Achieving a level playing field for the integrated multidisciplinary ABS

David Furst and Peter Scott

Next year, the first alternative business structures (ABSs) will come into being. Before that, the question of how they will be regulated must be resolved. If not, the regulators of a variety of professions may find themselves at odds with each other

In his final report of December 2004 (the Clementi report), Sir David Clementi discussed the future regulation of multidisciplinary practices (MDPs), which he described as 'practices which bring together lawyers and other professionals to provide legal and other services to third parties' and commented by way of example that:

'in the areas of consumer debt, inheritance planning or personal taxation, a combination of both legal and accounting skills could be a valuable asset for the client. Research carried out by MORI suggests that there is some consumer interest in the convenience and accessibility of one stop shopping.'

Benefits may also arise for corporate clients in areas such as mergers and acquisitions, recovery situations, taxation, and both domestic and international and property issues.

The Clementi report considered that the most fundamental issue with MDPs was that of regulatory reach:

'how could a legal services regulator exercise power over people who were not lawyers, were offering clients a different professional service and who might have different codes of practice in areas such as client handling?'

It was also recognised that there would be an extra layer of complexity to regulation if there were two or more professions represented in an MDP, and none had a majority.

This article discusses such a multidisciplinary ABS model, where the delivery of legal services is not ring-fenced from other models and which is likely to attract a great deal of attention from various groups of professionals — including lawyers, accountants, independent financial advisers, surveyors and estate agents — who can see the obvious synergies of working together as well as the sharing of overheads.

However, if the laudable aspirations set out in the Clementi report, which had the interests of the consumer firmly in mind, are to be achieved, then a number of fundamental issues will first need to be satisfactorily resolved if a sensible regulatory framework is to be provided to enable groups of different professionals to work together in an integrated business model.

The Solicitors Regulation Authority (SRA), in its recent consultative document, said that MDPs raise a number of challenges, particularly in relation to the extent of its own jurisdiction and, therefore, how its requirements will apply to MDPs, as well as questions around the SRA's and MDPs' relationships with other regulators.

On the same theme (in its consultation paper 18 of 2 September 2009), the SRA said that:

'the multidisciplinary model, where the delivery of legal services is not ring-fenced from other models . . . will require our regulation to be adapted to a "services" model rather than an "entity" model in some areas. There are existing models for this within other regulatory systems from which we can learn.'

The SRA has now said that its jurisdiction should be limited to reserved legal activities, non-reserved legal activities (such as legal advice) and even some (what it calls) 'non-legal activities'. It is far from clear what 'non-reserved legal activities' comprise. Arguably, taxation work and compliance with company law is a legal activity, much of which is carried out by accountants rather than lawyers. Equally, much work carried out by lawyers is not of a legal nature but could be better described as business or other types of advice. Perhaps, with this in mind, rather than adapting its regulation to a 'services' model, the SRA proposes that:

'The fact that the SRA's jurisdiction will not necessarily apply to all the activities of an ABS takes nothing away from our power to regulate the entity as a whole and to have regard to the manner in which the firm as a whole is being governed.'

The potential for conflicts between regulatory regimes is a serious risk

This follows from the position that since 2009 there has been 'entity regulation' for all existing law firms, based on licensing the practising vehicle itself and where the SRA's full regulatory and disciplinary powers apply to everyone in the firm including non-lawyer managers and employees. In its response to the Legal Services Board's discussion paper 'Wider access, better value, strong protection', the SRA said that '[entity regulation] will be an equally important aspect of our approach to ABS regulation'. Accordingly, the SRA now intends to apply entity regulation to integrated multidisciplinary ABSs, even where lawyers are in a minority and where, on any basis, the SRA is not competent to regulate and discipline the other professionals.

In such a scenario, it is possible, for example, that a group of accountants, who form the majority of an integrated multidisciplinary ABS and who are fully compliant with the rules of their own regulator (the Institute of Chartered Accountants in England and Wales (ICAEW)), could at the same time be in breach of the SRA Code and disciplined by the SRA. The potential for such conflicts between regulatory regimes is a serious risk.

At the time of writing, only the SRA has applied to be a licensing authority. It could be that others will emerge, possibly from other professions, to cater for situations where lawyers are in the minority. This will not in itself solve the problem, but may reverse the challenge. The regulatory regimes of each

profession, while generally seeking to protect the public interest, have developed to deal with different pressures and problems and so have discernible differences. These differences are likely to become even greater when the basis of regulation of law firms changes to outcomes-focused regulation, which is fundamentally different to the approach adopted by some other professions, such as accountancy and surveying, which are rules based.

There are other serious hurdles to be overcome if the integrated multidisciplinary ABS is to be able to attract professionals of quality in sufficient numbers to become a widely used vehicle providing consumers with the best value-for-money services available, as originally envisaged by the Clementi report.

Legal professional privilege is unique and regarded as a cornerstone of the lawyer–client relationship

The idea of an integrated MDP is that there will be different professionals working together on matters for clients, rather than each group being ring-fenced. How will questions of liability for negligence be dealt with, given that professional duties of care differ between professions? And each profession has its own rules regarding mandatory professional indemnity insurance. Will the existing SRA rules for law firms regarding professional indemnity insurance and approved insurers apply to MDPs, including those where only a minority are lawyers?

The Clementi report also recognised that the issue of legal professional privilege could be an inhibitor to the development of MDPs. Currently, legal professional privilege is virtually unique to the legal profession and is regarded as a cornerstone of the lawyer–client relationship, to a greater degree than in comparable professions. The recent hearing of the *Prudential* case in the Court of Appeal may change that. As things stand, in an MDP there is likely to be a lack of clarity for its clients as to whether legal professional privilege applies only in respect of legal matters discussed with a lawyer, or to all matters dealt with by the MDP. Non-legal professionals may not be covered by these same rules. Ring-fencing the legal practice, while dealing with the privilege issue, will not necessarily achieve the benefits that different professionals working together as a team in an integrated business are likely to achieve.

A final area is the question of compliance. If the supervision of the SRA were all-inclusive, then logically the Legal Ombudsman would handle all complaints. This would oust the jurisdiction of current regulators, such as the ICAEW, Royal Institution of Chartered Surveyors, and the Institute of Actuaries, and inadvertently concentrate complaints against several professions in the hands of one regulator, ousting bodies such as the Financial Regulatory Council.

The SRA has established a working group to address issues relating to MDPs in order to look at options to harmonise regulatory requirements and to develop a memorandum of understanding between regulators detailing how they will work together to regulate such firms. There would appear to be a mountain to climb before that can happen and the potential stumbling block would seem to be insistence by the SRA that it will regulate the entity and everyone in the MDP, notwithstanding that its jurisdiction will not necessarily apply to all the activities of the organisation.

An alternative approach – to have a lead regulator for, say, the majority profession within the MDP, with arrangements in place as to how regulators of minority professions are to operate – might be a more workable solution. It will clearly be important to ensure that nothing falls into a gap between regulators. Equally, if there is significant regulatory overlap, the attraction of running an MDP is negligible. It is essential that a framework is agreed so that prospective MDPs can assess the regime under which they will be regulated in good time to enable them to make a decision as to whether they wish to become an MDP in October 2011.

Unless these issues are quickly resolved, the opportunity to create a new and effective alternative business structure for the benefit of both consumers and the professionals involved will be irretrievably lost and Sir David's vision will not become a reality.

David Furst *is chair of Horwath Clark Whitehill and past president of the ICAEW.* **Peter Scott** *is a former managing partner of Eversheds' London and European offices and now runs his own professional consulting practice.*