was, well, I will use the term restrictive, but not in the terms of restrictive practices. I mean that I did not have the freedom that I would have wanted. And by that I mean that internally there was a lot of differences of opinions. ... between the two offices. And actually, once I left the partnership, the two offices separated and became two different firms. ....I became frustrated with the fact, that although I was a partner (I was effectively running my own department) I was getting caught up in the politics of the two offices. And both had different approaches to things like marketing and fees and things like that, and whether or not legal aid was to be taken on. And that was another reason for going to the bar. About 50% of my workload was legal aid, and it was becoming less profitable and more intensive in terms of administration... both criminal and civil... The paperwork was becoming far too onerous for the level of remuneration. It wasn't actually so bad in criminal, it was civil that was the problem.

Another chose the bar because of frustration with the Procurator Fiscal Service:

Switched to the bar as didn't like the way in which Fiscal Service was losing its independence. It was in the early days, and now they have lost their independence with a vengeance...

The benefit of greater independence of the bar manifest itself in other ways:

I decided to go to the bar as essentially my kids had started school, and I thought about doing full-time work, and the fiscal service was appalling, it had got very bad. I wanted the independence of the bar. I wanted that distance from the client.

Similarly:

To be honest, it was because I had a baby and it was a very much more sensible working practice. I could take the whole summer off and take school holidays off. And okay, I'm not paid for that time, but time is really valuable if you have got kids, and I thought it would work out well. And it has in many ways worked out well with children.

Both the flexibility offered by the bar and the benefit of practicing as a solicitor before calling to the bar was highlighted by another interviewee:

I had wanted to go the bar post-qualifying, but I had young children so I decided to defer. I went to the bar because I didn't want to do just the easy work, like car accidents, accidents at work. I was bored with this stuff. You can do it in your sleep. I wanted to do something more difficult. It is good to do some easy work, but the more complicated work takes more time. I couldn't justify spending that amount of time on a case as a solicitor. I would not have been recovering my fees. At the bar, I can spend all day, I can make a decision to do that, even if I don't get paid, it is my decision, whereas with solicitors spending time on a case is a problem. Even the more experienced solicitors work as a team. The solicitors don't make money sitting in court. They make money from turning clients over. In more important cases, you can't have that mentality.

Another expressed this view quite simply:

At the time I felt like, I had always wanted to try at the bar. And the independence, and the ability to do more legal work, legal research perhaps rather than administrative work. ... It's quite a nice lifestyle in terms of independence...

Mixed views were expressed concerning the sacrifice of security for the more risky career of an advocate:

Well, I think the overriding factor was that this was clearly where I wanted to be. The others were largely questions of affordability and therefore a case of how much I would have after selling my flat. And I worked out that I would have enough to keep me going for a number of years, one year as a solicitor and one year devilling, and then 6 or 12 months before any fee earnings starting coming through. I suppose I had a safety net because I was a [previous occupation] so I could have gone back to that if I had to drop out at any point.

Another said:

It was a hard decision as I was a partner. I was established in a good firm. It wasn't difficult financially as I was an equity partner, so I got paid out. This provided me with 2 years income. So there was little pressure in that way.

One interviewee did not see the issue as a financial one:

The financial decision isn't that difficult. There is that 9 month non-earning period, when you are devilling, but the banks are understanding, and by that stage of your career you'll have savings. The major disincentive is not financial, it is the uncertainty of it you'll make it. It is ironic considering the context, the bar is the ultimate free market, if you don't work you don't eat, there are no barriers to competition, we are all competitors. And so people don't make it.

Having an asset to sell also makes a move to the bar more of a possibility:

To make the switch, I had saved money, which I could do as I had worked for so long. We sold the house in [...] and bought a smaller place here. And the money from the sale saw me through. I was lucky enough to get work right away. The criminal work started out slowly, but still it paid fairly quickly. I was living on savings, on capital.

Similarly, 'Well, I used to live in London, I moved up from there. I had a flat down there which I then sold.'

### *(3) Economies of Scale*

Partnerships, and other multi-lawyer forms of practice, have the potential to generate benefits from the sharing of the costs of support staff, premises and equipment. Whilst, as pointed out above, legal services is not a physical capital intensive service there will undoubtedly be some economies of scale to be gained from the sharing of support staff etc. What is not clear is at what size these economies of scale are exhausted for advocacy services. Furthermore, as has been pointed out<sup>9</sup>, it is wrong to compare the overheads of solicitors firms with those of barristers (or advocates) as they provide different services.

The OFT has on a number of occasions argued that group practice will bring economies of scale without providing any quantitative evidence as to their magnitude or at what size of partnership they might be exhausted. To the extent that such economies of scale are available to partnerships of advocates they are already available to advocates through the sharing of costs through Faculty Services Ltd and access to the Faculty Library and the Faculty's consultation facilities.

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<sup>9</sup> Stephen Davies, *The economic implications of partnership restrictions in the legal services sector and their possible removal*, paper prepared for the Lord Chancellor's Department, September 2005. Available at: <http://www.dca.gov.uk/legalsys/lrreform.htm>.

*(4) Sharing of Costs in the Faculty*

The basis on which subscribers pay for the services provided by Faculty Services Ltd and members of the Faculty pay for their membership constitutes a form of risk spreading. Faculty Services collects a commission from subscribers based on a percentage of the fees collected on behalf of the subscriber. Thus subscriptions from those advocates with low volumes of work will be lower than those with high volumes of work and subscriptions from advocates undertaking low fee work will be less than those undertaking high fee work. The wide variation on fee income across subscribers indicates a wide distribution of shares of the costs of operating FSL. This is illustrated in Table 3. In 2006/7 12% of subscribers had gross fee income of £250,000 or greater while 21% had gross fee income of £35,000 or less.

**Table 3**  
**Fee Income Distribution**  
**(in current prices)**

YEAR	UNDER £35,000		£35,000 - £99,999		£100,000-£249,999		OVER £250,000	
	NUMBER	%	NUMBER	%	NUMBER	%	NUMBER	%
1996/97	116	31%	183	49%	66	18%	11	3%
1997/98	110	29%	175	46%	83	22%	12	3%
2004/05	106	23%	144	31%	173	38%	38	8%
2005/06	105	23%	138	30%	176	38%	41	9%
2006/07	97	21%	137	30%	169	37%	57	12%

The variation in income of advocates is also illustrated by Table 4 which presents data on the fee income, number of fee notes and number of advocates for each of the multi-member stables for the most recent year. Average gross fee income per subscriber ranges from just below £71,200 to over £300,000. The number of fee notes per subscriber range from 47 to 157 and gross income per fee note from £663<sup>10</sup> to £2,095.

The two stables with the lowest income per subscriber are stables which comprise predominately criminal practitioners whilst that with the highest income per subscriber is a predominately commercial stable. It should be noted that within the two low earning stables there are a number of high earning members. The Scottish Legal Aid Board publishes annually the legal aid fees received by all advocates. The latest figures published by SLAB imply that the two or three highest earning advocates in these two stables earn around 22% of each stable's income. Thus the remaining subscribers will have average gross incomes significantly below that shown in the table. Similar considerations may also apply to other stables suggesting that many members of most stables will be earning significantly below the average for their stable. Variation in the average number of fee notes per subscriber only explains around 57% of the variation in the average income per subscriber across stables.

<sup>10</sup> This figure may be distorted because of a very large number of low value fee notes relating to one subscriber. The next lowest income per fee note is £1,234.

**Table 4**

	<b>Total Stable Income</b>	<b>Number of Fee Notes</b>	<b>Number of Advocates</b>	<b>Silks</b>	<b>Proportion of Silks</b>	<b>Gross Income per subscriber</b>
<b>STABLE A</b>	2776072	1643	39	8	0.205128	71181.34
<b>STABLE B</b>	2189279	1271	28	3	0.107143	78188.54
<b>STABLE C</b>	3401997	2726	38	5	0.131579	89526.24
<b>STABLE D</b>	3827844	2669	40	6	0.15	95696.10
<b>STABLE E</b>	4593675	6926	48	5	0.104167	95701.56
<b>STABLE F</b>	5185624	3487	47	11	0.234043	110332.42
<b>STABLE G</b>	6365371	5508	54	5	0.092593	117877.24
<b>STABLE H</b>	6428670	5210	50	10	0.2	128573.39
<b>STABLE I</b>	4838055	4551	29	7	0.241379	166829.47
<b>STABLE J</b>	7556544	4912	45	13	0.288889	167923.21
<b>STABLE K</b>	8774794	4189	29	8	0.275862	302579.11

Some statistical analysis of the factors which influence average fee incomes of stables has been conducted.<sup>11</sup> As mentioned above, at the extremes of income per subscriber there appears to be a difference based on the split between criminal and commercial work. Statistical analysis reveals that this effect is more complex than first might appear. The list of special areas of interest which appear on stable web pages have been used to calculate the proportion of members of each stable specialising in criminal trials and the proportion specialising in commercial matters. It is also possible in the statistical analysis to take account of the different levels of experience of members of each stable (measured by years since calling to the Bar) and the proportion of stable members who are silks.<sup>12</sup> Differences in area of specialisation across stables appear to have a statistically significant effect on the average number of fee notes of the stable. The higher the proportion of members of a stable specialising in criminal trials the lower is the average number of fee notes. A total of 85% of the variation in average number of fee notes per stable is explained by this factor together with the proportion of silks and the mean experience of the members. Almost 75% of the variation in average income per subscriber across stables is explained by the average number of fee notes, and the proportion of silks. When account is taken of the higher average income of members of Stable K the explanatory power of these variables increases to almost 90% of the variation in average gross fee income per subscriber.

Whilst it may be an oversimplification to suggest that the cost of providing clerking and billing services will be related to solely the number of fee notes (proxying the level of activity) this could be an alternative basis for distributing the costs of FSL across subscribers. The effect of using such a basis for defraying the costs of FSL has been

<sup>11</sup> Ideally, this should have been carried out for individual advocates rather than stables but considerations of confidentiality dictated that the researchers should only have access to data relating to stables.

<sup>12</sup> Whilst there is a strong correlation between experience and being a silk, these factors have discernable statistical effects. Whilst basing the statistical analysis on average figures for each stable reduces the amount of variation it has the advantage of removing random fluctuations as compared with comparisons of individual advocates.

calculated by the researchers. It reduces the average commission paid by one stable by 38% while almost doubling another.

The dues for membership of the Faculty comprise a small fixed component and a component related to the advocates fee income. An alternative means of defraying the Faculty's costs would be for them to be shared equally across all members. What such a level of fee would be has also been calculated. This would result in a reduction in the average dues paid for one stable of almost 60% and an increase for another of 75%.

Combining these two alternative means of funding the Faculty and FSL gives a minimum measure of the extent to which the costs to advocates are redistributed by relating them to income rather than to use of the services. The average cost to one stable would fall by 47% and another would rise by 68%. Given that using averages for stables dampens the variation it is likely that the differences will actually be greater at the level of the advocate. This redistribution of the costs of practise as an advocate can be interpreted as equivalent to a limited element of risk sharing across the Faculty.

This analysis of cost sharing across members of the Faculty suggests that the OFT's contention that permitting partnerships between advocates would enable economies of scale which are not available to independent practitioners to be captured is mistaken. Members of the Faculty already benefit from economies of scale through participation in FSL and access to the shared facilities of the Faculty. Whilst a partnership might provide risk sharing through income sharing this would depend on the rules used in partnerships to distribute income. Furthermore, there is already a degree of income sharing across Faculty members because the commission charged by Faculty Services Limited is proportional to an advocate's fees and Faculty dues are also determined in large part by an advocate's income.

### **Implications of the Rule against Partnership for Competition**

The discussion in the *Report of the Research Working Group on the Legal Services Market in Scotland* of the rule against partnership contained in paragraph 1.2.4 of *The Guide to Professional Conduct of an Advocate* suggests that *a priori* multi-lawyer practices might be expected to operate at lower cost than sole practise. However, the more detailed examination of these factors presented above suggests that a proper understanding of advocates' practices and the cost sharing arrangements of members of the Faculty weakens this argument. The revealed behaviour of members of the Faculty who have moved from practise as a solicitor to practise at the bar further undermines the previously presumed advantages of group practise. The vast majority of Intrants to the bar in Scotland in recent years have previously practised as Solicitors in Scotland. This suggests that Intrants view the increased risks associated with independent practise at the bar to be compensated by benefits (such as increased specialisation and autonomy). Prior practise as a solicitor allows a prospective advocate to build up expertise and reputation in particular areas of law which mitigates the risks associated with sole practise.

'Lawyers' with a preference for advocacy who wish to combine this with the income and cost sharing associated with group practice have the opportunity to practise as solicitor-advocates. The educational requirements for acceptance as a 'devil' are almost identical to those for a traineeship as a solicitor. This reduces the cost of transfer between the two branches of the legal profession in Scotland as compared to transfer between the two branches in England & Wales. Transfer in either direction is thus possible at a relatively low cost.

In principle the choice between practising as a solicitor or as a solicitor-advocate or as an advocate resolves to the individual's preferred trade-off between specialisation in court advocacy, litigation management, financial risk and personal autonomy. In practice, however, the Faculty's prohibition on mixed doubles gives advocates a competitive advantage over solicitor advocates.<sup>13</sup> Thus there remains an impediment to competition between the separate branches of the profession when it comes to advocacy. The analysis carried out above suggests that if this impediment were removed the choice of the branch of the profession in which to practise would be a matter of balancing greater risk against personal autonomy and opportunity for court room advocacy.

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<sup>13</sup> This rule prohibits a solicitor advocate appearing as a junior with a member of the Faculty acting as senior. It thus impedes the ability of a solicitor advocate to gain the experience derived from working with a senior counsel. See *Report of the Research Working Group on the Legal Services Market in Scotland* pp. 67-63.

## Appendix I

### Interview Topics for Advocates

- **Career trajectories**

When/why move into advocacy, barriers/incentives to move into advocacy, need for training/retraining, movement between solicitors/advocates, specialisation (substantive area of law, desired), costs and process of switching

- **Nature of advocacy**

Nature of the work (eg also advice work), how it differs from solicitor practice (restriction on mixed doubles), acquisition of skills, working in a relatively small, jurisdiction (rural areas)

- **Structure of advocacy**

Faculty Services Limited (if they were to leave what would they lose/gain, economies of scale), relationship with clerks, other services (library etc)

- **Relationship with clients**

Limits on direct access, referrals, distribution of cases within stables, advertising

- **Legal market**

How has the market changed over time, exposure to risk (eg fluctuations in income, legal aid cutbacks), risk spreading practices, limits of partnerships (would they change their practice if restrictions were lifted, rationale/effect of restrictions, cost sharing), perceived impact of solicitor advocates (according to area of law)

### Interview Topics for Clerks

- **Career trajectories**

- **Structure of stables**

Specialisations, relationship with rural areas, changes in recent years

- **Structure of advocacy**

Faculty Services Limited (if advocates were to leave what would they lose/gain, economies of scale), other services (library, administrative support etc)

- **Assigning clients**

How are clients assigned to advocates (specialisation, availability), risk sharing (fluctuations in income, stresses), relationship between clerks and clients, relationships between advocates and clients, advertising

- **Legal market**

How has the market changed over time, exposure to risk (eg fluctuations in income, legal aid cutbacks), risk spreading practices, limits of partnerships (would advocates change their practice if restrictions were lifted, rationale/effect of restrictions, cost sharing), perceived impact of solicitor advocates (according to area of law)