

## SPICe Briefing

# Legal Services (Scotland) Bill

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The Legal Services (Scotland) Bill is intended to enable the establishment of new business structures within the legal services industry in Scotland and to deliver a suitable regulatory framework for those individuals and organisations that provide such services.

This briefing provides —

- background information on policy developments preceding the Bill
- an overview of the legal services market in Scotland
- a description of the legal profession in Scotland
- a description of the current and proposed regulatory framework
- an overview of why reform is considered to be necessary
- a summary of the key provisions of the Bill



# CONTENTS

<b>OVERVIEW</b>	<b>3</b>
<b>BACKGROUND</b>	<b>3</b>
<b>THE LEGAL SERVICES MARKET</b>	<b>4</b>
SCOTLAND	4
ENGLAND AND WALES	5
<b>THE LEGAL PROFESSION</b>	<b>5</b>
SOLICITORS	5
<i>The “Guarantee Fund” and professional indemnity insurance</i>	6
SOLICITOR ADVOCATES	7
ADVOCATES	7
<b>REGULATION OF LEGAL SERVICES</b>	<b>8</b>
PRINCIPLES OF GOOD REGULATION	8
SCOTLAND	8
ENGLAND AND WALES	9
<b>THE NEED FOR REFORM</b>	<b>9</b>
<b>THE BILL</b>	<b>11</b>
<i>Regulation and the regulatory objectives</i>	11
<i>Professional principles</i>	11
<i>Approved regulators</i>	12
<i>Regulatory schemes</i>	12
<i>Performance report and audit</i>	13
<i>Operational positions</i>	13
<i>Fit to own test</i>	13
<i>Complaints</i>	13
<i>The Legal Profession</i>	14
<i>Confirmation services</i>	14
<i>Availability of legal services</i>	14
<b>FINANCIAL IMPLICATIONS</b>	<b>15</b>
APPLICATIONS TO BE APPROVED REGULATORS	15
MONITORING APPROVED REGULATORS	15
CONFIRMATION SERVICES - APPLICATIONS TO BE APPROVING BODY	15
<b>SOURCES</b>	<b>15</b>
<b>RELATED BRIEFINGS</b>	<b>20</b>

## OVERVIEW

The Bill is intended to enable the establishment of new business structures within the legal services industry in Scotland and to deliver a suitable regulatory framework for those individuals and organisations that provide legal services. Currently, legal practitioners must operate within business structures strictly limited by both statute and professional practice rules and within a regulatory framework in which the regulators both regulate and represent the legal profession.

The reforms are intended to liberalise the legal services market and create a more flexible and modern regulatory framework for legal services, with the ultimate objective of achieving improved access for all to high quality legal services. The Bill is introduced against the backdrop of the Scottish Government's broader commitment to simplifying the regulatory regime within the Scottish public sector. It has been colloquially referred to as heralding the arrival of "Tesco-law", on the basis that it will allow, for the first time in Scotland, organisations that are not owned by legal professionals (such as banks and supermarkets) to offer legal services to the public.

## BACKGROUND

The "Which?" super-complaint of May 2007<sup>1</sup> asserted that, by stifling choice, restrictions imposed on providers of legal services in Scotland significantly harmed the interests of consumers, inhibited innovation and excluded potential entrants from the legal services market. The super-complaint could be seen as the immediate catalyst for the current reforms, although the regulation of legal services has been an active policy issue for the last 4-5 years. The super-complaint identified the following particular grounds for complaint:

- restrictions on advocates' business structures
- restrictions on solicitors and advocates providing services jointly
- restrictions on third party entry to the legal services market
- restrictions on direct access to advocates.

It is worth observing that, of the four grounds for complaint identified by the 'Which?' super-complaint, three were directed against the Faculty of Advocates, with only one complaint (relating to the restriction on third-party investment) against the practices of solicitors.

In its [response to the super-complaint](#), the Office of Fair Trading (OFT) recommended that the Scottish Government publish a statement setting out how it intended to reform the legal services industry. In response, the Cabinet Secretary for Justice, Kenny MacAskill MSP, challenged the legal profession to take a lead in identifying how to move forward. This was followed by a [debate in the Parliament on 15 November 2007](#).

On 1 November 2007, the Law Society of Scotland ("the Society") published a consultation paper, [The Public Interest: Delivering Scottish Legal Services - A Consultation on Alternative Business Structures](#), and the Faculty of Advocates ("the Faculty") response, [Access to Justice: A Scottish Perspective: a Scottish Solution](#), was published in spring 2008. The Cabinet Secretary for Justice welcomed these responses in a [statement to Parliament on 11 June 2008](#).

The current legislative proposals were also preceded by the [Research Working Group on the Legal Services Market in Scotland](#), which reported in 2006, and by the [European Commission](#)

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<sup>1</sup> A 'super-complaint' can be made to the OFT when a designated body, such as the Consumers' Association (which produces "Which?"), thinks that a feature (or features) of a market is significantly harming consumer interests. The right to submit a super-complaint was created by section 11 of the Enterprise Act 2002.

[review of competition in the liberal professions](#), as well as by developments in England and Wales and, in particular, by the publication in 2005 of the [Clementi Review of the Regulatory Framework for Legal Services in England and Wales](#). The subsequent Legal Services Act 2007 reformed the way legal services in England and Wales are regulated and placed the consumer interest at the heart of the regulatory framework.

The Scottish Government consultation on the regulation of legal services in Scotland, [Wider choice and better protection](#), ran from 23 December 2008 until 29 March 2009. Forty [responses to the Scottish Government Consultation](#) were posted online (it is understood that 47 responses in total were received). In addition, the Scottish Government established a Bill Reference Group, which included legal and consumer experts and representatives of the legal professional bodies, to explore the detail of the planned reforms.

The Legal Services (Scotland) Bill (“the Bill”) was introduced on 30 September 2009.

## THE LEGAL SERVICES MARKET

### SCOTLAND

“A competitive legal services market is crucial to ensure that services are provided at a reasonable cost and in a user-friendly way.” ([Scottish Executive 2006](#), page 8)

Paragraph 18 of the Regulatory Impact Assessment describes one of the perceived shortcomings with the legal profession as currently structured. It states:

“In relation to commercial firms, the service sought by major commercial clients is not restricted to advice on Scots law and representation in disputes. It may encompass, for example, risk management and risk avoidance, regulatory compliance, collaborative IT based development of legal documentation, or the application of European law and human rights principles to international business. Firms require a range of non-legal expertise to deliver these new models of service, including business, IT and financial expertise. Currently, no-one with such expertise can have a direct stake in a Scottish law firm.”

Legal services are defined in the Bill (s 3) as services which consist of either: (a) the provision of legal advice or assistance (in connection with any contract, deed, writ, will or other legal document, the application of the law, or any form of resolution of legal disputes); and/or (b) the provision of legal representation (in connection with the application of the law or any form of resolution of legal disputes).

It has been estimated that the legal profession contributes an approximate turnover of more than £1 billion per annum to the Scottish economy ([Scottish Parliament 2009](#)). High levels of competition exist in some areas of the legal services market, such as commercial law, financial services and tax and residential conveyancing, but less so in other areas, such as family law, welfare, housing, debt and consumer law. The number of firms undertaking civil legal aid work also fell (although there is some evidence that civil legal aid applications have increased in 2009<sup>2</sup>) and concerns have been expressed about the number of practitioners coming into areas such as criminal law ([Scottish Executive 2006](#)). In relation to the current economic downturn, there is evidence that the legal services industry has been significantly affected, with reduced transactions (particularly in residential property conveyancing), a downturn in profitability and job losses (see, for example, [The Journal March 2009](#)). There are also geographical variations

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<sup>2</sup> The SLAB Annual Report 2008-09 reports a 12% increase in number of civil legal aid applications to 17,738 over the past year (SLAB 2009).

within the market (for example, limited availability of family law practitioners in some areas) and the legal profession is increasingly considered to be based in the central belt. A recent survey of the legal profession found that 46% of respondents worked in Lothian and Borders and a further 28% worked in Glasgow and Strathkelvin ([Judicial Appointments Board for Scotland 2009](#), page 3.2).

## ENGLAND AND WALES

The legal services market in England and Wales generated £19 billion (or 1.73%) of the UK's gross domestic product in 2003 ([Justice Department 2005](#), page 4). In 2004 there were 96,757 solicitors, of whom 75,079 were working in private practices. There were 9,211 solicitors' firms in 2004. Sole practitioners made up 45.3% of solicitors' firms and a further 39.7% had four or fewer partners, but 69.2% of solicitors worked in firms of five partners or more. There were 3,310 solicitors with rights of audience in the higher courts in April 2005 and, in 2004, there were 14,364 practising barristers.

Timetables for implementation are not definite, but it is anticipated that law firms based in England and Wales will be able to adopt alternative business structures in full within the next two years or so. So far, take up of new business structures (in the form of a limited type of legal disciplinary practice) has been modest (Legal Services (Scotland) Bill, Regulatory Impact Assessment, para 76).

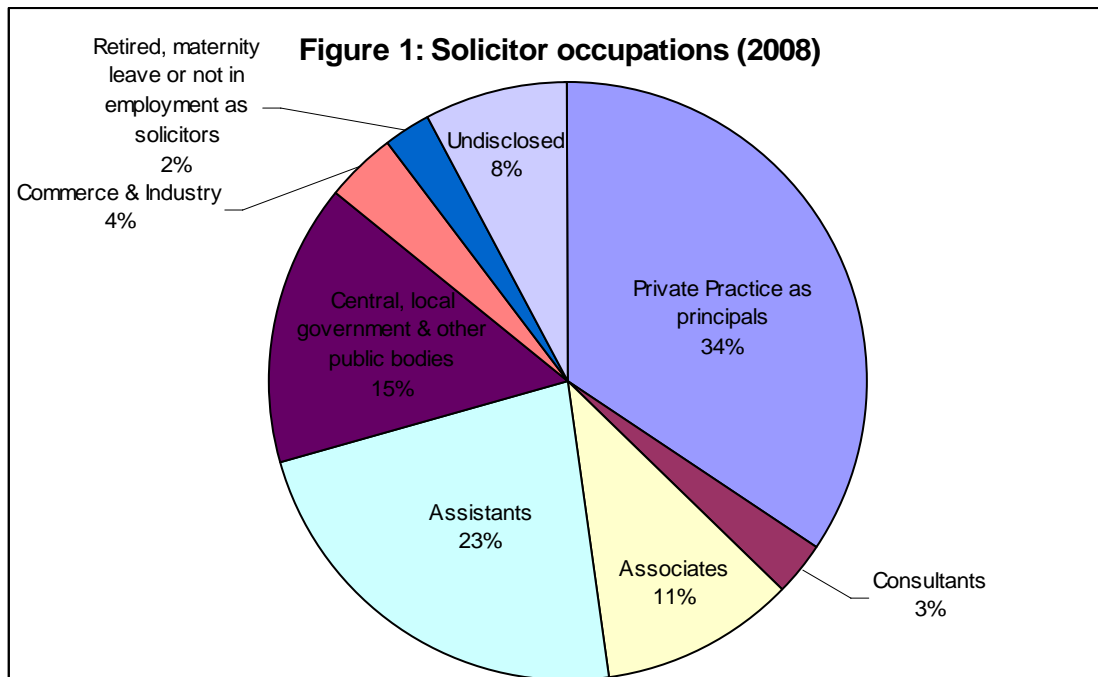
## THE LEGAL PROFESSION

### SOLICITORS

Traditionally, the role of the solicitor was that of a general adviser to clients in relation to matters such as the buying and selling of property, the preparation of wills and the winding up of estates. Solicitors are able to appear in the sheriff and district courts. There were 10,434 solicitors holding practising certificates in Scotland on 31 October 2008 ([Law Society 2008](#), page 54), accounting for around 95% of the legal profession in Scotland.<sup>3</sup> There are 1,247 legal firms in Scotland, of which 46% are sole practitioners ([Law Society 2007](#), page 3). More than a quarter of practising solicitors are employed by organisations in non-lawyer ownership, acting as "in-house" lawyers, in, for example, the financial services sector or for central or local government (see figure 1 below). In-house lawyers are not permitted to offer legal services directly to the public.

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<sup>3</sup> It is understood that the number of solicitors holding practice certificates has since fallen, partly as a result of the current economic downturn.



Source: [Law Society 2008](#), page 54

At present, the Society's Practice Rules<sup>4</sup> and the Solicitors (Scotland) Act 1980 prohibit:

- solicitors from sharing fees or profits with non-solicitors
- shareholding in a legal firm by anyone who is not a director
- ownership of a legal firm by non-lawyers;
- solicitors from forming multi-disciplinary practices (for example with accountants, architects or surveyors).

In order to facilitate the alternative business structures (ABS) envisaged by the Bill, the Society has indicated that it will amend its Practice Rules. However, the Society is opposed to any move to separate its regulatory and representative functions ([Law Society Journal, April 2009](#), page 42).

It is anticipated that many solicitors will wish to continue to operate in traditional solicitors' practices and it is important to emphasise that the Bill will not prevent them from doing so. Existing forms of regulated legal practice, such as solicitors operating as sole practitioners or in partnership, will continue to be regulated by the Society.

### **The "Guarantee Fund" and professional indemnity insurance**

The Society administers the Scottish Solicitors Guarantee Fund which provides consumer protection. All solicitors who are partners in private practice and who handle clients' money contribute annually. Any client who has suffered monetary loss as a result of the dishonesty of a solicitor or their staff may make a claim on the fund.

Solicitors in private practice are also required to purchase professional indemnity insurance through a Master Policy which the Society maintains on behalf of its members. The insurance provides cover of up to £2 million for any one claim. The OFT expressed concern that the inability of Scottish solicitors to choose their own professional indemnity insurance provider may represent a restriction on competition (Scottish Executive 2006, page 64). However, the OFT

<sup>4</sup> The Solicitors (Scotland) (Multi-Disciplinary Practices) Practice Rules 1991 and the Solicitors (Scotland) Practice Rules 1991.

did not receive any representations from law firms that found their ability to compete was restricted by the indemnity insurance arrangements and concluded that it was unlikely that these arrangements restricted competition in practice (page 65).

The Scottish Legal Complaints Commission's powers include oversight of the Law Society of Scotland's Master Policy and Guarantee Fund.

## SOLICITOR ADVOCATES

The Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 ("the 1990 Act") introduced a right of audience for 'solicitor advocates' in the upper courts in Scotland (the High Court and the Court of Session) for those solicitors who could satisfy the Society of their competency in the practice and procedure of the upper courts. Solicitors who wished to represent clients in the upper courts, with a title of solicitor advocate, also had to pass an examination. The first solicitor advocates were admitted in May 1993. By 2008, there were in excess of 250 practising solicitor advocates in Scotland ([Law Society 2008](#)). The reform was intended to increase competition in the provision of legal services and improve consumer choice (hitherto, only advocates could represent people in the upper courts) by providing direct access to advocacy services within a single business entity.

It has been argued that there is a risk that solicitors in firms which include solicitor advocates may face a potential conflict of interest in advising clients on the merits of instructing the firms' solicitor advocate on the one hand or instructing an 'independent' advocate on the other. Earlier this year, the Lord Justice Clerk (Lord Gill) raised concerns relating to certain aspects of the professional conduct and regulation of solicitor advocates in Scotland ([Woodside v HMA](#)). On 28 September 2009, the Scottish Government announced a [review into the workings of the system of solicitor advocates](#) to be chaired by Ben Thomson, chairman of investment bank Noble Group. The review will report by March 2010 ([Scottish Government 2009c](#)).

## ADVOCATES

Advocates are specialists in the art of advocacy and have extensive rights of audience in all Scottish courts (advocates, unlike solicitors, have automatic rights of audience in the upper courts). The number of advocates has almost doubled in the past 30 years (from 250 to about 470) ([Scottish Executive 2006](#), page 35).

The Faculty of Advocates is an independent body of lawyers who have been admitted to practise as advocates in Scottish courts. The Court and the Lord President exercise ultimate regulatory oversight over the Faculty although, in practice, many of the regulatory functions are performed by the Faculty of Advocates and the Dean of Faculty. Faculty rules<sup>5</sup> prevent advocates from entering into partnership with other advocates and, in effect, all advocates are self-employed sole practitioners. A service company, Faculty Services Limited, provides a centralised administrative facility, including clerking and invoicing services, for all those members of the Faculty who wish to use it.

The 2006 Direct Access Rules allow legal professional, some other professionals, public authorities and some other specified bodies ([direct access bodies](#)) on an approved list to instruct an advocate directly. Lay clients and members of the public cannot access the services of an advocate directly and must instruct an approved third party to do so on their behalf. In practice, solicitors are the main point of entry for the services provided by advocates. The 'purchase' decisions of solicitors are based on reputation, previous experience or the recommendations of clerks to the advocate 'stables' ([Scottish Executive 2006](#), page 36).

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<sup>5</sup> *The Guide to the Professional Conduct of Advocates*, para 1.2.4

Some consider that the requirement to use a solicitor to instruct an advocate constitutes an unnecessary cost to the consumer. Allowing solicitors and advocates to form partnerships would permit direct access by clients to advocates. Organisations such as Consumer Focus Scotland, 'Which?' and the OFT have also argued that the prohibition on advocates entering into partnership should be lifted. In a recent Journal of the Law Society article, two advocates described the advocate's business model as "a commercial anomaly which is very difficult to justify in business terms (...) they are inhibited from developing their services by arcane practice rules with origins in the 18th century" ([Campbell and Carruthers 2008](#)).

The Faculty has maintained that its current practice rules should be retained ([Faculty of Advocates 2008](#)). The Faculty of Advocates (2008) favoured maintaining an independent referral Bar subject to the 'cab rank rule'<sup>6</sup> and argued that access to justice in Scotland would be diminished and public choice reduced if advocates operated in partnerships. The 'mixed doubles' rule, which prevented the instruction of an advocate and solicitor-advocate in the same case, was removed by the Faculty in September 2008.

As with the Society, the Faculty performs a dual representative and regulatory role. Some organisations (including Consumer Focus and the OFT) have argued that the regulatory framework of the Faculty should be more radically altered, with greater non-lawyer involvement and a separation of the representative and regulatory functions. However, the Scottish Government does not propose to alter the regulatory regime for advocates at this time.

## REGULATION OF LEGAL SERVICES

### PRINCIPLES OF GOOD REGULATION

In general terms, effective regulation is considered necessary to ensure public protection and maintain quality. The Better Regulation Task Force set out [five principles of good regulation](#). These are that good regulation should be:

1. Proportionate
2. Accountable
3. Consistent
4. Transparent
5. Targeted

Self-regulation may encourage a regulatory system which operates in the interests of the professionals and against the interests of consumers. On the other hand, self-regulation can reduce regulatory cost and such systems can adjust to changing circumstances more quickly than those based on external regulation (Stephen 2008).

### SCOTLAND

Notwithstanding the ultimate role of the Court, the legal services profession in Scotland is currently regulated by the Faculty and the Society (the [Association of Commercial Attorneys](#) has recently been granted rights of audience and will assume a regulatory role for the small group of professionals it represents). The Society has statutory responsibility for the regulation of solicitors under the Solicitors (Scotland) Act 1980. The introduction of ABS, with the possibility of lawyers working in a more commercialised environment and alongside other professionals, presents challenges in establishing an effective regulatory framework for all those who may now become involved in the legal services market, not least because different regulatory regimes

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<sup>6</sup> 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.

exist for different professions. The Society has already made clear its desire to take on regulatory responsibility for alternative business structures and proposed a regulatory framework to support its position. In order to achieve maximum flexibility and to avoid creating a confusing regulatory maze, the Society proposed a single regulatory model that could accommodate all business structures ([Law Society Journal, April 2009](#), page 42). The Scottish Government consultation questioned whether the Society should be an ABS regulator given that such a role may involve it regulating people working in ABS who are not solicitors.

It has been suggested (see *Scottish Law Gazette* 2009a, page 45) that the credit crunch and the problems within the financial services industry in the UK followed broadly similar structural changes to that industry as are now being considered for the legal services industry in Scotland. Although it was originally intended that the reformed regulatory framework for legal services would be “light touch”, the recent experiences of the banking and financial services sector have caused the Scottish Government to reconsider its approach in favour of a more robust regulatory regime. The Scottish Government describes its approach in the Bill as one of ‘principle-based regulation’.

## ENGLAND AND WALES

The Legal Services Act 2007 established an independent [Office for Legal Complaints](#) (OLC) to remove complaints handling from the legal professions and to enable users of legal services to use an independent and impartial Ombudsman scheme to resolve disputes involving their lawyer. It is anticipated that the OLC will begin to resolve complaints in the second half of 2010. The Act also introduced an independent oversight regulator, the [Legal Services Board](#) (LSB). The LSB will act as a single, independent and publicly accountable regulator with the power to enforce high standards in the legal sector. The role of the LSB is not to regulate the providers of legal services but to ensure that front-line regulators satisfy the regulatory objectives (it regulates the regulators and is described as a ‘super-regulator’). The chair of the Board will be a lay person. The Board shares its regulatory objectives with the eight ‘Approved Regulators’ of the legal profession, each of which has direct responsibility for the day-to-day regulation of the different types of lawyers. The costs associated with establishing the LSB and OLC were calculated by the UK Government during the passage of the Legal Services Act to be £32.1 million (to be paid for by the legal profession).

In October 2008, the Law Society of England and Wales commissioned Lord Hunt to conduct an [independent review of the future regulation of law firms](#). The review found that consumers are at increasing risk from a growing “fringe legal market” in will writing, probate work and claims handling. It also found that large swaths of legal activity are entirely unregulated, making consumers vulnerable to incompetence, negligence or even fraud across a wide range of transactions.

## THE NEED FOR REFORM

As previously indicated, the Bill is intended to allow the establishment of new business structures within the legal services industry in Scotland. The Scottish Government believes that the current restrictions on business structures potentially constrain innovation and do not deliver a competitive legal services market. The Society is of the view that it is in the interests of the public and the profession to permit alternative business structures that could facilitate a more modern and competitive legal service ([Law Society 2008](#)). By the Society’s own admission, the business structures in which solicitors currently practise reflect society, the profession and market conditions of the mid-twentieth century ([Law Society 2008](#), page 6).

Concern has been expressed, including by the Office of Fair Trading and the Clementi review, about the dual regulatory and representative roles within the legal services sector. It has also

been argued that a greater degree of non-lawyer involvement on the Council of the Law Society would be desirable in order to better balance its public and professional interests. In 2001 and 2002, the Justice 1 Committee of the Scottish Parliament held an inquiry into the regulation of the legal profession. The Committee's report ([Scottish Parliament 2002](#)) also recognised the conflict of interest (or potential conflict of interest) presented by the dual role of the Society. Of those who expressed a clear view on this matter in the Scottish Executive's 2005 consultation [Reforming complaints handling, Building consumer confidence](#), 84% were in favour of splitting the Society's dual regulatory and representative functions ([Scottish Executive 2005](#), page 22). In response to these concerns, the [Scottish Legal Complaints Commission](#) (which opened for business on 1 October 2008) was established by the Legal Profession and Legal Aid (Scotland) Act 2007. The role of the Scottish Legal Complaints Commission is considered in more detail below.

Some responses to the Society's 2007 consultation expressed the view that unless more flexible business structures were permitted, it would be harder for Scottish law firms to flourish and offer a competitive product in a modern environment ([Law Society 2008](#)). Concern was also expressed that if the legal profession could not respond to new demand it risked the accelerated entry into the market of other unregulated providers, and that failure to modernise risked a flight of business and young talent from Scotland ([Law Society 2008](#), page 8). Introducing external capital to Scottish legal firms is also considered by some to be necessary to operate competitively in the modern business environment and will, it is hoped, improve the competitiveness, business efficiency and profitability of the Scottish legal sector. The OFT has stated that enabling alternative business structures would allow efficiencies which would in turn lead to lower costs and, subsequently, lower fees for consumers of legal services ([OFT 2007](#), page 9).

There are risks associated with exposing the legal services industry to a greater degree of commercialisation, not least in reconciling the commercial interests of any new owners with the professional obligations of the lawyers (the issue of client confidentiality is one area where it is thought that such a conflict might arise). It is important to remember that lawyers are officers of the court with duties and responsibilities beyond those of their individual client. External ownership and, in particular, ownership by shareholders, may create a conflict of interests between the interests of clients and those of the shareholders. Both the Society and the Faculty have previously expressed concern that allowing non-lawyer ownership of legal firms may conflict with the core values of the lawyer (independence, avoidance of conflicts of interest and client confidentiality).

Some fear that traditional legal practices may not be able to compete with larger commercial companies entering the market, who may be able to absorb the costs of providing legal services as a loss leader to other services. Outside ownership may also lead to law firms offering only profitable legal services. As a consequence, choice, availability and, ultimately, access to justice may be reduced. The Scottish Law Gazette, the journal of the Scottish Law Agents Society, has been canvassing opinion on Alternative Business Structures and reports an approximate 90% rejection of ABS (Scottish Law Agents Society 2009b). Mike Dailly of the Govan Law Centre has also previously expressed scepticism at the proposals for reform ([The Firm 2008](#)):

“The OFT agenda has been driven by a handful of people in very large Scottish firms who want to be able to sell shares in their companies to a wider market so they can then prosper, and a misguided consumer lobby which does not represent the Scottish people. They would rather entrust legal services to the UK's banks and supermarkets (...) allowing speculative investors to participate in the ownership of law firms could restrict fundamental access to justice.”

Solicitors and advocates cannot currently provide services jointly or form partnerships with each other. Instead, solicitors must instruct advocates on a case by case basis. The OFT argued that there would be benefits in lifting these restrictions – solicitors and advocates would be able to offer legal services to clients as part of the same law practice ([OFT 2007](#), page 12). Removing such restrictions may enable firms to act more efficiently by, for example, offering clients a ‘one-stop shop’ for a range of different professional services, which might result in lower overall fees for clients. The Scottish Government has not, however, been persuaded by these arguments and the Bill will not require the Faculty to allow advocates to participate in ABS.

## **THE BILL**

The Bill does not prescribe particular business forms but instead is intended to create a regulatory regime that enables a range of types of business structure to exist. The Government’s proposals for a new regulatory framework will make it possible for the following types of ABS to operate in Scotland:

- non-lawyer ownership
- external ownership
- multi-disciplinary practice

### **Regulation and the regulatory objectives**

Part 1 of the Bill (s 1) sets out the following six regulatory objectives which the Scottish Ministers and approved regulators must comply with and promote:

- a) supporting the constitutional principle of the rule of law
- b) protecting and promoting the interests of consumers and the public interest
- c) promoting access to justice and competition in the provision of legal services
- d) promoting an independent, strong, varied and effective legal profession
- e) encouraging equal opportunities within the legal profession
- f) promoting and maintaining adherence to the ‘professional principles’

Although the regulatory objectives are similar to those adopted in England and Wales under the Legal Services Act 2007, the structure and approach is different (reflecting the different size and composition of the legal markets north and south of the border).

The regulation of ABS will apply to any form of business where a legal professional is involved in the provision of legal services to a third party. Section 37 of the Bill provides that if there is a legal professional within a body or organisation, then that entity (or business unit) would become the subject of the ABS regulatory regime. This new regulatory regime will not, however, apply to existing forms of legal service provider (such as sole practitioners, firms of solicitors or law centres) who will continue, in most cases, to be regulated by the Society or Faculty.

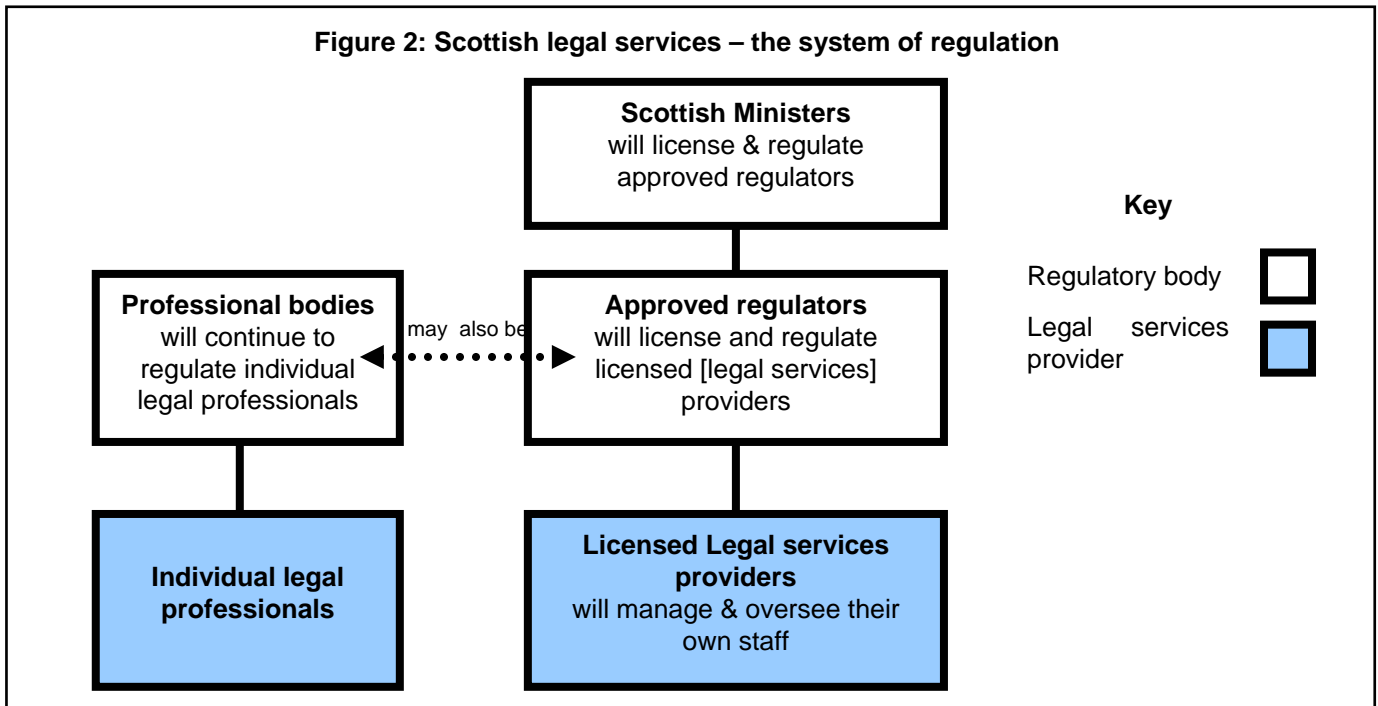
### **Professional principles**

The ‘professional principles’, those principles to which persons providing legal services should adhere, are set out in section 2 of the Bill. These are to:

- a) support the proper administration of justice
- b) act with independence and integrity
- c) act in the best interests of their clients
- d) maintain good standards of work
- e) comply with such duties as are normally owed to the court
- f) meet their obligations under any relevant professional rules.

## Approved regulators

The Bill conspicuously avoids the creation of any ‘new’ statutory regulatory body.<sup>7</sup> Although the regulatory structure created by the Bill is intended to be relatively simple, allowing alternative business structures within the legal profession undoubtedly raises some complex regulatory issues. In simplified terms, the Bill provides the following three tiers of regulation:



Part 2 of the Bill makes provision for regulating the supply of certain legal services by approved regulators. There are no restrictions on the type of body that can apply to become an approved regulator. The Society has already indicated its intention to become an approved regulator. Although it is not currently the Scottish Government’s intention to charge fees to those seeking to act as approved regulators, the Bill does allow such charging should the costs of administering the system become higher than expected (s 5(6)). In the event of the failure of an approved regulator, the Bill gives the Scottish Ministers the power to establish a new regulatory body or to assume the regulatory role themselves (s 35).

The Scottish Government estimates that, in time, there may be in the range of 150 to 250 businesses providing legal services using one of the alternative business structures permitted by the Bill, regulated by up to six approved regulators ([Explanatory Notes](#), para 236).

## Regulatory schemes

The Bill will require professional and other bodies who wish to become approved regulators to submit a regulatory scheme to the Scottish Ministers detailing the kind of licensed providers they wish to regulate, the rules they will apply and how they intend to promote the regulatory objectives (s 5, 6 and 8). The Bill specifies a range of matters which must be dealt with in any regulatory scheme and also enables Ministers to prescribe, by regulation, further matters which must be addressed in such schemes (s 8). Approved regulators are required to set out in their regulatory scheme how they will address potential regulatory conflict (such as in cases where the professional rules of different professionals within a licensed legal services provider clash) (s 9).

<sup>7</sup> Although the Faculty of Advocates becomes a statutory body, its role not previously being defined in statute.

## **Performance report and audit**

The [Policy Memorandum](#) refers to a two-staged audit process for licensed legal services providers (an annual self-assessment and a triennial external audit by the approved regulator). The Bill provides (at s 17) that the Head of Practice of a licensed legal services provider must carry out an annual review (a Performance Report) and send the report to the approved regulator. The Bill also provides that licensed legal services providers must keep in place “proper accounting and auditing procedures” (s 18). Section 24 provides that approved regulators must “assess each of its licensed services providers at least once in every successive period of 3 years”. The [Policy Memorandum](#) (para 116) cites the Australian model as a useful example of a ‘proactive regulatory regime’.

A model of regulation which relies on self-assessment may be open to abuse. However, self-regulation also reduces the overall burden on the regulatory body and any risks may be mitigated by the existence of certain safeguards (such as the proposed triennial external audit). In the education sphere, for example, self-evaluation has, according to HM Senior Chief Inspector of Education, become increasingly embedded and has contributed well to improving performance and raising attainment and achievement for all learners ([HMIE](#)). In the health field, both the Care Commission and NHS QIS employ some form of self-assessment.

## **Operational positions**

All licensed legal services providers must have a Head of Legal Services and either a Head of Practice or a Practice Committee (s 39-41). The policy intention is to ensure that there is a legally qualified person (the Head of Legal Services) responsible for ensuring that any legal services that a business provides accords with the core values of the legal profession. Those deemed unsuitable will be prevented and/or disqualified from holding such posts.

## **Fit to own test**

The Scottish Government’s original proposals included a requirement that 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 policy has been modified so that the fit to own test is applied only to outside investors (solicitors will be presumed to be fit to be investors). Fit to own tests are employed in a variety of business contexts, including in relation to the ownership of professional football clubs.

The Bill provides (s 50) that a person is presumed unfit if insolvent; disqualified from being a company director or holding a position of business responsibility; or has a conviction for dishonesty or other serious offence. When an approved regulator is considering an outside investor’s fitness to invest, it will consider factors such as the investor’s financial position and financial record and the investor’s probity and character.

## **Complaints**

The Scottish Legal Complaints Commission will be responsible for dealing with complaints about legal services provided by licensed legal services providers (“service complaints”). Issues of misconduct will be referred to the appropriate professional regulators (“conduct complaints”). The Bill introduces a third type of legal complaint (the other types being “service complaints” and “conduct complaints”) – a “regulatory complaint” (s 65). This type of complaint applies only to licensed legal services providers and can be made in relation to a failure to comply with an approved regulator’s regulatory scheme and terms of its licence, or failure to have regard to the regulatory objectives or adhere to professional principles.

## The Legal Profession

### Solicitors

Section 92 in Part 4 of the Bill (chapter 3) enables lay involvement in the governance of the Society with the intention of more clearly demarcating the Society's regulatory function from its representative function. In doing so, the Bill amends the regulatory framework established by the Solicitors (Scotland) Act 1980. In particular, the Bill provides for a regulatory committee within the Society which should be independent of any other person or interest and have at least 50% lay membership (including a lay convenor and chair) (s 93). The Bill sets out a broad framework for governance with the detailed constitutional arrangements being established by the Society itself. The Society has issued a consultation paper [The Law Society of Scotland's Governing Council – Proposals for change](#) which seeks members' views on proposed reforms affecting council membership.

### Advocates

The Scottish Government has decided to codify the regulatory framework governing advocates (the Faculty of Advocates was not previously established by statute but its role is well established and recognised by the courts). Part 4 of the Bill (chapter 2) creates a statutory basis for the regulation of advocates. Complaints against advocates are considered by the Scottish Legal Complaints Commission, although issues of professional misconduct will be referred to the Faculty. The Bill does not require the Faculty to allow advocates to participate in ABS but it does make it possible for advocates to participate in licensed legal services providers should the Faculty, at some point in the future, decide that it wishes to do so.

### Confirmation services

The provision of certain legal services (conveyancing, applying for confirmation in executries and preparing writs in court proceedings) is legally reserved to qualified solicitors and certain other professionals. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 Act made it possible for certain people other than solicitors to be licensed to practise as conveyancing or executry practitioners.

When a person dies their property must be collected and distributed to any beneficiaries. The executor is the person responsible for this. An executor is appointed either by will (an *executor-nominate*) or by a sheriff (an *executor-dative*). An executor must obtain from the sheriff *confirmation* of his title. Administration without confirmation is unauthorised and may make the executor liable for all the deceased's debts. Currently only solicitors are authorised to provide *confirmation* services.

The Scottish Government believes that confirmation services could be provided by other properly qualified professionals, such as chartered accountants. Part 3 of the Bill creates a new process by which bodies may apply to authorise other professionals to prepare documentation in relation to the process of winding up the estate of a deceased person. The Bill provides that any body wishing its members to be able to have confirmation rights must make application to the Scottish Ministers for certification as an approving body (s 73-74).

### Availability of legal services

The Bill amends the Legal Aid (Scotland) Act 1986 to provide (s 96) that the Scottish Legal Aid Board ("the Board") has the general function of monitoring the availability and accessibility of legal services in Scotland. The Board is also given a duty "from time to time to give the Scottish Ministers such information as they may require relating to the availability and accessibility of legal services in Scotland" (s 96).

## FINANCIAL IMPLICATIONS

The Scottish Government anticipates that the only costs it will incur as a consequence of the Bill are in relation to its role in processing approved regulator applications and monitoring the performance of approved regulators.

The Financial Memorandum also outlines the Scottish Government's estimates of costs to other bodies, such as those acting as approved regulators. The RIA suggests that the Bill is unlikely to impose significant direct regulatory costs on existing businesses (RIA, para 77). The largest financial impact will be on solicitors and the Society (RIA, para 79).

## APPLICATIONS TO BE APPROVED REGULATORS

The Scottish Government will incur costs in dealing with applications to be approved regulators and approving bodies for confirmation services ([Financial Memorandum](#), para 216). It is anticipated that these costs are likely to commence in the financial year 2011/2012 (but may start the previous year) ([Financial Memorandum](#), para 217). The Scottish Government anticipates that between one and six bodies may apply to be approved regulators ([Financial Memorandum](#), para 218).<sup>8</sup> Assuming five or six applications, the Scottish Government estimates annual staffing costs of £71,995 (to be met from within existing budgets) ([Financial Memorandum](#), para 219). The Bill Team will take on responsibility for dealing with such applications.

## MONITORING APPROVED REGULATORS

The estimated annual staffing costs of monitoring approved regulators (again assuming five or six bodies are involved) is £48,000, with costs again being met from within existing budgets and responsibility falling to the Bill Team ([Financial Memorandum](#), para 221).

## CONFIRMATION SERVICES - APPLICATIONS TO BE APPROVING BODY

The Scottish Government anticipates that staffing costs of around £18,989 per annum will be incurred over a one to two year period in order to process applications to be an approving body of confirmation agents. Costs will be met from within existing budgets and responsibility for processing such applications will fall to the Bill Team ([Financial Memorandum](#), para 225).

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<sup>8</sup> Possible applicants include the Law Society of Scotland, Institute of Chartered Accountants of Scotland, Royal Institution of Chartered Surveyors, the Royal Institute of British Architects, the Financial Services Authority and the Funeral Planning Authority

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[SB 09-52 The Scottish Civil Court System \(380 KB pdf\)](#) - 20 August 2009

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