

Wider choice and better protection

a consultation paper on the
regulation of legal services
in Scotland

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Proposals for future legislation

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Abbreviations used in this consultation

The 1980 Act	The Solicitors (Scotland) Act 1980
The 1990 Act	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990
The 2006 Act	The Compensation Act 2006
ABS	Alternative Business Structures
ATE	After-the-event [insurance]
The Bill	The Legal Profession Bill
CFS	Consumer Focus Scotland
Clementi Report	Report of the Review of the Regulatory Framework for Legal Services in England and Wales
ICAS	Institute of Chartered Accountants of Scotland
LDP	Legal disciplinary practice
LSA 2007	Legal Services Act 2007
LSB	Legal Services Board
MDP	Multi-disciplinary practice
NDPB	Non-departmental public body
OFT	Office of Fair Trading
SLCC	Scottish Legal Complaints Commission
The Society	The Law Society of Scotland
SRA	Solicitors Regulation Authority

Legal Profession consultation paper Cabinet Secretary's foreword

I have great pleasure in consulting on the Government's proposals to allow new business structures to deliver legal services in Scotland.

At this time of great challenges to the legal profession, it has never been more important that the profession remains strong, independent, and able to compete domestically and internationally.

The Scottish Government intends to liberalise the Scottish legal services market in ways that will free up the profession to organise itself differently, to offer services to the public alongside other professionals, and to seek alternative sources of financial support to grow their businesses. We announced the Legal Profession Bill as part of this year's legislative programme. This is a once-in-a-generation opportunity to create a more flexible and modern regulatory framework for legal services.

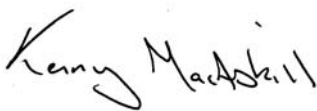
We welcomed the proposals put forward by the Law Society of Scotland and Faculty of Advocates earlier this year which were in the main in tune with our direction of thinking - that the regulatory framework must be proportionate to the size and scope of the legal services market in Scotland. We must guard against having too many bodies and unnecessary tiers of regulation. Instead we should concentrate on developing a robust system of regulation to protect the profession's core values and enshrine the profession's commitments to service, probity and excellence.

Regulation should also avoid any disadvantage to consumers where there are new structures which may bring together different professions.

That is a complex challenge. To help inform our proposals I asked some of the country's leading legal and consumer experts to join a consultative group set up to explore these issues. That group helped us to shape the proposals in this paper for a regulatory regime that will allow alternative business structures to operate in an open, transparent and accessible way in Scotland's legal services market.

The Government knows that the current economic situation is seriously affecting many law firms, as well as many other businesses and families. It is only natural in the face of such uncertainty to take comfort in the tried and tested forms of business. However, I believe that now is the time for the profession that has served Scotland so well for over 300 years to embrace change and look to the future. In doing so, the profession will continue to be a source of pride for decades to come.

I look forward to receiving your comments on the consultation paper.



Kenny MacAskill, MSP
Cabinet Secretary for Justice
7 January 2009

Chapter 1 The road to reform

Introduction

1 The objective of our proposed legislation in the legal services market is to achieve improved access for all to high quality legal services, within a competitive market, which is appropriately regulated to ensure public protection and maintain quality. A flourishing Scottish legal profession is a crucial part of the supportive environment for business which the Government wishes to create, and we believe reform is necessary if that profession is to remain successful and innovative, in the face of increased competition. Equally important is the need to ensure an adequate supply of accessible and affordable legal services in Scotland.

Road to reform

1.1 The case for reform was considered in the Report by the Research Working Group on the Legal Services Market in Scotland¹ in 2006. The report was driven by the review by the European Commission² of competition in the liberal professions and by developments in England and Wales which had culminated in the Clementi report in 2005.³ The report identified those restrictions which might prevent or limit competition in the Scottish market. The Group recommended that sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”), should be commenced. This was achieved on 1 March 2007.

1.2 The arrangements for handling complaints against the legal profession were reformed in the Legal Profession and Legal Aid (Scotland) Act 2007, which followed the report of the Justice 1 Committee of the Scottish Parliament⁴, and which established the Scottish Legal Complaints Commission (SLCC). The SLCC became operational on 1 October 2008.

1.3 *Which?* lodged a “super-complaint” on 8 May 2007 to the Office of Fair Trading (OFT)⁵ which asserted that the current regulation of Scottish legal firms restricted choice to consumers and prevented the formation of alternative business structures (ABS). *Which?* favoured the creation of ABS to provide choice and innovation to consumers and the profession. They also supported the creation of a

¹ <http://www.scotland.gov.uk/Resource/Doc/111789/0027239.pdf>

² Report on Competition in Professional Services, COM (2004) 83 final. Available at: <http://europa.eu/scadplus/leg/en/lvb/l23015.htm>

³ Report of the Review of the Regulatory Framework for Legal Services in England and Wales. Available at: <http://www.legal-services-review.org.uk/content/report/report-chap.pdf>

⁴ <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1115-02.htm#Col3407>

⁵ A super-complaint can be made to the OFT when a designated consumer body thinks that a feature, or combination of features, of a market is significantly harming consumers’ interests. The Consumers’ Association (which publishes “*Which?*”) is such a designated body.

Scottish Legal Services Board, an independent body, which would be responsible for the regulatory control of the Scottish legal profession and consumer protection.

1.4 In its response⁶ the OFT did not assume that the changes proposed for England and Wales through the Legal Services Act 2007 (“LSA 2007”) would automatically be suitable for the Scottish market, but supported greater liberalisation of that market. The OFT recommended that the Government publish a statement to set out how it intended to reform the current system.

1.5 The Cabinet Secretary for Justice set out in a speech on 28 September 2007 the Government’s view that the status quo was not an option, and challenged the profession to take a lead in identifying how to move forward. There followed a debate in the Scottish Parliament on 15 November 2007⁷ which unanimously endorsed a motion⁸ stating 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...”

and that it 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”.

1.6 In December 2007, the Government published a policy statement in response to the OFT⁹, noting the consultations which were underway within the Law Society of Scotland and the Faculty of Advocates and setting out the Government’s provisional views on a range of issues.

1.7 The Law Society of Scotland (“the Society”) published a policy paper, “The Public Interest: Delivering Scottish Legal Services,” in April 2008 which argued that it was in the interests of the public and profession to permit alternative business structures that could facilitate a more modern and competitive legal service. The Society’s Council saw no objection in principle to any business model – it stated the key issues were to establish an appropriate regulatory framework and to maintain the core values of the legal profession. The Society’s AGM approved the policy on 22 May 2008.

1.8 The Faculty of Advocates’ response, “Access to Justice: a Scottish Perspective: a Scottish Solution”, published in May 2008, favoured maintaining an

⁶ http://www.of.gov.uk/shared_of/super-complaints/oft946.pdf

⁷ <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1115-02.htm#Col3407>

⁸ *Ibid* Cols 3414 and 3417 S3M-847

⁹ [Regulation and business structures in the Scottish legal profession](#): Scottish Government policy statement on OFT response to *Which?* super-complaint.

independent referral Bar subject to the cab rank rule¹⁰. Although the Faculty does not wish its members to participate in ABS it has no objection to solicitors being able to do so, and argues that it should be open to any advocate wishing to join an ABS to do so by becoming a solicitor advocate.

1.9 The Cabinet Secretary confirmed during his Parliamentary statement on 11 June 2008 that legislative change would occur as soon as the Parliamentary timetable allowed. The Scottish Government's aim is to develop a comprehensive package, and for the profession to develop the necessary rule changes in parallel with the legislative process, so that we will remain roughly in line with the timings for the English reforms. The introduction of ABS in England and Wales is planned for 2010/2011.

1.10 The Legal Profession Bill was announced as part of the Scottish Government's legislative programme on 3 September 2008.

Bill Reference Group

1.11 During the last few months some of the country's leading legal and consumer experts have been meeting with Scottish Government officials and the legal professional bodies to explore the detail of the planned reforms. This group, together with views expressed by other interested stakeholders, has helped inform this consultation. The minutes of meetings and papers can be viewed on the Government's website at: <http://www.scotland.gov.uk/Topics/Justice/profession-reform/Reference-Group/Minutes>.

The aim of the Legal Profession Bill

1.12 The principal effects of the Legal Profession Bill will be to reform the regulatory framework for legal services, and remove restrictions on the types of business models under which a solicitor can offer such services, while allowing the traditional business model to remain an option for those who choose to carry on practising within that structure.

1.13 The Bill will therefore set out the following.

- The principles underpinning the regulatory framework (chapter 4).
- Who will be subject to regulation under that framework (chapter 5).
- The procedures under which regulators of new business structures will be authorised (chapter 5).
- How the regulation of ABS will relate to the regulation of individual professionals (chapter 5).
- The safeguards to ensure that those owning or directing an ABS are fit and proper persons (chapter 6).

¹⁰ Under the "cab-rank" rule an advocate is duty bound to accept instructions irrespective of personal preference, provided a reasonable fee is offered and an advocate is qualified and able to carry out the instructions.

1.14 In addition, the Bill will contain provisions which allow for modernisation of the governance of the Law Society of Scotland, and codify the regulatory arrangements of the Faculty of Advocates.

1.15 In chapter 9 we consult on a further issue, the possible regulation of claims management companies.

Chapter 2 Alternative business structures

2 This section outlines how the legal profession is presently structured, the background to reform and what changes would be needed to permit different sorts of alternative business structures (ABS).

Current position

2.1 The Scottish legal profession is essentially made up of solicitors and advocates. Around 95% are solicitors; the position of advocates is discussed in chapter 8.

2.2 Solicitors can work alone or form a partnership with other solicitors. Only solicitors can own a firm of solicitors and employed solicitors cannot act for third parties. Solicitors are prevented from forming a partnership with non-solicitors (except with registered foreign lawyers in multi-national practices). Solicitors cannot form a business relationship with an advocate.¹¹

2.3 The Law Society of Scotland (“the Society”) has statutory responsibility for regulation of solicitors under the Solicitors (Scotland) Act 1980 (“the 1980 Act”). The Act provides for the statutory basis for the Society, the right to practice, conduct and discipline, professional practice and complaints¹² and disciplinary proceedings relating to solicitors in Scotland. The Society has statutory responsibility for the promotion of the interests of solicitors, as well as the interests of the public in relation to the profession.

2.4 Section 34 of the 1980 Act permits the Council of the Society to make practice rules, subject to the approval of the Lord President for rules relating to professional practice and conduct and discipline of solicitors. Any rule which has the effect of prohibiting the formation of multi-disciplinary practices must be approved by Scottish Ministers subject to consultation with the Office of Fair Trading (OFT).

2.5 There are two other categories of professional who fall within the scope of the “legal profession”, for the purposes of the Bill: those holding rights of audience by virtue of Sections 25-29 of the 1990 Act and licensed conveyancers and executry practitioners.

2.6 Sections 25 to 29 of the 1990 Act provide that the Lord President of the Court of Session and the Scottish Ministers may grant professional and other bodies rights to conduct litigation and rights of audience. An application to the Lord President of the Court of Session and the Scottish Ministers has to be accompanied by a draft

¹¹ Advocates are obliged to practise as sole practitioners by a rule which provides that “an advocate may not form a partnership with another advocate or any other person in connection with his or her practice”. The Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991 provide that “a solicitor shall not form a legal relationship with a person or body who is not a solicitor with a view to their jointly offering professional services as a multidisciplinary practice to any person or body” (Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991, rule 4).

¹² The Legal Profession and Legal Aid (Scotland) Act 2007 set up the Scottish Legal Complaints Commission as a gateway for all complaints.

scheme which indicates the code of conduct required of members, a complaints procedure, disciplinary procedures and sanctions. The Lord President and Scottish Ministers must approve the scheme before it can come into effect, and have powers to withdraw rights if they feel that the body is in breach of that scheme.

2.7 To date, the Association of Commercial Attorneys has successfully applied for and been granted rights to conduct litigation and rights of audience and the Institute of Chartered Accountants of Scotland (ICAS) has submitted an application for approval.

2.8 The 1990 Act made it possible for people other than solicitors to be licensed to practice as conveyancing or executry practitioners. Originally these practitioners were regulated by a public body – the Scottish Conveyancing and Executry Services Board.

2.9 The Society is now responsible for the regulation of conveyancing and executry practitioners as a result of the Public Appointments and Public Bodies etc (Scotland) Act 2003. There is an official register of these practitioners maintained by the Keeper of the Registers of Scotland. This currently lists ten executry practitioners.

2.10 Throughout the rest of this paper, we use the term “legal professionals” to refer to solicitors, advocates, licensed conveyancers and executry practitioners, and those holding rights of audience under the 1990 Act.

The options for alternative business structures

2.11 The Government supports the view of the Society that the restrictions on the business structures applying to solicitors should be reformed.

2.12 The LSA 2007 which applies in the main to England and Wales only, will reform the regulatory structure of the legal profession in those countries. It establishes a “super-regulator” – the Legal Services Board (LSB). In turn, the LSB will authorise and provide oversight of “front-line” regulators, which will regulate providers of legal services such as solicitors and barristers. The Act envisages that the regulatory framework will oversee the development of ABS.

2.13 The LSA 2007 provides for a limited form of ABS known as Legal Disciplinary Practices (LDP) to emerge before the Multi-Disciplinary Practices and other forms of ABS are authorised. Legal practitioners will be permitted to provide services for third parties and form practices with other professional groups to offer legal services. The Solicitors Regulation Authority (SRA) is hoping to enable regulation of these new structures from March 2009.

2.14 Multi-Disciplinary Practices (as referred to in paragraphs 2.28 to 2.30), though permitted, are unlikely to be implemented before 2011.

2.15 The Government does not believe that the approach for England and Wales is right for Scotland. There are key differences between the legal services markets

north and south of the border and we want to shape proposals to fit Scottish circumstances.

- The legal services market is much larger in England and Wales in terms of both turnover and numbers of legal professionals. There are about 108,000 solicitors and 14,000 barristers in England and Wales compared with 10,150 solicitors and around 460 advocates in Scotland.
- The regulatory framework in Scotland is not complex by comparison with England. Legal professionals are regulated by either the Law Society of Scotland or the Faculty of Advocates.¹³ This contrasts with the “regulatory maze” which was identified by the Clementi report in 2005 in England and Wales.

2.16 Furthermore, the Government is committed to the simplification of the Scottish public sector. We do not believe it is necessary or proportionate to establish a “super-regulator” to licence and oversee the bodies which regulate legal services.

2.17 The Law Society of Scotland’s position is that it is not a particular business structure which should guarantee the protection of professional values, but the regulatory framework within which legal businesses operate.

2.18 We accept this analysis although, as we discuss in chapter 8, we believe that there are some special circumstances applicable to the Faculty of Advocates.

2.19 We believe the current restrictions on business structures potentially constrain innovation, and do not deliver a competitive market across the range of legal services.¹⁴ We also recognise that a number of Scottish legal firms wish to be free to deliver services in new ways, and that they need to be able to compete effectively against legal practices from other jurisdictions, as well as unregulated providers of similar services.

2.20 In reforming the regulatory framework, we need to recognise not only that the private legal profession is offering commercial services in a competitive marketplace but also that an independent legal profession is vital to underpin the rule of law, and that the public must be able to place trust in the competence and integrity of anyone operating as a legal professional.

2.21 We set out our proposals for the regulatory framework in the following chapters. This framework would make it possible for any of the following types of ABS to operate in Scotland.

¹³ There is an exception and this is any professionals granted rights under the provisions outlined at para 2.6.

¹⁴ The Research Working Group found that there were relatively low levels of competition in family law, debt, welfare, housing and consumer law, with supply problems in some areas – see paras 3.67-3.70 of their report (ibid).

An ABS involving non-lawyer ownership

2.22 This would allow non-lawyers, who participate in a practice without offering a direct service to clients (for example as a chief executive or financial director) to hold an equity stake in the practice.

2.23 The potential advantages include attraction and retention of expertise within the senior reaches of the legal profession. Directors would have a stake in the practice and be incentivised to deliver good quality, efficient and competitive services. This would ultimately benefit consumers.

2.24 Safeguards would be required to ensure that only fit and proper persons were able to exercise influence or control over a legal practice and that such practices were properly regulated.

An ABS involving external ownership

2.25 This type of ABS would allow shareholding by people other than a director of the practice, including investors holding sufficient shares to give them an influencing or controlling interest in the practice. Ownership by non-lawyers of a legal practice would be allowed and organisations would be able to employ solicitors to provide legal services to the public.

2.26 The potential advantages include:

- increased access to external capital may allow firms to grow and compete; and
- incentives for staff who could be rewarded with shareholding.

2.27 The potential risks include:

- the possible pressure to act in improper or illegal ways, or to compromise core values such as independence, protecting the interests of the client and confidentiality (issues that are considered in chapters 5 and 6); and
- a concentration of practices into larger units, which could be detrimental to access to justice, particularly in rural areas or specialist forms of practice. (Access to justice issues are considered in chapter 4.)

2.28 Provisions would also need to be in place for either the continued operation of the Guarantee Fund and Master Policy or some other form of insurance cover. (These are considered in chapter 7.)

Multi-disciplinary practices (MDPs)

2.29 This would allow solicitors and other professionals (such as accountants, architects and surveyors) to come together in business to provide legal and other services to third parties.

2.30 The potential advantages include the following.

- Greater flexibility and choice for clients by using one-stop shops to conduct a range of business.
- Firms would be able to share overheads and in turn pass cost savings to clients.
- Sustaining legal practices in small communities, where a solicitor's practice might not be commercially viable on its own.

2.31 The main difficulty which needs to be resolved before MDPs can operate is reconciling the different regulatory codes that may impact on the business. In particular, there may be a potential threat to the client's right to confidentiality and legal professional privilege. The standards and core values of the legal profession should not be compromised and the rights and redress of consumers must be protected. (This is considered in chapter 5.)

Questions

- 1 Do you agree that alternative business structures (ABS) should be permitted for the provision of legal services by solicitors in Scotland?**
- 2 Are there any of the 3 business structures described in paragraphs 2.21 to 2.30 which should not be permitted?**
- 3 Are there any of these 3 business structures which should be permitted but which you feel would require additional safeguards?**
- 4 Should there be any change to the present arrangements for regulating licensed conveyancers and executry practitioners, or those with rights of audience, as described in paragraphs 2.5 to 2.9?**

Chapter 3 Who will be affected by the Bill?

3 This chapter considers which professionals offering legal services will be affected by the changes in the Bill.

Regulated legal services in Scotland

3.1 Unlike other regulated areas of business (for example, financial services), there is no all-encompassing definition of “legal services” which are subject to regulation. Instead, we have two regulated professions – solicitors and advocates – together with a limited number of other professionals authorised to provide services which otherwise only solicitors or advocates could provide.

3.2 The Research Working Group on the Legal Services Market in Scotland¹⁵ commented that a solicitor or advocate may provide their services in all of the following areas of law: employment, personal injury, financial services/tax, immigration, criminal law, residential conveyancing, commercial conveyancing, commercial, family and welfare/debt/housing and consumer law.

3.3 However, the only areas reserved exclusively to solicitors are set out in section 32 of the 1980 Act. In effect, these are conveyancing, applying for confirmation in executries, and preparing writs relating to court proceedings. For many solicitors, particularly those providing legal services to the business sector, these are only a small part of their legal business.

3.4 Even these reservations are subject to exceptions, namely licensed conveyancers and executry practitioners, and people granted rights to conduct litigation and rights of audience under sections 25-29 of the 1990 Act.

3.5 All solicitors have rights of audience in the district and sheriff courts. Solicitors who are solicitor advocates also have rights of audience in the supreme courts, the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council.

3.6 Advocates specialise in litigation or pleading a case in court, although they will also appear in a variety of other forums, and they can also provide written advice. Advocates are able to plead in any court in Scotland. They are granted rights of audience by the Court of Session. A description of the legal services the advocate provides is given on the Faculty of Advocate’s website.¹⁶

Defining legal services

3.7 We considered whether it would be desirable to provide in the Bill a comprehensive definition of “legal services” which would operate to bring anyone who provided such services within the scope of regulation. This could create a level

¹⁵ www.scotland.gov.uk/Resource/Doc/111789/0027239.pdf, chapter 3.

¹⁶ <http://www.advocates.org.uk/profession/services.html>.

playing field between, for example, solicitors and others who compete in the provision of legal services but may currently be unregulated.

3.8 We have concluded that this would not be practicable or desirable for the following reasons.

- Defining the boundary of legal services is extremely difficult – definitions in other jurisdictions are often tautologous, essentially defining legal services as “what lawyers do”.¹⁷
- Many of the areas which would be covered by such a definition are already regulated by other legislation, some of which is reserved to the UK Parliament (such as financial services, immigration advice, and consumer credit). Further regulation could be outwith the current powers of the Scottish Parliament and in any event could create significant regulatory conflict.
- We have no evidence of widespread detriment to consumers across unregulated areas (such as the provision of basic legal advice by the voluntary sector)¹⁸, and creating a new regulatory regime for all providers in such areas would be disproportionate. We discuss a specific concern later when we consider whether claims management companies in Scotland should be regulated and we invite views on the subject (see chapter 9).

3.9 Therefore, we propose that the Bill will provide for the following.

- The professions of solicitors and advocates will continue to be subject to regulation.
- Insofar as solicitors and advocates continue in traditional forms of practice (that is, sole practitioners or solicitors in partnership only with other solicitors), that regulation will continue to be by the Society and Faculty of Advocates respectively.
- The reserved areas of practice will remain as now, although we will consider whether it would be desirable to provide that these reserved areas could in future be changed by subordinate legislation.
- The regulation of ABS will apply to any other form of business where a legal professional is involved in the provision of legal services to third parties.
- In that context, “legal services” will be broadly defined, on similar lines to the definition of “legal activity” in the LSA 2007, namely legal advice, assistance or representation in connection with the application of the law or the resolution of legal disputes.¹⁹

¹⁷ See, for example, definitions of legal services in Australia. In New South Wales, legal services are defined in the Legal Profession Act 2007, as amended, as “work done, or business transacted, in the capacity of a solicitor” (<http://www.parliament.nsw.gov.au>). In Queensland, the Legal Profession Act 2007 defines legal services as “work done, or business transacted, in the ordinary course of legal practice” (www.legislation.qld.gov.au/legisln/current/l/legalproa07.pdf).

¹⁸ Such advice is not subject to statutory regulation, but the Government has supported measures to develop standards of good practice, such as the Homepoint scheme, which can provide reassurance to funders, the public and referral agencies.

¹⁹ Section 12 of the LSA 2007 (which does not extend to Scotland) states:
(3) In this Act “legal activity” means—

- A business which does not involve legal professionals will not be regulated under the provisions of the Bill, even if it provides legal services within this broad definition. It will not be permitted to provide services in reserved areas.

Confirmation rights

3.10 At present, professionals who are not solicitors are prevented from preparing any papers in respect of an application for a grant of confirmation in favour of executors.²⁰ The Government is of the view that such work should continue to be regulated, but is not convinced that it should be impossible for other regulated professionals, such as accountants, to carry out this task. It is not obvious why this particular aspect of handling estates should be restricted when, for example, advising on a will is not.

3.11 There is already a method of acquiring the rights to prepare confirmation papers through an application for rights to conduct litigation or rights of audience, but this is not tailored to the needs of those seeking confirmation rights.²¹ It requires the body to apply for wider rights of audience even though they may have no intention of exercising such rights.

3.12 We are, therefore, considering whether the Bill should include a provision that would allow a professional or other body to apply for executry rights. This would allow approved non-solicitor members of that body to exercise confirmation rights in the same way that probate rights are exercised in England and Wales.²²

3.13 If provision were made in the Bill to allow approved non-lawyers to prepare papers in an application for a grant of confirmation in favour of executors, application would be made only for the rights required and only to Scottish Ministers (rather than to Scottish Ministers and the Lord President, as applies for rights of audience). The

(a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and

(b) any other activity which consists of one or both of the following—

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;

(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

(4) But “legal activity” does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).

(5) For the purposes of subsection (3) “legal dispute” includes a dispute as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or liabilities.

²⁰ The restriction is in section 32(1)(c) of the Solicitors (Scotland) Act 1980.

²¹ This “back door” method is possible as section 61 of the Legal Profession and Legal Aid (Scotland) Act 2007 amends section 32(2) so that section 32(1) does not apply to a member of a body which has made a successful application under section 25 of the 1990 Act for rights acquired under section 27 of that Act.

²² In England and Wales, probate rights are granted under the provisions of section 55 of the Courts and Legal Services Act 1990.

process would still be subject to rigorous safeguards and guidance similar to that in place for applications for rights to conduct litigation and rights of audience. Anyone exercising such rights would be regulated by the approved body.

Questions

5 Should the areas of business reserved to legal professionals as described in paragraph 3.3 remain as now?

6 Do you support the proposals that the Bill should focus on the regulation of legal professionals and businesses where legal professionals are involved in the provision of legal services to third parties (for the reasons given in paragraph 3.8)?

7 Do you agree that (subject to the issues discussed in chapters 7 and 8), the arrangements for regulation of solicitors and advocates in traditional forms of practice, should remain as they are now?

8 Do you think that provisions to allow applications for confirmation rights, as described in paragraphs 3.10 to 3.13, should be included in the Bill?

Chapter 4 Principles of regulation

4 This chapter sets out our view of the principles which should be in place to underpin the regulatory framework for alternative business structures (ABS). Regulators would have a duty to promote such principles, which would be relevant to any provider of legal services. This chapter also considers how regulation can best promote access to justice.

General regulatory principles

4.1 The Better Regulation Task Force set out five principles of good regulation.²³

- Proportionality: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed and costs identified and minimised.
- Accountability: regulators must be able to justify decisions and be subject to public scrutiny.
- Consistency: Government rules and standards must be joined up and implemented fairly.
- Transparency: regulators should be open and keep regulations simple and user-friendly.
- Targeting: regulation should be focused on the problem and minimise side effects.

4.2 The Better Regulation principles have been endorsed by the Regulatory Review Group which advises the Scottish Government.

4.3 These principles have informed the Government in developing our proposals for the regulatory framework, and we wish them to guide the actions of the regulators of legal services.

Legal regulation principles

4.4 We also believe it is important to set out more specific regulatory objectives which reflect the special features of the provision of legal services. These objectives would guide those regulating the provision of legal services. We propose, at this stage, that this duty would fall to Scottish Ministers with the agreement of the Lord President (paragraph 5.16 provides more detail).

4.5 This is a change from the current position. At present the objects of the Society under the 1980 Act are simply stated to include:²⁴

- “The promotion of
- (a) the interests of the solicitors’ profession in Scotland; and
 - (b) the interests of the public in relation to that profession.”

²³ See [Regulation - Less is More: Reducing Burdens, Improving Outcomes](#), annex B, p51. The five principles of good regulation were identified by the Better Regulation Task Force (an independent group established in 1997 to advise the UK Government) against which the appropriateness and effectiveness of any type of regulation should be tested.

²⁴ Section 1(2).

4.6 The Faculty of Advocates does not have formally stipulated regulatory objectives, although their Guide to Conduct²⁵ sets out the duties advocates have in relation to the Faculty, the court and to the client.

4.7 In setting out objectives, we recognise the need for balance between stipulating too few objectives with the risk of leaving features out, and too many objectives which could dilute the importance of key areas. It is also important to focus on objectives which regulation can reasonably expect to influence.

4.8 Having considered existing models, including section 1 of the LSA 2007, we propose the following regulatory objectives.²⁶

- Upholding the rule of law and the administration of justice.
- Protecting and promoting the public interest.
- Promoting access to justice.
- Protecting and promoting the interests of consumers.
- Promoting competition in the provision of legal services.
- Promoting and maintaining adherence to professional principles.

4.9 Subject to the views of consultees, we see merit in the approach in the LSA 2007 of setting out the considerations which should guide the actions of regulators, and stating the “professional principles” which will inform regulation and which would be common to any bodies providing legal services.

4.10 The LSA 2007 places a regulator of legal services under a statutory obligation so far as is reasonably practicable, to act in the following.

- A way which is compatible with the regulatory objectives.
- A way that the regulator considers most appropriate for the purpose of meeting those objectives.

The regulator must have regard to the following.

- The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
- Any other principle appearing to it to represent the best regulatory practice.

4.11 The professional principles in the LSA 2007 are as follows.

- Authorised persons should act with independence and integrity.
- Authorised persons should maintain proper standards of work.
- Authorised persons should act in the best interests of their clients.
- Persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised

²⁵ http://www.advocates.org.uk/downloads/guidetoconduct_5thedition.pdf.

²⁶ http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1-l1g1- part 1.

persons should comply with their duty to the court to act with independence in the interests of justice.

- The affairs of clients should be kept confidential.

4.12 The professional principles would not replace the codes of individual professional bodies, but where those bodies exercise regulatory functions, such codes and their application would be expected to be compatible with the professional principles.

4.13 These principles would not seem to conflict with the core values of solicitors, as stipulated in the Society's Code of Conduct for Scottish Solicitors 2002.²⁷

- Guaranteed independence. Solicitors must give advice without fear or favour.
- Acting in the interests of the client. Solicitors must preserve their independence, observe the law and adhere to professional conduct.
- Avoidance of conflicts of interest. Solicitors should avoid acting for multiple parties in matters where there may be a conflict of interest.
- Client confidentiality. All discussions must be treated with the highest confidence.
- Provision of a professional service. Solicitors must be competent in matters s/he receives instruction on, carry out work in a timeous manner and communicate effectively with clients.
- Charging of fair and reasonable fees.
- Enshrining trust and integrity.
- Ensuring a proper relationship with the courts.
- Ensuring a proper relationship with other lawyers.
- Civil professionalism. Seek improvements in the law and legal system and act as a guardian of national liberties.
- Discrimination. Solicitors must not discriminate on the grounds of race, sex, religion or disability.

4.14 Similarly, the general principles guiding the conduct of an advocate of independence, trust and personal integrity, and confidentiality, appear compatible with the professional principles as stated above.²⁸

Access to justice

4.15 One of the proposed regulatory objectives would place a duty on regulators to promote access to justice. Access to justice is a key aim of the Government, and the proposals of both the Faculty of Advocates and the Society place great emphasis on the issue.

4.16 Regulation is not the only or even main route to securing access to justice – it forms part of the Government's wider approach to improving access. Key to that approach is ensuring the supply of legal advice and representation.

²⁷ See [Code of Conduct for Scottish Solicitors 2002](http://www.lawscot.org.uk) on the Society's website, www.lawscot.org.uk

²⁸ Guide to the Professional Conduct of Advocates, 5th edition, op.cit. chapter 2.

4.17 The Government's view is that access to justice should primarily be secured through legal professionals operating in the private and in some cases not for profit sectors. However, where such a supply is not available, or there are policy reasons to support a mixed model of provision, we will supplement that provision by targeted, publicly run or commissioned services. For example, the Government has recently committed an additional £1.5m a year to improve advice and representation in areas such as debt and housing in response to the economic downturn.

4.18 The Government is seeking to improve the availability of legal aid where that is feasible and affordable. The Cabinet Secretary for Justice announced on 7 November 2008 plans to extend financial eligibility for civil legal aid to those with disposable incomes up to £25,000 a year (the current limit is £10,306).²⁹ The Government is also working with the Law Society of Scotland and the Scottish Legal Aid Board to consider what may need to be done to ensure that solicitors entering the profession in the future continue to undertake legal aid work.

4.19 We are also taking forward a range of initiatives³⁰ to help courts, tribunals and other dispute resolution mechanisms to be more efficient, speedier and more responsive to the needs of those who use them.

4.20 We believe that our legislative proposals will support access to justice by opening up the possibilities for new ways to provide legal services, but there are risks which need to be managed as far as possible by effective regulation. Regulation cannot, by itself, guarantee access to justice, but it can play a positive or negative role.

4.21 In areas where there is a well functioning and competitive legal services market, a positive effect is likely to be achieved primarily by ensuring that regulatory provisions or licence conditions do not distort or reduce competition.

4.22 In areas of under-supply or publicly funded provision, different issues arise. There are concerns that concentration of supply could reduce competition and that there will be a focus on more profitable areas of business, potentially at the expense of the traditional small to medium sized "High Street" practice.³¹

²⁹ <http://www.scotland.gov.uk/News/Releases/2008/11/07110142>.

³⁰ These include:

- a Bill to modernise and reform the law of arbitration in Scotland;
- Wide-ranging reforms to summary criminal justice;
- Following the final reports, responding to the Civil Courts Review led by Lord Gill, and the work of the Administrative Justice Steering Group chaired by Lord Philip;
- consideration of proposals in the Business Expert and Law Forum report, including a strategy to promote Scotland as a centre of excellence in dispute resolution;

³¹ Such firms are the core of the profession, offering personal and accessible services to local communities across Scotland – although, as the Society notes, the trend towards consolidation of practices is already evident in some areas. See page 12 of the Society's policy paper.

4.23 Such firms are the core of the profession offering personal and accessible services to local communities across Scotland – although, as the Society notes, the trend towards consolidation of practices is already evident in some areas.

4.24 We considered whether the regulators should impose explicit access to justice requirements on providers of legal services – either on all providers, on those operating an ABS, or in particular cases where a risk to access is present.

4.25 This could be done through conditions of licence, for example by requiring a provider to offer services in less remunerative areas of law, or to provide support in some way to other services operating in areas such as social welfare law (for example, by training, *pro bono* work, or technical assistance).

4.26 We have concluded that such provisions would be very difficult to operate fairly and effectively in a competitive private market, and are not the best vehicle for securing access. While it will be possible for a regulator of ABS to grant conditions of licence, these are only likely to apply in exceptional cases.

4.27 However we do believe that it should be possible for the regulator to refuse to issue a licence where there is demonstrable evidence that the business will have a wider negative effect on supply.

4.28 We anticipate such provisions being used very sparingly and in accordance with regulatory principles of fairness and transparency.

4.29 It would also be the responsibility of regulators to monitor issues of supply, and report to the Government any issues of concern calling for wider Government action.

Questions

9 Do you agree that there should be a statement of regulatory objectives for providing legal services in ABS as proposed in paragraph 4.8?

10 Do you agree that regulatory objectives should be supplemented by considerations which should guide the actions of regulators, as proposed in paragraphs 4.9 and 4.10?

11 Do you agree that there should be a statement of professional principles for those providing legal services in ABS as proposed in paragraph 4.11?

12 Are there any amendments which should be made to the Government's proposed listings at paragraphs 4.8, 4.10 and 4.11?

13 Do you agree that it should be possible for regulators to grant conditions of licence or to refuse a licence to operate an ABS where there is demonstrable evidence of a risk to access to justice (as proposed at paragraph 4.27)?

14 Do you have any other suggestions as to how the regulatory objective of promoting access to justice can best be achieved?

Chapter 5 The regulatory approach

5 This chapter presents possible options for an effective regulatory framework and considers how regulatory regimes can be reconciled in a way which values different professional codes whilst safeguarding common principles.

Issues to be addressed

5.1 The Government agrees with the conclusion of the Society's policy paper that the key is appropriate regulation of the **entity** – that is, the alternative business structure (ABS) providing a legal service. This is a model already used in industries such as financial regulation and so is familiar to many legal practices, but is a shift from the traditional model of professional regulation which predominantly regulates at the level of the **individual practitioner**.

5.2 However, those practising in an ABS who are themselves members of a regulated profession will continue to be regulated by their own professional bodies. In effect these individuals will be regulated on two levels. It is possible, but not inevitable, that the entity regulator and the professional regulator will be the same body.

5.3 Three core issues need to be resolved.

- Defining the ABS – particularly if the legal service is part of a larger business.
- Dealing with potential conflict between the professional codes of individuals participating in the entity and the rules of the entity regulator.
- Deciding who should regulate the entity.

5.4 These are complex issues and we do not propose that the Bill itself should seek to resolve every potential conflict between different professionals who might participate in an ABS. The Bill will set out a framework but, for some forms of multi-disciplinary practice, there will need to be agreement between the individual professional regulators to ensure that those professionals could conform to the requirements of the appropriate entity regulator. As is planned in England and Wales, simpler forms of ABS (such as legal firms with a minority of non-lawyer partners) may be likely to develop more quickly.

Defining the entity

5.5 As outlined in chapter 3, we intend that regulation should apply to any business where a legal professional is involved in the provision of legal services to third parties. That business may be a partnership, an incorporated practice or a limited company. In most cases, we expect that the boundaries of that business will be clear and the whole business will be liable to regulation by the entity regulator.

5.6 Difficulties may arise where legal services are a small aspect of a larger business, for instance, when a large organisation decides to offer legal services as a strand of its overall business. If that business does not want its entire operation to be subject to legal services regulation, it will be necessary for it to demonstrate to the regulator the following.

- The boundaries of the legal services business which is subject to regulation.
- How they will maintain a separation between provision of legal services by the ABS and the activities of the wider unregulated business.
- How they will ensure that clients and those dealing with the ABS are aware of the distinction between the part of the ABS that provides legal services and the wider business.

5.7 We considered whether the legislation should prescribe that, in such cases, the ABS would require to have a separate legal identity as a partnership or company. On balance, we have concluded that it is not necessary to prescribe in the Bill the particular form of relationship between the larger body and its ABS, provided the regulator can be satisfied on the above points.

Dealing with regulatory conflict

5.8 Regulatory conflict will not be an issue for those legal firms in Scotland which remain within the traditional business model, whether as partnerships or as sole practitioners.

5.9 However, there is potential for regulatory conflict in an ABS where the entity and all the professionals within it do not belong to the same regulatory body. Examples of ABS where there might be regulatory conflict include the following.

- A law firm that delivers legal services which is co-owned by solicitors and non-lawyer managers, where the latter are subject to different professional regulatory codes.
- A business that delivers a range of services including legal services and which includes solicitors and other regulated professionals. These may include accountants, architects, surveyors, or funeral directors, or a combination of such professionals.

5.10 Our approach is that the ABS entity regulator should have primacy. Its rules will apply to the activities of all legal professionals and others practising in the firm, in relation to all matters pertaining to the provision of legal services (defined broadly, as we propose at 3.9 above). It should regulate proactively – satisfying itself that the business is operating proper systems of management, oversight and quality control. Linked to that approach will be a requirement for every ABS to have either an identified “Head of Legal Services” who would have personal responsibility for ensuring compliance with entity regulation or, alternatively, a Practice Committee whose members would jointly be responsible for such matters. (Your views on this are invited at the end of chapter 6.)

5.11 The responsibility for professional discipline will remain with the professional regulators. It will be for those regulators to review their rules to consider how far any breach of standards set by an entity regulator should be a matter for professional discipline. Other than the Society and the Faculty of Advocates, which are dealt with specifically in our proposals (see chapters 7 and 8), it will ultimately be for individual professional bodies to determine whether it is appropriate for their members to participate in any particular form of ABS and retain their professional status. Where

professionals provide services under reserved regulation such as insolvency, consumer credit, and immigration advice, they will be subject to the existing licensing conditions with the appropriate body.

5.12 The Scottish Legal Complaints Commission (SLCC) will be responsible for dealing with complaints against a regulated ABS for the legal services it provides, in the same manner as it does for solicitors and advocates at present. The SLCC will act as a gateway and will deal with issues of inadequate professional service. Issues of misconduct will be referred to the appropriate professional regulators.

Professional privilege

5.13 A specific area of potential conflict is the position of legal professional privilege. We agree with the Society that this would need to be protected under an ABS system. Legal professional privilege protects communications between a solicitor and their client in relation to legal advice and communications, and documents made in preparation for court proceedings.

5.14 This issue has been dealt with in the LSA 2007 for England and Wales. Under those provisions, clients of licensed bodies will have the same legal professional privilege rights that they would have had if they had instructed a traditional law firm. The LSA 2007 ensures that as long as communications with a licensed body are carried out through a lawyer or under the supervision and direction of a lawyer, the ordinary rules of legal professional privilege will apply.

5.15 We are minded to adopt a similar approach but would welcome views in response to the question below.

Determining who should regulate the ABS

5.16 We propose that the Scottish Government, with the agreement of the Lord President of the Court of Session, should authorise regulatory bodies to act as regulators of ABS. In doing so, they will require to be satisfied that the regulators meet criteria to be set out in the Bill, including that the regulator:

- is adequately resourced and organised to undertake this responsibility;
- has developed an appropriate regulatory scheme to comply with the regulatory objectives and ensure public protection; and
- is sufficiently independent of bodies being regulated to ensure public confidence and avoid conflicts of interest.

5.17 These criteria are likely to require a clear separation between the regulatory role and any other functions performed by the body (such as promotion of a particular profession) and a substantial degree of lay involvement in the regulatory function.

5.18 We intend to allow flexibility in the Bill so that the authorisation could be for any form of ABS or a particular identified model.

5.19 In future, it would be possible for the Government, on cause shown, and with the agreement of the Lord President, to revoke or amend the authorisation (if, for example, there was evidence that regulation was not operating effectively). We anticipate that the period of the authorisation would normally be open-ended, but it would be possible for Ministers to require that a licence be renewed after a specified period.

5.20 This is different from the approach adopted by the UK Government in the LSA 2007 which has established a “super-regulator”, the Legal Services Board, to licence individual regulators of legal services. As discussed at 2.14-2.15 above, we believe that creating an additional public body to undertake this role is disproportionate and unnecessary in the Scottish context.

5.21 However, we are interested in your view on whether it would be desirable to have some form of advisory panel which could offer advice to Ministers on applications for authorisation and keep the regulatory framework under review. This panel, or perhaps the existing Joint Standing Committee on Legal Education, might also advise on regulatory issues to do with admission and training for providers of legal services in ABS.

5.22 The Society has indicated in its policy statement that it would see itself as the natural regulator of ABS. The Government believes that this may very well prove to be the case, but that it would be inappropriate to grant exclusive powers to the Society without a process of ensuring that it has established the appropriate regulatory framework.

5.23 In summary, the Government makes the following proposals.

- Any ABS would be regulated by a single regulator, authorised to regulate that form of business by Scottish Ministers with the agreement of the Lord President.
- Professionals within that ABS would also continue to be regulated by their own professional bodies.
- ABS would be subject to the SLCC with respect to complaints.
- It would be for each professional body to consider the implications of how participating in an ABS would affect the individual’s professional duties.
- Entities and professionals would continue to be subject to any subject-specific regulation (such as financial services and immigration advice).

Questions

15 Do you agree that ABS should be regulated at the entity level, with individual professionals regulated by their own professional bodies, as set out in paragraphs 5.1 and 5.2?

16 Do you agree with our proposals for defining the ABS in paragraph 5.6?

17 Do you agree with our proposals for dealing with regulatory conflict in paragraphs 5.10 to 5.12?

18 Do you have any views on how the legal professional privilege should be protected in an ABS with reference to paragraphs 5.13 to 5.15?

19 Do you have any views in the setting up of some form of advisory panel to advise Ministers on applications as described in paragraph 5.21?

20 Do you agree that Ministers, with the agreement of the Lord President, should authorise ABS regulators as proposed in paragraph 5.16?

21 Do you agree that the Bill should set out the criteria for authorisation of ABS regulators, and that these criteria should relate to organisational capacity, independence, and an appropriate regulatory scheme (as proposed in paragraph 5.16)?

Chapter 6 Ownership of legal services

6 This chapter considers how to ensure that owners of alternative business structures (ABS), who are not themselves legal professionals, do not pose a threat to the core values of the legal profession.

Policy

6.1 Our approach is that there should be no restriction on any particular class of people or organisations who can own an ABS offering legal services – whether as shareholders or principals in the practice.

6.2 Concerns have been raised about the risk that external owners might use their control to influence solicitors to act illegally or unethically.

6.3 The Society considers that this could have implications for obligations under the Money Laundering or Proceeds of Crime legislation and other co-regulatory regimes.³² However, the Society also points out that existing business structures do not in themselves prevent solicitors succumbing to a range of influences, whether as a result of financial pressures or powerful clients.

Fitness to own

6.4 Nevertheless, we believe that outside ownership should only be permitted where those holding an interest in a legal practice can pass a “fit to own” test and comply with an appropriate code of conduct. Furthermore, regulation should require that there is no conflict of interest, and that there should be a proactive regulatory regime, which will take all reasonable steps to ensure that these requirements are met.

6.5 Having considered the proposals of the Law Society and the provisions in part 5 of the LSA 2007, our proposals are outlined below.

- Anyone owning all or part of, or operating as a principal in, an ABS, would be required to satisfy the ABS regulator that they pass a “fit to own” test. The details would be specified by the regulator, but the criteria would include:
 - honesty, integrity and reputation;
 - competence and capability; and
 - financial soundness.
- Where the owner is a corporate body such as a limited company, it would be open to the regulator to require not just that corporate body but those in control of that body to pass such a test.
- A requirement to demonstrate fitness when requested by the regulator – it would be open at any time for the regulator make such a request and to determine that a person was no longer “fit to own” and to require the interest in the ABS to be given up.

³² As outlined in the Society’s policy paper at page 12.

- It would be possible for the regulator to “passport” classes of persons as automatically deemed “fit to own” – for example, those who have already passed a comparable test in another regulatory regime.
- Anyone deemed able to be a partner in a legal practice by either the Society or any alternatively approved regulator would be “fit to own” an ABS.
- The ABS would require to have a Head of Legal Services and Head of Practice, who would respectively be personally responsible for ensuring that the legal service was provided in accordance with ethical standards and that the firm was complying with practice standards (for example, in relation to finance and administration). A possible alternative, on which we would welcome your view, is a Practice Committee whose members would jointly be responsible for such matters. The Head of Practice or Practice Committee would also report to the regulator in respect of owners with control or influence, and consider the continued ability of these individuals to meet the “fit and proper” test.
- All ABS must provide an indemnity in respect of any loss of clients’ monies.
- An ABS could not take instructions on a case from a client where an outside owner has an adverse influence or conflict of interest in the legal outcome.
- Outside owners would not be allowed to interfere in individual client cases or have access to client files or other information about individual cases.

Questions

22 Do you agree that there should be a “fit to own” test specified by the ABS regulator which should apply to anyone owning, or acting as a principal in, an ABS as proposed in paragraph 6.5?

23 Do you agree with the details of the test as proposed in paragraph 6.5?

24 Do you agree that the proposals provide sufficient safeguards to ensure that professional principles are not compromised in ABS which are externally owned?

25 Do you have any views on the proposals for a Head of Legal Services and Head of Practice or, alternatively, a Practice Committee for ensuring ethical and practice standards in ABS owned by non-legal owners?

Chapter 7 Law Society of Scotland

7 This section looks at what changes might be made to the governance of the Law Society of Scotland (the Society), including to accommodate ABS which deliver legal services.

Removal of current restrictions

7.1 At present the Society's Practice Rules prevent:

- solicitors from sharing fees or profits with non-solicitors;³³
- shareholding in a legal firm by anyone who is not a director and ownership by non-lawyers; and
- the formation of multi-disciplinary practices.³⁴

7.2 In order for solicitors to participate in ABS, the Society will be required to remove these restrictions. It has indicated its preparedness for doing so in its policy paper.

7.3 The Society is also currently considering wider governance issues. The Government wishes to support this by ensuring that the primary legislation which establishes the Society is compatible with its role as a modern regulator of legal services which aspires also to regulate new forms of business structure.

Current structure of the Law Society of Scotland

7.4 Part I of the Solicitors (Scotland) Act 1980 provides for the organisation of the Society and the establishment and functions of its Council (governing body). Section 1 provides that, in addition to the exercise of various statutory functions, the objects of the Society "shall include the promotion of (a) the interests of the solicitor's profession in Scotland and (b) the interests of the public in relation to that profession".

7.5 The membership of the Society consists of every solicitor holding a current practising certificate.³⁵ Schedule 1 of the 1980 Act requires the Council to provide a constitution, conduct elections, hold meetings and appoint office bearers and committees. The Form of Council is set out in the Society's Constitution,³⁶ which has been in place since 1988.

7.6 The Council exists:

- to carry out the business of the Society in name of the Council;

³³ Rule 4 of the Solicitors (Scotland) Practice Rules 1991.

³⁴ Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991.

³⁵ Solicitors (Scotland) Act 1980 section 2.

³⁶ http://www.lawscot.co.uk/Members_Information/council_info/opofcouncil.aspx.

- to apply the governing statutes and professional rules of the solicitors' profession in Scotland;
- to promote the interests of the solicitors' profession and the interests of the public in relation to the profession;
- to determine the policies of the Society; and
- to lead the profession.

7.7 The Council exercises its authority itself, through a variety of Committees and through the Executive Officers of the Society. 44 members of the Council are elected by the members of the profession and up to 9 members can be co-opted by the Council. All of these members are currently solicitors. The Council's 44 elected members must come from different geographical constituencies.

7.8 The Council is required to meet no fewer than 10 times each year and in practice meets every month except July. Meetings are chaired by the president whom failing the vice-president, and a quorum of 9 members is required.

7.9 Standing Orders are made by the Council in terms of article 25 of the Constitution of the Society. They include rules about:

- the conduct of business at general meetings of the Society;
- the meetings of the Council;
- the appointment of Council committees; and
- the conduct of committee business.

Governance review

7.10 The Society is undertaking a governance review. The review will make recommendations on the over-arching constituency/representational model for the Society; the under-pinning committee structure; and the internal management connection between Council, Office Bearers and the senior management team of the Society to ensure transparency, clear lines of responsibility and authority and provide an efficient and flexible environment for regulation, policy and management decision-making.

7.11 This is a long-term review which will be implemented on a phased basis. Council has already approved the establishment of a Finance Committee, and a working party to examine how committee convenors are appointed. Papers are also currently being prepared on how an oversight committee (management board) may streamline policy work in the future. Larger, more constitutionally challenging changes, which will require the preparation of detailed proposals alongside legal advice and consultation with both the profession and stakeholders, are being developed in parallel to the incremental changes that can be made internally.

7.12 The Society aspires to become a regulatory body of ABS. The Government recognises that the Society requires a modern statutory framework which ensures that it can operate efficiently and effectively, and that its regulation is credible and independent in the eyes of the public, and those subject to regulation.

Governance arrangements

7.13 It is unusual in modern governance for a governing council of over 50 members to exercise the range of functions exercised by the Law Society Council, and to meet as regularly as it does. A more common arrangement would be for such a body to set the broad policy direction, and for operational functions to be exercised by a smaller executive body, supported by designated committees. Changes were made as recently as 2003³⁷ to allow delegation by the Council, but we believe that further changes may be required.

Non-lawyer involvement

7.14 The absence of non-lawyer representation on the Council is a noticeable feature of the current decision making function of the Society. In response to the consultation³⁸ which informed the Legal Profession and Legal Aid (Scotland) Act 2007, the Society put forward proposals which would have allowed non-solicitors to be co-opted onto the Council, but these changes were not taken forward by Parliament.

7.15 Consumer bodies have also called for greater non-lawyer participation in the Council's governance, to reflect the fact that the Society is not simply a membership organisation, but a statutory body which has the public interest as a core concern. Consumer Focus Scotland (CFS)³⁹ has proposed that (as is the case with bodies such as the Scottish Legal Complaints Commission) a significant majority of the members of the governing body should be non-lawyers. CFS advocates that there should be up to 75% independent representation, including the chair, within self-regulating schemes.

7.16 The Government is not currently persuaded that the extent of non-lawyer participation in the governance of the Society requested by CFS is justified, but accepts that a significant degree of credible non-lawyer involvement would provide reassurance that the Society is able effectively to balance public and professional interests.

Separation of regulatory and representative role

7.17 The Office of Fair Trading (OFT), amongst others, has expressed concerns about the regulatory and representative roles of the Society. Its view is that, in the interests of consumer protection, there should be a clear separation of the regulatory function from the responsibilities for representing and promoting the interests of the profession. It is argued that, for a profession that places emphasis on the avoidance of conflicts of interest (of even the appearance of such), undertaking both roles creates such a conflict.

³⁷ Council of the Law Society of Scotland Act 2003 (asp 14).

³⁸ Entitled: "**Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland**".

³⁹ Formerly the Scottish Consumer Council.

7.18 Undoubtedly, it is in the broader interests of the profession that it should maintain its public standing, so there is in that sense a commonality of interest between the profession and the public. Nonetheless, the combination of roles does make it harder to demonstrate that regulatory decisions are taken purely with the public interest in mind, regardless of any inconvenience or difficulty they may cause to the profession.

7.19 Should the Society be an ABS regulator, the combined roles would be harder to justify as the Society would be regulating people working in ABS who are not solicitors (indeed may be in competition with solicitors), while being required to promote the interests of solicitors.

7.20 In England and Wales, the regulatory and representative functions of the Law Society of England and Wales have been split with the establishment of the Solicitors Regulatory Authority (SRA). This is part of the Law Society but operates at arm's length as an independent regulatory body, whose purpose is to protect the public by ensuring that solicitors meet high standards, and by acting when risks are identified.

7.21 Such a split is not straightforward. The SRA's resources are ultimately dependent on decisions by the Law Society, so it is not able to operate completely without reference to the Society. Also, it is difficult to distinguish between regulatory functions and those of a professional body. Education and training, for example, contains elements of both.

7.22 A more radical option is for the Society to focus only on one role – to choose either to be a professional regulator or to be a representative body. This is the way professions such as the medical profession operate.⁴⁰ However, if the Society were to give up its regulatory role, the establishment of a new independent regulator would require the creation of a new public body at considerable expense, and would involve the loss of the considerable regulatory experience of the Society.

7.23 It is the Government's view that the Law Society should remain as the regulator of individual solicitors, and we are sympathetic to their aspirations to regulate ABS. However we believe that this will require a move towards a clearer separation of the regulatory function. In respect of this aspect of the work of the Society, we also believe that the argument for majority non-lawyer representation on any regulatory committee has considerable merit.

Guarantee Fund and Master Policy

7.24 Currently, consumers enjoy a greater level of protection if the legal services they receive are delivered by a Scottish solicitor working within a traditional firm, as opposed to an unregulated legal services provider working outside the reserved areas. If alternative business structures are to become a reality in Scotland, it is important that the same level of consumer protection applies to alternative business structures as it does to traditional business models.

⁴⁰ The General Medical Council (GMC) is the regulatory body and the British Medical Association BMA acts as trade union and professional representative body.

7.25 There are two different kinds of consumer protection particular to the solicitors' profession, namely the Guarantee Fund and the Master Policy.

Guarantee Fund⁴¹

7.26 The Law Society of Scotland administers the Scottish Solicitors Guarantee Fund which is a unique consumer protection. The fund, to which all solicitors who are partners in private practice and who handle clients' money contribute annually, can be used to reimburse any persons who have suffered monetary loss as a result of the dishonesty of a solicitor or their staff.

7.27 A justifiable claim must satisfy all of the following conditions.

- The solicitor or their staff must have acted dishonestly in the course of their legal practice.
- The claimant must have suffered monetary loss.
- All other means of recovery must have been exhausted.

7.28 Most claims are against sole practitioners as those who work in a partnership are likely to be covered by the Master Policy for the dishonesty of one of their partners or a member of staff.

Possible limits to liability

7.29 When the Guarantee Fund was established, society was very different. It can be argued that to ensure that mandatory protections should be aligned with modern business practice and consistent with the treatment of other professionals

7.30 The Society is of the view that the current unlimited liability of the Guarantee Fund across the whole profession is inconsistent with encouraging greater enterprise and the attraction of third party capital to alternative business structures. However, it may be felt desirable that the owners of an individual business remain liable to fully compensate victims of dishonesty within that business so far as not covered by insurance.

7.31 It also believes that irrespective of the introduction of ABS, a cap on the value of individual claims should be introduced. The question of whether the overall liability of the Fund should also be limited is still being considered, although the Society is not aware of any equivalent commitment within any other legal jurisdiction nor, indeed, any other profession or sector.

Who should contribute?

7.32 One of the main questions to be determined is who within an ABS should be expected to contribute to the Guarantee Fund. Currently for incorporated legal practices, only the principals of the practice contribute to the Fund.

⁴¹ Provisions for the Guarantee Fund are found in section 43 of the Solicitors (Scotland) Act 1980.

7.33 Another option would be to require a contribution from all legal services firms (irrespective of the business model) rather than principals, with an underlying formula to calculate how much each firm must pay, although there is a risk that calculating a contribution might be disproportionately bureaucratic.

Professional indemnity insurance – Master Policy⁴²

7.34 All solicitors in private practice must have professional indemnity insurance. The Master Policy is the compulsory professional indemnity insurance arrangement which covers all Scottish solicitors working in private practice. The Society arranges the Master Policy for professional indemnity insurance through appointed brokers. Claims are handled by the Master Policy insurers. The insurance provides cover of up to £2 million for any one claim.

How would this fit in with ABS?

7.35 The Government considers that it should be a licensing condition for ABS to take out appropriate professional indemnity insurance. Such insurance would require to be at least equivalent to the Master Policy in order to ensure proper public protection as well as guaranteeing consistency between ABS and the traditional business model for a legal practice.

Questions

26 Should changes be made to the Society's governance arrangements, for example, in relation to the size of Council, frequency of meetings and decision making powers?

27 Do you agree that there should be significant non-lawyer membership on the Council of the Society?

28 Should the representation and regulatory roles of the Society be split as proposed by the Office of Fair Trading (see paragraph 7.17)?

29 Should the Guarantee Fund or an equivalent provision be required for ABS?

30 Should the liability under the Guarantee Fund be capped, either for individual claims, or the overall liability?

31 Are there any particular provisions which are required in relation to professional indemnity insurance for ABS, beyond what is set out at paragraph 7.35?

⁴² Provisions for solicitors' professional indemnity are found in section 44 of the Solicitors (Scotland) Act 1980.

Chapter 8 The Faculty of Advocates

8 This chapter explores the regulatory position of advocates, and the Faculty's response to the Government's policy statement.

Regulation and governance

8.1 The Faculty of Advocates is an independent body of lawyers who have been admitted to practise as advocates before the Courts of Scotland. It has been in existence since at least 1532 when the College of Justice was set up by Act of the Scots Parliament, but its origins are believed to predate that event.

8.2 The basis on which the Faculty operates as a regulator of advocates is set out in the Faculty's Guide to the Professional Conduct of Advocates as follows:⁴³

"The Faculty of Advocates is a self-governing body consisting of those admitted to the office of Advocate in the Court of Session. The formal act of admission to that office is an act of the Court and an Advocate can ultimately be deprived of his office only by the Court. But, by long tradition, the Court has left it to the Faculty of Advocates (a) to lay down the qualifications for admission, (b) to determine whether an applicant for admission satisfies those qualifications, (c) to lay down the rules of professional conduct, and (d) to exercise disciplinary authority.

The Dean of Faculty is the elected leader of the Faculty of Advocates and, again by long tradition, the Faculty entrusts him with wide powers to make rulings on matters of professional conduct and, subject to the Disciplinary Rules of Faculty, to exercise disciplinary authority. The Dean's Council is a consultative body whose function is to advise the Dean on these and other matters.

In practice therefore, the legal and professional rights and obligations of an Advocate depend:

- (i) upon the fact that he holds the office of Advocate in the supreme Courts of Scotland; and
- (ii) upon the fact that he is a Member of the Faculty of Advocates and is subject to the disciplinary authority of the Faculty and its Dean."

8.3 In effect, the Faculty exercises a dual role of representing the interests of advocates and, on behalf of the Courts, regulating advocates in the public interest and in the interests of justice.

8.4 The Faculty is led by its Dean, who is elected by the whole membership, supported by the Vice-Dean, Treasurer, Clerk, Keeper of the Library and Chairman of Faculty Services Ltd, all of whom are also elected. In 1992 the Faculty adopted a constitution for an elected Council of advocates. The Council, which advises the Dean, has power to formulate and implement policy for the administration and

⁴³ The Guide to the Professional Conduct of Advocates, 5th edition (op. Cit.) paras 1.1.2 – 1.1.4.

development of the Faculty; the maintenance of the Advocates Library; the provision of administrative facilities through Faculty Services Ltd and the formulation of regulations governing admission, codes of conduct and professional practice.

8.5 Complaints against advocates are considered by the Scottish Legal Complaints Commission, although issues of professional misconduct will be referred by them to the Faculty. The Disciplinary Rules of the Faculty⁴⁴ provide for non-advocate involvement in the disciplinary process – three of the six members of a disciplinary tribunal will be non-advocate members from a panel appointed by Scottish Ministers.

8.6 Concerns have been expressed that, as with solicitors, the joint exercise of regulatory and representative functions creates a potential conflict of interest – or at least the perception of such a conflict. Consumer bodies have argued that there should be independent regulatory oversight of advocates and a Council with a non-advocate chair and majority of non-advocate members.⁴⁵

8.7 The Faculty's position is that advocates are indeed subject to an oversight regulator – the Lord President of the Court of Session. It argues that the oversight of the Bar by the court is a common practice across the world, and that to fundamentally change that relationship would raise issues concerning the independence of the courts from Government. Furthermore, it contends that the small size and collegiate nature of the Bar makes the current regulatory regime proportionate and effective, and a new regulatory structure would add to the overheads of the Bar, increasing costs to consumer with, in its view, no significant related benefit.

8.8 The Government is not currently persuaded that a new regulatory regime for advocates is warranted, and does not propose to alter the status of advocates as holders of a public office granted by the Court of Session.

8.9 Although this Bill is fundamentally about ABS our discussions with the Bill Reference Group highlighted that it would be helpful to codify the regulatory framework governing advocates, including the role of the Lord President within this framework. This suggestion received general endorsement from both the Faculty and consumer groups in the Bill Reference Group, and would sit alongside the provisions of the Judiciary and Courts (Scotland) Act 2008, which sets out provisions for the operation of the courts under the leadership of the Lord President.

8.10 In doing so, we will consider, in consultation with the Lord President, how best such codification might reflect the regulatory principles outlined in chapter 4.

⁴⁴ <http://www.advocates.org.uk/downloads/disciplinaryrules2008.pdf>

⁴⁵ As with the Society, CFS favour up to 75% non-advocate membership of the Faculty of Advocates' Council.

Position on ABS

8.11 Advocates are bound by a rule⁴⁶ that “[an advocate] cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate”. In effect, all advocates must practice as sole traders. Bodies such as the CFS, *Which?* and the OFT have argued that this prohibition on partnerships should be lifted.

8.12 The Faculty set out the following arguments for maintaining these restrictions in *Access to Justice: a Scottish Perspective: a Scottish Solution*.⁴⁷

- The referral Bar provides choice to consumers of legal services, many of whom may not have access to the large specialist firms of solicitors concentrated in cities. Access to justice in Scotland would be diminished and public choice reduced if advocates operated in partnerships.
- The “cab-rank” rule offers consumer protection. Advocates cannot pick and choose cases or clients. Advocates would be bound by the duties of any partnership or firm in an ABS and the “cab-rank” rule could not be maintained.
- The position of the Scottish Bar is significantly different to that of barristers in England. Apart from the huge disparity in size (17,000 barristers compared to 460 advocates), which has implications for the operation of the legal market, it is already the case in England that barristers can be employed in solicitors’ firms. Allowing barristers to operate in partnership with solicitors (as is envisaged by the LSA 2007) is a less radical change than altering the position of advocates.
- The current model reduces the administration and the financial burden that partnership would bring. The current structure means that advocates are not diverted from the practice of law to operate a firm. Communal use and shared costs associated from the use of the Library and Faculty Services Ltd ensures reduced overheads.

8.13 The Faculty’s response also supported certain changes to their Rules. The “mixed-doubles” rule, which prevented the instruction of an advocate and solicitor advocate in the same case, was subsequently removed by the Faculty in September 2008. The Faculty also proposes widening measures on direct access by clients in appropriate circumstances.

Transfer between advocates and solicitor advocates

8.14 The Faculty argue that the maintenance of their restrictions does not prevent anyone who practices advocacy from participating in an ABS. Advocates would be able to join any new structures by opting to become solicitor advocates. Solicitor advocates have the same rights of audience as advocates. The main differences are that solicitor advocates are regulated by the Law Society of Scotland and are not bound by any of the structures under which the Faculty operates.

⁴⁶ The Guide to the Professional Conduct of Advocates, paragraph 1.2.5

⁴⁷ <http://www.advocates.org.uk/news/news.html>

8.15 The Faculty's response points to some current restrictions, removal of which would simplify the process of transfer from the Faculty to the solicitors' branch.

8.16 The Government's response to the OFT report on the *Which?* super-complaint stated:

“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.”

8.17 Against this approach, it could be argued that it maintains restrictions which some, albeit a minority, of the current members of Faculty wish to see removed. If there are significant reputational or other factors which might discourage those wishing to participate in ABS from taking the solicitor advocate route, the argument that consumer choice is ensured would be weakened.

8.18 On balance, the Government is not currently persuaded that it is necessary to require the Faculty to permit its members to form partnerships or participate in ABS, provided transfer between the two branches of the profession can be a straightforward proposition which does not involve substantial detriment to the practitioner. We propose to work with the Law Society of Scotland and the Faculty to consider the various issues which might facilitate ease of transfer, including entry requirements, transfer arrangements, and mutual recognition of practice and continuing professional development.

8.19 This approach would not prevent the Faculty from adopting a different position in future concerning ABS, since the restrictions are contained in its own rules, rather than in statute.

8.20 We also wish to consider how to ensure that consumers are clear about the nature of the relationship they have with a person providing advocacy services, and the choices open to them. While solicitor advocates and advocates perform essentially the same task, there are significant differences in the duties they owe to clients and the courts, fundamentally based on the fact that the solicitor advocate has a contractual relationship with a client, while the advocate acts in the exercise of a mandate.⁴⁸ This means, for example, that advocates cannot sue for fees. The mandate also gives them greater power than a solicitor advocate to take certain decisions in relation to a court action without the express authority of the client.

⁴⁸ See Lord Inglis in *Batchelor v Patterson & Mackersy* (1876) 3R. 914, discussed in the Guide to the Professional Conduct of Advocates, 5th edition, Chapter 1.

Questions

32 Do you agree that the Faculty should not be required to allow its members to form partnerships or participate in ABS, provided that those wishing to do so can easily become solicitor advocates?

33 Do you believe that the regulatory framework of the Faculty should be organised into a code set out in law?

34 Do you believe that the regulatory framework of the Faculty described in paragraphs 8.1 to 8.10 should be changed in any respect?

Chapter 9 Regulation of claims management

9 This chapter considers whether there is a need for regulation of claims management companies, and sets out possible options.

Introduction

9.1 Although there is little objective evidence of malpractice in Scotland, there is some unease amongst professional and consumer bodies about the lack of regulation of the claims management industry, and the potential to exploit that lack to the detriment of the consumer.

9.2 Claims management companies are businesses that offer claims management services to the public. These consist of advice or services in respect of claims for compensation, restitution, repayment or any other remedy for loss or damage, or in respect of some other obligation. Claims management services might be offered by a firm of lawyers, in which case, there would be regulation by the Law Society of Scotland. Other claims management firms might employ a solicitor, in which case that solicitor would be regulated by the Law Society, though other employees of the firm might be unregulated. But in many cases, there is no solicitor in the business. If so, the services in a Scottish firm are unregulated, whereas in England and Wales there is regulation by the Claims Management Services Regulator set up under the provisions of the Compensation Act 2006 (“the 2006 Act”).

Background

9.3 In 2000, the Lord Chancellor ended the availability of legal aid for personal injury claims in England and Wales. As a result, the practice of using conditional or speculative fee arrangements (known colloquially as “no win, no fee”) grew. Consequently, the number of claims management companies increased, many of which were just “middlemen” with no solicitors. These companies with no solicitors had to employ solicitors if and when a case was going to court and it was only at this late stage that a legal opinion was given on the chance of success.⁴⁹

9.4 There is a strong case that, in the English and Welsh context, claims management companies have increased access to justice. Some claimants, who would otherwise not have been able to afford to take action, have managed to obtain redress. But there has also been a downside to the growth of these companies. Some claims management companies used questionable techniques to persuade clients to sign up including approaching people in hospital, the use of market stalls, and cold calling. Some companies also used practices such as persuading clients to give false information about the event that caused injury, wildly over-stating the chances of success, and grossly exaggerating the possible compensation that the client might receive.⁵⁰

⁴⁹ There is anecdotal evidence that even when a firm employed a solicitor, sometimes when a case was being dealt with by a non-lawyer, there was no legal opinion until this late stage.

⁵⁰ See [No win, no fee, no chance](#), Sandbach J, Citizens Advice, December 2004.

9.5 Many companies did not explain the full implications of after-the-event (ATE) insurance to clients. An ATE policy is required to pay the other side's award in the event of a client losing a case. The premiums for this insurance are high (currently £300-£900, though it can be much more in complex cases). As many of the clients had modest financial means the companies set up high cost loans for their clients to pay the premiums.

9.6 Sometimes, ATE insurance came with conditions. Firstly, the insurance company could direct a client to accept an offer from the other side rather than go to court. This has led to cases where settlements have occurred which subsequent legal opinion has considered to be substantially less than the client would have received if the case had gone to court. (There are also cases recorded where claims management companies with no legal opinion have pressurised clients to accept a low offer.) Secondly, the insurance company may insist on the client seeing and paying for an examination by its own medical practitioner. (Since January 2005 ATE insurers and claims management companies that are also insurers have been subject to regulation by the Financial Services Authority in respect of their insurance activities.)

9.7 The result of all this is that people who thought that they had nothing to lose because it was "no win, no fee" found themselves in considerable debt, as it had not been properly explained to them that the slogan only referred to the claims management company's fee. Even some of those who won their cases found themselves in debt because medical fees and/or the cost of the ATE insurance amounted to more than the sum awarded.

9.8 Anxieties about the situation with claims management companies and the "compensation culture" that they were perceived to be encouraging, led to a report by the Better Regulation Task Force.⁵¹ As a result, Ministers at Westminster decided to regulate these companies. The regulation was achieved through implementation of part 2 of the 2006 Act. The Claims Management Services Regulator⁵² was created by section 11 of the 2006 Act. The regulator was required to:

- authorise and regulate claims management companies;
- set and monitor standards of competence and professional conduct;
- promote good practice, in particular as to the provision of information about charges and other matters to users;
- promote practices likely to facilitate competition; and
- ensure that arrangements are made for the protection of users, including complaints handling.

9.9 The Ministry of Justice has evaluated the effects of claims management regulation. The evaluation's executive summary states: "The regulatory regime for

⁵¹ [Better routes to redress](#), Better Regulation Task Force, 2004.

⁵² The regulator is the Secretary of State and the Ministry of Justice has a small team to deal with regulatory policy.

claims management activities is considered to have had a significant effect in reducing malpractice in its first full year of operation.

- Cold calling in person has been significantly reduced. This has reduced the number of frivolous claims and helped defuse the perception of a “compensation culture”.
- Unauthorised marketing in hospitals has been largely eliminated.
- A strategy has been developed for dealing with contrived accidents, with the Department also taking a co-ordinating role for the various enforcement agencies and the insurance industry.
- Malpractice by companies handling claims against the Criminal Injuries Compensation Authority has been significantly reduced, including through some companies voluntarily leaving the market.
- Misleading use of the expression “no win, no fee” has largely been eliminated.
- Misleading claims on websites have been almost entirely removed and rules requiring websites to give a physical address are being complied with.
- What little malpractice there was in respect of handling endowment claims has largely been removed.
- The growth of claims handlers dealing with bank charges has been controlled, preventing significant malpractice from developing.”⁵³

9.10 When the Compensation Bill was being drafted and introduced at Westminster, consideration was given as to whether it should be extended to cover Scotland. At that time (2005), there was no evidence of similar problems with claims management companies north of the border and the decision was taken not to extend the Bill to Scotland. The view was taken at the time that this was a devolved matter and that Scottish Ministers could in future decide to regulate if deemed necessary.

The present situation

9.11 We have consulted with the Society of Chief Officers of Trading Standards in Scotland, the Office of Fair Trading, the Ministry of Justice, Citizens Advice Scotland, the former Scottish Consumer Council⁵⁴, and the Law Society of Scotland. Though there is some anxiety, not one of these groups was able to supply any evidence of a complaint in Scotland.

9.12 In this consultation, we wish to consider the extent of any difficulties with claims management companies in Scotland.

Summary and conclusion

9.13 The Scottish Government considers that there is a place for speculative fee arrangements in relation to personal injury matters, although the ongoing availability

⁵³ [Claims management regulation: impact of regulation: one year assessment](#), Mark Boleat, Ministry of Justice, April 2008, pp 8-9.

⁵⁴ Now CFS.

of legal aid, and the recently proposed extension of eligibility limits, may limit their extent for the foreseeable future. Other stakeholders agree as to the desirability of allowing speculative fees.⁵⁵

9.14 The provisions of the Bill would mean that where a claims management company is an ABS, it will be regulated under the provisions for regulating such firms. This still leaves a question as to what happens when, as is often the case, there is no legal professional within the firm and the company is not subject to any regulation.

9.15 The Government is considering whether regulation should be introduced similar to that in England and Wales. The aim of this regulation would be to protect consumers by requiring all claims management companies offering services in Scotland to be placed on a register. The Bill would provide for a set of regulatory rules and provide enforcement measures and sanctions. More specifically, it would provide for a regulator which will:

- authorise, license and regulate claims management companies;
- set and monitor standards of competence and professional conduct;
- promote good practice; and
- make sure that arrangements are in place to protect the public and to provide for the handling of complaints.

The options

9.16 There are three options available to the Scottish Government.

- Do nothing.
- Regulation by a non-departmental public body (NDPB).
- Introduce a regulatory framework similar to that which exists in England and Wales (as created by the 2006 Act).

Option 1 – do nothing

9.17 The do nothing option would leave claims management companies unregulated in Scotland. This means that Scottish consumers will continue to have less protection than their counterparts in England and Wales. There is a risk:

- that unscrupulous service providers could operate unregulated with little consumer protection: and
- of dubious service providers moving to Scotland to avoid the regulation in England and Wales.

⁵⁵ For example, the Scottish Consumer Council (now CFS) has written: “In principle, we believe that speculative fee arrangements may provide a useful means of increasing access to justice in some cases for those who are ineligible for legal aid and do not have access to other means of funding, such as a trade union or legal expenses insurance.”

Option 2 – a new NDPB

9.18 A non-departmental public body would provide an independent regulator. The greatest difficulty with this option is the burden on the taxpayer. If a new body were to be set up, the costs of so doing are likely to be significant. The creation of a new NDPB would also be inconsistent with the Government's aim of simplifying the public sector. Using an existing non-departmental public body is likely to involve less cost but identifying a suitable body might be difficult.

Option 3 – regulate by Government with contracted out operation

9.19 Finally, the Government could follow the model used in England and Wales which was introduced by part 2 of the 2006 Act, where it was recognised that much of the regulatory work was similar to that undertaken by local authority trading standards departments. Staffordshire County Council was selected, after an open tender process, to provide a Monitoring and Compliance Unit under contract to the Ministry of Justice. The unit reports directly to the ministry and all regulatory decisions are made by the ministry. A similar tendering exercise and regulatory model could be undertaken in Scotland with Justice Ministers taking the regulatory decisions. Set-up costs would still be involved but are likely to be less than the option of using a non-departmental public body. The aim would be that running costs should be recovered through licensing fees. The biggest risk is that no body tenders for the regulation.

Questions

35 Do you consider that regulation of claims management companies operating in Scotland is necessary?

36 If you think that regulation is necessary, which option do you favour?

- **Regulation through a non-departmental public body.**
- **Regulation by Scottish Ministers with licensing and administration contracted out to trading standards department or similar body.**

37 Are you aware of any issues in Scotland with “no win, no fee” arrangements where the cost to the client was greater than the award?

38 Are you aware of any poor practices by claims management companies in Scotland, for example:

- **questionable advertising, and/or**
- **practices such as cold calling, market stalls, or approaching people in hospital in Scotland, and/or**
- **inappropriate pressure to settle a claim?**

Consultation questionnaire

This questionnaire is intended for you to respond to the questions raised within the consultation paper.

We have presented the questions which appear in the consultation in full below. They are in the same order with the same numbers as in the consultation paper, with space for you to answer.

Please read through the consultation paper and then record your answer to each question in the space provided.

You may answer as many questions as you wish; you do not need to answer all the questions if you do not wish to do so.

Additional pages are also provided at the end of the document in case you require further space for your response to any of the questions.

Chapter 2: Alternative business structures

1 Do you agree that alternative business structures (ABS) should be permitted for the provision of legal services by solicitors in Scotland?

Yes

No

If no, please explain why not.

2 Are there any of the 3 business structures described in paragraphs 2.21 to 2.30 which should not be permitted?

Yes

No

If yes, please provide details below.

If yes, please provide your reasons for why you feel they should not be permitted below.

3 Are there any of these 3 business structures which should be permitted but which you feel would require additional safeguards?

Yes

No

If yes, please provide your reasons why you feel additional safeguards are necessary and, if possible, suggest what these safeguards should be.

4 Should there be any change to the present arrangements for regulating licensed conveyancers and executry practitioners, or those with rights of audience, as described in paragraphs 2.5-2.9?

Yes

No

If no, please provide your reasons why you feel any area should be added or removed.

Chapter 3: Who will be affected by the Bill?

5 Should the areas of business reserved to legal professionals as described in paragraph 3.3 remain as now?

Yes

No

If no, please describe which people you have in mind and your reasons for added regulation.

6 Do you support the proposals that the Bill should focus on the regulation of legal professionals and businesses where legal professionals are involved in the provision of legal services to third parties (for the reasons given in paragraph 3.8)?

Yes

No

If yes, please provide your reasons for why you feel change is necessary.

7 Do you agree that (subject to the issues discussed in chapters 7 and 8), the arrangements for regulation of solicitors and advocates in traditional forms of practice, should remain as they are now?

Yes

No

If no, please explain why not.

8 Do you think that provisions to allow applications for confirmation rights, as described in paragraphs 3.10 to 3.13, should be included in the Bill?

Yes

No

If no, please explain why not.

Chapter 4: Principles of regulation

9 Do you agree that there should be a statement of regulatory objectives for providing legal services in ABS as proposed in paragraph 4.8?

Yes

No

If no, please explain why not.

10 Do you agree that regulatory objectives should be supplemented by considerations which should guide the actions of regulators, as proposed in paragraph 4.9 and 4.10?

Yes

No

If no, please explain why not.

11 Do you agree that there should be a statement of professional principles for those providing legal services in ABS, as proposed in paragraph 4.11?

Yes

No

If no, please explain why not.

12 Are there any amendments which should be made to the Government's proposed listings at paragraphs 4.8, 4.10 and 4.11?

Yes

No

If yes, please suggest amendments and the reasons why you feel they are needed.

13 Do you agree that it should be possible for regulators to grant conditions of licence or to refuse a licence to operate an ABS where there is demonstrable evidence of a risk to access to justice (as proposed at paragraph 4.27)?

Yes

No

If no, please explain why not.

14 Do you have any other suggestions as to how the regulatory objective of promoting access to justice can best be achieved?

If so, please provide these below.

Chapter 5: The regulatory approach

15 Do you agree that ABS should be regulated at the entity level, with individual professionals regulated by their own professional bodies, as set out in paragraphs 5.1 and 5.2?

Yes

No

If no, what alternative regulatory model would you prefer to see and why?

16 Do you agree with our proposals for defining the ABS in paragraph 5.6?

Yes

No

If no, what changes would you propose?

17 Do you agree with our proposals for dealing with regulatory conflict in paragraphs 5.10 to 5.12?

Yes

No

If no, what changes would you propose?

18 Do you have any views on how the legal professional privilege should be protected in an ABS with reference to paragraphs 5.13 to 5.15? If so, please provide details below.

19 Do you have any views in the setting up of some form of advisory panel to advise Ministers on applications as described in paragraph 5.21? If so, please provide details below.

20 Do you agree that Ministers, with the agreement of the Lord President, should authorise ABS regulators as proposed in paragraph 5.16?

Yes

No

If no, please explain why not and, if possible, suggest alternative options.

21 Do you agree that the Bill should set out the criteria for authorisation of ABS regulators, and that these criteria should relate to organisational capacity, independence, and an appropriate regulatory scheme (as proposed in paragraph 5.16)?

Yes

No

If no, please explain why not.

Chapter 6: Ownership of legal services

22 Do you agree that there should be a “fit to own” test specified by the ABS regulator which should apply to anyone owning, or acting as a principal in, an ABS as proposed in paragraph 6.5?

Yes

No

If no, please explain why not.

23 Do you agree with the details of the test as proposed in paragraph 6.5?

Yes

No

If no, what changes would you suggest?

24 Do you agree that the proposals provide sufficient safeguards to ensure that professional principles are not compromised in ABS which are externally owned?

Yes

No

If no, what changes or additions to the test would you suggest?

25 Do you have any views on the proposals for a Head of Legal Services and Head of Practice or, alternatively, a Practice Committee for ensuring ethical and practice standards in ABS owned by non legal owners?

If so, please provide details below.

Chapter 7: Law Society of Scotland

26 Should changes be made to the Society's governance arrangements, for example, in relation to the size of Council, frequency of meetings and decision making powers?

Yes

No

If yes, what changes should be made?

If no, please explain why not.

27 Do you agree that there should be significant non-lawyer membership on the Council of the Society?

Yes

No

If yes, which percentage (for example, 25% or 50% or 75%) should be non-lawyers and how should such members be appointed?

If no, please explain why not.

28 Should the representation and regulatory roles of the Society be split as proposed by the Office of Fair Trading (see paragraph 7.17)?

Yes

No

If yes, how should this be implemented?

If no, please explain why not.

29 Should the Guarantee Fund or an equivalent provision be required for ABS?

Yes

No

If no, please explain why not.

30 Should the liability under the Guarantee Fund be capped, either for individual claims, or the overall liability?

Yes

No

If no, please explain why not.

31 Are there any particular provisions which are required in relation to professional indemnity insurance for ABS, beyond what is set out at paragraph 7.35?

Yes

No

If yes, please tell us what you think is required.

Chapter 8: The Faculty of Advocates

32 Do you agree that the Faculty should not be required to allow its members to form partnerships or participate in ABS, provided that those wishing to do so can easily become solicitor advocates?

Yes

No

If no, please explain why not.

33 Do you believe that the regulatory framework of the Faculty should be organised into a code set out in law?

Yes

No

If no, please explain why not.

34 Do you believe that the regulatory framework of the Faculty described in paragraphs 8.1 to 8.10 should be changed in any respect?

Yes

No

If yes, what changes you would like to see made.

Chapter 9: Regulation of claims management

35 Do you consider that regulation of claims management companies operating in Scotland is necessary?

Yes

No

If no, please explain why not.

36 If you do think that regulation is necessary, which option do you favour? (please tick one box)

Regulation through a non-departmental public body

Regulation by Scottish Ministers with licensing and administration contracted out to a trading standards department or similar body

Why do you favour this option?

37 Are you aware of any issues in Scotland with “no win, no fee” arrangements where the cost to the client was greater than the award?

Yes

No

If yes, please provide details.

38 Are you aware of any poor practices by claims management companies in Scotland, for example:

- **questionable advertising, and/or**
- **practices such as cold calling, market stalls, or approaching people in hospital in Scotland, and/or**
- **inappropriate pressure to settle a claim?**

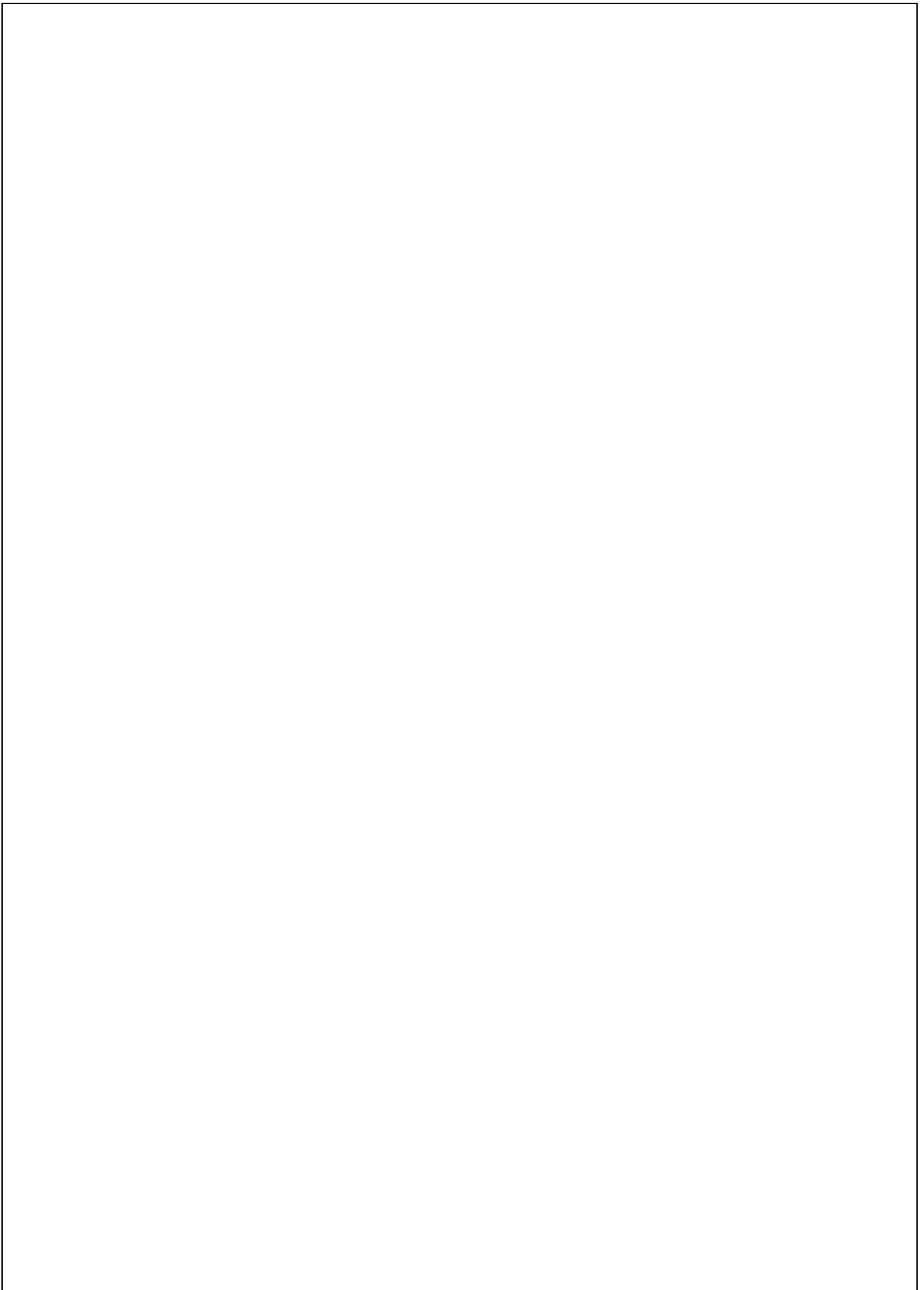
Yes

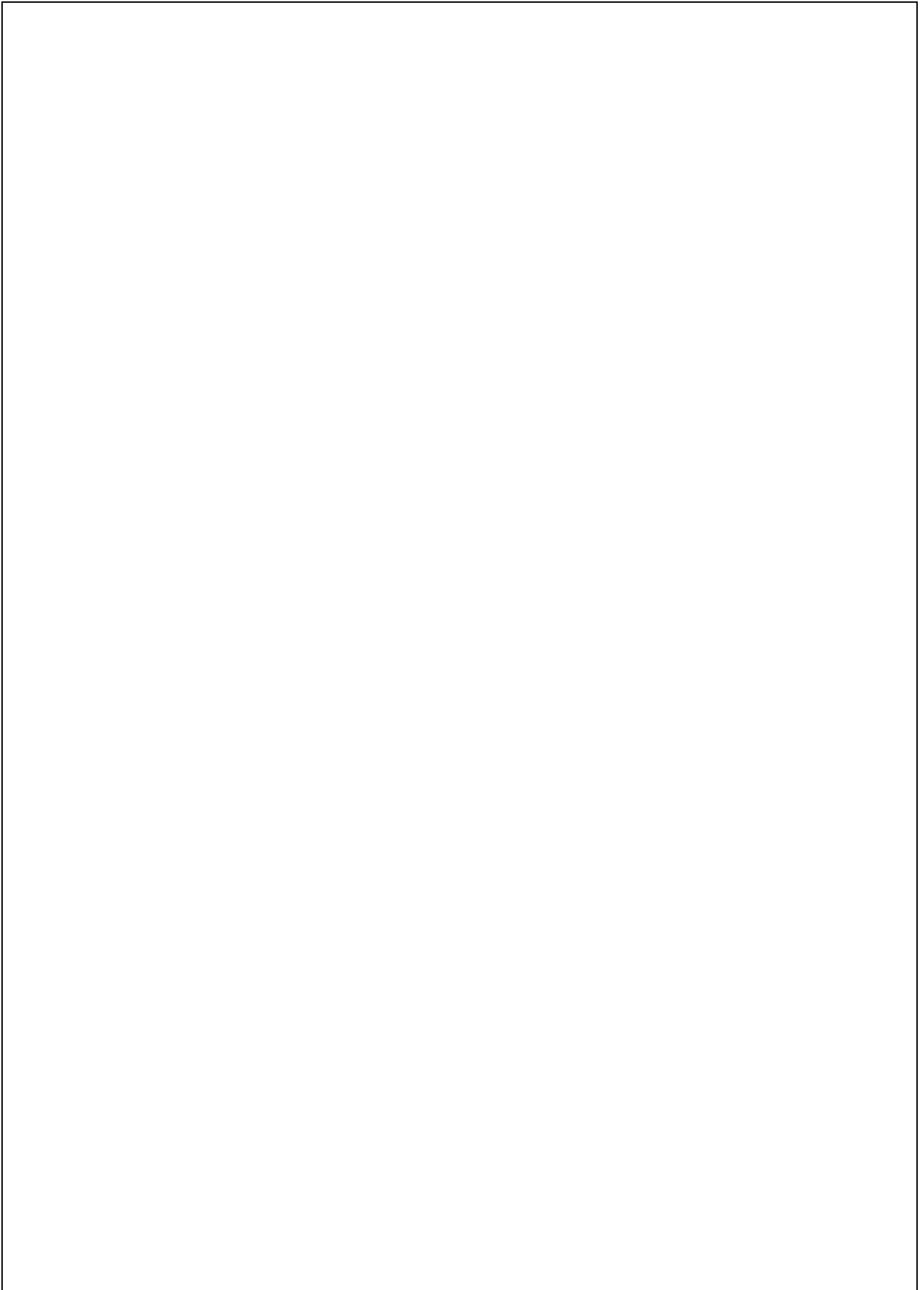
No

If yes, please provide details.

End of consultation questions

Additional pages are provided for your use if required. If you use these pages, please give the number of the question to which your response refers, where appropriate.





Responding to this consultation

We are inviting written responses to this consultation paper by Friday 3 April 2009. Electronic comments would be preferred but all responses, whether electronic or written, will be carefully considered. The Scottish Government has a number of consultation questions on which it would welcome views. Please do not feel obliged to answer all the questions. Equally, if you would like to comment on any other aspects of the proposals, the Scottish Government would welcome your views.

We would be grateful if you could use the separate consultation questionnaire, **provided at annex A**, to answer the questions posed throughout the consultation paper.

Please send your completed response and, Respondent Information Form (see "Handling your response" below) to:

Julie.Muir@scotland.gsi.gov.uk

or

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EH1 3DG

If you have any queries contact Julie Muir on 0131 244 8242.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (SEconsult: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return (electronically if possible) the **Respondent Information Form** which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library. Please ensure that you complete the attached Respondent Information Form. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the terms of the Legal Profession Bill. We aim to issue a report on this consultation process [by the end of the summer of 2009. The aim is that the Bill will be introduced shortly before summer 2009 with Stage 1 taking place in the spring of 2010.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Julie Muir
Legal System Division
Constitution, Law and Courts Directorate
Scottish Government
Area 2W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Julie.Muir@scotland.gsi.gov.uk

The Scottish Government consultation process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government website enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (for example, analysis of response reports) can be accessed at: Scottish Government consultations at <http://www.scotland.gov.uk/consultations>).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and
- be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

List of organisations being consulted

Bill Reference Group membership

Law Society of Scotland
Faculty of Advocates
Office of Fair Trading
Scottish Consumer Focus
Scottish Legal Aid Board
Professor Alan Paterson of Strathclyde University

Legal organisations

Association of Commercial Attorneys
Bar Council (England and Wales)
Crown Office and Procurator Fiscal's office
Glasgow Bar Association
Govan Law Centre
Irwin Mitchell Solicitors
Law Commission for England and Wales
Legal Services Agency
Legal Services Board
Legal Services Ombudsman for England and Wales
Lord President of the Court of Session
Lord Chief Justice
Northern Ireland Assembly: Legal Services Review
Oracle Chambers
Royal Faculty of Procurators in Glasgow
Scotland Against Crooked Lawyers
Scottish Child Law Centre
Scottish Association of Law Centres
Scottish Council for Development and Industry
Scottish Courts Service
Scottish Financial Enterprise
Scottish Justices Association
Scottish Law Agents Scotland
Scottish Law Commission
Scottish Legal Action Group (SCOLAG)
Scottish Legal Complaints Commission
Scottish Paralegal Association
Solicitors Regulation Authority
Scottish Sheriff Court Users Group
Scottish Solicitors' Discipline Tribunal
Sheriffs Association
Society of Solicitor Advocates
Society of Solicitors in the Supreme Courts in Scotland
The Law Society in England and Wales
The Law Society of Northern Ireland

The Society of Chief Trading Standards Officers in Scotland
WS Society

Academics

Margaret Burns
Margaret Ross
Professor Avrom Sherr
Professor Frank Stephen
Scottish University Law Faculties/Departments

Other organisations

Association of Personal Injury Lawyers
Confederation of British Industry (CBI)
Citizens Advice Scotland
Competition Commission
Convention of Scottish Local Authorities (COSLA)
Core Solutions Group
Equality and Human Rights Commission
Federation of Small Businesses in Scotland
Financial Services Authority
Institute of Chartered Accountants of Scotland (ICAS)
Money Advice Scotland
Northern Ireland Executive
Regulatory Review Group
Royal Institute of Chartered Surveyors (RICS)
Society of Local Authority Chief Executives and Senior Managers (SOLACE)
Society of Local Authority Lawyers and Administrators (SOLAR)
Scottish Chambers of Commerce
Scottish Human Rights Commission
Scottish Mediation Network
STUC
Victim Support Scotland
Which?