



**Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland**

**The Law Society of Scotland's Response**

**April 2009**

## **INTRODUCTION**

This response to “Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland” (“the consultation”) is prepared on behalf of the Law Society of Scotland (“the Society”). It aims to assist the Scottish Government, the Scottish Parliament and the Society’s members to improve access for all to high quality legal services within a competitive market which is appropriately regulated to ensure public protection and maintain quality.

The Society supports the introduction of alternative business structures (“ABSs”) in Scotland, and published its own policy paper *Delivering Scottish Legal Services* in April 2008 which states that “it is in the interests of the public in Scotland and of the legal profession to permit, alongside traditional business models, alternative business structures that could facilitate more modern and competitive delivery of legal services”.

The Society is in favour of the Scottish Government taking the necessary steps to amend or repeal the legislation that currently impedes or prevents alternative business structures as soon as possible; conferring regulatory responsibility for alternative business structures on to the Society; and suggesting a regulatory framework to support this recommendation.

### **The legal services market in Scotland**

Current law states that in Scotland, only solicitors can own law firms and only solicitors can form partnerships with other solicitors. The Society is responsible for the regulation of solicitors in Scotland. The Faculty of Advocates regulates advocates.

There are 1,238 legal firms in Scotland, of which 46% are sole practitioners. Of the remaining legal firms, partnership numbers range from two to 80. Of the approximate 10,500 practising certificates that are issued annually, more than a quarter are to solicitors who are employed by an organisation in non-lawyer ownership and who are not permitted to offer services to the public.

The legal sector makes a significant contribution to the Scottish economy. Legal firms have

been very successful over the last 20 years and through expansion and diversification, have adapted to meet the demands of their clients. This has been achieved within a strong regulatory framework.

There is a widening gap between high street practice and large-scale practice, reflected in the type and nature of work, profitability and specialisation.

There is a high degree of variability in the characteristics of the market. Some areas have, until the recent economic downturn, demonstrated high levels of competition (financial services and tax, residential conveyancing, commercial) while others have characteristically low levels of competition (family, welfare, housing, debt and consumer law).

There are key differences between legal sectors in sources of funding, levels of consumer information and consumer orientation. There are also geographical differences within the market in terms of urban, small town and rural areas. There are concerns about the future supply of legal practitioners in specific areas of the market. In particular, there is a shortfall in family law practitioners, in practitioners engaged in welfare, debt and housing work and there are declining numbers of practitioners acting in criminal legal aid work. There are also clear indications that the number of firms undertaking civil legal aid work is reducing.

Non-regulated or alternatively regulated providers of legal services began to enter the market around 20 years ago. Claims companies and will writers operate in areas proximate to regulated areas of practice. These developments may have had some effect on perceptions as to the nature of regulation and may have led to some consumer confusion.

The services sector generally has undergone radical change over the last 20 years. There is, notwithstanding the recent economic downturn, a global market in services, made possible by developments in technology and communications. New business systems are enabling improved accessibility to networks of customers and more efficient and cost-effective means of delivering services. Customers are increasingly adept at shopping around, in a global market, for services that meet their expectations, requirements and budget.

## **Alternative Business Structure background**

In recent years some solicitors and commentators have begun to question the ownership and partnership rules of solicitors' firms, suggesting that the legal services market could benefit from allowing ABSs.

Proposals include:

- allowing solicitors and non-solicitors to enter into partnership;
- allowing non-solicitor ownership of, and investment in, law firms; and
- extending the legal services offered by organisations such as banks and supermarkets.

In England, research carried out under the Clementi Review led the Department of Constitutional Affairs to conclude that some changes would benefit the consumer. In October 2007, the Legal Services Act was passed with provision for the introduction of alternative business structures.

With continuing calls for change from some in the legal profession in Scotland and the potential cross-border effect of the Legal Services Act 2007, the Society recognised the need to engage the profession further in the alternative business structure debate and brought together a working party at the beginning 2007 to consider this.

In May 2007, the Office of Fair Trading (OFT) supported claims by the consumer group Which? that restrictions in the legal services market in Scotland were harming consumer interests. The OFT called on the Scottish Government and the Scottish legal profession to consider how these restrictions might be lifted. The Cabinet Secretary for Justice supported the need for change and charged the profession with developing detailed proposals that could be put forward for consideration by government.

The Society welcomed the opportunity to demonstrate its determination that the Society and its members should lead the debate on the future delivery of legal services in Scotland.

Views of Society members were sought at an event in London in June 2007 and a conference in Edinburgh in September. A wider and more formal consultation followed.

*The Public Interest: Delivering Scottish Legal Services – A consultation on Alternative Business Structures* was published on 31 October 2007 and comments were invited by 31 January 2008.

A number of common themes were identified with an overall support for some change from the status quo. The majority of respondents noted that any change would need to take into account the following:

- that any new structures are regulated effectively;
- that core values of the solicitor's profession, i.e. independence, the provision of legal professional privilege, the obligation of confidentiality and the avoidance of conflicts of interest, are upheld;
- that access to justice is not negatively affected; and
- that appropriate consumer safeguards are in place.

## **Policy Proposals**

As highlighted above, the Society's policy paper *Delivering Scottish Legal Services* was published in April 2008, supporting the introduction of ABSs in Scotland. It also recommended that the Scottish Government amend or repeal the legislation that currently impedes or prevents ABSs as soon as possible; and that regulatory responsibility for ABSs should be conferred on to the Society. The paper contained an outline of a regulatory framework to support these recommendations.

The solicitors' profession voted in favour of the policy paper at the Society's AGM in May 2008.

## SPECIFIC COMMENTS

The Council has the following responses to make to the consultation questions.

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

The legal profession in Scotland should be able to offer its services through structures which best meet the needs of modern society and a global economy. Practitioners should be free to retain the traditional business model but there should be alternatives to choose from. The various business structure options in chapter 2 may offer advantages which could benefit the delivery of legal services in Scotland. The models considered differ and offer different advantages and disadvantages. The paper does not however define an ABS. Although paragraphs 2.22 to 2.31 describe features of an ABS, these do not amount to a definition. The Scottish Government should set out in the Bill a clear definition of an ABS and how that differs from a traditional business structure. The principle to be enshrined in the definition, taking up the wording in paragraph 5.5 of the consultation paper, is that an ABS is a business where a legal professional is involved in the provision of legal services to third parties, which would not be authorised to provide such legal services under the current rules as set out in paragraph 7.1 of the consultation paper.

The fundamental question is how to provide modern business methods for the delivery of legal services in Scotland which are safe, effective and which benefit the public and the profession.

Regulation of the legal services market is an essential component which contributes to the proper functioning of the justice system, the economy and society in general. In any complex society which has an advanced system of law, consumers and legislators require a system of regulation which provides for:

- a) appropriate educational qualifications;
- b) a licensing procedure;

- c) a complaints procedure; and
- d) a range of consumer protections.

The Scottish legal services market is not unique in requiring such a system of regulation. Every advanced economy requires such a mechanism for consumer protection. The time to introduce the right one for Scotland is now.

Any change must be accompanied by appropriate regulation to protect the core values of the Scottish legal profession and to ensure that there is a fair and equal playing field for all legal service providers in Scotland. There is also a strong view that the Society and its standards of conduct rules are fundamental to any system of appropriate regulation. The core values, standards and rules ensure that the client is offered professional legal services and a range of regulatory protections.

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

No.

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

There is no need to have a regulatory model for each type of possible business structure. Instead, there should be a single regulatory model that can accommodate all business structures. Accordingly, none of the three business structures referred to in paragraphs 2.21 to 2.30 would require “additional” safeguards but they should all be underpinned by a single regulatory structure which ensures appropriate regulation and maximum flexibility for all legal service providers to ensure their clients receive high quality services at reasonable cost. This has the advantage of avoiding a regulatory maze which risks causing confusion for the consumer.

**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?***

The statutory framework for the regulatory regime for conveyancing and executry practitioners is set out in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 as amended by the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

The Society has been the regulator of conveyancing and executry practitioners since the transfer of responsibilities from the Scottish Conveyancing and Executry Services Board (SCESB) to the Law Society of Scotland on 15 August 2003. It is the Society's Registrar who is the Registrar for conveyancing and executry practitioners. However, the official register of conveyancing and executry practitioners is maintained by the Keeper of the Registers of Scotland.

The present arrangements for regulating conveyancing practitioners and executry practitioners or those with rights of audience under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are satisfactory and proportionate, however the Society proposes that it would be more efficient for the official register to be held by the Society and that there should be a move towards greater harmonisation of the regulatory arrangements between solicitors and conveyancing and executry practitioners.

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

Paragraph 3.3 states that "...the only areas reserved exclusively to solicitors are set out in section 32 of the 1980 Act". This is inaccurate in terms of the statute. Paragraph 3.4 acknowledges that inaccuracy and confirms that the "reservations" are subject to exceptions. It is worth setting out section 32(1) and (2):

"32 Offence for unqualified persons to prepare certain documents

(1) Subject to the provisions of this section and regulations 6, 11, 12 and 13 of the European Communities (Lawyer's Practice) (Scotland) Regulations 2000, any

unqualified person (including a body corporate) who draws or prepares—

- (a) any writ relating to heritable or moveable estate; or
  - (b) any writ relating to any action or proceedings in any court; or
  - (c) any papers on which to found or oppose an application for a grant of confirmation in favour of executors,
- shall be guilty of an offence.

(2) Subsection (1) shall not apply—

- (a) to an unqualified person if he proves that he drew or prepared the writ or papers in question without receiving, or without expecting to receive, either directly or indirectly, any fee, gain or reward (other than by way of remuneration paid under a contract of employment); or
- (b) to an advocate; or
- (c) to any public officer drawing or preparing writs in the course of his duty; or
- (d) to any person employed merely to engross any writ; or
- (e) an incorporated practice.”

Accordingly, many categories of person can carry out conveyancing, court and executry work. There is broad competition among the 1200 solicitors' firms who can offer this range of services as well as other professionals in the market. The consumer has a choice of agents who have the integrity, skills and competence to carry out this work in a way that is consistent with the interests of justice. Most importantly, the consumer can instruct solicitors in the knowledge that they:

- have high standards of legal education and training,
- have expertise, provided in many instances in the context of a 'one-stop' service where a property can be marketed, the consumer can obtain independent financial and legal advice, missives can be concluded and conveyancing can be carried out;
- maintain statutory indemnity and compensation fund arrangements; and
- are subject to the Scottish Legal Complaints Commission which offers an independent service complaints adjudication, as well as disciplinary and conduct regulation operated by the Society.

The Society agrees with the Government's conclusion in paragraph 3.9 that the reserved areas of practice should remain as now. The Society also agrees that it should be possible to add to the reserved areas by way of statutory instrument.

**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, however there needs to be a definition of "legal professional". The last bullet point in paragraph 3.9 states that "a business which does not involve legal professionals will not be regulated ... even if it provides legal services within the broad definition". If paragraph 3.9 is read in the context of paragraph 3.7, which states that defining legal services "could create a level playing field between, for example, solicitors and others who compete in the provision of legal services but may currently be unregulated", the definition of "legal professional" would need to include some legal services providers who are not solicitors. It would also require their business entity to be regulated.

The definition of "practitioner" in section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 points the way to a definition of "legal professional" but would require amendment. In that section "practitioner" is defined as:

- a) an advocate ...;
- b) a conveyancing practitioner ...;
- c) an executry practitioner ...;
- d) a firm of solicitors ...;
- e) an incorporated practice ...;
- f) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the 1990 Act ...;
- g) a solicitor ...;

It would be a mistake to provide a comprehensive definition of “legal services” for the reasons given in paragraph 3.8. Either the definition would include a number of activities carried out by businesses and employees which do not need to be regulated, for example citizens advice bureaux, law centres, trade unions or social workers, or there would need to be numerous exclusions to ensure that such activities would not be within the regulated arena.

**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?**

The arrangements for regulation of solicitors and advocates in traditional forms of practice should continue as they are.

**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?**

At present under s32 of the Solicitors (Scotland) Act 1980, solicitors and executry practitioners can provide services for the application for confirmation. They are subject to regulation and provide unrivalled public protections. If the Scottish Government extends the capability to make applications for confirmation then those with such extended rights should be subject to as rigorous regulation as solicitors and should also provide equivalent public protections. The terms of sections 54, 55 and schedule 9 of the Courts and Legal Services Act 1990 (as amended) provide a good model for any prospective amendment. Anybody seeking rights to apply for confirmation should be able to satisfy Scottish Ministers and the Lord President that:

- a) their business is, and is likely to continue to be, carried on by fit and proper persons or, in the case of an individual, that he or she is a fit and proper person;
- b) they, and any person employed by them to provide executry services, are suitably trained;

- c) satisfactory arrangements will at all times be in force for covering adequately the risk of any claim made against them in connection with their provision of executry services;
- d) they are subject to the Scottish Legal Complaints Commission and comply with the regulations made by Scottish Ministers and the Lord President about complaints; and
- e) they have in force satisfactory arrangements to protect their clients if they cease to provide executry services.

**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?**

There should be a statement of regulatory objectives for providing legal services in ABSs as proposed in paragraph 4.8, subject however to some amendment.

For example, although the “administration of justice” is mentioned, the “interests of justice” are not. Furthermore, promoting and maintaining adherence to professional principles should include reference to “professional ethics”.

There is also no requirement stated in paragraph 4.8 to safeguard and promote the independence of the legal profession which should be a key issue in the regulatory objectives.

These regulatory objectives should not just apply to the regulation of ABSs but also to the regulation of traditional firms and to the Law Society as a whole.

**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.

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.

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

No. These seem appropriate.

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.

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

This can be achieved in a number of ways. The creation of a functioning Community Legal Service involves partnership between the public sector, private provision and the third sector. Primarily the onus is on Government to encourage, support and create structures and provide resources which meet the needs of the citizen and provide genuine access to justice. Fundamentally, the best way to promote access to justice is to make the prospect and the reality of working in areas of law impacting on access to justice more attractive to encourage more people to work in such areas. The Society looks forward to being involved in the development of options in this area and is itself considering what those options might be.

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.

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

As drafted, paragraph 5.5 would suggest that traditional firms are included in the scope of regulation, which is at odds with the content of paragraphs 2.22 – 2.31 and 3.9. The Society believes that this was not the Government's intention and is a drafting error. Nonetheless, it highlights the need for a proper definition of ABS firms, as expressed in the response to Question 1 of this paper. The Society reiterates the need for a definition to be contained in the Bill.

There are a number of ways to define an ABS. Clearly, the most specific is to require an ABS to operate through a separate and distinct legal entity such as a subsidiary company formed for the purpose of delivering legal services. Other mechanisms such as those in paragraphs 5.6 do present particular challenges, for example separation of legal services and other unregulated businesses, and client awareness.

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

The Society agrees that the entity regulator should have primacy; however, this does not solve the issue of regulatory conflict. The Society believes that where potential co-regulators are unable to either specify clear boundaries and responsibilities, or even reach fundamental agreement on basic principles which are important to the administration of justice, then no such co-regulation can take place. In advance of any legislative change, the Society intends to enter into discussions with appropriate potential co-regulators.

There needs to be more clarity on the proposal in paragraph 5.12. Given the regulator's public interest responsibility, it must ensure that it avoids any clients of regulated entities being unclear on where to make claims in the event of default or what their rights are in respect of other areas of consumer concern.

The Society draws the Government's attention to the provisions of Articles 23-25 of the EU Services Directive (2006/123/EC) in this connection.

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

While paragraph 5.13 states that legal professional privilege protects communication between a solicitor and his client in relation to 'legal advice and communications', there is no clear definition of what this encompasses. The Society assumes that the definition will be the same as that contained in section 330(10) of the Proceeds of Crime Act 2002.

The law relating to legal professional privilege is a complex area of which some aspects are affected by European Community law, for example the provisions of the third Money Laundering Directive (2005/60/EC). There are issues arising from the application of EC law which will have to be carefully considered by the Scottish Government to ensure that:-

1. legal professional privilege is adequately protected;
2. the terms of Article 25 of the EU Services Directive and current case law are taken into account; and
3. the risk of an adverse ruling from the European Court of Justice affecting any prospective legislation is minimised.

The Council agrees that the approach in paragraph 5.15 is correct, subject to the points raised above.

**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.**

If Ministers require an advisory panel to advise on applications as described then the Society would accept this as long as the panel has a clear remit and purpose.

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

Yes.

- 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.

- 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.

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

Yes.

Where the owner is a corporate body, the regulator should be able to apply the criteria to those in control. There may be ECHR implications regarding the proposal that an interest in ABS should be given up in certain circumstances, so such a procedure should be made subject to appeal to the courts.

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

In domestic law, yes. The Society however draws the Government's attention to the provisions of Article 25 of the EU Services Directive (2006/123/EC) in this connection and the role which the European Court of Justice may play in the application of EC law to the ABS regime.

The Society has already stated its support for the underlying principles of the Government's proposals but acknowledges that, if sanctioned as a regulator, it will, in authorising any particular form of ABS, have to have regard to ensuring that the internationally recognised rights of the clients of Scottish solicitors are not potentially compromised.

**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?***

The Society agrees with the proposals.

**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?***

The Society recognises that in order to be an effective regulator of ABSs, it requires revised and modernised governance arrangements.

The Society's governance review has been progressing for over a year – independent of the Society's own work on ABSs. It is one strand of a bigger initiative to re-examine its role and purpose for the 21<sup>st</sup> century, for the benefit of both the public and the profession. Developments within the ABS arena and changes to ownership models that will emerge once legislation is in place will have a fundamental effect on its regulatory functions; and any changes to the Society's governance will reflect the need for greater independent scrutiny of its procedures, through a different Council structure and membership.

The profession will have the opportunity to consider detailed governance proposals at its AGM in May.

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

There should be non-lawyer membership on the Council. Currently there are four non-lawyer observers. As noted in the consultation paper, the Council promoted amendments to the law to provide for non-lawyer membership but these amendments were unsuccessful when debated in Parliament. Accordingly, the opportunity should be taken in the Bill to provide for non-lawyer membership of the Council. In this context, the Society is of the view that around 20% non-lawyer membership of the Council would be appropriate.

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

No.

The Society has rigorously examined the arguments for separating its functions. The Society believes that a conjoined approach lies at the heart of the profession and that separating the functions would be harmful to the delivery of that ideal. Not only would separation be unnecessarily expensive and bureaucratic but at the core of any profession is the aspiration not only to provide the best possible service to the client but also to recognise that it has a responsibility to act in the public interest in all that it does. The regulation of the profession is the means by which the profession ensures these aspirations are met.

Within the unified structure of the Society, practical separation of regulatory and representative roles is already a reality. Since the Council of the Law Society of Scotland Act 2003, all the Society's committees dealing with complaints have had delegated powers to decide cases without reference to the Council. These

committees have 50% solicitor and 50% non-solicitor members, assuring transparency and balance between the solicitor and the consumer. Many other committees have non-lawyer members including the Guarantee Fund, Insurance and Professional Practice Committees. Changes which are anticipated to the Society's governance will strengthen the practical separation of functions.

In the third meeting of the Bill Reference Group, Sue Aspinall from the OFT confirmed that if the Society were to adopt the plan for a separate regulatory committee this would satisfy the OFT's request for the separation of the regulatory function. The Society commends this point of view.

In addition, the Scottish Legal Complaints Commission (a body which was not in existence when Clementi was considering these issues) creates an independent services complaint handling body which not only deals with service complaints but also has oversight powers and substantial non-lawyer membership. There is no need for further legislative amendment in this area.

In its report published in May 1980 (Command 7846), the Royal Commission on Legal Services in Scotland considered the terms of the 1949 Act in respect of the duties to the profession and to the public. The Commission stated at paragraph 15.10 of that report:

*"...we consider that there is undoubted benefit to the public in having the solicitors' professional body under a wider obligation than simply to look after their own membership. Much of value we feel would be lost if the Law Society were to become simply the professional association or trade union of solicitors."*

This statement remains equally valid in 2009.

The review of the regulatory framework for legal services in England and Wales final report (December 2004) examined the position of regulatory and representative functions in England and Wales. Sir David Clementi's consultation paper made it clear that one of the central issues of the review was to explore whether the hybridity

of regulatory and representative functions met his terms of reference. He considered that four aspects of the terms of reference had particular relevance:

- “i) that the regulatory arrangement chosen should promote the public and consumer interest;
- ii) that it should promote competition;
- iii) that it should promote innovation; and
- iv) that the regulatory arrangement should be transparent.”

The Clementi analysis may be correct for England and Wales but this does not mean it is appropriate for Scotland. Competition within the legal profession and innovation in the provision of legal services is already evident in Scotland without the need for introducing a regulatory arrangement that is, in the Society’s view, disproportionate and unduly burdensome, both financially and in terms of regulatory scale.

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

In the ABS regime, the level of public protection for the consumer should be the equivalent of that offered by traditional solicitors’ firms. This means in practice that an ABS should be able to present adequate fidelity cover to compensate its clients in the event of dishonesty by the ABS or one of its principals or employees.

This will not only be in the public interest but will also promote fair competition between ABSs and traditional solicitors’ firms.

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

The Council is of the view that liability under the Guarantee Fund should be capped, both for individual and overall liability for the reasons set out in paragraphs 7.29 – 7.31.

**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?***

The Society agrees with the proposal set out in the consultation paper which is that professional indemnity insurance for an ABS must at least be equivalent to the professional indemnity insurance arrangements for a traditionally structured law firm in order to ensure proper public protection as well as guaranteeing consistency between the regulatory regime for ABSs and traditional business models.

Question 31 assumes that the insurance market will provide professional indemnity insurance arrangements for ABSs. That is not a certainty as no one can predict the future course of markets. Ultimately, it will be the insurance market which will determine whether there is or is not professional indemnity insurance for ABSs.

***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?***

Whether or not Faculty members should be allowed to form partnerships or participate in ABS is a matter for others to decide.

The Society has a statutory responsibility to administer the scheme for the grant of extended rights of audience to solicitors. It is in the public interest that solicitors and advocates should be able to transfer between the branches of the legal profession in Scotland, which is why the Society has called for a review of the rules relating to rights of audience.

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

The Society has no view on this issue.

***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?***

The Society has no view on this issue.

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

Yes.

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

The Society favours regulation by adopting an approach similar to the Compensation Act 2006, which provides proper regulation in the public interest.

**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?***

The Council is unaware of any claimant whose claim was successful - i.e. the defenders paid some compensation - who ended up worse off. Some will not have been much better off after paying their solicitor, particularly where no expenses are payable by defenders such as Employment Tribunal claims. Clearly, those who lost their case will be worse off unless they had insurance which paid the defender's expenses and their own outlays. The Council is aware that some claimants who had signed a contract with a claims company before the case was referred to a solicitor will have had to pay some of their damages to the claims company.

**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?***

There has been some questionable advertising - especially implying that the person or company is a solicitors' practice. There have also been street surveys, and on one occasion an attempt to sell names and addresses of accident victims, including hospital patients, by an English based company to Scottish solicitors.

Questionable advertising is also a serious concern with will writers. A number of such businesses have published misleading leaflets and websites, again mainly with implied legal qualifications. These companies prey on the elderly and vulnerable and regulation of them is as desirable and in the public interest as it is for claims companies.



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