

REGULATION AND BUSINESS STRUCTURES IN THE SCOTTISH LEGAL PROFESSION

Scottish Government Policy Statement on OFT Response to Which? Super-Complaint

Background

1. On 8th May 2007, the consumer organisation ‘Which?’ submitted a super-complaint to the Office of Fair Trading (OFT), under the provisions of s11 of the Enterprise Act 2002. The super-complaint asserted that restrictions imposed on providers of legal services harmed the interests of consumers, and also submitted that the regulatory structure for legal services should be reformed, with the creation of a new oversight regulator – the Scottish Legal Services Board.
2. The OFT published its response on 31 July 2007. That response did not set out a final view as to whether the introduction of an oversight regulator would be the most appropriate regulatory arrangement for Scotland, and suggested that regulatory arrangements for legal services in Scotland should be given further consideration by the Scottish Government. The response set out the OFT’s view that, in general, the restrictions on business structures set out in the super-complaint were unjustified, and asked that
 - the Scottish Government set out its own views on how it proposes to take these issues forward
 - the Law Society of Scotland and the Faculty of Advocates should carry out wide-ranging reviews of their respective rules and make significant and transparent progress towards lifting the restrictions.
3. In particular, the OFT recommended that by the end of 2007, the Scottish Government should publish a statement which details its policy views on
 - how it considers legal services should be regulated
 - how the restrictions outlined in the super-complaint should be lifted
 - a timing commitment for these aims.

4. This policy statement addresses these points and sets out the basis upon which the Government is working with the legal profession and other interests to take forward wide-ranging reforms to the regulation and structure of the legal profession.

The Scottish Government's approach to legal services

5. The Government regards a strong and independent legal profession as fundamental to the institutional and civic framework of the Scottish nation. Alongside the Church and the education system, the Scottish legal system formed one of the pillars of Scottish identity over 300 years of an incorporating union.
6. We do not accept the argument put forward by 'Which?' that the present structure of the legal services market in England and Wales is very similar to the Scottish legal services market¹, and we welcome the OFT's conclusion that the Scottish market is different, and that it is important to develop an appropriate Scottish solution².
7. The Scottish legal services market is simpler with, essentially, only two significant providers of regulated legal services – solicitors and advocates. The scale is hugely different (e.g. around 460 advocates against 15,000 barristers. This has major implications for developing a proportionate and efficient regulatory regime. Scotland's geography and demography is different, with fewer large metropolitan areas, and a large number of small towns and remote rural areas, with implications for access to justice.
8. There are significant issues of access to justice and competition for legal services in Scotland. These are most acute in relation to areas of law which receive significant public funding, such as family law, welfare, debt and housing law³, rather than those which are more driven by consumer and market demand. This does not of itself negate arguments for alternative business structures, but does impact on the balance of risk and benefit in liberalising the legal service market, and on the policy priorities of the Government.

¹ Which? Super-complaint, page 2, para 2

² [oft response to the Which? super-complaint, para 2.1](#)

³ [Report by the Research Working Group on the Legal Services Market in Scotland, Scottish Executive, Edinburgh, 2006, Chapter 3](#)

9. That said, the Government recognises that a range of factors, including increasing specialisation and commoditisation in the legal services market, and pressure from within the profession to be allowed to develop new forms of service provision, mean that change is necessary to the framework within which legal services are delivered.
10. The Justice Secretary has set out the key features the Government seeks to promote in taking forward reform. The overarching aim is *access for all to high quality legal services, within a competitive market which is appropriately regulated* to ensure the public is protected and quality is maintained.
11. Within the overarching aim, the following issues are particularly important in the development of the Government's policy
 - we wish Scottish law firms to be able to compete internationally, and to make the Scottish legal system more attractive to major businesses
 - at the same time, regulation and business structures should support the availability of competitive legal services in local communities
 - we wish to retain an independent referral bar
 - we wish to protect the core values of the legal profession, in order to protect the interests of justice and of consumers.

How policy is being taken forward

12. The Government is, then, of the view that change is necessary, and believes that the legal profession should respond to that challenge rather than the Government impose change, at least in the first instance.
13. The Justice Secretary outlined this approach at a conference organised by the Law Society of Scotland on 28th September, and challenged the profession to take a lead in identifying how it can move forward, and how best to maintain the core values of the profession. In that speech, he confirmed the Government's view that the status quo is not an option, and that the profession needed to respond quickly and decisively to the challenges it faces.

14. The Scottish Parliament endorsed this approach in a [debate](#) on 15 November, when the Parliament unanimously agreed the following motion:

That the Parliament notes the Office of Fair Trading's response to the super-complaint by *Which?* on restrictions on business structures and direct access in the Scottish legal profession and the Law Society of Scotland's consultation on alternative business structures; believes that the regulatory and business structures of the Scottish legal profession should reflect Scottish circumstances and support improved access to high-quality legal services in a competitive and appropriately regulated market in accordance with competition law, and notes the Scottish Government's approach of working closely with the legal profession to secure reforms that will allow the Scottish legal profession to compete internationally while enhancing access to justice in local communities and considers that this approach should also widen choice, provide easier access to legal services and create the conditions for more affordable services so that social justice will be at the heart of future changes.

15. The Law Society of Scotland issued on 1 November 2007 a [discussion paper](#) in relation to options for the introduction of alternative business structures. Comments are invited by 31st January 2008. The Faculty of Advocates are also consulting their members. We anticipate that they will provide proposals as respects their branch of the profession at around the same time. The Scottish Government has continued to engage with the profession and consumer interests over the issues raised in the OFT response.

Issues on which the OFT sought the policy views of the Scottish Government

How legal services should be regulated in Scotland

16. We have considered the form of regulatory arrangements that are suitable for the Scottish legal profession and for the foreseeable future do not envisage setting up a new regulatory body along the lines of the Legal Services Board in England. In the Government's view, this would be a disproportionate and inefficient approach. We note that such a model was not called for by the OFT, and is not supported by the Scottish Consumer Council.

17. There are in effect only two significant providers of regulated legal services in Scotland – solicitors (regulated by the [Law Society of Scotland](#)) and advocates (regulated by the [Faculty of Advocates](#)). The Law Society also regulates licensed conveyancers, after a previous separate regulatory structure was abolished because of the small number of practitioners. Oversight of regulation is provided by Scottish Ministers and the Lord President. We believe that this framework remains generally appropriate.
18. Apart from the expense and complexity involved in creating an oversight regulator, such an approach would be inconsistent with the Government’s commitment to de-cluttering the public services landscape.
19. However, within that framework, we will continue to make improvements as necessary to the regulatory regime. We are establishing an independent Scottish Legal Complaints Commission, which should be operational by autumn of 2008 (considerably in advance of the equivalent English body). The Law Society of Scotland is currently reviewing its governance, alongside its consideration of alternative business structures. We note the proposals of the Scottish Consumer Council for wider lay involvement in the Law Society, and will consider what options may be appropriate as part of the wider reforms being taken forward.
20. We recognise that some forms of alternative business structure might be difficult for the Law Society, as currently constituted, to regulate, and we will work with them in considering what changes may be desirable in future to ensure regulation continues to protect the interests of justice and consumers, without unnecessarily restricting competition and innovation in legal services.

Restrictions governing business structures

21. The Scottish Government does not accept the inference in the phrasing of the OFT response, which asks the Government to indicate ‘how the restrictions outlined in the super-complaint can be lifted⁴. While the Government has made clear, and the profession has accepted, that change is necessary, it is premature to conclude that *all* the

⁴ [ibid.para 10.1](#)

restrictions should be lifted. Some may prove to be desirable to protect quality or access, and there may be restrictions which it would be impractical to remove without creating a disproportionately complex regulatory structure. The Law Society discussion document suggests that a ‘stepped approach’, as proposed by the Joint Committee of the UK Parliament in relation to the Legal Services Act, may be worth considering⁵. We are attracted to this idea. It might allow reforms which attract a degree of consensus and raise less fundamental regulatory issues to be implemented more quickly, and for the impact of more far-reaching reforms to be fully assessed.

Advocates’ business structures, solicitors and advocates providing services jointly, direct access to advocates

22. These issues primarily concern the rules governing the Faculty of Advocates. It would be inappropriate to give a definitive response to these issues pending the proposals which the Faculty will put to the Government shortly, but we would make the following general comments.

23. As stated above, the Government is committed to maintaining an independent referral Bar in Scotland. The Scottish Bar is much smaller than England and is arguably more collegiate in nature, although the way in which that collegiate structure operates continues to evolve. Alongside the Faculty, there is a significant and growing number of solicitor-advocates.

24. Arguably, it may not be necessary to remove all restrictions on how Faculty members operate if those wishing to adopt different practice models, or consumers wishing to access different groups of services, can do so using solicitor advocates. For that argument to be justified, it would be necessary for solicitor advocates to enjoy the same rights and status as advocates, and for it to be straightforward to switch from one branch of the profession to another. We will wish to consider whether this approach may be a practical way of securing the benefits of liberalising the provision of advocacy services in the courts.

⁵ [The Public Interest: Delivering Scottish Legal Services - A consultation on alternative business structures. Law Society of Scotland, 2007](#)

25. On direct access, we note that the profession has already extended the right of direct access, and we understand it is considering whether this can be taken further. We also note the OFT's separate consideration of the 'mixed doubles' rule. Clearly, if the way forward was to be based on an equity of status between advocates and solicitor advocates, such a rule would be difficult to defend.

Third party entry and multi-disciplinary practices

26. There are a number of possible models:

- a. law firms with a minority of non-lawyer partners to assist in the management of the firm
- b. law firms with a minority of non-lawyer partners offering alternative legal services
- c. lawyers in a multi-disciplinary practice who are not in majority control
- d. third party ownership of legal businesses.

27. We do not at this stage rule out any of these options, and we consider that some forms of alternative structures could well provide benefits to consumers, and opportunities for new forms of provision, including in areas such as social welfare law. However, as the OFT response acknowledges, the third and fourth options in particular raise significant regulatory issues which require detailed consideration. The approach to regulation adopted in the Legal Services Act has been devised for a different market (see paras 6-9), is as yet untested, and is inconsistent with our broader policy approach (paras 16-20).

28. We note that the OFT does not consider the regulatory issues to be insurmountable but, as a Government, we have a responsibility to address these problems in detail in developing the way forward.

Timing of future developments

29. As stated above (para. 15), the Law Society consultation ends on 31st January. The Law Society then aims to develop detailed proposals for approval by its members in the Spring of 2008. The Faculty of Advocates is working to a similar timescale.

30. We have encouraged the profession to act quickly, and will do all in our power to support early reforms, including through secondary legislation where appropriate. We anticipate therefore that significant progress will be made during 2008.
31. Some reforms may require amendment to primary legislation, particularly the Solicitors (Scotland) Act 1980. Such changes would need to be brought forward as and when the Parliamentary timetable allows. Since the current administration is a minority government, it will be necessary to ensure a consensus in Parliament for any primary or secondary legislation. A number of the speakers in the recent Parliamentary debate expressed a view that this reform should not be rushed. Against that, we are aware of the wish of many in the profession not to be disadvantaged by falling behind reforms elsewhere, and we will continue to treat this as a high policy priority.