Passage of the

Legal Services (Scotland) Bill 2009

SPPB 151
Passage of the

Legal Services (Scotland) Bill 2009

SP Bill 30 (Session 3), subsequently 2010 asp 16

SPPB 151

EDINBURGH: APS GROUP SCOTLAND
For information in languages other than English or in alternative formats (for example Braille, large print, audio tape or various computer formats), please send your enquiry to Public Information, The Scottish Parliament, Edinburgh, EH991SP.

You can also contact us by email sp.info@scottish.parliament.uk

We welcome written correspondence in any language.
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td></td>
</tr>
<tr>
<td><strong>Introduction of the Bill</strong></td>
<td>1</td>
</tr>
<tr>
<td>Bill (As Introduced) (SP Bill 30)</td>
<td></td>
</tr>
<tr>
<td>Explanatory Notes (and other accompanying documents) (SP Bill 30-EN)</td>
<td>89</td>
</tr>
<tr>
<td>Policy Memorandum (SP Bill 30-PM)</td>
<td>135</td>
</tr>
<tr>
<td>Delegated Powers Memorandum (SP Bill 30-DPM)</td>
<td>170</td>
</tr>
<tr>
<td><strong>Stage 1</strong></td>
<td></td>
</tr>
<tr>
<td>Stage 1 Report, Justice Committee</td>
<td>199</td>
</tr>
<tr>
<td>Annexe A: Subordinate Legislation Committee Report</td>
<td>269</td>
</tr>
<tr>
<td>Annexe B: Finance Committee consideration</td>
<td>286</td>
</tr>
<tr>
<td>Annexe C: Extracts from the minutes of the Justice Committee</td>
<td>296</td>
</tr>
<tr>
<td>Annexe D: Oral evidence</td>
<td>299</td>
</tr>
<tr>
<td>Annexe E: Written evidence, including supplementary evidence and Scottish Government correspondence</td>
<td>393</td>
</tr>
<tr>
<td>Further supplementary submissions to the Justice Committee</td>
<td>638</td>
</tr>
<tr>
<td>Correspondence between the Justice Committee and the Presiding Officer</td>
<td>650</td>
</tr>
<tr>
<td>Correspondence from the Minister for Community Safety to the Justice Committee, 19 March 2010</td>
<td>651</td>
</tr>
<tr>
<td>Correspondence from the Scottish Legal Complaints Commission to the Justice Committee, 26 March 2010</td>
<td>652</td>
</tr>
<tr>
<td>Scottish Government response to the Stage 1 Report, 16 April 2010</td>
<td>655</td>
</tr>
<tr>
<td>Correspondence from the Law Society of Scotland to the Justice Committee, 20 April 2010</td>
<td>666</td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 28 April 2010</td>
<td>667</td>
</tr>
<tr>
<td>Official Report, Meeting of the Parliament, 28 April 2010</td>
<td>668</td>
</tr>
<tr>
<td><strong>After Stage 1</strong></td>
<td></td>
</tr>
<tr>
<td>Correspondence from the Law Society of Scotland to the Justice Committee, 30 April 2010</td>
<td>689</td>
</tr>
<tr>
<td>Scottish Government response to the report of the Subordinate Legislation Committee at Stage 1, 25 May 2010</td>
<td>692</td>
</tr>
<tr>
<td><strong>Before Stage 2</strong></td>
<td></td>
</tr>
<tr>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on the Guarantee Fund, 26 May 2010</td>
<td>698</td>
</tr>
<tr>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on the regulation of non-lawyer will writers, 1 June 2010</td>
<td>700</td>
</tr>
<tr>
<td>Correspondence from the Scottish Government to the Justice Committee enclosing correspondence from the Office of Fair Trading, 4 June 2010</td>
<td>701</td>
</tr>
<tr>
<td><strong>Stage 2</strong></td>
<td></td>
</tr>
<tr>
<td>1st Marshalled List of Amendments for Stage 2 (SP Bill 30-ML1 (Revised))</td>
<td>705</td>
</tr>
<tr>
<td>1st Groupings of Amendments for Stage 2 (SP Bill 30-G1 (Revised))</td>
<td>778</td>
</tr>
<tr>
<td>Date</td>
<td>Title</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>Extract from the Minutes, Justice Committee</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>Official Report, Justice Committee</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>2nd Marshalled List of Amendments for Stage 2 (SP Bill 30-ML2)</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>2nd Groupings of Amendments for Stage 2 (SP Bill 30-G2)</td>
</tr>
<tr>
<td>15 June 2010</td>
<td>Extract from the Minutes, Justice Committee</td>
</tr>
<tr>
<td>15 June 2010</td>
<td>Official Report, Justice Committee</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>3rd Marshalled List of Amendments for Stage 2 (SP Bill 30-ML3)</td>
</tr>
<tr>
<td>8 June 2010</td>
<td>3rd Groupings of Amendments for Stage 2 (SP Bill 30-G3)</td>
</tr>
<tr>
<td>22 June 2010</td>
<td>Correspondence from Kenneth Dalling, solicitor, to the Justice Committee relating to amendment 373</td>
</tr>
<tr>
<td>22 June 2010</td>
<td>Correspondence from John McGovern, Frank McGuire, Patrick Maguire, Mike Dailly, Walter Semple and David O’Hagan to the Justice Committee relating to amendment 373</td>
</tr>
<tr>
<td>22 June 2010</td>
<td>Extract from the Minutes, Justice Committee</td>
</tr>
<tr>
<td>22 June 2010</td>
<td>Official Report, Justice Committee</td>
</tr>
<tr>
<td>29 June 2010</td>
<td>Extract from the Minutes, Justice Committee</td>
</tr>
<tr>
<td>29 June 2010</td>
<td>Official Report, Justice Committee</td>
</tr>
<tr>
<td>2 July 2010</td>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on commitments made at Stage 2, 2 July 2010</td>
</tr>
<tr>
<td>27 September 2010</td>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on commitments made at Stage 2, 27 September 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Extract from the Minutes of the Parliament, 6 October 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Official Report, Meeting of the Parliament, 6 October 2010</td>
</tr>
<tr>
<td>30 September 2010</td>
<td>Bill (As Amended at Stage 2) (SP Bill 30A)</td>
</tr>
<tr>
<td>30 September 2010</td>
<td>Revised Explanatory Notes (SP Bill 30A-EN)</td>
</tr>
<tr>
<td>30 September 2010</td>
<td>Supplementary Financial Memorandum (SP Bill 30A-FM)</td>
</tr>
<tr>
<td>30 September 2010</td>
<td>Supplementary Delegated Powers Memorandum (SP Bill 30A-DPM)</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>After Stage 2</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Subordinate Legislation Committee Report on Bill As Amended at Stage 2</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Before Stage 3</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on commitments made at Stage 2, 2 July 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Correspondence from the Minister for Community Safety to the Justice Committee on commitments made at Stage 2, 27 September 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Stage 3</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Marshalled List of Amendments selected for Stage 3 (SP Bill 30A-ML (Revised))</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Groupings of Amendments for Stage 3 (SP Bill 30A-G)</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Extract from the Minutes of the Parliament, 6 October 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Official Report, Meeting of the Parliament, 6 October 2010</td>
</tr>
<tr>
<td>6 October 2010</td>
<td>Bill (As Passed) (SP Bill 30B)</td>
</tr>
</tbody>
</table>
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The material in Annexes D and E of the Justice Committee’s Stage 1 Report was originally published on the web only, and is now included in full in this volume.

The Scottish Government made a written response to the report of the Subordinate Legislation Committee at Stage 1, in addition to the Government’s general response to the Stage 1 Report by the Justice Committee. Both responses are included in this volume. At its meeting on 1 June 2010, the Subordinate Legislation Committee considered and noted the response without debate. No extracts from the minutes or the Official Report of that meeting are, therefore, included in this volume.

At its meeting on 21 September 2010, the Subordinate Legislation Committee considered the delegated powers in the Bill as amended at Stage 2 and agreed its report without debate. The report is included in this volume, but no extracts from the minutes or the Official Report of that meeting are included.
CONTENTS

PART 1
THE REGULATORY OBJECTIVES ETC.

1 Regulatory objectives
2 Professional principles
3 Legal services
4 Ministerial oversight

PART 2
REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1
APPROVED REGULATORS

Approved regulators

5 Approved regulators
6 Approval of regulators
7 Authorisation to act

Regulatory schemes

8 Regulatory schemes
9 Reconciling different rules

Licensing rules

10 Licensing rules: general
11 Initial considerations
12 Other licensing rules
13 Licensing appeals

Practice rules

14 Practice rules: general
15 Financial sanctions
16 Enforcement of duties
17 Performance report
18 Accounting and auditing
19 Professional indemnity
Internal governance

20 Internal governance arrangements
21 Communicating outside
22 More about governance

Regulatory functions etc.

23 Regulatory and representative functions
24 Assessment of licensed providers
25 Giving information to SLAB
26 Additional powers and duties
27 Guidance on functions

Performance

28 Monitoring performance
29 Measures open to Ministers

Ceasing to regulate

30 Surrender of authorisation
31 Cessation directions
32 Transfer arrangements
33 Extra arrangements

Miscellaneous

34 Change of approved regulator
35 Step-in by Ministers

CHAPTER 2

LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

36 Licensed providers
37 Eligibility criteria
38 Key duties

Operational positions

39 Head of Legal Services
40 Head of Practice
41 Practice Committee

Appointment to position etc.

42 Notice of appointment
43 Challenge to appointment
44 Disqualification from position
45 Effect of disqualification
46 Conditions for disqualification

Designated persons

47 Designated persons
48 Listing and information
### Outside investors

- 49 Fitness for involvement
- 50 Factors as to fitness
- 51 Behaving properly
- 52 More about investors

### Discontinuance of services

- 53 Duty to warn
- 54 Ceasing to operate
- 55 Safeguarding clients
- 56 Distribution of client account

### Professional practice etc.

- 57 Employing disqualified lawyer
- 58 Concealing disqualification
- 59 Pretending to be licensed
- 60 Professional privilege

## Chapter 3

### Further provision

#### Achieving regulatory aims

- 61 Input by the OFT
- 62 Role of approved regulators
- 63 Policy statement

#### Complaints

- 64 Complaints about regulators
- 65 Complaints about providers

#### Registers and lists

- 66 Register of approved regulators
- 67 Registers of licensed providers
- 68 Lists of disqualified persons

#### Miscellaneous

- 69 Privileged material
- 70 Immunity from damages
- 71 Effect of professional or other rules

### Part 3

#### Confirmation services

#### Regulation of confirmation agents

- 72 Confirmation agents and services
- 73 Approving bodies
- 74 Certification of bodies
- 75 Regulatory schemes
- 76 Financial sanctions
- 77 Pretending to be authorised
Other regulatory matters

78 Revocation of certification
79 Surrender of certification
80 Register and list

Ministerial functions

81 Ministerial intervention
82 Regard to OFT input

Related provision

83 Complaints about agents
84 Privilege and immunity
85 Consequential modification

PART 4

THE LEGAL PROFESSION

CHAPTER 1

APPLYING THE REGULATORY OBJECTIVES

86 Application by the profession

CHAPTER 2

FACULTY OF ADVOCATES

87 Regulation of the Faculty
88 Professional rules
89 Particular rules

CHAPTER 3

SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

90 Qualified persons
91 Changes as to practice rules

The Law Society

92 Council membership
93 Regulatory committee
94 Removal from solicitors roll

CHAPTER 4

OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance
96 Availability of legal services
97 Information about legal services
Scottish Legal Complaints Commission

98 Minor amendments

PART 5
GENERAL

99 Regulations
100 Ancillary provision
101 Definitions
102 Commencement and short title

Schedule 1—Performance targets
Schedule 2—Directions
Schedule 3—Censure
Schedule 4—Financial penalties
Schedule 5—Amendment of authorisation
Schedule 6—Rescission of authorisation
Schedule 7—Surrender of authorisation
Schedule 8—Investors in licensed providers
Schedule 9—Index of expressions used
Legal Services (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; and for connected purposes.

PART 1

THE REGULATORY OBJECTIVES ETC.

1 Regulatory objectives

For the purposes of this Act, the regulatory objectives are the objectives of—

(a) supporting the constitutional principle of the rule of law,
(b) protecting and promoting—
   (i) the interests of consumers,
   (ii) the public interest generally,
(c) promoting—
   (i) access to justice,
   (ii) competition in the provision of legal services,
(d) promoting an independent, strong, varied and effective legal profession,
(e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
(f) promoting and maintaining adherence to the professional principles.

2 Professional principles

For the purposes of this Act, the professional principles are the principles that persons providing legal services should—

(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) where—
   (i) exercising before any court a right of audience, or
   (ii) conducting litigation in relation to proceedings in any court,
(f) meet their obligations under any relevant professional rules.

3 Legal services

(1) For the purposes of this Act, legal services are services which consist of (at least one of)—
   (a) the provision of legal advice or assistance in connection with—
      (i) any contract, deed, writ, will or other legal document,
      (ii) the application of the law, or
      (iii) any form of resolution of legal disputes, or
   (b) the provision of legal representation in connection with—
      (i) the application of the law, or
      (ii) any form of resolution of legal disputes.

(2) But, for those purposes, legal services do not include—
   (a) judicial activities,
   (b) any other activity of a judicial nature,
   (c) any activity of a quasi-judicial nature (for example, acting as a mediator).

(3) In subsection (1)(a)(iii) and (b)(ii), “legal disputes” includes disputes as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or obligations.

4 Ministerial oversight

(1) Subsections (2) and (3) apply in relation to the exercise by the Scottish Ministers of their functions under Parts 2 and 3.

(2) The Scottish Ministers must, so far as practicable, act in a way which—
   (a) is compatible with the regulatory objectives, and
   (b) they consider most appropriate with a view to meeting those objectives.

(3) The Scottish Ministers must adopt best regulatory practice under which (in particular) regulatory activities should be—
   (a) carried out—
      (i) effectively (but without giving rise to unnecessary burdens),
      (ii) in a way that is transparent, accountable, proportionate and consistent,
   (b) targeted only at such cases as require action.
PART 2
REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1
APPROVED REGULATORS

5 Approved regulators

(1) For the purposes of this Part, an approved regulator is a professional or other body which is approved as such by the Scottish Ministers under section 6.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approved regulator must include—
   (a) a copy of the applicant’s proposed regulatory scheme (see section 6(1)(c)),
   (b) a copy of its proposed statement of policy under section 63(1),
   (c) a description of—
      (i) the applicant’s constitution and composition (including internal structure),
      (ii) its internal governance arrangements,
      (iii) its representative functions (if any),
      (iv) its other activities (if any).

(4) The applicant—
   (a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,
   (b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approved regulators that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge—
   (a) an applicant to become an approved regulator,
   (b) approved regulators.

6 Approval of regulators

(1) The Scottish Ministers may approve the applicant as an approved regulator if they are satisfied that—
   (a) the applicant has—
      (i) the legal competence necessary,
      (ii) sufficient resources (financial and otherwise),
      (iii) the capability in other respects,
      to regulate licensed legal services providers in accordance with this Part,
(b) the applicant will always exercise its regulatory functions—
   (i) independently of any other person or interest,
   (ii) properly in other respects (in particular, with a view to achieving public confidence),
(c) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 8),
(d) the applicant’s internal governance arrangements are, or will be, suitable (as determined with particular reference to section 20).

(2) The Scottish Ministers may approve the applicant as an approved regulator subject to conditions.

(3) Before deciding whether or not to approve the applicant as an approved regulator, the Scottish Ministers must consult—
   (a) the Lord President,
   (b) the OFT, and such other organisation appearing to them to represent the interests of consumers in Scotland as they consider appropriate,
   (c) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
   (a) must send a copy of the application to the consultees,
   (b) may send a copy of any revised application to any or all of them.

(5) The Scottish Ministers must notify the applicant if they intend to—
   (a) refuse to approve it as an approved regulator, or
   (b) impose conditions under subsection (2).

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about approval under this section, including (in particular)—
   (a) the process for seeking their approval,
   (b) the criteria for their approval (including things that applicants must be able to demonstrate),
   (c) what categories of bodies may (or may not) be an approved regulator.

7 **Authorisation to act**

(1) An approved regulator may not exercise any of its regulatory functions unless it is authorised to do so by the Scottish Ministers under this section.

(2) The Scottish Ministers may give their authorisation if they are satisfied (or continue to be satisfied)—
(a) as mentioned in subsection (1) of section 6,
(b) as regards any criteria provided for under subsection (7)(b) of that section.

(3) Their authorisation may be given with restrictions imposed by reference to particular categories of—

(a) licensed provider,
(b) legal services.

(4) Their authorisation may be given—

(a) either—
   (i) without limit of time, or
   (ii) for a fixed period of at least 3 years,
(b) subject to conditions.

(5) The Scottish Ministers may, after consulting the approved regulator, remove or vary any conditions imposed under subsection (4)(b).

(6) A request for their authorisation may be—

(a) made at any reasonable time (including at the same time as applying for their approval under section 6),
(b) withdrawn by the approved regulator (or applicant) at any time by giving them written notice to that effect.

(7) The Scottish Ministers must notify the approved regulator (or applicant) if they intend to—

(a) withhold their authorisation, or
(b) impose conditions under subsection (4)(b).

(8) If notification is given to the approved regulator (or applicant) under subsection (7), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(9) The approved regulator (or applicant) must provide the Scottish Ministers with such information as they may reasonably require for their consideration of its request.

(10) The Scottish Ministers may by regulations make further provision about authorisation under this section, including (in particular)—

(a) the process for requests for their authorisation,
(b) the criteria for their authorisation.

(11) In this section, a reference to authorisation means initial or renewed authorisation.

---

Regulatory schemes

8 Regulatory schemes

(1) An approved regulator must—
(a) make a regulatory scheme for licensing and regulating the provision of legal services by its licensed legal services providers, and
(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) contain—
   (i) the licensing rules (see section 10),
   (ii) the practice rules (see section 14),
(b) include provision for reconciling different sets of regulatory rules (see section 9),
(c) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify).

(3) The regulatory scheme may—

(a) relate to—
   (i) one or more categories of licensed provider,
   (ii) some or all legal services,
(b) make different provision for different cases or types of case.

(4) An approved regulator may amend its regulatory scheme (or any aspect of it), but—

(a) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(b) the Scottish Ministers may not give their approval before they have consulted—
   (i) the Lord President, and
   (ii) such other person or body as they consider appropriate.

(5) The Scottish Ministers may by regulations—

(a) confer authority for the regulatory schemes of approved regulators to deal with the provision by their licensed providers of such other services (in addition to legal services) as the regulations may prescribe, and
(b) specify the extent to which (and the manner in which) the regulatory schemes may do so.

9 Reconciling different rules

(1) The provision required to be in the regulatory scheme by section 8(2)(b) is such provision as is reasonably practicable (and appropriate in the circumstances) for—

(a) preventing or resolving regulatory conflicts, and
(b) avoiding unnecessary duplication of regulatory rules.

(2) For the purposes of this section, a regulatory conflict is a conflict between—

(a) the regulatory scheme of an approved regulator, and
(b) any professional or regulatory rules made by any other body which regulates the provision of legal or other services.
(3) The Scottish Ministers may by regulations make further provision about regulatory conflicts that may involve an approved regulator.

**Licensing rules**

10 Licensing rules: general

(1) For the purposes of this Part, the licensing rules are rules about—

(a) the procedure for becoming a licensed provider, including (in particular)—

(i) the making of applications,

(ii) the criteria to be met by applicants,

(iii) the determination of applications,

(iv) the issuing of licences,

(b) the terms of licences and attaching to licences of conditions or restrictions,

(c) the—

(i) renewal of licences,

(ii) circumstances in which licences may be revoked or suspended,

(d) licensing provision affecting outside investors in licensed providers (including for section 49(2)),

(e) licensing fees that are chargeable by the approved regulator.

(2) Rules made in pursuance of subsection (1)(a) to (c) must allow for review by the approved regulator of any decision made by it under the rules that materially affects an applicant for a licence or (as the case may be) a licensed provider.

(3) Licensing rules may include such further licensing arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

11 Initial considerations

(1) Licensing rules made in pursuance of section 10(1)(a) must provide for—

(a) consultation with the OFT, where appropriate in accordance with subsection (2), in relation to a licence application,

(b) how the approved regulator is to deal with a licence application where it believes that granting it would cause (directly or indirectly) a material and adverse effect on the provision of legal services.

(2) For the purpose of subsection (1)(a), it is appropriate to consult the OFT where the approved regulator believes that the granting of the licence application may have the effect of—

(a) preventing competition within the legal services market, or

(b) significantly restricting or distorting such competition.

12 Other licensing rules

(1) Licensing rules may allow for—
(a) an applicant to be issued with a provisional licence—
   (i) in anticipation of its becoming (or becoming eligible to be) a licensed provider, and
   (ii) whose full effect as a licence is conditional on its becoming a licensed provider (and such other relevant matters as the rules may specify), or

(b) a licensed provider to be issued with a provisional licence—
   (i) in anticipation of its transferring to the regulation of the approved regulator, and
   (ii) whose full effect as a licence is conditional on the transfer occurring (and such other matters as the rules may specify).

(2) Licensing rules must—

(a) state that a licence application may be refused on the ground that the applicant appears to be incapable (for any reason) of complying with the regulatory scheme,
(b) provide for grounds for non-renewal, revocation or suspension of a licence where the licensed provider is breaching (or has breached) the regulatory scheme.

13 Licensing appeals

(1) An applicant for a licence or (as the case may be) a licensed provider may appeal against a relevant licensing decision taken by virtue of this Part—

   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which that decision is intimated to it.

(2) A relevant licensing decision is a decision to—

   (a) refuse the licensed provider’s application for—
      (i) a licence, or
      (ii) renewal of its licence,
   (b) attach conditions or restrictions to its licence, or
   (c) revoke or suspend its licence.

Practice rules

14 Practice rules: general

(1) For the purposes of this Part, the practice rules are rules about—

   (a) the—
      (i) operation and administration of licensed providers,
      (ii) standards to be met by licensed providers,
   (b) the operational positions within licensed providers (including for section 45(4)),
   (c) accounting and auditing (see section 18),
   (d) professional indemnity (see section 19),
(e) the making and handling of any complaint about—
   (i) a licensed provider,
   (ii) a designated or other person within a licensed provider,
(f) the measures that may be taken by the approved regulator, in relation to a licensed provider, if—
   (i) there is a breach of the regulatory scheme, or
   (ii) a complaint referred to in paragraph (e) is upheld.

(2) Rules made in pursuance of subsection (1)(f) must allow a licensed provider to make representations to the approved regulator before it takes any of the measures available to it under the rules.

(3) Practice rules may include such further arrangements as to the professional practice, conduct or discipline of licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

15 Financial sanctions

(1) Practice rules made in pursuance of section 14(1)(f) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their approval under section 6.

(3) A financial penalty imposed by virtue of this section—
   (a) is payable to the approved regulator,
   (b) must be applied towards the cost of exercising its functions under this Part.

(4) A licensed provider may appeal against a financial penalty (or the amount of a financial penalty) imposed on it by virtue of this section—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the penalty is intimated to it.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

16 Enforcement of duties

(1) Practice rules must include provision that it is a breach of the regulatory scheme for a licensed provider to—
   (a) fail to comply with section 38, or
   (b) fail to comply with its—
       (i) other duties under this Part, or
       (ii) duties under any other enactment.

(2) Practice rules must require a licensed provider to—
   (a) review and report on its performance (see section 17), and
17 **Performance report**

(1) Practice rules made by reference to section 16(2)(a) are (in particular) to give the Head of Practice of a licensed legal services provider the functions of—

(a) carrying out an annual review, and

(b) sending a report (in a specified form) on the review to the approved regulator.

(2) The review must include an examination of—

(a) the licensed provider’s compliance with section 38(1), and

(b) the involvement of any outside investors in the licensed provider.

(3) Practice rules made by reference to section 16(2)(b) may describe the approved regulator’s functions under section 24.

18 **Accounting and auditing**

Practice rules must—

(a) require licensed providers to keep in place proper accounting and auditing procedures,

(b) include provision corresponding to that applying under sections 35 to 37 (accounts rules) of the 1980 Act in relation to an incorporated practice.

19 **Professional indemnity**

Practice rules must—

(a) require licensed providers to keep in place sufficient arrangements for professional indemnity,

(b) include provision corresponding to that applying under section 44 (professional indemnity) of the 1980 Act in relation to an incorporated practice.

20 **Internal governance**

(1) The internal governance arrangements of an approved regulator must incorporate such provision as is necessary with a view to ensuring that the approved regulator will—

(a) always exercise its regulatory functions—

(i) independently of any other person or interest,

(ii) properly in other respects (in particular, with a view to achieving public confidence),

(b) continue to allocate sufficient resources (financial and otherwise) to the exercise of its regulatory functions,

(c) review regularly how effectively it is exercising its regulatory functions (in particular, by reviewing the effectiveness of its regulatory scheme).
(2) In relation to an approved regulator which has representative functions, relevant factors in connection with subsection (1)(a) include (in particular) the need for—

(a) the approved regulator’s code of conduct (if any) for its members to be compatible with the regulatory objectives and the professional principles,

(b) the approved regulator to—

(i) exercise its regulatory functions separately from its other functions (in particular, any representative functions), and

(ii) avoid conflicts of interest in relation to its regulatory functions,

(c) the approved regulator to secure that a reasonable proportion of the individuals who are responsible for the exercise of its regulatory functions are not qualified legal practitioners.

(3) The approved regulator’s regard to the factor mentioned in subsection (2)(b) is demonstrable by (for example) its securing that within its structure its regulatory functions are clearly demarcated.

21 Communicating outside

(1) The internal governance arrangements of an approved regulator must not, in relation to the persons who are involved in the exercise of its regulatory functions, prevent the persons from engaging in consultation or other communication with—

(a) other approved regulators,

(b) the Scottish Ministers,

(c) the Scottish Legal Aid Board,

(d) the Scottish Legal Complaints Commission, or

(e) the OFT, or any other public body which has functions concerning the application of competition law.

(2) Where an approved regulator has representative functions, its internal governance arrangements must not, in relation to any person who—

(a) is involved in the exercise of its regulatory functions, and

(b) considers that the independence or effectiveness of the approved regulator’s exercise of its regulatory functions is being (or has been) for any reason adversely affected by the furtherance of its representative functions,

prevent the person notifying the Scottish Ministers accordingly.

(3) Subsections (1) and (2) are subject to any overriding prohibition or restriction arising by virtue of any relevant—

(a) enactment or rule of law, or

(b) rule of professional conduct or ethics.

22 More about governance

(1) The Scottish Ministers may by regulations make further provision about the internal governance arrangements of approved regulators.
(2) However, regulations under subsection (1) must relate to the regulatory functions of approved regulators.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult any approved regulator that would be affected by the regulations.

(4) For the purposes of this Part, the internal governance arrangements of an approved regulator are its own organisational and operational arrangements for the carrying out of its activities.

Regulatory functions etc.

23 Regulatory and representative functions

(1) For the purposes of this Part, the regulatory functions of an approved regulator are any such functions that the approved regulator has as regards its licensed legal services providers including (in particular) its functions—
   (a) in relation to its regulatory scheme, or
   (b) under section 24.

(2) For the purposes of this Part, the representative functions of an approved regulator are any functions that the approved regulator has, in that or any other capacity, of representing or promoting the interests of the individual persons (taken collectively or otherwise) who form its membership.

(3) Nothing in this Part permits the Scottish Ministers to interfere with an approved regulator’s representative functions (but this does not prevent the Scottish Ministers taking such action under this Part as they consider appropriate for the purpose of ensuring that an approved regulator’s regulatory functions are not prejudiced by its representative functions).

24 Assessment of licensed providers

(1) An approved regulator must assess each of its licensed legal services providers at least once in every successive period of 3 years from (in each case) the date on which the approved regulator issued the licensed provider with its licence.

(2) The Scottish Ministers may require an approved regulator to carry out a special assessment of a licensed provider if the Scottish Legal Complaints Commission requests that they do so in a case where the Commission has significant concerns about how a complaint about a licensed provider has been dealt with.

(3) An assessment under this section must (in particular) concern—
   (a) the licensed provider’s compliance with section 38(1), and
   (b) such other matters as the approved regulator considers appropriate.

(4) When conducting the assessment, the approved regulator may—
   (a) require from the licensed provider the production of any—
       (i) relevant documents,
       (ii) other relevant information,
   (b) interview any person within the licensed provider.
(5) The approved regulator must—
   (a) prepare a report on the assessment, and
   (b) send a copy of the report to the licensed provider (and, if the assessment was
       required under subsection (2), also send one to the Scottish Ministers and the
       Commission).

(6) But before finalising the report, the approved regulator must—
   (a) send a draft of the report to the licensed provider, and
   (b) give it a reasonable opportunity to make representations about—
       (i) the findings of the assessment, and
       (ii) any recommendations contained in the report.

(7) If the assessment discloses (or appears to disclose) any professional misconduct by a
    member of a professional association, the approved regulator must notify that
    association accordingly.

(8) An approved regulator may delegate its functions under this section to any suitable
    person or body.

(9) The Scottish Ministers may by regulations make further provision about the assessment
    of licensed providers.

### Giving information to SLAB

(1) An approved regulator must provide the Scottish Legal Aid Board with such information
    as the Board may reasonably require for the purpose mentioned in subsection (2).

(2) The purpose is the Board’s exercise of its function under section 1(2A) of the 1986 Act.

### Additional powers and duties

(1) The Scottish Ministers may by regulations make provision conferring on approved
    regulators such additional functions as they consider to be necessary or expedient for
    them to have for the purposes of this Part.

(2) Before making regulations under subsection (1), the Scottish Ministers must consult—
    (a) every approved regulator,
    (b) the Lord President, and
    (c) such other person or body as they consider appropriate.

### Guidance on functions

(1) In exercising its functions under this Part, an approved regulator must have regard to
    any guidance issued to it, or to approved regulators generally, by the Scottish Ministers
    for the purposes of or in connection with this Part.

(2) Before issuing such guidance, the Scottish Ministers must consult—
    (a) every approved regulator, and
    (b) such other person or body as they consider appropriate.

(3) The Scottish Ministers must publish any such guidance as issued (or re-issued).
Performance

28 Monitoring performance

(1) The Scottish Ministers may monitor the performance of approved regulators in such manner as they consider appropriate.

(2) Monitoring the performance of an approved regulator includes (in particular) doing so by reference to—
   (a) its compliance with its duties under section 62,
   (b) the exercise of its regulatory functions,
   (c) the operation of its internal governance arrangements,
   (d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) An approved regulator must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

29 Measures open to Ministers

(1) The Scottish Ministers may, in relation to an approved regulator, take one or more of the measures mentioned in subsection (4) if they consider that to be appropriate in the circumstances of the case.

(2) When considering the appropriateness of taking any of those measures, or a combination of them, the Scottish Ministers must (except in the case of a measure mentioned in paragraph (f) of that subsection) have particular regard to the effect that it may have on the approved regulator’s observance of the regulatory objectives.

(3) Schedules 1 to 6 (to which subsection (1) is subject) respectively make provision concerning the measures mentioned in subsection (4).

(4) The measures are—
   (a) setting performance targets,
   (b) directing that action be taken,
   (c) publishing a statement of censure,
   (d) imposing a financial penalty,
   (e) amending an authorisation given under section 7,
   (f) rescinding an authorisation given under that section.

(5) The rescission of an authorisation by virtue of subsection (4)(f) has the effect of terminating the associated approval (of the approved regulator) given under section 6, except where it is stated under paragraph 5(3)(b) of schedule 6 that the approval is preserved.

(6) The Scottish Ministers may by regulations—
(a) specify other measures that may be taken by them,
(b) make further provision about the measures that they may take (including for the
procedures to be followed),
in relation to approved regulators.

Ceasing to regulate

30  Surrender of authorisation

(1) An approved regulator may, with the prior agreement of the Scottish Ministers, surrender the authorisation given to it under section 7.

(2) Schedule 7 (to which subsection (1) is subject) makes provision concerning the surrender of such an authorisation.

(3) An approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of such an authorisation.

(4) The surrender of an authorisation by virtue of subsection (1) has the effect of terminating the associated approval (of the approved regulator) given under section 6.

31  Cessation directions

(1) This section applies where—

(a) an approved regulator amends its regulatory scheme so as to exclude the regulation of particular categories of licensed legal services providers or legal services, or

(b) the authorisation of an approved regulator is to be (or has been)—

(i) amended by virtue of section 29(4)(e) so as to exclude the regulation of certain categories of licensed providers or legal services,

(ii) rescinded by virtue of section 29(4)(f), or

(iii) surrendered by virtue of section 30(1).

(2) The Scottish Ministers may direct the approved regulator to take specified action (or refrain from doing something) if they consider that to be necessary or expedient for the continued effective regulation of a licensed provider.

(3) The approved regulator must (so far as practicable) comply with a direction given to it under subsection (2).

(4) For the purposes of this section, a reference to an approved regulator includes (as the context requires) a former approved regulator.

32  Transfer arrangements

(1) This section applies where—

(a) an approved regulator has amended its regulatory scheme so as to exclude the regulation of particular categories of licensed legal services provider or legal services,

(b) the authorisation of an approved regulator is to be (or has been)—
(i) amended by virtue of section 29(4)(e) so as to exclude the regulation of particular categories of licensed provider or legal services,

(ii) rescinded by virtue of section 29(4)(f), or

(iii) surrendered by virtue of section 30(1), or

(c) the approved regulator is otherwise unable to continue to regulate some or all of its licensed providers.

(2) The approved regulator must (as soon as reasonably practicable)—

(a) notify each of its licensed providers of the relevant situation within subsection (1),

(b) do so by reference to any effective date.

(3) A notification under subsection (2) must inform each licensed provider as to whether it requires, in consequence of the relevant situation, to transfer to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(4) Each licensed provider that is so required to transfer to a new regulator must—

(a) within 28 days beginning with the date of the notification, or failing which as soon as practicable, take all reasonable steps so as to transfer to the regulation of a new regulator, and

(b) where it does so transfer, take (as soon as practicable) such steps as are necessary to ensure that it complies with the new regulator’s regulatory scheme before the end of the changeover period.

(5) For the purpose of subsection (4)(b), the changeover period is the period of 6 months beginning with the date on which the new regulator takes over the regulation of the licensed provider.

(6) On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

33 Extra arrangements

(1) The Scottish Ministers may by regulations make provision in connection with section 32 as to the arrangements for the transfer of licensed providers to the regulation of a different approved regulator (a “new regulator”).

(2) Regulations under subsection (1) may (in particular)—

(a) provide for a licensed provider which has not transferred to the regulation of a new regulator to be regulated by such new regulator as may be appointed by the Scottish Ministers with the new regulator’s consent,

(b) provide for the Scottish Ministers to recover on behalf of the new regulator, or a licensed provider, any fee (or a part of it) paid by the licensed provider to the former approved regulator in connection with licensed provider’s current licence.
34 Change of approved regulator

(1) A licensed legal services provider may transfer voluntarily to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(2) But the transfer requires the new regulator’s written consent (and its agreement to issue the licensed provider with a licence having effect from the date on which the transfer is to occur).

(3) Where a licensed provider wishes to do so, it must—
   (a) give a notice which complies with subsection (4) to—
      (i) the current regulator, and
      (ii) the Scottish Ministers, and
   (b) provide such further information as may reasonably be required by either of them.

(4) A notice complies with this subsection if it—
   (a) explains why the licensed provider wishes to transfer to the regulation of a new regulator,
   (b) specifies—
      (i) the new regulator,
      (ii) the date on which the transfer is to occur (which must be within 28 days of the date of the notice), and
   (c) is accompanied by a copy of the new regulator’s written consent to the transfer.

(5) On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

(6) The Scottish Ministers may by regulations make further provision about the transfer by a licensed provider to the regulation of a new regulator.

35 Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approved regulator.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approved regulator in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Part to apply with or subject to such modifications as the regulations may specify.

(4) Regulations may be made under subsection (1) or (2) only where the Scottish Ministers believe that they are necessary or expedient in order to ensure that the provision of legal services by licensed providers is regulated effectively.
CHAPTER 2
LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

36
(1) For the purposes of this Part, a licensed legal services provider is a business entity which, through the designated and other persons within it—

(a) provides (or offers to provide) legal services—
   (i) to the general public or otherwise, and
   (ii) for a fee, gain or reward, and

(b) does so under a licence issued by an approved regulator in accordance with the approved regulator’s licensing rules.

(2) An entity is eligible to be a licensed provider only if it has within it, for the provision of legal services, at least one solicitor who holds a practising certificate that is free of conditions (as construed by reference to section 15(1) of the 1980 Act).

(3) A licensed provider may not be regulated by more than one approved regulator at the same time.

(4) In this Part, a reference to a licensed provider is to a licensed legal services provider.

Eligibility criteria

37
(1) This section applies for the purposes of licensing an entity as a licensed legal services provider under this Part.

(2) The following are examples of arrangements which would make an entity eligible to be a licensed provider—

(a) the entity has within it—
   (i) at least one solicitor as mentioned in section 36(2), and
   (ii) at least one individual practitioner of another type,
   for the carrying out of the sort of legal work for which each is qualified,

(b) the entity has within it at least one solicitor as mentioned in section 36(2) but, through also having within it at least one person who is not a solicitor or other type of individual practitioner, additionally provides (or offers to provide)—
   (i) other professional services, or
   (ii) services of another kind,

(c) the entity has within it at least one solicitor as mentioned in section 36(2) but not every person who has ownership or control of the entity, or another material interest in it, is a solicitor (or a firm of solicitors) or an incorporated practice.

(3) But an entity, to be eligible to be a licensed provider—

(a) need not be a body corporate or a partnership,

(b) requires, if it falls—
   (i) under the ownership or control of another entity, or
(ii) within the structure of another entity,
    to be a separate part of the other entity or otherwise distinct from it.

(4) For the avoidance of doubt, an entity is not eligible to be a licensed provider if it—
    (a) consists of—
        (i) a single solicitor practising under the solicitor’s own name, or
        (ii) a solicitor otherwise practising as a sole practitioner,
    (b) is a firm of solicitors or an incorporated practice, or
    (c) is a law centre as defined in section 65(1) of the 1980 Act.

(5) In subsection (2)(a)(ii) and (b), a type of “individual practitioner” (apart from a solicitor) is—
    (a) an advocate,
    (b) a conveyancing or executry practitioner,
    (c) a person having a right to conduct litigation or a right of audience by virtue of
        section 27 of the 1990 Act, or
    (d) a confirmation agent within the meaning of Part 3.

(6) The Scottish Ministers may by regulations—
    (a) make further provision about eligibility to be a licensed provider,
    (b) modify—
        (i) section 36(2) so as to specify an additional type of legally qualified person
            (as an alternative to a solicitor as mentioned there),
        (ii) subsection (5) so as to add a type of legal practitioner to the list there.

38 Key duties

(1) A licensed legal services provider must—
    (a) have regard to the regulatory objectives,
    (b) adhere to the professional principles,
    (c) comply with—
        (i) its approved regulator’s regulatory scheme,
        (ii) the terms and conditions of its licence.

(2) A licensed provider must seek to ensure that every designated or other person who is—
    (a) within the licensed provider, and
    (b) subject to a professional code of conduct,
    complies with the code of conduct.

(3) A licensed provider must have within it—
    (a) a Head of Legal Services (see section 39), and
    (b) either—
(i) a Head of Practice (see section 40), or
(ii) a Practice Committee (see section 41).

(4) A licensed provider must ensure that the following positions are not left unoccupied—
(a) that of its Head of Legal Services, and
(b) that (as the case may be)—
(i) of its Head of Practice, or
(ii) within its Practice Committee by virtue of section 41(3).

(5) However, the same person may (at the same time) be a licensed provider’s Head of Legal Services and also its Head of Practice.

39 Head of Legal Services

(1) It is for a licensed legal services provider to make such administrative arrangements as it considers appropriate in respect of its Head of Legal Services.

(2) A person is eligible for appointment (and to act) as its Head of Legal Services only if the person is a solicitor who holds a practising certificate that is free of conditions (as construed by reference to section 15(1) of the 1980 Act).

(3) But a person becomes disqualified from that position if the person is disqualified from practice as a solicitor by reason of having been—
(a) struck off (or removed from) the roll of solicitors, or
(b) suspended from practice.

(4) A Head of Legal Services has the function of securing the licensed provider’s—
(a) compliance with section 38(1)(a) and (b),
(b) fulfilment of its other duties under this Part so far as relevant in connection with its provision of legal services.

(5) A Head of Legal Services is to manage the designated persons within the licensed provider with a view to ensuring that they—
(a) have regard to the Head’s function under subsection (4),
(b) meet their professional obligations.

(6) A Head of Legal Services is to take such reasonable steps as may be required for the purposes of subsection (4).

(7) If it appears to a Head of Legal Services that the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment, the Head is to report that fact to the Head of Practice.

(8) Where (and to the extent that) under this section and section 40 a function falls to both—
(a) a Head of Legal Services, and
(b) a Head of Practice,
they are jointly and severally responsible as regards the function.
(9) The Scottish Ministers may by regulations—

(a) make further provision about—

(i) Heads of Legal Services,

(ii) the functions of such Heads,

(b) modify subsection (2) so as to specify an additional type of legally qualified person (as an alternative to a solicitor as mentioned there).

40 Head of Practice

(1) It is for a licensed legal services provider to make such administrative arrangements as it considers appropriate in respect of its Head of Practice.

(2) A person is eligible for appointment (and to act) as its Head of Practice only if the person—

(a) has such qualifications, expertise and experience as are reasonably required, and

(b) in other respects, is fit and proper for the position.

(3) A Head of Practice has the function of securing the licensed provider’s—

(a) compliance with section 38(1)(c),

(b) fulfilment of its other duties under this Part.

(4) A Head of Practice is to manage the designated and other persons within the licensed provider with a view to ensuring that they—

(a) have regard to the Head’s functions under this Part,

(b) meet any professional obligations to which they are subject.

(5) A Head of Practice is to take such reasonable steps as may be required for the purposes of subsection (3).

(6) If it appears to a Head of Practice that—

(a) the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment,

(b) an investor in the licensed provider is—

(i) failing (or has failed) to fulfil any of the person’s duties under this Part or another enactment, or

(ii) contravening (or has contravened) section 51(1) or (2),

the Head is to report that fact to the licensed provider’s approved regulator.

(7) The Scottish Ministers may by regulations make further provision about—

(a) Heads of Practice,

(b) the functions of such Heads.

41 Practice Committee

(1) It is for a licensed legal services provider—
(a) to decide whether to have a Practice Committee (instead of having a Head of Practice),
(b) if it has one, to make such administrative arrangements as it considers appropriate in respect of it.

(2) A Practice Committee has the functions under this Part that would otherwise be exercisable by a Head of Practice (and the specification of any of those functions is to be read accordingly).

(3) A Practice Committee is to have among its members a person who would be eligible for appointment as its Head of Practice (if there were one).

(4) The members of a Practice Committee are jointly and severally responsible as regards the Committee’s functions.

(5) The Scottish Ministers may by regulations make further provision about—
(a) Practice Committees,
(b) the functions of such Committees.

**Appointment to position etc.**

**42 Notice of appointment**

(1) Subsection (2) applies whenever a licensed legal services provider appoints a person as its—
(a) Head of Legal Services, or
(b) Head of Practice.

(2) The licensed provider must—
(a) within 14 days from the date of the appointment—
   (i) notify its approved regulator of that fact,
   (ii) give the approved regulator the name and other details of the person appointed,
(b) from that date give the approved regulator such further relevant information, and by such time, as it may reasonably require.

(3) Subsections (4) and (5) apply where a licensed provider sets up a Practice Committee.

(4) The licensed provider must—
(a) within 14 days from the date on which the Committee is set up—
   (i) notify its approved regulator of that fact,
   (ii) give the approved regulator the names and other relevant details of the Committee’s members (including with specific reference to section 41(3)),
(b) from that date give the approved regulator such other relevant information, and by such time, as it may reasonably require.

(5) The licensed provider must also—
(a) whenever there is a change in the membership of the Committee, give the approved regulator—
(i) notice of the change,
(ii) the name and other relevant details of any new Committee member,
within 14 days from the date on which the change occurs,
(b) if it ever dissolves the Committee (in favour of having a Head of Practice), notify
its approved regulator of that fact within 14 days from the date on which the
dissolution occurs,
(c) from the date mentioned in paragraph (a) or (b) (as the case may be) give the
approved regulator such further relevant information, and by such time, as it may
reasonably require.

43 Challenge to appointment

(1) An approved regulator may by written notice challenge the appointment by any of its
licensed providers of any person (“P”—
(a) as its—
(i) Head of Legal Services, or
(ii) Head of Practice, or
(b) as a member of its Practice Committee.

(2) A notice of a challenge under subsection (1)—
(a) requires to be given by the approved regulator within 14 days of the relevant
notification to it under section 42(2), (4) or (5)(a),
(b) is to specify the grounds for the challenge.

(3) A challenge under subsection (1) may be made only if the approved regulator—
(a) believes that P is (or may be)—
(i) ineligible, or
(ii) unsuitable,
for the appointment, or
(b) has other reasonable grounds for the challenge.

(4) If the approved regulator determines (after making a challenge under subsection (1)) that
the grounds for the challenge are made out, it may direct the licensed provider to rescind
P’s appointment.

(5) Before giving a direction under subsection (4), the approved regulator must give the
licensed provider and P 28 days (or such longer period as it may allow) to—
(a) make representations to it,
(b) take such steps as the licensed provider or P may consider expedient.

(6) Rules made in pursuance of section 10(1)(b) and (c) must (additionally)—
(a) explain the basis on which P’s suitability for the appointment is determinable,
(b) provide that the licensed provider’s licence is to be revoked or suspended if the
licensed provider does not comply with a direction under subsection (4).
(7) For the purpose of subsections (1) to (6), an example of things relevant as respects P’s suitability for the appointment is whether P has a record of misconduct in any professional context.

44 Disqualification from position

5 (1) An approved regulator has the functions exercisable—

(a) under this section and section 45, and

(b) by reference to one or more of the conditions specified in section 46,

in relation to a person (“P”) who holds within any of its licensed providers any of the posts to which those sections relate.

10 (2) If the first condition is met in relation to P, the approved regulator must disqualify P from—

(a) appointment (or acting) as the Head of Practice,

(b) membership of a Practice Committee.

(3) If the second condition is met in relation to P, the approved regulator—

(a) must disqualify P from—

(i) appointment (or acting) as the Head of Legal Services or Head of Practice,

(ii) membership of a Practice Committee,

(b) may disqualify P from being a designated person.

(4) If the third condition is met in relation to P, the approved regulator must disqualify P from—

(a) appointment (or acting) as the Head of Legal Services or Head of Practice,

(b) membership of a Practice Committee.

(5) If the fourth condition is met in relation to P, the approved regulator—

(a) must disqualify P from—

(i) appointment (or acting) as the Head of Legal Services or Head of Practice,

(ii) membership of a Practice Committee,

(b) may disqualify P from being a designated person.

(6) If the fifth condition is met in relation to P, the approved regulator may disqualify P from—

(a) appointment (or acting) as the Head of Legal Services or Head of Practice,

(b) membership of a Practice Committee,

(c) being a designated person.

45 Effect of disqualification

(1) A disqualification under section 44—

(a) may be—

(i) without limit of time, or
(ii) for a fixed period,

(b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(2) Where a disqualification under section 44 is from being a designated person, the disqualification may be framed so as to be limited by reference to—

(a) particular activities, or

(b) activities carried out without appropriate supervision (for example, that of a senior solicitor).

(3) Before disqualifying P under section 44, the approved regulator must give the licensed provider and P 28 days (or such longer period as it may allow) to—

(a) make representations to it,

(b) take such steps as the licensed provider or P may consider expedient.

(4) Practice rules must—

(a) set procedure (which the approved regulator is to follow) for imposing a disqualification under section 44,

(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that section.

(5) A person who is disqualified under section 44 may appeal against the disqualification—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the disqualification is imposed.

46 Conditions for disqualification

(1) This section applies for the purposes of section 44.

(2) The first condition is that—

(a) P—

(i) is subject to a trust deed granted by P for the benefit of P’s creditors,

(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay P’s creditors,

(iii) has been adjudged bankrupt and has not been discharged from bankruptcy, or

(iv) has been sequestrated (that is, sequestration of P’s estate has been awarded) and the sequestration has not been discharged, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(3) The second condition is that—

(a) P is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.
(4) The third condition is that—
   (a) P—
       (i) is subject to a disqualification order or undertaking under the Company
           Directors Disqualification Act 1986 or corresponding Northern Ireland
           legislation,
       (ii) is disqualified by a court from holding, or otherwise has been removed by a
            court from, a position of business responsibility (for example, from being a
            director of a charity), and
   (b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(5) The fourth condition is that—
   (a) P—
       (i) has been convicted of an offence involving dishonesty, or
       (ii) in respect of an offence, has been fined the equivalent amount to the
            maximum on level 3 of the standard scale or more (whether on summary or
            solemn conviction) or has been sentenced to imprisonment for a term of 2
            years or more, and
   (b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(6) The fifth condition is that—
   (a) P (acting in the relevant capacity) has—
       (i) failed in a material regard to fulfil any of P’s duties under (or arising by
           virtue of) this Part, or
       (ii) caused, or substantially contributed to, a material breach of the terms or
            conditions of the licensed provider’s licence, and
   (b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(7) In subsections (3)(a) and (4)(a)(i), “Northern Ireland legislation” has the meaning given

Designated persons

(1) In this Part, a “designated person” within a licensed legal services provider is a person
    who is designated as such under subsection (2).

(2) Designation under this subsection is designation by the licensed provider to carry out
    legal work in connection with the licensed provider’s provision of legal services.

(3) For the purposes of subsection (2)—
   (a) designation by the licensed provider means designation on its behalf by its Head
       of Legal Services or Head of Practice (who has the function accordingly),
   (b) a person is eligible for designation only if the person is—
       (i) an employee or manager of the licensed provider (or otherwise works
           within it under any arrangement), or
       (ii) an investor in it,
(c) it is immaterial whether the person is—
   (i) a member of a professional association, or
   (ii) paid for the work.

(4) Nothing in this Part affects the operation of any other enactment, or any rule of professional practice, conduct or discipline, which properly requires that a particular sort of legal work be carried out by an individual of a particular description.

48 Listing and information

(1) The Head of Practice of a licensed provider must—
   (a) keep a list of the designated persons within the licensed provider, and
   (b) give its approved regulator a copy of the list whenever the approved regulator requests it.

(2) The Head of Practice must give its approved regulator such information about the designated persons within the licensed provider as the approved regulator may reasonably request.

Outside investors

49 Fitness for involvement

(1) An approved regulator must—
   (a) before issuing a licence to a licensed legal services provider, or renewing it, satisfy itself as to the fitness of every outside investor in the licensed provider for having an interest in the licensed provider,
   (b) thereafter, monitor as it considers appropriate the investor’s fitness in that regard.

(2) Licensing rules may relate to outside investors in a licensed provider (as well as to the licensed provider), but must—
   (a) explain the basis on which an outside investor’s fitness for having an interest in a licensed provider is determinable,
   (b) provide that, where the approved regulator determines that the investor is unfit in that regard—
      (i) a licence is not to be issued to the licensed provider (or renewed),
      (ii) if issued, the licence is to be revoked or suspended.

(3) The approved regulator must, before making its final determination as to fitness, give the outside investor 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the investor may consider expedient.

(4) A person who is determined as unfit under this section may appeal against the determination—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the determination is made.
50 Factors as to fitness

(1) This section applies for the purposes of section 49.

(2) The following are examples of things relevant as respects an outside investor’s fitness for having an interest in a licensed provider—

(a) the investor’s—

(i) financial position and business record,

(ii) probity and character (including associations),

(b) whether—

(i) the investor has ever caused, or substantially contributed to, a material breach of the terms or conditions of any licensed provider’s licence,

(ii) the investor’s involvement in the licensed provider may (in the approved regulator’s opinion) be detrimental to the observance of the regulatory objectives or adherence to the professional principles, or to the compliance with this Part or any other enactment, by any person or body,

(iii) the investor has ever contravened section 51(1) or (2) or there is (in the approved regulator’s opinion) a significant risk that the investor will ever contravene that section.

(3) An outside investor is to be presumed to be unfit for having an interest in a licensed provider if one or more of the following conditions is met—

(a) the first condition is that the investor—

(i) is subject to a trust deed granted by the investor for the benefit of the investor’s creditors,

(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay the investor’s creditors,

(iii) has been adjudged bankrupt and has not been discharged from bankruptcy, or

(iv) has been sequestrated (that is, sequestration of the investor’s estate has been awarded) and the sequestration has not been discharged,

(b) the second condition is that the investor is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation,

(c) the third condition is that the investor—

(i) is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 or corresponding Northern Ireland legislation,

(ii) is disqualified by a court from holding, or otherwise has been removed by a court from, a position of business responsibility (for example, from being a director of a charity),

(d) the fourth condition is that the investor—

(i) has been convicted of an offence involving dishonesty, or
(ii) in respect of an offence, has been fined the equivalent amount to the maximum on level 3 of the standard scale or more (whether on summary or solemn conviction) or has been sentenced to imprisonment for a term of 2 years or more.

(4) An outside investor is to be presumed (subject to other relevant considerations) to be fit for having an interest in a licensed provider if the investor is—

(a) qualified to practise as a solicitor, or

(b) qualified to practise as a solicitor in—

(i) England and Wales, or

(ii) Northern Ireland.

(5) In subsection (3)(b) and (c)(i), “Northern Ireland legislation” has the meaning given in section 24(5) of the Interpretation Act 1978.

51 Behaving properly

(1) An outside investor in a licensed legal services provider must not (in that capacity) act in a way that is incompatible with—

(a) the regulatory objectives or the professional principles,

(b) the licensed provider’s duties under section 38(1), or

(c) its—

(i) other duties under this Part,

(ii) its duties under any other enactment.

(2) An outside investor in a licensed provider must not (in that capacity)—

(a) interfere in the provision of legal or other professional services by the licensed provider,

(b) in relation to any designated or other person within the licensed provider—

(i) exert undue influence,

(ii) solicit unlawful or unethical conduct, or

(iii) otherwise behave improperly.

52 More about investors

(1) Schedule 8 provides for other—

(a) requirements to which licensed legal services providers are subject,

(b) functions of approved regulators,

in relation to interests in licensed providers.

(2) The Scottish Ministers may by regulations make further provision—

(a) relating to interests in licensed providers, including (in particular) by—

(i) imposing requirements to which licensed providers, or investors in a licensed provider, are subject for the purposes of this Part,
(ii) defining (or elaborating) for those purposes what amounts to ownership, control or another material interest,

(iii) specifying for those purposes criteria or circumstances by reference to which an outside investor is to be presumed, or to be held, to be fit (or unfit),

(iv) modifying (by elaboration or exception) a definition in subsection (4),

(b) for licensing rules in connection with persons who have an interest in a licensed provider.

(3) In sections 49 and 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.

(4) In this Part—

(a) an “investor” in a licensed provider is any person who has—

(i) ownership or control of the licensed provider, or

(ii) any other material interest in it,

(b) an “outside investor” in a licensed provider—

(i) is an investor who is not a designated person within the licensed provider,

(ii) does not include an investor whom the licensed provider intends to become a designated person.

Discontinuance of services

53 Duty to warn

(1) Subsection (2) applies where a licensed legal services provider—

(a) is in serious financial difficulty, or

(b) for any reason—

(i) intends to stop providing legal services, or

(ii) is likely to become unable to continue providing legal services.

(2) The licensed provider must—

(a) notify (without delay) its approved regulator accordingly,

(b) provide the approved regulator with such relevant information as the approved regulator may require,

(c) take all reasonable steps to mitigate such disruption to its clients as is likely to result from the difficulty or (as the case may be) its ceasing to provide legal services.

54 Ceasing to operate

(1) Subsections (2) to (5) apply where—

(a) because of a vacancy within a licensed legal services provider, the licensed provider has within it no person who is eligible to be (or act as) its—

(i) Head of Legal Services, or
(ii) Head of Practice,

(b) in respect of a licensed provider—

(i) a provisional liquidator, liquidator, receiver or judicial factor is appointed,

(ii) an administration or winding up order is made,

(iii) a resolution is passed by it for its voluntary winding up (except where that resolution is solely to facilitate reconstruction or amalgamation with another licensed provider), or

(c) for some other reason, a licensed provider stops providing legal services.

(2) The licensed provider must—

(a) notify (without delay) its approved regulator accordingly,

(b) provide the approved regulator with such information about the situation as the approved regulator may require.

(3) The approved regulator must revoke the licensed provider’s licence except where the approved regulator is satisfied that—

(a) the situation is temporary, and

(b) there are sufficient arrangements in place to safeguard the interests of the licensed provider’s clients until such time as the situation is rectified.

(4) For the purpose of subsection (3), the approved regulator must review the situation every 14 days (or, if it so chooses, more frequently).

(5) Where a licensed provider has ceased to exist—

(a) its functions under subsection (2)(a) and (b) fall to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, its function under subsection (2)(b) falls to a person nominated by its approved regulator.

(6) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

55 Safeguarding clients

(1) Subsections (2) and (3) apply where—

(a) a licensed legal services provider—

(i) has given (or is required to give) notice to its approved regulator under section 53(2)(a), or 54(2)(a), or

(ii) has had (or is to have) its licence revoked or suspended under this Part, and

(b) the approved regulator has not informed it (or has not had an opportunity to do so) that the approved regulator is satisfied that it has made sufficient arrangements for the safeguarding of its clients’ interests.

(2) The licensed provider must—

(a) prepare—

(i) in the case of revocation, final accounts,
(ii) in the case of suspension, interim accounts,
which (in particular) detail all sums held on behalf of clients,
(b) comply with any directions given under subsection (3).

(3) The approved regulator may direct the licensed provider to take specified action (or refrain from doing something) if the approved regulator considers that to be necessary or expedient for safeguarding the interests of the licensed provider’s legal services clients.

(4) Directions given under subsection (3) may (in particular) require the licensed provider to make available to a relevant person or body any—

(a) document or information (of whatever kind) held in the licensed provider’s possession or control which—

(i) relates to, or is held on behalf of, a client of the licensed provider, or
(ii) relates to any trust of which the licensed provider (or one of the designated persons within it) is sole trustee or co-trustee only with other designated persons in the licensed provider,

(b) sum of money held by the licensed provider—

(i) on behalf a client,
(ii) subject to any trust of the kind mentioned in paragraph (a)(ii).

(5) For the purposes of subsection (4), a relevant person or body is—

(a) the particular client,

(b) the approved regulator,

(c) a provider of legal services that is properly instructed by the licensed provider, or the approved regulator, to act in place of the licensed provider.

(6) The Court of Session may, on an application by the approved regulator, make an order—

(a) confirming that the licensed provider is required to comply with any direction given under subsection (3),

(b) varying the direction or imposing such conditions as the Court considers appropriate in the circumstances,

(c) that, without the leave of the Court, no payment be made by any bank, building society or other body named in the order out of any account (or any sum otherwise deposited) in the name of the licensed provider.

(7) Before making such an order, the Court must—

(a) give the licensed provider and any other person with an interest an opportunity to be heard,

(b) be satisfied that the direction (or, as the case may be, freezing of an account) represents an appropriate course of action in all the circumstances of the case.

(8) The approved regulator may recover from the licensed provider any expenditure reasonably incurred by the approved regulator in consequence of its taking action under this section.

(9) Where a licensed provider has ceased to exist, its functions under (or arising by virtue of) this section fall—
(a) to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, to a person nominated by its approved regulator.

(10) The Scottish Ministers may by regulations make further provision about the steps that are, in the circumstances within subsection (1), to be taken to safeguard the interests of clients of licensed providers.

(11) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

56 Distribution of client account

(1) Any sums of the kind to which section 42 of the 1980 Act applies that are held in a client account (as referred to in that section) kept by a licensed provider are, in any of the events mentioned in subsection (2A) of that section, to be distributed in the same way as they would if they were subject to that section.

(2) For the purpose of subsection (1), any reference in that section to an incorporated practice is to be read as if it were a reference to the licensed provider.

Professional practice etc.

57 Employing disqualified lawyer

(1) Subsection (2) applies in relation to—

(a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,

(b) a person—

(i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or

(ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,

(c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—

(i) practising as an advocate,

(ii) acting as a conveyancing or executry practitioner,

(iii) exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the 1990 Act, or

(iv) acting as a confirmation agent within the meaning of Part 3,

(d) a body whose certificate of recognition as an incorporated practice has been revoked.

(2) A licensed legal services provider must not employ or remunerate as a designated person—

(a) the person while the person is so debarred (however described in subsection (1)), or

(b) the body while the revocation subsists.
(3) But subsection (2) is inoperative in relation to the person or (as the case may be) body if the licensed provider has its approved regulator’s written authority that is so inoperative in the circumstances of the particular case.

(4) Any authority under subsection (3) may be given—
- (a) for a specified period,
- (b) with conditions attached.

(5) A licensed provider may appeal to the Court of Session if it is aggrieved by—
- (a) the withholding of any such authority, or
- (b) any conditions attached under subsection (4)(b).

(6) On an appeal under subsection (5), the Court may direct the approved regulator on the matter as the Court considers appropriate.

(7) If a licensed provider wilfully contravenes—
- (a) subsection (2), or
- (b) any conditions attached under subsection (4)(b),
its approved regulator may revoke or suspend its licence.

58 Concealing disqualification

(1) Subsection (2) applies to—
- (a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,
- (b) a person—
  - (i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or
  - (ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,
- (c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—
  - (i) practising as an advocate,
  - (ii) acting as a conveyancing or executry practitioner,
  - (iii) exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the 1990 Act, or
  - (iv) acting as a confirmation agent within the meaning of Part 3.

(2) The person is guilty of an offence if, while the person is so debarred (however described in subsection (1)), the person seeks or accepts employment by a licensed provider without previously informing it of the debarment.

(3) A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Subsection (5) applies to a body whose certificate of recognition as an incorporated practice has been revoked.
(5) The body is guilty of an offence if, while the revocation subsists, the body seeks or accepts employment by a licensed provider without previously informing it of the revocation.

(6) A body which commits an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

59 Pretending to be licensed

(1) A person commits an offence if the person—

(a) pretends to be a licensed provider, or

(b) takes or uses any name, title, addition or description implying that the person is a licensed provider.

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

60 Professional privilege

(1) Subsection (2) applies to any communication made to or by—

(a) a licensed provider in the course of its acting as such in its provision of legal services for any of its clients,

(b) a designated person (apart from a solicitor or advocate) within the licensed provider who is acting—

(i) in connection with its provision of such legal services, and

(ii) at the direction, and under the supervision, of a solicitor.

(2) The communication is, in any legal proceedings, privileged from disclosure as if the licensed provider or (as the case may be) the person had at all material times been a solicitor acting for the client.

(3) Subsection (4) applies to any special provision which—

(a) is contained in an enactment or otherwise,

(b) relates to a solicitor, and

(c) concerns—

(i) the disclosure of information with respect to which a claim of professional privilege could be maintained, or

(ii) the production, seizure or removal of documents with respect to which such a claim could be maintained.

(4) The provision has effect (with any necessary modifications) in relation to a licensed provider, and any designated person (apart from a solicitor) within a licensed provider, as it does in relation to a solicitor.

(5) This section is without prejudice to any other enactment or rule of law concerning professional or other privilege from disclosure (in particular, as applicable in relation to a solicitor).
CHAPTER 3

FURTHER PROVISION

Achieving regulatory aims

61  Input by the OFT

(1) The Scottish Ministers or (as the case may be) an approved regulator must, whenever consulting the OFT under this Part, request the OFT—

(a) to give such advice as it considers appropriate in relation to the matter concerned,
(b) in considering what advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are or (as the case may be) the approved regulator is to take account of any advice given by the OFT within—

(a) the relevant consultation period, or
(b) otherwise—

(i) in the case of the Scottish Ministers, the period of 90 days beginning with the day on which they request the advice,
(ii) in the case of the approved regulator, the period of 30 days beginning on the day on which it requests the advice or such longer period not exceeding 90 days as it may agree with the OFT.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

62  Role of approved regulators

(1) Subsections (2) to (4) apply in relation to the exercise by an approved regulator of its functions under this Part.

(2) The approved regulator must, so far as practicable, act in a way which—

(a) is compatible with the regulatory objectives, and
(b) it considers most appropriate with a view to meeting those objectives.

(3) The approved regulator must adopt best regulatory practice under which (in particular) regulatory activities should be—

(a) carried out—

(i) effectively (but without giving rise to unnecessary burdens),
(ii) in a way that is transparent, accountable, proportionate and consistent,
(b) targeted only at such cases as require action.

(4) The approved regulator must seek to ensure that its licensed legal services providers have regard to the regulatory objectives.

63  Policy statement

(1) An approved regulator must prepare and issue a statement of policy as to how, in exercising its functions under this Part, it will comply with its duties under section 62.
(2) The approved regulator—
   (a) may revise the policy statement,
   (b) if it does so, must re-issue the policy statement.

(3) The approved regulator may issue (or re-issue) the policy statement only with the approval of the Scottish Ministers.

(4) The approved regulator must publish the policy statement as issued (or re-issued).

(5) In exercising its functions under this Part, the approved regulator must have regard to the policy statement as issued (or re-issued).

Complaints

64 Complaints about regulators

(1) The Scottish Ministers must investigate any complaint made to them about an approved regulator.

(2) But the Scottish Ministers are not required to investigate (or may cease investigating) any complaint that they determine to be—
   (a) a complaint for which section 57D(1) of the 2007 Act makes provision, or
   (b) frivolous, vexatious or totally without merit.

(3) Where the Scottish Ministers—
   (a) do not uphold the complaint, or
   (b) determine that the complaint is as described in subsection (2)(a) or (b),
   they must notify the complainer and the approved regulator accordingly (with reasons).

(4) Where the Scottish Ministers determine that the complaint is as described in subsection (2)(a), they must also refer the complaint to the Scottish Legal Complaints Commission.

(5) Where the Scottish Ministers uphold the complaint, they must—
   (a) notify the complainer and the approved regulator accordingly (with reasons), and
   (b) decide whether to proceed under section 29.

(6) The Scottish Ministers may delegate to the Scottish Legal Complaints Commission any of their functions under subsections (1), (3) and (5)(a).

(7) The Scottish Ministers may by regulations make further provision about complaints made about approved regulators (and how they are to be dealt with).

65 Complaints about providers

In the 2007 Act, after Part 2 insert—

“PART 2A
SPECIAL PROVISION FOR LICENSED PROVIDERS ETC.

57A Complaints about licensed providers

(1) Parts 1 and 2 apply in relation to complaints made about licensed legal services providers as they apply in relation to complaints made about practitioners.
(2) Subsection (1) is subject to—
(a) subsections (3) and (4), and
(b) such further modification to the operation of Parts 1 and 2 as the Scottish Ministers may by regulations make for the purposes of—
(i) subsection (1),
(ii) section 57B(4) and (5).

(3) In relation to a services complaint about a licensed provider, its approved regulator is to be regarded as the relevant professional organisation.

(4) A conduct complaint may not be made about a licensed provider, but—
(a) such a complaint may be made about a practitioner within such a provider,
(b) the provisions relating to such a complaint remain (subject to such modification as to those provisions as is made under subsection (2)(b)) applicable for the purposes of section 57B(4) and (5).

57B Regulatory complaints
(1) There is an additional type of complaint which applies only in relation to licensed providers (a “regulatory complaint”).
(2) A regulatory complaint is where any person suggests that a licensed provider is failing (or has failed) to—
(a) have regard to the regulatory objectives,
(b) adhere to the professional principles,
(c) comply with—
(i) its approved regulator’s regulatory scheme,
(ii) the terms of its licence.
(3) In relation to a regulatory complaint about a licensed provider, its approved regulator is to be regarded as the relevant professional organisation.
(4) The procedure in respect of a regulatory complaint is (by virtue of section 57A(4)(b)) the same as it would be for a conduct complaint about a licensed provider, subject to such modification as to that procedure as is made under section 57A(2)(b).
(5) The Commission and the approved regulator have (by virtue of section 57A(4)(b)) the same functions in relation to a regulatory complaint as they would have in relation to a conduct complaint about a licensed provider, subject to such modification as to those functions as is made under section 57A(2)(b).

57C Levy, advice and guidance
(1) A licensed provider must pay to the Commission—
(a) the annual general levy, and
(b) the complaints levy (if arising),
(2) The amount of the annual general levy for a licensed provider may be—
(a) different from the amount to be paid by individuals, and
(b) of different amounts (including nil) in different circumstances.

(3) The Commission—
(a) must (so far as practicable) provide advice to any person who requests it as respects the process of making a regulatory complaint to the Commission,
(b) may issue guidance under section 40 to approved regulators and licensed providers as respects how licensed providers are to deal with regulatory complaints.

57D Handling complaints

(1) Sections 23 to 25 apply in relation to any complaint made about how an approved regulator has dealt with a regulatory complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those sections as the Scottish Ministers may by regulations make for the purposes of that subsection.

57E Interpretation of Part 2A

For the purposes of this Part—
“approved regulator”,
“licensed legal services provider” (or “licensed provider”),
“regulatory scheme”,
are to be construed in accordance with Part 2 of the Legal Services (Scotland) Act 2010.”.

Registers and lists

66 Register of approved regulators

(1) The Scottish Ministers—
(a) must keep and publish a register of approved regulators,
(b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approved regulator—
(a) its contact details (including its address, website and telephone number),
(b) the date on which it was given the relevant approval under section 6,
(c) the date on which it was given the relevant authorisation under section 7 (and the duration of that authorisation (unlimited or the fixed period)),
(d) the categories of legal services to which that authorisation relates,
(e) details of any measure taken by the Scottish Ministers under section 29.

5 67 Registers of licensed providers

(1) An approved regulator must keep and publish a register of its licensed legal services providers.

(2) The register is to include the following information in relation to each licensed provider—

(a) its name and any place of business,
(b) the relevant details about its licence,
(c) the name of every outside investor in the licensed provider,
(d) the name of every person intimated to the approved regulator under paragraph 3 of schedule 8,
(e) the names and the dates of appointment of—

(i) its Head of Legal Services, and
(ii) its Head of Practice or, if applicable, each member of its Practice Committee (including with specific reference to section 41(3)),
(f) whether the licensed provider has been the subject of any disciplinary action and (if so) a description of that action.

(3) In subsection (2)(b), the “relevant details” about a licensed provider’s licence are—

(a) the date on which the licence was originally granted,
(b) the date that it was most recently renewed,
(c) whether it is subject to any conditions,
(d) the date that it will expire.

(4) But, in the case of a former licensed provider, the “relevant details” are instead—

(a) the date on which the licence was originally granted,
(b) the period for which the licensed provider held a licence,
(c) the reason for the licensed provider ceasing to hold a licence.

(5) The Scottish Ministers may by regulations—

(a) make further provision about the information to be contained in the registers of licensed providers, and
(b) prescribe the manner in which those registers are to be kept and published.

(6) In this section, a reference to a licensed provider includes a former licensed provider.
68 Lists of disqualified persons

(1) An approved regulator must keep a list of the persons whom it has disqualified under section 44 (that is, from holding a certain position in a licensed legal services provider).

(2) The list kept under subsection (1) must include the following information in relation to each person concerned—

(a) the person’s name,

(b) the—

(i) name of any relevant licensed provider,

(ii) any relevant position held by the person as at the date of the disqualification,

(c) each position from which the person is disqualified,

(d) the date of disqualification and its duration (unlimited or the fixed period),

(e) the reasons for the disqualification.

(3) An approved regulator must keep a list of the persons whom it has determined as unfit under section 49 (that is, for being an outside investor in a licensed provider).

(4) The list kept under subsection (3) must include the following information in relation to each person concerned—

(a) the person’s name,

(b) the name of any relevant licensed provider,

(c) the date of the determination,

(d) the grounds for the determination.

(5) The approved regulator must—

(a) publish the lists kept by it under this section, and

(b) notify the Scottish Ministers of any material alterations made to either of them.

(6) The Scottish Ministers may by regulations—

(a) make further provision about the information to be contained in the lists kept under this section,

(b) prescribe the manner in which those lists are to be kept and published.

Miscellaneous

69 Privileged material

(1) Subsection (2) applies to the publication under this Part of any—

(a) advice, report or notice, or

(b) other material.

(2) For the purposes of the law on defamation, the publication is privileged.

(3) But subsection (2) is ineffective if it is proved that the publication was made with malice.
Immunity from damages

(1) Neither an approved regulator nor any of its officers, members or employees is liable in damages for any act or omission occurring in the exercise (or purported exercise) of its functions under this Part.

(2) But subsection (1) is ineffective if it is shown that the act or omission was in bad faith.

Effect of professional or other rules

(1) Sections 88(5) and 91(3) respectively make provision (in connection with this Part) as to the effect of professional rules to which advocates and solicitors are subject.

(2) Nothing in this Part affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of other persons who provide professional services (in particular, as it may relate to their involvement in or with licensed legal services providers).

(3) This Part is without prejudice to any function of a person or body—

(a) arising by virtue of the application of another enactment (or a regulatory rule made under another enactment), and

(b) to regulate in any respect the provision of any professional or other services by licensed legal services providers.

PART 3
CONFIRMATION SERVICES

Confirmation agents and services

(1) For the purposes of this Part, confirmation services are services that are—

(a) described in subsection (2), and

(b) provided (or offered)—

(i) to members of the public, and

(ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing papers on which to found or oppose an application for the confirmation of a person as the executor nominate or dative in relation to the estate of a deceased person.

(3) It is immaterial for the description in subsection (2) whether or not the services also involve applying to the sheriff on behalf of the person so as to secure the person’s confirmation as such (or taking other related action).

(4) For the purposes of this Part, a confirmation agent is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide confirmation services is conferred.

Approving bodies

(1) For the purposes of this Part, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section 74.
(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—
   (a) a copy of the applicant’s proposed regulatory scheme (see section 74(1)(b)),
   (b) a description of—
      (i) the applicant’s constitution and composition (including internal structure),
      (ii) its activities.

(4) The applicant—
   (a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,
   (b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

74 Certification of bodies

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—
   (a) the applicant is suitable to be an approving body,
   (b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 75).

(2) The Scottish Ministers may certify the applicant as an approving body—
   (a) either—
      (i) without limit of time, or
      (ii) for a fixed period,
   (b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,
   (c) subject to conditions.

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—
   (a) the OFT, and such other organisation appearing to them to represent the interests of consumers in Scotland as they consider appropriate,
   (b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
   (a) must send a copy of the application to the OFT,
   (b) may send—
      (i) to any other consultee, a copy of the application,
      (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must notify the applicant if they intend to—
(a) refuse to certify it as an approving body, or
(b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—

(a) the process for seeking their certification,
(b) the criteria for their certification (including things that applicants must be able to demonstrate),
(c) what categories of bodies may (or may not) be an approving body.

75 **Regulatory schemes**

(1) An approving body must—

(a) make a regulatory scheme for—

(i) conferring on any of the individual persons within its membership the right to provide confirmation services, and
(ii) regulating the provision of confirmation services by the persons on whom (in accordance with the scheme) that right is conferred, and

(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) describe the training requirements to be met by a prospective confirmation agent,
(b) incorporate a code of practice to which a confirmation agent is subject,
(c) require that a confirmation agent keep in place sufficient arrangements for professional indemnity,
(d) include rules about—

(i) the making and handling of any complaint about a confirmation agent,
(ii) the measures that may be taken by the approving body, in relation to a confirmation agent, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the confirmation agent were a practitioner to whom that section relates)) about the confirmation agent is upheld,

(e) allow a confirmation agent to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),
(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by confirmation agents,
(b) make such further arrangements as to the professional practice, conduct or discipline of confirmation agents for which provision is (in the approving body’s opinion) necessary or expedient,

(c) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a confirmation agent to provide confirmation services if the agent contravenes the code of practice,

(ii) the suspension of that right of a confirmation agent if a complaint, suggesting that the agent is guilty of professional misconduct in relation to the provision of confirmation services, is made about the agent.

(4) A confirmation agent may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the agent’s right to provide confirmation services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the agent.

(5) An approving body must, so far as practicable when exercising its functions under this Part, observe the regulatory objectives.

76 Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section 75(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section 74.

(3) A financial penalty imposed by virtue of this section—

(a) is payable to the approving body,

(b) must be applied towards the cost of exercising its functions under this Part.

(4) A confirmation agent may appeal against a financial penalty (or the amount of a financial penalty) imposed on the agent by virtue of this section—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the penalty is intimated to the agent.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

77 Pretending to be authorised

(1) A person commits an offence if the person—

(a) pretends to be a confirmation agent (or otherwise pretends to have the right to provide confirmation services under this Part), or
(b) takes or uses any name, title, addition or description implying that the person is a confirmation agent (or otherwise implying that the person has the right to provide confirmation services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Other regulatory matters

78 Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section 81(3).

(2) The Scottish Ministers may—

(a) revoke the certification given to the approving body under section 74,

(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

79 Surrender of certification

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section 74.

(2) The approving body must—

(a) take all reasonable steps to mitigate such disruption to the clients of its confirmation agents as is likely to result from the surrender,

(b) in particular, take steps for ensuring that any relevant work is—

(i) completed, or

(ii) taken over by a suitably qualified person,

before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—

(a) for the purpose of subsection (2), or

(b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—

(a) subsection (2), and

(b) any directions given to it under subsection (3).
Part 3—Confirmation services

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

80 Register and list

(1) The Scottish Ministers—
(a) must keep and publish a register of approving bodies,
(b) may do so in a such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
(a) its contact details (including its address, website and telephone number),
(b) the date on which it was given the relevant certification under section 74.

(3) An approving body must—
(a) keep a list of its confirmation agents,
(b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its confirmation agents as the Scottish Ministers may reasonably request.

Ministerial functions

81 Ministerial intervention

(1) An approving body must—
(a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
(b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
(a) if directed to do so by the Scottish Ministers, must—
(i) review its regulatory scheme (or any relevant part of it), and
(ii) report to them its findings and (if appropriate) inform them of any proposed amendment to the scheme,
(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—
(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—
(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,

(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Part, direct the approving body to take specified remedial action (or refrain from doing something).

(4) The Scottish Ministers may by regulations make provision requiring an approving body to—

(a) carry out an annual review of the performance of its confirmation agents, and

(b) send a report (in a specified form) on the review to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision about—

(a) approving bodies,

(b) confirmation agents.

82 **Regard to OFT input**

(1) The Scottish Ministers, whenever consulting the OFT under section 74(3)(a), must request the OFT—

(a) to give such advice as it considers appropriate in relation to the matter concerned,

(b) in considering what (if any) advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are to take account of any advice given by the OFT within—

(a) the relevant consultation period, or

(b) otherwise, the period of 90 days beginning with the day on which they request the advice.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

**Related provision**

83 **Complaints about agents**

In the 2007 Act, after Part 2A (inserted by section 65) insert—

“PART 2B

SPECIAL PROVISION FOR CONFIRMATION AGENTS ETC.

57F **Complaints about confirmation agents**

(1) Parts 1 and 2 apply in relation to complaints made about confirmation agents as they apply in relation to complaints made about practitioners.

(2) Subsection (1) is subject to—

(a) subsection (3), and

(b) such further modification to the operation of Parts 1 and 2 as the Scottish Ministers may by regulations make for the purposes of subsection (1).
(3) In relation to a services or conduct complaint about a confirmation agent, its approving body is to be regarded as the relevant professional organisation.

57G Handling complaints

(1) Sections 23 to 25 apply in relation to any complaint made about how an approving body has dealt with a conduct complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those sections as the Scottish Ministers may by regulations make for the purposes of that subsection.

57H Levy and interpretation of Part 2B

(1) A confirmation agent must pay to the Commission—
   (a) the annual general levy, and
   (b) the complaints levy (if arising),
   in accordance with Part 1.

(2) For the purposes of this Part—
   “approving body”,
   “confirmation agent”,
   “confirmation services”,
   are to be construed in accordance with Part 3 of the Legal Services (Scotland) Act 2010.”.

84 Privilege and immunity

(1) For the purposes of the law on defamation, the publication under this Part of any material is privileged unless it is proved that the publication was made with malice.

(2) Neither an approving body nor any of its officers, members or employees is liable in damages for any act or omission occurring in the exercise (or purported exercise) of its functions under this Part unless it is shown that the act or omission was in bad faith.

85 Consequential modification

(1) In the Confirmation of Executors (Scotland) Act 1858, in section 2 (petition to commissary), after “1990” insert “or by a confirmation agent within the meaning of Part 3 of the Legal Services (Scotland) Act 2010”.

(2) In the 1980 Act—
   (a) in section 32 (offence for unqualified persons to prepare certain documents) of the 1980 Act, in subsection (2C), after “1990” insert “or to a confirmation agent within the meaning of Part 3 of the Legal Services (Scotland) Act 2010”,
   (b) in paragraph 1A of Schedule 4 (constitution, procedure and powers of Tribunal), after head (b)(ii) insert—
“(iii) confirmation agents within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

(3) In section 12A (register of advice organisations) of the 1986 Act, after subsection (2)(b) insert—

“(ba) is a confirmation agent within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

(4) In paragraph 2 of schedule 1 (the Scottish Legal Complaints Commission) to the 2007 Act, after sub-paragraph (6)(b) insert—

“(ba) confirmation agents within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

**PART 4**

THE LEGAL PROFESSION

**CHAPTER 1**

APPLYING THE REGULATORY OBJECTIVES

15 **Application by the profession**

(1) Each of the regulatory authorities mentioned in subsection (2) must, so far as practicable when exercising the authority’s regulatory functions (as defined in subsection (3)), act in a way which—

(a) is compatible with the regulatory objectives, and

(b) it considers most appropriate with a view to meeting to those objectives.

(2) For the purpose of this section, the “regulatory authorities” are—

(a) the Court of Session,

(b) the Lord President,

(c) the Faculty of Advocates,

(d) the Council of the Law Society,

(e) any other person who or body that has regulatory functions in relation to the provision of legal services by legal practices (of any type).

(3) For the purpose of this section, the “regulatory functions” of a regulatory authority—

(a) are its functions of regulating in respect of any matter the professional practice, conduct and discipline of legal practices (of any type),

(b) include its functions of making professional or regulatory rules to which legal practices (of any type) are subject.

(4) In subsections (2) and (3), “legal practices” means—

(a) solicitors (including firms of solicitors) or incorporated practices,

(b) advocates,

(c) conveyancing or executry practitioners, or
(d) persons having a right to conduct litigation or a right of audience by virtue of section 27 of the 1990 Act.

CHAPTER 2

FACULTY OF ADVOCATES

87 Regulation of the Faculty

(1) The Court of Session is responsible—
(a) for—
   (i) admitting persons to (and removing persons from) the office of advocate,
   (ii) prescribing the criteria and procedure for admission to (and removal from) the office of advocate,
(b) for regulating the professional practice, conduct and discipline of advocates.

(2) The Court’s responsibilities within subsection (1)(a)(ii) and (b) are exercisable on its behalf, in accordance with such provision as it may make for the purpose, by—
(a) the Lord President, or
(b) the Faculty of Advocates.

88 Professional rules

(1) Subsections (2) and (3) apply to any rule which—
(a) prescribes the criteria or procedure for admission to (or removal from) the office of advocate, or
(b) regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(2) If the rule is made by the Faculty, the rule—
(a) is of no effect unless it has been approved by the Lord President (and may not be revoked unless its revocation has been approved by the Lord President),
(b) must be published by the Faculty.

(3) In any other case, the rule—
(a) is of no effect unless the Faculty has been consulted on it (and may not be revoked unless the Faculty has been consulted on its revocation),
(b) requires—
   (i) where made by the Lord President, to be published,
   (ii) where made by the Court of Session, to be contained in an Act of Sederunt.

(4) Neither this section nor section 89 affects the validity of any rule—
(a) that was in force immediately prior to the commencement of this section, and
(b) which regulates in respect of any matter the professional practice, conduct or discipline of advocates.
Nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of advocates (in particular, as it may relate to their involvement in or with licensed legal services providers).

89 Particular rules

(1) Subsection (2) applies to any rule—
   (a) which regulates in respect of any matter the professional practice, conduct or discipline of advocates, and
   (b) under which an advocate is prohibited from forming a legal relationship with another advocate, or any other person, for the purpose of their jointly offering professional services to the public.

(2) The rule is of no effect unless it has been approved by the Scottish Ministers after they have consulted the OFT.

(3) Subsection (2) is without prejudice to section 88(2) and (3).

(4) In section 31 (rules of conduct etc.) of the 1990 Act, subsection (1) is repealed.

CHAPTER 3

SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

90 Qualified persons

(1) In section 26 (offence for solicitors to act as agents for unqualified persons) of the 1980 Act, in subsection (3), after “does not include” insert “a licensed legal services provider,”.

(2) In section 30 (liability for fees of other solicitor) of the 1980 Act—
   (a) after “incorporated practice” in the second place where it occurs insert “or a licensed legal services provider”,
   (b) for “other solicitor or incorporated practice” substitute “employed party”,
   (c) for “other solicitor’s or incorporated practice’s” substitute “party’s”.

(3) In section 31 (offence for unqualified persons to pretend to be solicitor or notary public) of the 1980 Act—
   (a) the unnumbered block of text (from “In” to “practice.”) between subsections (1) and (2) is repealed,
   (b) after subsection (2) insert—
      “(2A) This section does not apply to an incorporated practice or a licensed legal services provider.”.

(4) In section 32 (offence for unqualified persons to prepare certain documents) of the 1980 Act, after paragraph (e) of subsection (2) insert “; or
   (ea) a licensed legal services provider;”.

(5) In section 33 (unqualified persons not entitled to fees etc.) of the 1980 Act—
(a) the first unnumbered block of text (from “Subject” to “matter.”) becomes subsection (1) and the second unnumbered block of text (from “This” to “cause.”) becomes subsection (2),

(b) in subsection (2) (as so numbered), after “incorporated practice” insert “or a licensed legal services provider”.

(6) In section 65(1) (interpretation) of the 1980 Act, in the definition of “unqualified person”, at the end insert “(but this does not include a licensed legal services provider as defined in Part II)”.

(7) In section 17 (qualified conveyancers) of the 1990 Act, in subsection (23)—

(a) after paragraph (b) insert—

“(ba) a licensed legal services provider within the meaning of Part 2 of the Legal Services (Scotland) Act 2010;”,

(b) after the subsequent “incorporated practice” insert “, licensed provider”.

91 Changes as to practice rules

(1) After section 33B of the 1980 Act insert—

“33C Licensed legal services providers

(1) Subsection (2) applies to any rule made under section 34 which prohibits or unduly restricts the—

(a) involvement of solicitors in or with, or employment of solicitors by, licensed legal services providers,

(b) the provision of services by licensed providers, or

(c) the operation of licensed providers in other respects.

(2) The rule is of no effect in so far as it does so (and for this purpose it is immaterial when the rule was made).

(3) The reference in subsection (1)(a) to solicitors does not include a solicitor who is disqualified from practice by reason of having been—

(a) struck off (or removed from) the roll, or

(b) suspended from practice.

(4) In this Part, “licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the Legal Services (Scotland) Act 2010.”.

(2) In addition—

(a) in section 34 (rules as to professional practice, conduct and discipline) of the 1980 Act—

(i) in subsection (1A)(f), for “incorporated practices which, are partners in or directors of multi-disciplinary practices” substitute “have an interest in or are employed by (or otherwise within) licensed legal services providers”;

(ii) subsection (3A) is repealed,

(b) in section 64A(1) of that Act, paragraph (b) and the word “; or” immediately preceding it are repealed,
(c) in section 64B of that Act, the words “or such as is mentioned in section 34(3A)” are repealed,

(d) in section 64D(6) of that Act, for “sections 25A(9) or (10) and 34(3A)” substitute “section 25A(9) or (10)”.

(e) in section 65(1) of that Act—
   (i) the definition of “multi-disciplinary practice” is repealed,
   (ii) in the definition of “unqualified person”, the words “, other than a multi-disciplinary practice,” are repealed,

(f) in section 17(23) of the 1990 Act—
   (i) paragraph (c) is repealed,
   (ii) the subsequent words “, multi-disciplinary practice” are repealed,

(g) in paragraph 29(15) of Schedule 8 to that Act—
   (i) in head (c), the insertion (into section 65(1) of the 1980 Act) of the definition of “multi-disciplinary practice” is repealed,
   (ii) head (f) and the word “and” immediately preceding it are repealed.

(3) Subject to section 33C of the 1980 Act, nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of solicitors.

The Law Society

92 Council membership

(1) In section 3 (establishment and functions of Council of Law Society) of the 1980 Act, in subsection (1), after “elected” insert “or appointed”.

(2) In Schedule 1 to the 1980 Act—
   (a) in paragraph 2 (the Council’s scheme)—
      (i) in head (a), the word “, election,” is repealed,
      (ii) after head (a) insert—
         “(aa) election and appointment to the Council;”,
   (b) in paragraph 3 (detail of the scheme), after head (b) insert—
         “(bza)shall make provision for—
         (i) the election of solicitor members to the Council,
         (ii) the appointment of non-solicitor members to the Council;”,
   (c) after paragraph 3 insert—
         “3A(1) This paragraph applies for the purpose of paragraph 3(bza).
         (2) Persons are electable as solicitor members if they are members of the Society.
         (3) Persons are appointable as non-solicitor members if they appear to the Council—
(a) to be qualified to represent the interests of the public in relation to the provision of legal services in Scotland, or
(b) having regard to the Society’s objectives, to be suitable in other respects.

(4) The Scottish Ministers may by regulations—

(a) specify—

(i) such additional criteria as they consider appropriate for appointability as non-solicitor members,
(ii) the number of non-solicitor members, or proportion of the non-solicitor part of the membership, in relation to whom the criteria are to apply,

(b) prescribe a minimum—

(i) number of non-solicitor members, or
(ii) proportion of the membership that is to comprise non-solicitor members,

if they believe that such prescription is necessary for ensuring that the number or proportion of non-solicitor members is adequate.

(5) Before making regulations under subsection (4), the Scottish Ministers must consult—

(a) the Council,
(b) the Lord President,
(c) the Office of Fair Trading, and such other organisation appearing to them to represent the interests of consumers in Scotland as they consider appropriate.

(6) The power to make regulations under subsection (4) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.”.

93 Regulatory committee

(1) In section 3A (discharge of functions of Council of the Law Society) of the 1980 Act, in subsection (11), for “is” substitute “is—

(a) subject to section 3B, and
(b)”.

(2) After section 3A of the 1980 Act insert—

“3B Regulatory committee

(1) The Council must, for the purpose mentioned in subsection (2), arrange under section 3A(1)(a) for their regulatory functions to be exercised on their behalf by a regulatory committee.

(2) The purpose is of ensuring that the Council’s regulatory functions are exercised—

(a) independently of any other person or interest,
(b) properly in other respects (in particular, with a view to achieving public confidence).

(3) The following particular rules apply as respects the regulatory committee—

(a) at least 50% of the committee’s membership is to comprise lay persons,

(b) the committee is to appoint one of its lay members as its convener,

(c) if the convener is not present at a meeting of the committee, another of its lay members is to chair the meeting.

(4) But nothing done by the regulatory committee is invalid solely because of a temporary shortfall in the number of its lay members.

(5) The Scottish Ministers may by regulations—

(a) make further provision about the Council’s regulatory functions if they believe that such provision is necessary for ensuring that those functions are exercised in accordance with the purpose stated in subsection (2),

(b) modify (by elaboration or exception) the definition in subsection (9) if they believe that such modification is appropriate.

(6) Before making regulations under subsection (5), the Scottish Ministers must consult the Council.

(7) The power to make regulations under subsection (5) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

(8) In subsection (3)(a), “lay persons” are persons who are not—

(a) solicitors,

(b) advocates,

(c) conveyancing or executry practitioners as defined in section 23 of the 1990 Act,

(d) those having a right to conduct litigation or a right of audience by virtue of section 27 of the 1990 Act, or

(e) confirmation agents within the meaning of Part 3 of the Legal Services (Scotland) Act 2010.

(9) For the purposes of this section, the Council’s “regulatory functions”—

(a) are their functions of regulating in respect of any matter the professional practice, conduct and discipline of solicitors (including firms of solicitors) and incorporated practices,

(b) include their functions of making rules under sections 34 and 35.”.

94 Removal from solicitors roll

(1) In section 10 (restoration of name to roll on request) of the 1980 Act—

(a) after subsection (1) insert—
“(1ZA) Where the restoration of a solicitor’s name to the roll has been prohibited under section 53(2)(aa), the solicitor is entitled to have the solicitor’s name restored to the roll if (but only if) the Tribunal so orders—

(a) on an application made to it by the solicitor, and

(b) after such enquiry as it thinks proper.”;

(b) in subsection (1A), after “section 9” insert “(except where subsection (1ZA) applies)”;

(c) in subsection (2), after “subsection (1)” insert “or (1ZA)”.

(2) In section 53 (powers of Tribunal) of the 1980 Act, in subsection (2)—

(a) after paragraph (a) insert—

“(aa) if the solicitor’s name has been removed from the roll under section 9, by order prohibit the restoration of the solicitor’s name to the roll;”;

(b) the word “or” where it occurs immediately after any of paragraphs (a) to (e) is repealed.

CHAPTER 4
OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance

In section 31 (solicitors and counsel) of the 1986 Act—

(a) in subsections (3), (4) and (5), for “relevant body” wherever appearing substitute “Board”;

(b) subsections (6) and (10) are repealed.

96 Availability of legal services

In the 1986 Act—

(a) in section 1 (the Scottish Legal Aid Board), after subsection (2) insert—

“(2A) The Board also has the general function of monitoring the availability and accessibility of legal services in Scotland.”;

(b) in section 2 (powers of the Board), after subsection (2)(d) insert—

“(da) to give the Scottish Ministers such advice as it may consider appropriate in relation to the availability and accessibility of legal services in Scotland;”;

(c) in section 3 (duties of the Board), after subsection (2) insert—

“(2A) The Board is, 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.”.
97 Information about legal services

(1) A body mentioned in subsection (2) must provide the Scottish Legal Aid Board with such information as the Board may reasonably require for the purpose mentioned in subsection (3).

(2) The bodies are—
(a) the Law Society,
(b) the Faculty of Advocates,
(c) the Scottish Court Service.

(3) The purpose is the Board’s exercise of its function under section 1(2A) of the 1986 Act.

98 Minor amendments

In the 2007 Act—
(a) in section 29(9), for “subsection (1)” substitute “subsection (8),”
(b) in section 46(1), in paragraph (c) in the definition of “unsatisfactory professional conduct”, for “section 27 of this Act” substitute “section 27 of the 1990 Act”,
(c) in paragraph 13(2)(a) of schedule 1—
(i) for “the function of deciding” substitute “a decision”,
(ii) for “whether” substitute “that”,
(iii) for “exercised” substitute “taken”,
(d) in paragraph 1(h)(iii) of schedule 3 for “whether” substitute “that”.

PART 5
GENERAL

99 Regulations

(1) Any power of the Scottish Ministers to make regulations under the preceding Parts of this Act is exercisable by statutory instrument.

(2) The regulations may—
(a) make different provision for different purposes,
(b) include such incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient for the purposes of or in connection with the regulations.

(3) But—
(a) a statutory instrument containing regulations under—
(i) section 8(2)(c) or (5),
(ii) section 26(1),
(iii) section 29(6),
(iv) section 35(1),
(v) section 55(10),
(vi) section 75(2)(f), or
(vii) section 81(5),
is not to be made unless a draft of the instrument has been laid before, and
approved by resolution of, the Scottish Parliament,
(b) a statutory instrument containing any other regulations under the preceding Parts of this Act is subject to annulment in pursuance of a resolution of the Parliament.

100 Ancillary provision

(1) The Scottish Ministers may by regulations made by statutory instrument make such—
   (a) supplemental provision, or
   (b) incidental, consequential, transitional, transitory or saving provision, as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) But—
   (a) a statutory instrument containing regulations under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament,
   (b) a statutory instrument containing any other regulations under that subsection is subject to annulment in pursuance of a resolution of the Parliament.

101 Definitions

(1) In this Act (unless the context otherwise requires)—
   “the 1980 Act” means the Solicitors (Scotland) Act 1980,
   “the 1986 Act” means the Legal Aid (Scotland) Act 1986,
   “the 1990 Act” means the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
   “the 2007 Act” means the Legal Profession and Legal Aid (Scotland) Act 2007,
   “Faculty” means the Faculty of Advocates,
   “Law Society” means the Law Society of Scotland,
   “Lord President” means the Lord President of the Court of Session,
   “OFT” means the Office of Fair Trading.

(2) In this Act (unless the context otherwise requires)—
   (a) the following expressions are to be construed in accordance with section 65(1) (interpretation) of the 1980 Act—
      “advocate”,
      “incorporated practice”,
      “practising certificate”,

“registered European lawyer”,
“registered foreign lawyer”,
“solicitor”,

(b) the following expressions are to be construed in accordance with section 23
(interpretation) of the 1990 Act—
“conveyancing practitioner”,
“executry practitioner”.

(3) In this Act (unless the context otherwise requires), a reference to a professional
association or body includes—

(a) the Law Society,
(b) any other organisation which serves a profession (for example, the Institute of
Chartered Accountants in Scotland).

(4) Schedule 9 is an index of expressions introduced for—
(a) the whole Act,
(b) Parts 2 and 3.

102 Commencement and short title

(1) This section and sections 99 to 101 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on the day that the Scottish Ministers
by order made by statutory instrument appoint.

(3) An order under subsection (2) may appoint different days for different provisions.

(4) An order under subsection (2) may—
(a) make different provision for different purposes,
(b) include such transitional, transitory or saving provision as the Scottish Ministers
consider necessary or expedient in connection with the commencement of this
Act.

(5) The short title of this Act is the Legal Services (Scotland) Act 2010.
SCHEDULE 1
(introduced by section 29(3))

PERFORMANCE TARGETS

Application

5 1 This schedule applies where the Scottish Ministers—

(a) are satisfied that an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or

(b) consider that, for any other reason, it is necessary or expedient for one or more performance targets to be set as respects an approved regulator.

Power to set targets

2 (1) The Scottish Ministers may—

(a) set one or more performance targets for the approved regulator in relation to its regulatory functions,

(b) require the approved regulator to set one or more performance targets in relation to its regulatory functions.

(2) The approved regulator must (so far as practicable) comply with a performance target set for it under sub-paragraph (1)(a) or (b).

Notice of intention

3 (1) Before setting a performance target, or requiring the approved regulator to do so, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to—

(i) set a performance target, or

(ii) require that the approved regulator set such a target,

(b) describe the proposed target (including the period within which it would have to be met),

(c) specify—

(i) the act or omission (or series of acts or omissions) to which the proposed target relates,

(ii) any other facts which, in their opinion, justify the intended target-setting.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed target.
(2) The Scottish Ministers must—
   (a) give a copy of the notice of intention to such persons or bodies as they consider appropriate,
   (b) consult them accordingly.

5 Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2), when deciding whether to proceed with the target-setting.

(2) The Scottish Ministers must—
   (a) send to the approved regulator a notice (a “decision notice”) of their decision,
   (b) notify the consultees under paragraph 4(2) of their decision,
   (c) publish any target set, or requirement made by them, under paragraph 2(1)(a) or (b) in such manner as they consider most appropriate to bring it to the attention of any relevant person or body.

(3) If the Scottish Ministers’ decision is in favour of target-setting, the decision notice must contain the target.

(4) An approved regulator must publish any target set by it following a requirement under paragraph 2(1)(b) in such manner as it considers most appropriate for bringing it to the attention of any relevant person or body.

(5) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

SCHEDULE 2
(introduced by section 29(3))

DIRECTIONS

Application

1 This schedule applies where the Scottish Ministers are satisfied that—
   (a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives,
   (b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act (including a direction imposed in accordance with this schedule),
   (c) an approved regulator has failed to adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
Schedule 2—Directions

(d) an approved regulator has made a material amendment to its regulatory scheme under section 8(4).

Power to direct

2 (1) The Scottish Ministers may direct the approved regulator to take—

(a) in a case falling within paragraph 1(a), such action as they consider will counter the adverse impact, mitigate its effect or prevent its recurrence,

(b) in a case falling within paragraph 1(b) or (c), such action as they consider will remedy the failure, mitigate its effect or prevent its recurrence,

(c) in a case falling within paragraph 1(d), such action as they consider necessary or expedient in relation to such transitional matters as may arise from the amendment.

(2) A direction under sub-paragraph (1) may require the approved regulator to modify any part of its regulatory scheme.

(3) A direction under sub-paragraph (1) must not be framed by reference to—

(a) a specific disciplinary case, or

(b) other specific regulatory proceedings.

(4) A direction under sub-paragraph (1) may require the approved regulator to refrain from doing something.

(5) The approved regulator must (so far as practicable) comply with a direction given to it in accordance with this schedule.

Notice of intention

3 (1) Before giving a direction to an approved regulator under this schedule, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to give a direction,

(b) indicate the terms of the proposed direction (including the date by which it would have to be complied with),

(c) explain why the Scottish Ministers are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed direction.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to—

(i) the Lord President,
(ii) such other person or body as they consider appropriate,

(c) after the expiry of the period for representations—
   (i) give the recipients under paragraph (b) a copy of any representations
       received from the approved regulator,
   (ii) consult them accordingly in relation to the appropriateness of giving the
direction.

(3) Where the Scottish Ministers consider that the proposed direction may have the effect of
preventing competition within the legal services market, or significantly restricting or
distorting such competition, they must (additionally)—

(a) send to the OFT—
   (i) a copy of the notice of intention,
   (ii) a copy of any representations received from the approved regulator,

(b) consult the OFT accordingly.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the
approved regulator, or any consultee under paragraph 4(2)(c) or (3), when deciding
whether to proceed with giving a direction.

(2) The Scottish Ministers must—
   (a) send to the approved regulator a notice (a “decision notice”) of their decision,
   (b) notify the consultees under paragraph 4(2)(c) and (3) of their decision,
   (c) publish the decision notice in such manner as they consider most appropriate for
       bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to give the direction, the decision notice must contain
the direction.

(4) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

Extension of time to comply

6 (1) The Scottish Ministers may, on an application by an approved regulator made at any
time after the giving of a direction, allow an approved regulator additional time to comply with
the direction.

(2) Where such additional time is allowed, the Scottish Ministers must publicise that fact in
such manner as they consider most likely to bring it to the attention of any relevant
person or body.
Enforcement

7 (1) If at any time it appears to the Scottish Ministers that an approved regulator has failed to comply with a direction given under this schedule, they may make an application to the Court of Session for an order as described in sub-paragraph (2).

5 (2) On an application under sub-paragraph (1), the Court may (if it decides that the approved regulator has failed to comply with the direction) order the approved regulator to take such steps as the Court thinks fit for securing that the direction is complied with.

SCHEDULE 3
(introduced by section 29(3))

CENSURE

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

   (a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or

   (b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act.

Power to censure

2 The Scottish Ministers may make and publish a statement censuring the approved regulator for—

   (a) the act or omission (or series of acts or omissions), or

   (b) the failure.

Preliminary advice

3 Before making the statement, the Scottish Ministers must consult—

   (a) the Lord President,

   (b) such other person or body as they consider appropriate,

   about the proposed statement.

Notice of intention

4 (1) If, after consulting under paragraph 3, the Scottish Ministers intend to proceed with making the statement, they must give the approved regulator a notice (a “notice of intention”) of that intention.

   (2) The notice of intention must—

       (a) state that the Scottish Ministers intend to publish the statement,

       (b) specify the date on which they intend to publish the statement (which must be after the expiry of the period mentioned in paragraph 5(1)),


(c) set out the terms of the proposed statement,

(d) specify—

(i) the act or omission (or series of acts or omissions), or

(ii) the failure,

5 to which the proposed statement relates.

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed statement.

(2) The Scottish Ministers must—

(a) provide the consultees under paragraph 3 with a copy of any representations received from the approved regulator,

(b) seek their further views in light of the representations.

Decision

6 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 3, when deciding whether to proceed with publishing the statement.

(2) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 3 of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to publish the statement, the decision notice must contain the statement (and the statement need not be published separately).

(4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.
SCHEDULE 4
(introduced by section 29(3))

FINANCIAL PENALTIES

Application

1 This schedule applies where the Scottish Ministers are satisfied that an approved regulator has failed to—
   (a) adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
   (b) comply with a direction given in accordance with schedule 2.

Power to impose penalty

2 (1) The Scottish Ministers may impose on the approved regulator a penalty, in respect of a failure mentioned in paragraph 1, of an amount not exceeding the prescribed maximum.
   (2) Here, the prescribed maximum is the maximum amount that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.
   (3) A financial penalty imposed under this paragraph is payable to the Scottish Ministers.

Amount of penalty

3 (1) When considering the appropriate amount of a penalty to be imposed under paragraph 2, the Scottish Ministers must have regard to—
   (a) the seriousness of the failure,
   (b) the nature of the failure in other respects.
   (2) It is material for the purpose of sub-paragraph (1)—
      (a) whether the failure was deliberate,
      (b) if the failure is attributable to recklessness or negligence, the degree involved.
   (3) The Scottish Ministers may consult such person or body as they consider appropriate when considering—
      (a) whether to impose a penalty,
      (b) the appropriate amount of the penalty.

Notice of intention

4 (1) Before imposing a financial penalty, the Scottish Ministers must give the approved regulator a notice (a “notice of intention”) of their intention to do so.
   (2) The notice of intention must—
      (a) state—
         (i) that the Scottish Ministers intend to impose a financial penalty,
         (ii) the amount of the proposed penalty,
(b) by reference to the failure concerned and any other relevant facts, explain why the Scottish Ministers consider that—

(i) it is appropriate to impose a penalty,

(ii) the amount of the proposed penalty is appropriate.

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed penalty.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of that notice, and a copy of any representations received from the approved regulator, to any person whom or body that they consult under sub-paragraph (3).

(3) After the expiry of the period for representations, the Scottish Ministers may consult such person or body as they consider appropriate about the appropriateness of—

(a) imposing the penalty,

(b) its amount.

Decision

6 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, and any consultee under paragraph 5(3), when deciding whether to proceed with imposing the penalty.

(2) The Scottish Ministers must—

(a) give a notice to the approved regulator (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 5(3) of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) The decision notice must—

(a) state whether or not a financial penalty is being imposed,

(b) give the reason for the imposition (or otherwise) of a penalty,

(c) if a penalty is being imposed—

(i) state the amount of the penalty (and mention any allowance made for payment by instalments),

(ii) explain why the Scottish Ministers consider that amount to be appropriate,

(iii) specify the date by which the penalty requires to be paid in full.

(4) That date must not be within the 3 months beginning with the day on which the decision notice is given to the approved regulator (but this does not preclude earlier payment at the initiative of the approved regulator).
(5) For the purpose of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

Variation of penalty

7 (1) The Scottish Ministers may, on an application from an approved regulator received within 21 days beginning with the day on which the decision notice is given to the approved regulator—
   (a) vary the date by which the penalty requires to be paid,
   (b) allow for the penalty to be paid by—
      (i) instalments (if not already allowed), or
      (ii) different instalments (if allowed).

(2) Where an application is made under sub-paragraph (1), no part of the penalty is required to be paid before the application is determined.

Appeal

8 An approved regulator on which a financial penalty is imposed under paragraph 2 may appeal to the Court of Session against the penalty on one or more of the appeal grounds.

Appeal grounds

9 The grounds for an appeal under paragraph 8 are—
   (a) that, in the circumstances of the case—
      (i) it was not appropriate to impose the penalty, or
      (ii) the amount of the penalty is excessive,
   (b) that the date specified under paragraph 6(3)(c)(iii) is unreasonable,
   (c) that the other arrangements for payment are unreasonable, including—
      (i) the absence of any provision for payment by instalments, or
      (ii) any provision for payment by instalments that has been allowed,
   (d) that—
      (i) the penalty was imposed otherwise than in accordance with this schedule, and
      (ii) the approved regulator’s interests have been substantially prejudiced as a result.

Time for appeal

10 (1) An appeal under paragraph 8 is to be made—
(a) within the period of 3 months beginning with the day on which the decision notice is given to the approved regulator, or
(b) where the ground of appeal is referable to something done under paragraph 7(1), within 3 months beginning with the day on which the approved regulator is notified of the thing done.

(2) Where an appeal is made under paragraph 8, no part of the penalty requires to be paid before the appeal is determined or withdrawn.

Interest

11 (1) If the whole or part of a penalty is not paid as required in accordance with this schedule the unpaid amount carries interest at the prescribed rate.

(2) Here, the prescribed rate is the rate that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.

Default

12 (1) Sub-paragraph (2) applies where the whole or part of a penalty is not paid as required in accordance with this schedule.

(2) The Scottish Ministers may recover from the approved regulator, as a debt due to them—

(a) the penalty or (as the case may be) the part of it, and
(b) the interest that it carries.

SCHEDULE 5

(introduced by section 29(3))

AMENDMENT OF AUTHORISATION

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

(a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, and

(b) the matter cannot be addressed adequately by the Scottish Ministers taking any of the measures mentioned in section 29(4)(a) to (d).

Power to amend

2 (1) The Scottish Ministers may amend the authorisation of the approved regulator (given under section 7).

(2) In particular, the Scottish Ministers may—

(a) impose restrictions as respects the authorisation by reference to particular categories of—

(i) licensed provider,
(ii) legal services,

(b) alter the duration of the authorisation (including by imposing a limit of time),

(c) impose new conditions, or vary any existing conditions, to which the authorisation is subject.

Notice of intention

3 (1) Before amending the approved regulator’s authorisation, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to amend the approved regulator’s authorisation,

(b) specify the proposed amendments to the authorisation, and

(c) explain why they are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed amendments.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to—

(i) the Lord President,

(ii) the OFT,

(iii) such other person or body as they consider appropriate,

(c) after the expiry of the period for representations—

(i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,

(ii) consult them accordingly in relation to the proposed amendments.

(3) When consulted under sub-paragraph (2)(c), the Lord President is to—

(a) give the Scottish Ministers such advice in respect of the proposed amendments as the Lord President thinks fit,

(b) in deciding what advice to give, have regard (in particular) to the likely impact of the proposed amendments on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

(a) the approved regulator, or

(b) any other person who holds information relevant in relation to proposed amendments,
must provide the Lord President with such information about the proposed amendments (or their likely consequences) as the Lord President may reasonably require.

**Decision**

1. The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with amending the authorisation.

2. The Scottish Ministers must—
   - give a notice of their decision (a “decision notice”) to the approved regulator,
   - give reasons in the decision notice for their decision,
   - notify the consultees under paragraph 4(2)(c) of their decision,
   - publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

3. If the Scottish Ministers decide to amend the authorisation, the decision notice must specify the date from which the amendments are to be effective (which may be the date on which that notice is given).

4. For the purposes of this schedule, relevant persons or bodies include—
   - other approved regulators,
   - providers of legal services,
   - organisations representing the interests of consumers,
   - members of the public.

**SCHEDULE 6**

*introduced by section 29(3)*

**RESCISSION OF AUTHORISATION**

**Application**

1. This schedule applies where the Scottish Ministers are satisfied that—
   - an act or an omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, and
   - the matter cannot be adequately addressed by the Scottish Ministers taking any of the measures mentioned in section 29(4)(a) to (e).

**Power to rescind**

2. The Scottish Ministers may rescind the authorisation of the approved regulator (given under section 7).
Notice of intention

3 (1) Before rescinding the approved regulator’s authorisation, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

5 (a) state that the Scottish Ministers intend to rescind the approved regulator’s authorisation,

(b) explain why they are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed rescission.

(2) The Scottish Ministers must—

10 (a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to—

(i) the Lord President,

(ii) the OFT,

(iii) such other person or body as they consider appropriate,

15 (c) after the expiry of the period for representations, the Scottish Ministers must—

(i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,

(ii) consult them accordingly in relation to the proposed rescission.

(3) When consulted under sub-paragraph (2)(c), the Lord President is to—

20 (a) give the Scottish Ministers such advice in respect of the proposed rescission as the Lord President thinks fit,

(b) in deciding what advice to give, have regard (in particular) to the likely impact of the proposed action on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

25 (a) the approved regulator, or

(b) any other person who holds information relevant to the proposed rescission,

must provide the Lord President with such information about the proposed rescission (or its likely consequences) as the Lord President may reasonably require.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with rescinding the authorisation.

(2) The Scottish Ministers must—
(a) give a notice of their decision (a “decision notice”) to the approved regulator,
(b) give reasons in the decision notice for their decision,
(c) notify the consultees under paragraph 4(2)(c) of their decision,
(d) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to rescind the authorisation, the decision notice must—
(a) specify the date from which the rescission is to be effective (which may be the date on which that notice is given),
(b) state, for the purpose of section 29(5), whether or not the approval of the approved regulator (given under section 6) is preserved.

(4) For the purposes of this schedule, relevant persons or bodies include—
(a) other approved regulators,
(b) providers of legal services,
(c) organisations representing the interests of consumers,
(d) members of the public.

SCHEDULE 7
(introduced by section 30(2))
SURRENDER OF AUTHORISATION

Application

1 This schedule applies where an approved regulator proposes to surrender its authorisation under section 30.

Surrender notice

2 (1) The approved regulator must give the Scottish Ministers a notice (a “surrender notice”) of its proposal to do so.

(2) The notice must—
(a) specify the approved regulator’s reasons for proposing to surrender its authorisation,
(b) be published (by the approved regulator) in such manner as the approved regulator considers most appropriate for bringing it to the attention of any relevant person or body.

Consultation

3 (1) The Scottish Ministers must, as soon as reasonably practicable after receipt of a surrender notice—
(a) send a copy of the notice to—
(i) the Lord President,
(ii) the OFT,

(iii) each of the approved regulator’s licensed providers,

(iv) such other person or body as they consider appropriate,

(b) consult them accordingly.

(2) The consultees under sub-paragraph (1) have 6 weeks beginning with the day on which they are sent the copy of the notice to make representations to the Scottish Ministers about the proposed surrender.

(3) When consulted under sub-paragraph (1), the Lord President is to—

(a) give the Scottish Ministers such advice in respect of the proposed surrender as the Lord President thinks fit,

(b) in deciding what advice to give, have regard to the likely impact of the proposed surrender on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

(a) the approved regulator, or

(b) any other person who holds information relevant to the proposed surrender,

must provide the Lord President with such information about the proposed surrender (or its likely consequences) as the Lord President may reasonably require.

**Decision**

4 (1) The Scottish Ministers must, within 28 days beginning with the day after the period mentioned in paragraph 3(2) ends, decide whether to agree to the proposed surrender.

(2) In making their decision, the Scottish Ministers must have regard to—

(a) any advice given to them by the Lord President,

(b) any representations made to them by the other consultees under paragraph 3(1),

(c) any further representation made to them by the approved regulator.

(3) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 3(1) of their decision,

(c) publish the decision notice in such manner as they consider appropriate for bringing it to the attention of any relevant person or body.

(4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.
Date of surrender

5 (1) If the Scottish Ministers agree to the surrender of the authorisation, the decision notice must specify the date from which the surrender is to be effective (which must be within the period of 6 months beginning with the date of the decision notice).

5 (2) That date—
   (a) is to be fixed having taken account of the wishes of the approved regulator,
   (b) must allow a reasonable amount of time for the carrying out of such transitional arrangements as are necessary in connection with the surrender.

SCHEDULE 8
(introduced by section 52(1))

INVESTORS IN LICENSED PROVIDERS

Initial notification requirements

1 (1) An applicant for a licence (issuable in accordance with an approved regulator’s licensing rules) must give the approved regulator the standard information about outside investors when applying for the licence.

15 (2) The applicant must also—
   (a) give (as soon as practicable) the approved regulator any standard information subsequently coming to light,
   (b) notify (as soon as practicable) the approved regulator of any other change in the standard information.

20 (3) The standard information is—
   (a) the name and other details of—
      (i) every outside investor in the applicant,
      (ii) any other person whom the applicant expects to be an outside investor in the applicant at such time as the licence may be issued,
   (b) in each case, a description of the nature of the person’s interest.

2 (1) It is an offence for a person to fail to comply with a requirement imposed on the person by paragraph 1.

30 (2) A person who commits an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

3 (3) It is a defence for a person prosecuted for an offence under sub-paragraph (1) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

Continuing notification requirements

3 (1) This paragraph applies where—
   (a) a person takes, or proposes to take, a step to acquire such an interest as would result in the person becoming an outside investor in a licensed provider,
Legal Services (Scotland) Bill

Schedule 8—Investors in licensed providers

(b) an outside investor takes, or proposes to take, a step which would—
   (i) significantly change the investor’s interest in the licensed provider, or
   (ii) acquire an additional kind of interest in the licensed provider, or
(c) a person becomes an outside investor in a licensed provider (including—
   (i) as a new investor, or
   (ii) while remaining an investor, by reason of ceasing to be (or not becoming) a designated person within the provider).

(2) In a case falling within sub-paragraph (1)(a) or (b), the licensed provider must (as soon as practicable) notify the approved regulator of the proposal including by giving it—
   (a) the name and other details of the person concerned,
   (b) the details of the interest concerned.

(3) In a case falling within sub-paragraph (1)(c), the licensed provider must (as soon as practicable) notify the approved regulator of the acquisition including by giving it the name and other details of the investor.

(4) Sub-paragraph (3) does not apply where sub-paragraph (2) has been complied with in relation to the acquisition.

(5) It is an offence for a person to fail to comply with a requirement imposed on the person by sub-paragraph (2) or (3).

(6) A person who commits an offence under sub-paragraph (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7) It is a defence for a person prosecuted for an offence under sub-paragraph (5) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

Requirement to notify investors

4 (1) Where an applicant gives information under paragraph 1, the applicant must notify any person whom the information concerns—
   (a) of—
      (i) the making of the application, and
      (ii) the fact that the identity of the person has been disclosed to the approved regulator,
   (b) of the effect of paragraph 5.

(2) Where a licensed provider gives notification under paragraph 3(2) or (3), the licensed provider must notify any person whom the notification concerns—
   (a) of—
      (i) the giving of that notification, and
      (ii) the fact that the identity of the person has been disclosed to the approved regulator,
   (b) of the effect of paragraph 5.
(3) It is an offence for a person to fail without reasonable excuse to comply with a requirement imposed on the person by sub-paragraph (1) or (2).

(4) A person who commits an offence under sub-paragraph (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Approved regulator may obtain information

5 (1) An approved regulator may require a person whose identity has been disclosed to it under paragraph 1 or 3 to provide it with such documents and other information as it may reasonably require.

(2) It is an offence for a person who is required to provide information by virtue of sub-paragraph (1)—

   (a) to fail without reasonable excuse to comply with the requirement, or
   (b) knowingly to provide false or misleading information.

(3) A person who commits an offence under sub-paragraph (2) is liable—

   (a) on summary conviction to a fine not exceeding the statutory maximum,
   (b) on conviction on indictment to a term of imprisonment not exceeding 2 years or a fine (or both).
# Schedule 9—Index of expressions used

## Whole Act expressions

<table>
<thead>
<tr>
<th></th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td><strong>particular expressions</strong></td>
</tr>
</tbody>
</table>
|   | regulatory objectives                     | all in Part 1
|   | professional principles                   |
|   | legal services                            |
| 10| **other expressions**                     |
|   | the 1980 Act, the 1986 Act, the 1990 Act & the 2007 Act | all in section 101(1) to (3)
<p>|   | advocate                                  |
|   | conveyancing practitioner                 |
|   | executry practitioner                     |
| 15| Faculty                                   |
|   | incorporated practice                     |
|   | Law Society                               |
|   | Lord President                            |
|   | OFT                                       |
| 20| <strong>professional association or body</strong>      |
|   | registered European lawyer                |
|   | registered foreign lawyer                 |
|   | solicitor                                 |</p>
<table>
<thead>
<tr>
<th>Part 2 expressions</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approved regulator (of licensed provider)</td>
<td>section 5</td>
</tr>
<tr>
<td>approval and authorisation (of approved regulator)</td>
<td>sections 6 and 7</td>
</tr>
<tr>
<td>designated person (within licensed provider)</td>
<td>section 47</td>
</tr>
<tr>
<td>Head of Legal Services, Head of Practice and Practice Committee (of licensed provider)</td>
<td>sections 39 to 41</td>
</tr>
<tr>
<td>internal governance arrangements (of approved regulator)</td>
<td>section 20</td>
</tr>
<tr>
<td>investor and outside investor (in licensed provider)</td>
<td>section 52</td>
</tr>
<tr>
<td>licensed legal services provider (and licensed provider)</td>
<td>section 36</td>
</tr>
<tr>
<td>licensing and practice rules (in regulatory scheme)</td>
<td>sections 10 and 14</td>
</tr>
<tr>
<td>regulatory and representative functions (of approved regulator)</td>
<td>section 23</td>
</tr>
<tr>
<td>regulatory scheme (of approved regulator)</td>
<td>section 8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part 3 expressions</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approving body (of confirmation agent)</td>
<td>section 73</td>
</tr>
<tr>
<td>confirmation agent and services</td>
<td>section 72</td>
</tr>
<tr>
<td>regulatory scheme (of approving body)</td>
<td>section 75</td>
</tr>
</tbody>
</table>
Legal Services (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; and for connected purposes.

Introduced by: Kenny MacAskill
On: 30 September 2009
Bill type: Executive Bill
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

LEGAL SERVICES (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Legal Services (Scotland) Bill introduced in the Scottish Parliament on 30 September 2009:
   
   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 30–PM.
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF BILL PROVISIONS

4. The principal effect of the Legal Services (Scotland) Bill (“the Bill”) is to liberalise the legal services market in Scotland by allowing solicitors who offer legal services to operate using certain business models which are currently prohibited. It will do this by making amendments to the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to remove restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership (see sections 90 and 91), and by creating a regulatory framework in which the new types of business will operate (see Parts 1 and 2). It is enabling rather than prescriptive legislation, as the traditional business models will remain an option for those solicitors who choose to carry on practising within those structures.

5. The Bill will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators (“approved regulators”), who in turn will regulate licensed legal services providers (“licensed providers”), as shown below:
   - firstly, the Scottish Ministers will license and regulate approved regulators.
   - secondly, the approved regulators will license and regulate licensed providers.
   - thirdly, a licensed provider, as a regulated body, will have obligations to manage and oversee people in the entity – including lawyers, other professionals and non-professionals – in a way which is compatible with the regulatory regime imposed by the approved regulator.

6. The Bill also includes:
   - regulatory objectives and professional principles which will apply to legal professionals, whether or not they choose to join licensed providers;
   - measures to reflect changes in the governance of the Law Society of Scotland (“the Society”);
   - statutory codification of the framework for the regulation of the Faculty of Advocates (“the Faculty”);
provisions enabling the Scottish Legal Aid Board ("the Board") to monitor the availability and accessibility of legal services in Scotland, with assistance from approved regulators and others;

• a new regulatory complaint that will be dealt with by the Scottish Legal Complaints Commission ("SLCC"); and

• provisions to allow others to apply for rights to obtain confirmation to the estates of deceased persons.

OVERVIEW OF STRUCTURE OF BILL

7. This Bill has 102 sections and 9 schedules. Section 101 contains definitions used in the Bill and schedule 9 is an index of expressions used in the Bill. The Bill is structured into 5 Parts, and these Explanatory Notes are divided into 5 Parts reflecting that structure. A brief overview is set out below which is followed by a detailed description of the sections of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces the schedule.

8. Part 1 sets out the regulatory objectives and principles that will govern regulators, the professional principles that will be required of practitioners, and a definition of legal services.

9. Part 2 establishes the regulatory framework within which approved regulators and licensed providers will operate.

• Chapter 1 sets out the requirements to be met by any organisation seeking to become an approved regulator, and the role of the Scottish Ministers in approving and authorising regulators and in overseeing the regulatory system thereafter.

• Chapter 2 sets out the requirements and duties placed on licensed providers.

• Chapter 3 contains further details of the regulatory framework, including the application of the regulatory objectives and professional principles to approved regulators, the role of the OFT, how complaints against licensed providers and approved regulators should operate, and various registers and lists which must be maintained.

10. Part 3 creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation – part of the process of winding up the estate of a deceased person.

11. Part 4 contains provisions affecting the regulation of individual legal professionals (as opposed to licensed providers) and modifying the duties of other public bodies.

• Chapter 1 imposes duties on the Society, the Faculty and others involved in the regulation of legal professionals with regard to the regulatory objectives in Part 1.

• Chapter 2 creates a statutory basis for the regulation of the Faculty.
• Chapter 3 amends the 1980 Act to remove restrictions on participation by solicitors in alternative business structures, to involve non-solicitors in the governance of the Society, to establish a separation between the regulatory and representative functions of the Society, and to amend the disciplinary rules so that solicitors facing sanctions cannot avoid them by removing themselves from the roll of solicitors.

• Chapter 4 creates new responsibilities for the Board and makes adjustments to the legislation governing the SLCC.

12. Part 5 contains general and ancillary provisions.

• Schedules 1 to 6 set out how various powers and sanctions open to the Scottish Ministers in respect of approved regulators should operate.

• Schedule 7 sets out the procedure for surrender of authorisation of an approved regulator.

• Schedule 8 makes provision in relation to investors in licensed providers.

• Schedule 9 contains an index of expressions used in the Bill.

COMMENTARY ON SECTIONS

PART 1 – THE REGULATORY OBJECTIVES ETC.

Section 1 – Regulatory objectives

Section 2 – Professional principles

13. Section 1 provides for the six regulatory objectives which the Scottish Ministers and approved regulators must comply with and promote in exercising their functions. Section 4 sets out the responsibilities of the Scottish Ministers in relation to the regulatory objectives. Section 62 does the same for approved regulators, as does section 86 for other legal services regulators.

14. The regulatory objectives include promoting and maintaining adherence to the professional principles (set out in section 2). There are six such principles to which persons providing legal services should adhere. These principles do not differ substantially from the professional principles by which solicitors and other legal professionals act, and are intended to ensure that the current standard of quality in the delivery of legal services is safeguarded. Licensed providers would be expected to “act in the best interests of their clients” meaning that they should, for example, observe the duty of confidentiality, avoid conflicts of interest and safeguard a client’s money and property. Licensed providers would be expected to maintain good standards of work, meaning that they should act competently, communicate effectively, be diligent and show respect and courtesy. Under section 38 licensed providers must have regard to the regulatory objectives and adhere to the professional principles. The Head of Legal Services is responsible for securing that adherence (section 39).

15. The regulatory objectives also include encouraging equal opportunities within the legal profession. While equal opportunities is a topic which is generally reserved to the UK Government (Section L2 of Part II of Schedule 5 to the Scotland Act 1998), there is an exception to this and that is the encouragement of equal opportunities, and in particular of the observance
of the equal opportunity requirements. The Scottish Parliament may impose duties on the Scottish Government and Scottish public bodies to make arrangements to secure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.

16. The Bill does not rank these objectives or the principles in order of importance, so there is no hierarchy within them. The Scottish Ministers, the approved regulators and the other legal service regulators (section 86(2)) will need to consider how they balance these competing objectives in any particular circumstances.

Section 3 – Legal services

17. This section defines legal services for the purposes of this Bill. The definition is broad, and includes services currently provided by people other than solicitors and advocates (for example, tax and planning specialists, and voluntary bodies providing advice on social welfare issues). However, the Bill does not seek to regulate all these various service providers. Apart from Part 3 (confirmation services), the Bill is restricted to legal services provided by businesses involving legal professionals (meaning solicitors, advocates, licensed conveyancers and executry practitioners, and those with rights to conduct litigation and/or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”)). In particular, a body can only be a licensed provider if a solicitor is involved (see section 36).

18. Subsection (2) sets out exclusions from the definition of legal services for the purposes of this Bill. Judges are excluded as are persons who exercise judicial functions. Arbitrators also fit within this exclusion as do chairs of tribunals.

Section 4 – Ministerial oversight

19. Section 4 provides that the Scottish Ministers, in relation to their functions under this Bill, must, as far as practicable, act in a way which is compatible with the regulatory objectives and that they consider most appropriate with a view to meeting those objectives. The phrase “so far as is practicable” is added because it is recognised that the duties are broad and compliance may not be able to be objectively measured. In particular, there may be tensions between objectives, and a reasonable balance will need to be struck between them.

20. The Scottish Ministers must also have regard to the principles of best regulatory practice under which (in particular) regulatory activities should be carried out effectively and in a way that is transparent, accountable, proportionate, consistent, and targeted. These are the “five principles of good regulation” first laid out in a report by the UK Better Regulation Task Force in 2005\(^1\). These guidelines state that regulation should be:

- proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
- accountable: regulators must be able to justify decisions, and be subject to public scrutiny;

consistent: Government rules and standards must be joined-up and implemented fairly;
transparent: regulators should be open, and keep regulations simple and user friendly; and

targeted: regulators should be focused on the problem, and minimise side effects.

PART 2 – REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1 – APPROVED REGULATORS

Approved regulators

Section 5 – Approved regulators

21. This section sets out how a professional or other body can become an approved regulator. This is framed as a two-stage process – the first stage is to obtain approval and the second to obtain authorisation. Essentially this is by application to the Scottish Ministers and this section details what information an application must include. If an application for approval is granted, then this means that the body can now call itself an approved regulator. It is only after successfully being granted an application for authorisation that the approved regulator can regulate its licensed providers.

22. Subsection (6) gives the Scottish Ministers a regulation making power to prescribe fees they can charge. This could allow a charge for each application or an annual regulatory charge or both.

Section 6 – Approval of regulators

23. Section 6 provides the criteria which an applicant must meet to satisfy the Scottish Ministers before it can be approved as an approved regulator. These include, among others, being adequately resourced, capable of performing the relevant regulatory functions and exercising regulatory functions independently of any other person or interest and properly.

24. Subsection (2) allows the Scottish Ministers to approve a body as an approved regulator subject to conditions. The conditions that may be attached to the potential approved regulator’s regulatory scheme and internal governance arrangements (how the body is structured and managed) are set out in more detail in sections 8 and 20 respectively.

25. Where the Scottish Ministers indicate that an application might not be approved, or if conditions are attached, an approved regulator can make representations within a 28-day period or take such other steps as it considers necessary (for example, by modifying its application or scheme).

26. The Scottish Ministers have the power to make regulations regarding the approval process, including the approval criteria and which types of bodies may or may not become approved regulators. This power could be used to set out the approval process in more detail, and to address any unforeseen issues.
Section 7 – Authorisation to act

27. Authorisation is the second stage of the process. Having been approved by the Scottish Ministers as an approved regulator, the body may not exercise any of its regulatory functions unless authorised so to do by the Scottish Ministers (subsection (1)). The section also makes provision where the Scottish Ministers think they might withhold or impose conditions on authorisation.

28. Subsection (2) provides that the Scottish Ministers can only give their authorisation if they are satisfied or continue to be satisfied amongst other things that the applicant is adequately resourced and capable of regulating licensed providers and that it continues to meet any criteria provided for in regulations made under section 6(7)(b).

29. Authorisation may be with or without conditions, may be subject to a time limitation and may also be restricted to particular types of legal services or legal service provider. A restriction in relation to a particular type of legal services may be appropriate where an approved regulator has expertise in a specialised area. One example is a body which regulates accountants which might seek to regulate mixed practices of accountants and lawyers, but not other forms of multi-disciplinary practice.

30. The Scottish Ministers have the power to make regulations regarding the authorisation process, and the criteria which must be met in order for an applicant to be authorised. This power could be used to set out the process for authorisation in more detail, and to address any issues which arise with regard to the criteria used.

Regulatory schemes

Section 8 – Regulatory schemes

31. Section 8 sets out the approved regulator’s responsibility to create and implement a regulatory scheme for its licensed providers, and describes what must be included in the scheme. (This is regulation of licensed providers as entities – individuals within the entities who are regulated by professional bodies will continue to be so regulated by them. For example, solicitors will be regulated by the Society).

32. The Scottish Ministers have the power to specify by regulations additional matters which the regulatory schemes must cover. This power could be used to address unforeseen issues with the regulatory schemes which may arise once the system is in operation.

33. The scheme should relate to the provision of legal services, as defined in section 3, however, the Scottish Ministers have the power to make regulations which authorise regulatory schemes to deal with other services in addition to legal services (subsection (5)).

34. Subsection (2) requires the scheme to include details about two sets of rules – the licensing rules (that is, rules relating to the application process and the issuing or renewal of licences – see sections 10 and 12) and the practice rules (governing how licensed providers operate – see sections 13 to 19).
35. Subsection (4) allows the approved regulator to amend fully or in part its regulatory scheme but any material change requires prior approval of the Scottish Ministers, who must also consult with certain persons before approving any such changes. If prior approval is not given, the changes are invalid.

**Section 9 – Reconciling different rules**

36. Section 9 provides that the approved regulator’s regulatory scheme must include appropriate provision which prevents or resolves regulatory conflicts, as well as avoids unnecessary duplication of regulatory rules. Regulatory conflict is conflict between the regulatory scheme and any professional or regulatory rules of any other body which regulates the provision of legal or other services. For example, conflict between a regulatory scheme and the Society’s rules or professional regulatory code of an accountant.

37. The Bill does not prescribe that one set of rules would automatically “trump” another in the event of any conflict. It will be for approved regulators to identify and address any potential conflicts, and for the Scottish Ministers to consider whether this has been done adequately in assessing any application for approval or authorisation under sections 6 and 7. However, it will be possible for the Scottish Ministers to make regulations about regulatory conflict under subsection (3).

**Licensing rules**

**Section 10 – Licensing rules: general**

**Section 11 – Initial considerations**

38. Sections 10 and 11 give details about what the licensing rules cover. The scheme must include these licensing rules and a consequence material in the licensing scheme is also part of the regulatory scheme as referred to in section 8. Licensing rules cover areas such as the procedure and requirements involved in becoming a licensed provider (including fees payable to the approved regulator).

39. The general approach of the Bill is to set out a broad framework and allow approved regulators the flexibility to devise an appropriate set of rules as best fits the services being regulated and which follows best regulatory practice. In some instances the Bill requires an approved regulator’s regulatory scheme to contain mandatory provisions. The rules must include provision for consultation with the OFT (see section 11(2)) where there may be an effect of preventing or restricting or distorting competition within the legal services market, and must set out how the regulator would deal with an application where it believes there would be a material and adverse effect on the provision of legal services (section 11(1)(b)).

**Section 12 – Other licensing rules**

40. This section provides for the possibility of provisional licences to allow a licensed provider to operate in anticipation of the full licence application being granted. This may be used, for example, in a situation where a licensed provider is transferring from one approved regulator to another.
Section 13 – Licensing appeals

41. This section provides for an appeal by a licensed provider (or an applicant to be a licensed provider) to the sheriff against a refusal to license or to renew its licence, attach conditions or restrictions to its licence, or to suspend or revoke its licence.

Practice rules

Section 14 – Practice rules: general

Section 15 – Financial sanctions

Section 16 – Enforcement of duties

42. Section 14 gives details about what practice rules cover. Section 15 makes specific provision for the financial penalties which may be imposed on licensed providers by approved regulators under section 14(1)(f), and for appeals against their imposition. Section 16 states that practice rules must specify that failure to comply with section 38 (setting out the key duties of licensed providers), any other duties under this Part, or duties under any other enactment, all constitute a breach of the regulatory scheme. Section 16 also sets out requirements for licensed providers to carry out reviews of their performance, and have the resulting report assessed by the approved regulator. Sections 17 to 19 set down further provision about practice rules.

Section 17 – Performance report

43. This section provides that the practice rules must require that the Head of Practice (or Practice Committee) of a licensed provider carry out an annual review and send a report to its approved regulator.

Section 18 – Accounting and auditing

44. This section requires that practice rules provide that licensed providers must be required to have proper accounting and auditing procedures in place, and include equivalent provisions to the accounts rules in sections 35 to 37 of the 1980 Act for solicitors operating in an incorporated practice. Sections 35 to 37 require the Society to make rules regarding the separate holding of clients’ funds, and the provision of an accountant’s certificate to demonstrate compliance with those rules.

Section 19 – Professional indemnity

45. Under this section, practice rules must require licensed providers to have certain professional indemnity arrangements, and include an equivalent provision to that on professional indemnity in section 44 of the 1980 Act.

46. Section 44 provides for the Council of the Society (“the Council”) to make rules concerning indemnity for solicitors against any class of professional liability (for example, for negligence in the delivery of a legal service). The rules may provide for a fund held by the Society, or for insurance with an authorised insurer held by the Society, or require solicitors to take out insurance. Currently, the Society’s rules provide that all solicitors acting as principals in
private practice must be insured under a single “master policy” held by the Society (Solicitors (Scotland) Professional Indemnity Insurance Rules 2005).

Internal governance

Section 20 – Internal governance arrangements

47. Any approved regulator must have arrangements in place which ensure it acts properly and with independence and that it provides sufficient resources for its regulatory functions in relation to licensed providers. The section sets out relevant factors (in subsection (2)) which approved regulators must have regard to in connection with the independent exercise of the regulatory function. One of these is the need to avoid conflicts of interest where possible. In order to mitigate conflicts, there is a need for a clear demarcation of regulatory functions from any representative functions the approved regulator may have (for example, as a professional body). In relation to the Society, section 93 of the Bill provides that the Society must set up a regulatory committee.

48. Internal governance arrangements are defined for the purposes of Part 2 of the Bill in section 22(4), and the distinction between regulatory and representative functions is defined in section 23.

Section 21 – Communicating outside

49. Section 21 provides that internal governance arrangements cannot prevent consultation and communications with persons or bodies outside the approved regulator. This section makes it clear that individuals exercising regulatory functions within an approved regulator can communicate with others involved in the regulation of legal services, and that they can notify the Scottish Ministers of any adverse impact on regulatory independence arising from the representative role of the regulator.

Section 22 – More about governance

50. Section 22 provides that the Scottish Ministers may make regulations including further provision about the internal governance arrangements of approved regulators, but only in relation to their regulatory functions. Before so doing they must consult any approved regulators that would be affected.

Regulatory functions etc.

Section 23 – Regulatory and representative functions

51. Section 23 defines regulatory and representative functions of an approved regulator under the Bill.

52. Subsection (3) makes clear that the Scottish Ministers are not authorised to exercise any of their functions under the Bill in relation to an approved regulator’s representative functions.
Section 24 – Assessment of licensed providers

53. Section 24 provides that approved regulators (or person who or body that has been delegated this function) are required to carry out periodic reviews of licensed providers at least once in every 3-year period. The 3-year period starts with the date that the particular licensed provider was issued the licence (subsection (1)). This is an external assessment which complements the annual self-assessment carried out under section 17. The assessment must consider how well the licensed provider has had regard to the regulatory objectives, adhered to the professional principles, complied with the approved regulator’s regulatory scheme and the licence conditions, and any such matters as the approved regulator considers appropriate (subsection (3)).

54. Subsection (2) provides that the Scottish Ministers may require an approved regulator to assess a licensed provider at other times if requested to do so by the SLCC. The SLCC may only make the request if it has significant concerns over the handling of a complaint by a licensed provider.

55. The approved regulator is required to inform the relevant professional association if the assessment of the licensed provider in question reveals professional misconduct (or potential professional misconduct) by any of its members (subsection (7)). For example, if there were indications of misconduct by a solicitor or a chartered accountant employed by the licensed provider, the approved regulator would have to notify the Society or the Institute of Chartered Accountants of Scotland respectively. This could happen whether or not the person in question is involved in the provision of legal services within the licensed provider.

56. Under subsection (9), the Scottish Ministers can make further provisions about the assessment of licensed providers by regulations. This could be used to deal with any unforeseen circumstances, or to elaborate on the assessment procedure and requirements should this be necessary.

Section 25 – Giving information to SLAB

57. The Board has been given the additional duty of monitoring the availability and accessibility of legal services in Scotland, as inserted into the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) as section 1(2A) by section 96 of the Bill. This section provides that an approved regulator must provide the Board with information in relation to this function.

Section 26 – Additional powers and duties

58. This section gives a power to the Scottish Ministers to make regulations conferring additional functions on approved regulators. Before making such regulations, the Scottish Ministers must consult with certain persons.
Section 27 – Guidance on functions

59. The Scottish Ministers are given a power to issue guidance to approved regulators, and regulators must have regard to this guidance. Where the Scottish Ministers issue guidance, this section also provides that they are required to publish it.

Performance

Section 28 – Monitoring performance

60. This section gives the Scottish Ministers a power to monitor performance of approved regulators, including acting compatibly with the regulatory objectives and adopting best regulatory practice, exercise of their regulatory functions, the operation of their internal governance arrangements, and compliance with any performance targets set or required to be set, or directions given, under section 29(1).

Section 29 – Measures open to Ministers

61. Section 29 describes the options open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Subsection (4) sets out the measures which can be taken, which include the rescission of a regulator’s authorisation to regulate. More detail as to when these measures will apply and on the procedures relating to these measures can be found in schedules 1 to 6 to this Bill.

62. The Scottish Ministers have the power under subsection (6) to make further provisions by regulations regarding the sanctions they can impose. This could be used to give further detail around the specifics of the sanctions, and the procedure involved. This subsection also gives the Scottish Ministers the power to specify, by regulations, additional measures which can be taken should this be considered necessary.

Schedule 1 – Performance targets

63. This schedule gives details and the procedures to be followed when the Scottish Ministers set performance targets for approved regulators and also provides a procedure for representations to the Scottish Ministers by the approved regulator.

Schedule 2 – Directions

64. This schedule gives details about the procedures to be followed (including consultation and representations) when the Scottish Ministers exercise their powers to give directions to and to set performance targets for approved regulators.

Schedule 3 – Censure

65. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to censure an approved regulator for any act or omission (including the procedures for representations).
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

Schedule 4 – Financial penalties

66. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to impose a financial penalty on an approved regulator (including the procedures for representations, amounts of financial penalties, appeals, and interest).

Schedule 5 – Amendment of authorisation

67. This schedule gives further details about the procedures to be followed when the Scottish Ministers amend the authorisation of an approved regulator (including the procedures for representations).

Schedule 6 – Rescission of authorisation

68. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to rescind an approved regulator’s authorisation (including the procedures for representations).

Ceasing to regulate

Section 30 – Surrender of authorisation

69. Section 30 deals with the situation where an approved regulator ceases to regulate. It allows an approved regulator to surrender its authorisation, with the prior agreement of the Scottish Ministers, under the procedure in schedule 7. Subsection (3) provides that an approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of its authorisation. For example, this may involve ensuring that the licensed providers have sufficient time to find and transfer to an alternative approved regulator before authorisation is surrendered.

70. Subsection (4) states that if an approved regulator surrenders its authorisation to regulate, it also loses its status as an approved regulator. This reflects the two-stage process involved in a body becoming a functioning approved regulator – it must first be approved (section 6), and then given authorisation to regulate by the Scottish Ministers (section 7). In giving up authorisation, both authorisation and approval are removed.

Section 31 – Cessation directions

71. Section 31 applies where an approved regulator’s regulatory scheme is amended so as to exclude its regulation of certain categories of legal services, or its authorisation is (or is to be) amended under section 29(4)(e), rescinded under section 29(4)(f), or surrendered under section 30(1).

72. The Bill gives the Scottish Ministers a wide direction making power to direct an approved regulator to take such action as they consider necessary or expedient for the purpose of providing continued effective regulation of affected licensed providers. This might include, for example, requiring an approved regulator to alter the timing of its surrender of authorisation to ensure that another approved regulator was in a position to accept its former licensed providers.
Section 32 – Transfer arrangements

Section 33 – Extra arrangements

73. These sections cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded, or amended an authorisation so it was no longer regulating particular categories of licensed provider or legal services. In such circumstances, the approved regulator must inform its licensed providers of the situation, and notify those which will have to transfer to another approved regulator (section 32(2) and (3)).

74. Subsections (4) and (5) of section 32 set out the process and timescales involved in moving from one approved regulator to another. The changeover period refers to the period of time during which a licensed provider which has been forced to transfer may continue to operate according to the regulatory scheme of its previous regulator, whilst being regulated by the new regulator. There is a requirement on the licensed provider to comply with the new regulator’s rules within the 6-month changeover period.

75. For example, suppose an approved regulator “X” notifies a licensed provider that it is ceasing to exist as an approved regulator, and that a transfer is therefore necessary. The licensed provider would identify a new approved regulator “Y”, and arrange to transfer to it within 28 days (or as soon as was practicable). Starting from the date on which Y took over responsibility for regulating the licensed provider in question, it would have 6 months in which to adopt Y’s regulatory scheme. During the 6-month “changeover” period, the licensed provider is free to continue to comply with only X’s regulatory scheme, but on the day that the changeover period is completed, it must comply fully with Y’s scheme.

76. This process requires the new approved regulator to regulate the licensed provider using the previous approved regulator’s regulatory scheme for the duration of the changeover period.

77. Section 33 gives the Scottish Ministers the power to make regulations relating to transfer arrangements.

78. This power can be used to address any unforeseen circumstances which might occur in the transfer process described in section 32. However, regulations may be used in two particular cases, described in subsection (2).

79. The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their choice (subject to that approved regulator’s consent). This may be necessary to ensure continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.

80. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the former approved regulator, in relation to the current licence of the licensed provider. This may
be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to its former regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.

Miscellaneous

Section 34 – Change of approved regulator

81. Section 34 provides for a voluntary transfer by a licensed provider to a new regulator, and sets out the timescale and requirements involved.

82. The new approved regulator must consent for the transfer to take effect. The licensed provider must give notice to the former approved regulator and to the Scottish Ministers. The licensed provider must explain why it is transferring and specify the new regulator. It must also specify the date on which the transfer will occur (which must be within 28 days of the notice) and provide a copy of the new approved regulator’s consent to the transfer.

83. The Scottish Ministers have the power (under subsection (6)) to make, by regulations, further provisions relating to such transfers.

Section 35 – Step-in by Ministers

84. Section 35 makes provision to allow the Scottish Ministers to ensure that licensed providers are regulated in the absence of a suitable approved regulator. The Scottish Ministers may by regulations either establish a new regulator (subsection (1)) or set themselves up as an approved regulator (subsection (2)) where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by licensed providers.

CHAPTER 2 – LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

Section 36 – Licensed providers

85. Section 36 provides the definition of a licensed provider. Any such body must have a licence from an approved regulator, provide legal services for a fee, gain or reward, and involve a practising solicitor (with an unrestricted practising certificate).

86. Subsection (3) states that a licensed provider may not be regulated by more than one approved regulator at the same time.

Section 37 – Eligibility criteria

87. This section describes some possible models of licensed provider and gives details of what criteria make and do not make an entity eligible to be a licensed provider.

88. Licensed providers need not have any particular business structure and need not be a body corporate, but they must be a recognisable business entity (such as a company). It is
possible that a business which is involved in matters with no link to legal services might in future have a stake in a licensed provider. In such a situation, subsection (3)(b) requires that there should be a distinct business entity within that organisation which operates as the licensed provider. This will prevent approved regulators from having to regulate matters which are not related to the broad definition of legal services in section 3.

89. The definition of licensed provider excludes existing forms of legal business structure. These will continue to be regulated as now (primarily by the Society and Faculty). The existing “traditional” forms of business structure for solicitors are set out in section 37(4).

90. The first is a solicitor operating as, in effect, a sole trader.

91. The second, the traditional practice, means either a partnership made up only of solicitors, or an “incorporated practice”. An incorporated practice is a form of solicitors’ practice with no outside ownership or control, which trades as a body corporate, and which may benefit from limited liability. Such practices are governed by the Solicitors (Scotland) (Incorporated Practices) Practice Rules 2001.

92. The third, law centres, are also already provided for in the 1980 Act. Section 65 of the 1980 Act defines “law centre” as “a body (a) established for the purposes of providing legal services to the public generally as well as to individual members of the public, and (b) which does not distribute any profits made either to its members or otherwise, but reinvests any such profits for the purposes of the law centre”. Such law centres typically have an arrangement with a solicitors’ firm which provides the legal services for the centre. Section 26(2) of the 1980 Act provides that the offence of acting as agents for unqualified persons does not apply to solicitors, registered foreign lawyer or registered European lawyer pursuing professional activities within the meaning of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000 who is employed full-time on a fixed salary by a body corporate or employed by a law centre.

93. The Scottish Ministers have the power to make further provision by regulations about eligibility to be a licensed provider (subsection (6)). This could be used, for example, to provide further detail or expand upon the eligibility criteria if necessary. This subsection also gives the Scottish Ministers power to modify by regulations section 36(2) (licensed providers) which currently requires an entity to include at least one solicitor in order to be eligible to be a licensed provider, so that in future it may be possible for a licensed provider to be eligible by including a different type of practitioner. They also have the power to modify the list of legal practitioners in subsection (5). This power could be used to add any types of legal practitioner which are created in the future, thus keeping the provision up to date.

Section 38 – Key duties

94. Section 38 sets out the key duties applicable to all licensed providers, including their obligations with respect to the regulatory objectives, professional principles, their approved regulator’s regulatory scheme and licence terms and conditions. Licensed providers must also ensure compliance with any professional code of conduct applicable to persons within the licensed provider – whether or not such codes are directly incorporated within the approved regulator’s scheme.
Because a licensed provider is an intangible entity, the Bill provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services and either a Head of Practice (see section 40) or Practice Committee (see section 41). The two posts have distinct but overlapping duties. Broadly, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles, while the Head of Practice is responsible for the broader compliance with the relevant regulatory scheme, and licence terms and conditions.

**Operational positions**

**Section 39 – Head of Legal Services**

Section 39 describes the position of Head of Legal Services, along with the requirements, duties and responsibilities associated with the role. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 54). As stated above, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles. The Scottish Ministers have the power to make further provision about this position and its function by regulations (subsection (9)(a)).

Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that his or her practising certificate is free of conditions. The relevant legislation on these restrictions is to be found in sections 4 and 15(1) of the 1980 Act. In the latter, there is provision for the Council (besides granting or refusing a practising certificate) to issue a practising certificate subject to such conditions that the Council thinks fit, for example, that the person should act under the supervision of another solicitor. The Scottish Ministers have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsection (9)(b)).

The Head of Legal Services is personally responsible for securing the licensed provider’s compliance with the regulatory objectives, its adherence to the professional principles, and its fulfilment of its other duties, and to take such reasonable steps (such as issuing of instructions, establishing appropriate arrangements for training, monitoring and supervision of staff, and internal audit) for these purposes. The Head of Legal Services is also responsible for managing designated persons. This section also provides for what role the Head of Legal Services has when the licensed provider is failing (or has failed) to fulfil its duties (subsection (7)).

Subsection (8) provides that where any function falls to both the Head of Legal Services and the Head of Practice they are jointly and severally responsible as regards the function. It will be noted that the Bill gives a “whistle blowing duty” to both the Head of Legal Services (section 39(7)) and Head of Practice (section 40(6)), the difference being that the Head of Legal Services is required to report to the Head of Practice and the Head of Practice to the approved regulator. Another joint function is to ensure that designated persons in the licensed provider meet their professional obligations (sections 39(5)(b) and 40(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 39(9) and 40(7).
Section 40 – Head of Practice

100. Section 40 describes the position of Head of Practice, along with the eligibility requirements, and the duties and responsibilities associated with the role. As stated above, the Head of Practice is responsible for broader compliance with the relevant regulatory scheme. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 54).

101. Subsection (2) gives details of the criteria that are required for a person’s appointment as its Head of Practice. Unlike the Head of Legal Services, no particular qualification is stipulated, although it is possible for the Scottish Ministers to add specific requirements by regulations under subsection (7). The Scottish Ministers may also make further provision by regulations about the functions of the Head of Practice.

102. Subsection (3) states the Head of Practice has the function of securing the licensed provider’s compliance with its approved regulator’s regulatory scheme and the terms and conditions of its licence. The duty is both to ensure compliance by the organisation as a whole, and to manage those working within the organisation to ensure they take account of the regulatory scheme. Whereas the Head of Legal Services managerial oversight is restricted to designated persons (i.e. those involved in the delivery of legal services – see section 47), the Head of Practice has oversight of everyone in a licensed provider.

103. Subsection (6) creates a “whistle blowing” duty. It provides that, if it appears to the Head of Practice that the licensed provider or any person having an interest in the licensed provider is failing (or has failed) to fulfil any of its duties, or that any such person is behaving (or has behaved) improperly in relation to the licensed provider or to any person within it, the Head of Practice must report the matter to the licensed provider’s approved regulator.

Section 41 – Practice Committee

104. Section 41 describes the composition and responsibilities of the Practice Committee, which licensed providers can choose to have instead of the Head of Practice. They have the same functions under the Bill. The Practice Committee must have as one of its members a person who would be eligible to be the Head of Practice (if the licensed provider had decided to have a Head of Practice). The members of a Practice Committee are to be jointly and severally responsible as regards the Committee’s functions. The Scottish Ministers have the power to make further provision by regulations relating to Practice Committees and their functions (subsection (5)).

Appointment to position etc.

Section 42 – Notice of appointment

105. This section contains requirements for notification by licensed providers to approved regulators of the details of the appointment of a Head of Legal Services and Head of Practice or Practice Committee, or any changes to these appointments.
Section 43 – Challenge to appointment

106. Section 43 gives an approved regulator the power to challenge any appointment to the posts of Head of Legal Services, Head of Practice or as a member of a Practice Committee. The section sets down the specific grounds of challenge: a challenge can only be made if an approved regulator believes that person to be ineligible or unsuitable, or on other reasonable grounds. After allowing representations, it is open to an approved regulator to direct that an appointment be rescinded.

Section 44 – Disqualification from position

Section 46 – Conditions for disqualification

107. Section 44(1) indicates that sections 45 and 46 should be read in conjunction with section 44. Section 46 lists conditions which may or will result in the disqualification of someone from the positions of Head of Legal Services, or Head of Practice, or from being a member of the Practice Committee, or from being a designated person (see section 47 for the definition of a designated person).

108. In all cases, disqualification depends on a decision by the approved regulator that the matter which gives rise to the disqualification makes the person unsuitable for the appointment. In other words, although specific grounds in any of the conditions in section 46 may be met, the disqualification is never automatic since the approved regulator must be also satisfied that the person is unsuitable for the position. Further, before any disqualification occurs, the approved regulator must allow the licensed provider and the person to take such steps as are expedient or to make representations (section 45(3)).

109. Section 44(2) indicates that an approved regulator must disqualify a person from being Head of Practice or member of the Practice Committee if that person is insolvent and the approved regulator is satisfied that this makes that person unsuitable (the first condition in section 46(2)).

110. Section 44(3) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services or Head of Practice or Practice Committee member if that person is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985 (or corresponding legislation) and the approved regulator is satisfied that this makes that person unsuitable (the second condition in section 46(3)). The approved regulator may disqualify someone from being a designated person on the same grounds.

111. Section 44(4) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 (or corresponding legislation) or has been disqualified by a court from holding a position of business responsibility and the approved regulator is satisfied that this makes that person unsuitable (the third condition in section 46(4)).
112. Section 44(5) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person has been convicted of an offence involving dishonesty or has been fined for an offence a sum equivalent to the maximum of level 3 on the standard scale or has been sentenced to imprisonment for a term of two years or more and the approved regulator is satisfied that this makes that person unsuitable (the fourth condition in section 46(5)). The approved regulator may disqualify someone from being a designated person on the same grounds.

113. Section 44(6) indicates that an approved regulator may disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member, or designated person if that person has failed to fulfil any of his or her duties as stated in this Part of the Bill, or has caused (or substantially contributed to a breach) of the terms or conditions relating to the licensed provider’s licence, and the approved regulator is satisfied that this makes that person unsuitable (the fifth condition in section 46(6)).

**Section 45 – Effect of disqualification**

114. Disqualification may be limited in terms of the time period (for all disqualified persons) or the activities which may not be carried out, or carried out without supervision (in the case of designated persons). However, a disqualification does not only apply to the particular position – it applies to the same position in every licensed provider, including licensed providers who may operate under a different approved regulator.

115. Because of the potentially serious consequences of disqualification from a particular post, representations must be allowed before a disqualification occurs; there must be a procedure for review within the practice rules; and there is also a subsequent right of appeal to the sheriff.

**Designated persons**

**Section 47 – Designated persons**

**Section 48 – Listing and information**

116. Section 47 defines what is meant by “designated person” and indicates who designates such a person. A designated person is a person (whether or not a legal professional, and whether or not paid) who carries out legal work in connection with the provision of legal services by a licensed provider. The designation is made by the Head of Legal Services or the Head of Practice (or Practice Committee).

117. The Head of Practice must keep a list of all such persons and provide a copy to the approved regulator if requested to do so. The procedures for disqualification in sections 44 to 46 allow approved regulators to take action against persons who should not be involved in the provision of legal services.

118. Section 47(4) provides that nothing in this Part of the Bill affects the provisions in any other enactment as to who may (or may not) carry out any particular sort of legal work. See, for
example, the restrictions in section 32 of the 1980 Act which make it an offence for unqualified persons to draw or prepare certain writs in relation to property, court action, and executries.

**Outside investors**

**Section 49 – Fitness for involvement**

119. This section provides that an approved regulator must be satisfied that all outside investors are fit to have an interest in the licensed provider at the licensing and renewal stages. The approved regulator must monitor the fitness of all investors at other times. Fitness to be an investor is to be determined in all these cases, with reference to the factors set out in section 50.

120. The approved regulator’s licensing rules in relation to applications and renewals for, terms of, and revocation and suspension of, licences may relate to any outside investor (as well as to a licensed provider) and the rules must explain how an outside investor’s fitness for having an interest in a licensed provider is to be determined.

121. An entity must not be licensed (or a licensed provider must have its licence revoked or suspended) if the approved regulator determines that an investor is unfit to have an interest. There is provision for an alleged unfit investor making representations or taking steps before the approved regulator makes its final determination and also an appeal to the sheriff.

**Section 50 – Factors as to fitness**

122. Section 50 provides examples of relevant factors when determining an outside investor’s fitness, such as financial position and business record. Subsection (3) sets out in what circumstances an outside investor is presumed to be unfit. These conditions are similar to those found in the first, second, third and fourth conditions in section 46(2) to (5) in relation to disqualification.

123. Subsection (4) provides that solicitors qualified to practise in Scotland, Northern Ireland and in England and Wales are presumed to be fit unless there are other relevant considerations.

**Section 51 – Behaving properly**

124. Subsection (1) forbids an outside investor from acting in a way which is incompatible with the regulatory objectives and the professional principles in the Bill, the licensed provider’s duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of the licence, and its other duties under Part 2 of the Bill and under any other legislation.

125. Subsection (2) provides that an outside investor in a licensed provider must not interfere in the provision of legal or other professional services by the licensed provider. Moreover he or she must not seek to exert undue influence over, or solicit unlawful or unethical conduct by, or otherwise behave improperly in relation to any designated or other person within the licensed provider.
Section 52 – More about investors

126. Subsection (2) gives the Scottish Ministers power to make regulations to make further provision in relation to interests in licensed providers and to make licensing rules in relation to persons with such interests. Section 52 introduces schedule 8 which contains more provision about outside investors.

127. Subsection (4) defines an “investor” and an “outside investor” in a licensed provider.

Discontinuance of services

Section 53 – Duty to warn

128. Section 53 requires that the licensed provider gives as much warning as possible to the approved regulator where it is in serious financial difficulty or in the case that it is likely to or intends to stop providing legal services. The licensed provider must also take steps to prevent disruption to clients.

Section 54 – Ceasing to operate

129. This section covers certain situations (as described in subsection (1)) where the approved regulator must revoke a licensed provider’s licence, unless the approved regulator is satisfied that the conditions described in subsection (3) are met. These are situations where the business is in the process of being wound up, or does not have someone who can be a Head of Legal Services or Head of Practice, or for some other reason a licensed provider stops providing legal services.

130. Unless the situation is temporary and there are sufficient arrangements in place to safeguard the interests of clients, a licence will be revoked. The situation will be reviewed every 14 days (or more frequently) to ensure that a decision on whether or not to revoke the licensed provider’s licence is made promptly to minimise the period of uncertainty for the licensed provider’s clients. In connection with a revocation, the licensed provider must notify without delay its approved regulator and provide information that the regulator requires.

Section 55 – Safeguarding clients

131. Section 55 makes provision to safeguard the interests of clients of a licensed provider which is ceasing, or has already ceased (see subsection (11)) to provide legal services. It sets out the requirements placed on the licensed provider in question, and allows the approved regulator to issue directions (subsection (3)) to it in order to protect the interests of clients. Such directions may concern making certain documents and information, or money held on behalf of clients or in trust, available. For example, where the licensed provider has ceased to exist, clients may find it difficult or time consuming to gain access to documents, information, or money, not least if the former point of contact is no longer available. The approved regulator’s ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could be used therefore to mitigate the impact on clients.
132. Subsection (6) allows recourse to the Court of Session should the licensed provider fail to comply with any directions given by the approved regulator. The Court may make various orders to preserve the clients’ positions, such as varying the approved regulator’s directions as it sees fit, or impose conditions, or freezing bank accounts. The Court, following consideration of the circumstances must be satisfied that the action is appropriate and must consider any relevant input from those with an interest in the situation before making an order (see subsection (7)).

133. Subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps taken to safeguard the interests of clients in the circumstances described in subsection (1).

Section 56 – Distribution of client account

134. This section indicates that, should a licensed provider go into administration, or be wound up, or have a provisional liquidator, liquidator, receiver or judicial factor appointed, or should it pass a winding up order (unless it does so simply for the purposes of reconstruction or amalgamation with another licensed provider), any client’s monies of the kind indicated in section 42 of the 1980 Act must be distributed in the way that section 42 of that Act requires. Section 42 deals with the distribution of sums in client bank account kept by a solicitor or an incorporated practice.

Professional practice etc.

Section 57 – Employing disqualified lawyer

135. Section 57 applies to:

- a solicitor who has been struck off the roll or suspended from practice;
- a European or foreign lawyer who has been suspended or whose registration has been withdrawn;
- an individual practitioner (as defined in section 37(5)) who has been either struck off, or suspended or disqualified from practising; or
- an incorporated practice whose certificate of recognition has been revoked.

136. The licensed provider, knowing that a person is so disqualified, must not employ or pay that person (subsection (2)), unless the approved regulator has given permission so to do (subsection (3)), which it may do for a specified period and with conditions attached (subsection (4)). Subsections (5) and (6) provide for appeals to the Court of Session in certain situations. Subsection (7) provides that if a licensed provider knowingly and deliberately employs a disqualified person, or wilfully contravenes any conditions, its licence may be revoked or suspended.

Section 58 – Concealing disqualification

137. Section 58 applies to the same persons as in section 57. It provides that a person (or incorporated practice) who has been disqualified will be guilty of an offence if, while disqualified, that person seeks or accepts employment by a licensed provider without informing
it of the disqualification. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

**Section 59 – Pretending to be licensed**

138. Section 59 provides that a person commits an offence if that person pretends to be a licensed provider, or takes or uses any name, title, addition or description implying that the person is a licensed provider. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

**Section 60 – Professional privilege**

139. Legal professional privilege protects the confidentiality of communications between a solicitor and the solicitor’s client that were conducted for the purpose of receiving legal advice, both oral and in writing, and of documents that are created for the main purpose of gathering evidence for use in legal proceedings. This section ensures that the clients of licensed providers have essentially the same legal professional privilege as they would have had if they had instructed a traditional sole practitioner, or law firm or incorporated practice. Such a communication is to be treated as if it were a communication made by a solicitor for the purposes of disclosure. This reproduces the effect which exists under common law in relation to clients of solicitors and which exists in statute for incorporated practices and registered foreign lawyers in, respectively, sections 33A and 33B of the 1980 Act.

**CHAPTER 3 – FURTHER PROVISION**

*Achieving regulatory aims*

**Section 61 – Input by the OFT**

140. Section 61 concerns the occasions when the Scottish Ministers and approved regulators consult with the OFT and sets out what they must do. Such consultation should be in relation to competition issues. The Scottish Ministers and approved regulators must take into consideration any advice given by the OFT.

**Section 62 – Role of approved regulators**

**Section 63 – Policy statement**

141. Section 62 sets out the responsibilities of approved regulators with regard to the regulatory objectives and the adoption of best regulatory practice. Section 63 provides that an approved regulator must prepare and issue (and may revise and re-issue) a policy statement detailing how it will meet these responsibilities. It must obtain the approval of the Scottish Ministers for any version and also must publish it.
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

Complaints

Section 64 – Complaints about regulators

142. Section 64 requires the Scottish Ministers to investigate all complaints about approved regulators unless a complaint is considered vexatious, frivolous or without merit and unless it is about the way in which the approved regulator has handled a complaint. A complaint about how an approved regulator has handled a complaint must be referred to the SLCC (subsection (4)).

143. Subsection (3) requires the Scottish Ministers to notify the complainers and the approved regulator concerned if the complaint is not investigated or not upheld and give reasons for their decision. Subsection (5) requires the Scottish Ministers to notify both parties concerned if the complaint is upheld and give reasons for their decision. They may decide to take any of the measures or sanctions open to them (see section 29), including direction, censure or ultimately rescinding authorisation. Subsection (6) allows the Scottish Ministers to delegate the function of investigating a complaint on their behalf to the SLCC. Subsection (7) allows the Scottish Ministers to make further provision about complaints by regulations.

Section 65 – Complaints about providers

144. Section 65 amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by inserting a new Part 2A making special provision for licensed providers in respect of complaints.

145. The basic approach of the 2007 Act, which the Bill retains, is that all complaints about legal professionals or law firms are initially considered by the SLCC, but the only complaints which are investigated by the SLCC are those found to be about inadequate professional services (“services complaints”) or about how other complaints have been handled (“handling complaints”). Complaints which are found to be about the professional conduct of a legal professional (“conduct complaints”) are referred to the relevant professional organisation (e.g. the Society or Faculty) for investigation and possible disciplinary action.

146. New section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers, although they can be made about legal professionals working in the licensed provider. Services complaints may be made about either the licensed provider or individual practitioners within the provider.

147. Various duties apply to the relevant professional organisation in the 2007 Act, for example, to liaise with the SLCC if a complaint being dealt with as a conduct complaint appears on investigation to be a services complaint (section 15 of the 2007 Act), and to provide the SLCC with information (section 37 of the 2007 Act). These duties are also imposed on approved regulators by sections 57A and 57B of the 2007 Act in relation to services complaints against licensed providers and the new regulatory complaints.

148. New section 57B of the 2007 Act introduces a new type of complaint – a “regulatory complaint” which can be made about a licensed provider alleging that it has not acted in accord with the regulatory objectives, the professional principles, the approved regulator’s regulatory scheme, or the conditions of its licence. These complaints will be referred by the SLCC to the
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

approved regulator to deal with, in accordance with the regulatory scheme. The procedures and functions of the SLCC are essentially the same as in respect of a conduct complaint.

149. New section 57C(1) and (2) of the 2007 Act deal with the levy to be paid by a licensed provider to the SLCC. In addition to any levy paid by individual practitioners in the entity, the licensed provider must itself pay an annual general levy, which might be a different amount from that paid by individual practitioners and might differ depending on the type of licensed provider. This gives the SLCC the discretion to impose an additional levy on licensed providers if the cost of regulating complaints against such providers is disproportionately high. However, it is possible for this annual levy to be set at nil – meaning only the legal professionals in the licensed provider would pay the normal general levy. It would also be possible for the SLCC to reduce the levy in respect of professionals in a licensed provider under the provisions of section 29(2) of the 2007 Act.

150. New section 57C(3) of the 2007 Act requires the SLCC to provide advice about making a regulatory complaint if requested and gives the SLCC power to issue guidance to approved regulators and licensed providers about how the latter should deal with regulatory complaints.

151. New section 57D of the 2007 Act indicates that a handling complaint about a regulatory complaint is dealt with in the same way as a handling complaint about a conduct complaint (see sections 23 to 25 of the 2007 Act).

152. New section 57E of the 2007 Act ensures that certain terms used in the new Part 2A of the 2007 Act have the same meanings as in the Bill.

Registers and lists

Section 66 – Register of approved regulators

Section 67 – Registers of licensed providers

153. Section 66 provides that the Scottish Ministers must keep and publish a register of approved regulators and that it should include information such as contact details, the date on which the regulator was given approval under section 6, the date on which it was given the relevant authorisation (see section 7), the categories of legal services covered by each authorisation, and details of any measures or sanctions taken by the Scottish Ministers (section 29).

154. Similarly, section 67 provides that approved regulators must keep and publish a register of their licensed providers, and lists the information which is to be included. In section 67(5) the Scottish Ministers have the power by regulations to make further provision about the information which must be held in the registers of licensed providers and set out how these registers are to be kept and published.

Section 68 – Lists of disqualified persons

155. Section 68 provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider (see section 44), and those it has
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

determined to be unfit to be an investor in a licensed provider (see section 49). These provisions may, for example, assist in ensuring that disqualified persons do not seek similar positions in businesses regulated by another approved regulator. Subsections (2) and (4) list the information to be recorded about disqualified and unfit persons respectively. The Scottish Ministers must be notified of any alterations made to either list (subsection (5)).

156. Subsection (6) gives the Scottish Ministers a regulation-making power to make further provision regarding the information to be contained in the lists and to prescribe how these are kept and published.

Miscellaneous

Section 69 – Privileged material

157. Section 69 provides that any publication of any advice, report, or notice or of other material under Part 2 of this Bill is privileged in relation to the law on defamation unless there was malicious intent in publishing the material.

Section 70 – Immunity from damages

158. Section 70 provides that an approved regulator is (and those who work in it are) not liable for any damages for any act or omission in the exercise of their functions, provided the act or omission was not in bad faith.

Section 71 – Effect of professional or other rules

159. This section makes it clear that the Bill does not affect any professional rules which regulate professional practice, conduct or discipline of persons (other than solicitors and advocates) who provide professional services. In other words, if the rules of any other profession contain provisions which would forbid or restrict their operating in a business alongside legal professionals, they would not be able to participate in licensed providers unless and until those rules were changed. Sections 88(5) and 91(3) of the Bill deal with the effect of professional rules of solicitors and advocates.

PART 3 – CONFIRMATION SERVICES

160. Currently, the power to prepare papers on which to found or oppose an application for grant of confirmation in favour of executors, in the winding up of a deceased person’s estate, is restricted to solicitors, by virtue of section 32 of the 1980 Act. However it is possible for others to seek to be granted such rights by virtue of an application for the right to conduct litigation and have a right of audience by virtue of section 27 of the 1990 Act. Part 3 of this Bill provides a more direct route by which other professional groups (such as accountants) might be authorised to deal with executries, without seeking a wider power to conduct litigation.
Regulation of confirmation agents

Section 72 – Confirmation agents and services

161. Section 72 defines “confirmation services” and “confirmation agent” for the purposes of this Bill.

Section 73 – Approving bodies

Section 74 – Certification of bodies

162. Approving bodies are able to authorise individuals to provide confirmation services, and are responsible for regulating those individuals which they have so authorised (see section 75).

163. These sections set out the process and criteria for becoming an approving body of confirmation agents. Section 73 covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant’s proposed regulatory scheme. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body.

164. The Scottish Ministers have a regulation making power (under section 73(6)) to prescribe fees that they may charge applicants for the position of approving body.

165. The Scottish Ministers also have the power (under section 74(7)) to make regulations regarding the application process, the criteria for certification, and the types of bodies that are able to apply. This power may be used to set out the application process in more detail, and to address any issues which arise with regard to particular types of applying body.

Section 75 – Regulatory schemes

166. Section 75 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to provide confirmation services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for confirmation agents, sufficient arrangements for professional indemnity, rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the confirmation agent to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide confirmation services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Bill.

Section 76 – Financial sanctions

167. Section 76 makes specific provision about the financial penalties which may be imposed by an approving body on confirmation agents under section 75(2)(d)(ii), and about appeals against their imposition. Financial penalties are paid to the approving body, but must be used in the exercise of the approving body’s regulatory functions.
Section 77 – Pretending to be authorised

168. This section makes it an offence and specifies the penalty for a person who is not authorised as a confirmation agent to pretend that the person is.

Other regulatory matters

Section 78 – Revocation of certification

169. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification for failing to comply with a direction (under section 81(3)).

170. Under subsection (3), such revocation means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the revocation takes effect.

Section 79 – Surrender of certification

171. Section 79 deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its confirmation agents caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified agent prior to the surrender taking effect.

172. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.

173. As with revocation, surrender means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the surrender takes effect.

Section 80 – Register and list

174. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of confirmation agents. Approving bodies must provide a copy of the list and information on confirmation agents to the Scottish Ministers on request.

Ministerial functions

Section 81 – Ministerial intervention

175. Subsection (1) requires an approving body to provide information, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.

176. Subsection (2)(a) requires an approving body to review its scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish Ministers if it
proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers’ approval before any amendment takes effect. Without approval, the amendment is invalid.

177. Subsections (4) and (5) give the Scottish Ministers powers to make provision about performance review as well as about approving bodies and confirmation agents more generally.

Section 82 – Regard to OFT input

178. This section provides that there is an obligation on the Scottish Ministers to take account of any advice given by the OFT within the relevant timescale when they consult the OFT.

Related provision

Section 83 – Complaints about agents

179. Section 83 makes provision for complaints by inserting a new Part 2B into the 2007 Act dealing with special provision for confirmation agents.

180. New section 57F of the 2007 Act provides for Parts 1 and 2 of that Act to apply to complaints about confirmation agents. If they consider it necessary, the Scottish Ministers may modify the way these Parts operate in relation to complaints about confirmation agents. If there is either a services or a conduct complaint about a confirmation agent, the approving body is to be regarded as the relevant professional organisation.

181. New section 57G of the 2007 Act provides for the sections in the 2007 Act relating to complaints about the handling of conduct complaints (sections 23 to 25) to be applied to approving bodies (with whatever modification the Scottish Ministers may make by regulation should they consider it necessary).

182. New section 57H(1) of the 2007 Act makes provision for the payment of the annual general levy to the SLCC.

Section 84 – Privilege and immunity

183. Section 84 provides that any publication of any material under Part 3 of this Bill is privileged in relation to the law on defamation unless there was malicious intent in publishing the material. An approving body (and those who work in them) are not liable for any damages for any act or omission in the exercise of their functions unless the act or omission was in bad faith.

Section 85 – Consequential modification

184. These changes to the provision of services relating to confirmation require modification to other legislation (specifically, the Confirmation of Executors (Scotland) Act 1858, the 1980 Act, the 1986 Act, and the 2007 Act) and the Bill makes such provision in this section.
PART 4 – THE LEGAL PROFESSION

CHAPTER 1 – APPLYING THE REGULATORY OBJECTIVES

Section 86 – Application by the profession

185. This section requires regulators of the legal profession (as listed in subsection (2)) when carrying out their regulatory functions (as defined in subsection (3)) to act in a way which is compatible with the regulatory objectives of the Bill.

CHAPTER 2 – FACULTY OF ADVOCATES

Section 87 – Regulation of the Faculty

186. Section 87 sets out in statute the existing position regarding regulation of advocates, namely that the Court of Session is responsible for admitting and removing persons from the public office of advocates (including setting the criteria for admission and prescribing the procedure) and for regulating the professional practice, conduct and discipline of advocates. It can delegate any of this except the actual admitting and removal to the Lord President or the Faculty. In practice, the bulk of regulation is currently delegated to the Faculty and the Dean, including rules of professional conduct and disciplinary procedures.

Section 88 – Professional rules

187. Subsection (2) requires that all rules or changes to rules made by the Faculty relating to the criteria or procedure for admission or removal of advocates, and relating to regulating the professional practice, conduct and discipline of advocates must be approved by the Lord President and be published by the Faculty. If these requirements are not met then the rule is of no effect. The rule is also of no effect where a rule is made otherwise than by the Faculty of Advocates (subsection (3)). If the Court of Session makes or changes these rules it must be by Act of Sederunt. If the Lord President makes or changes these rules, he must publish them.

188. Subsections (4) and (5) makes it clear that this section does not change any rule relating to the professional practice, conduct and discipline of advocates that was in force at the time this section comes into force and that those rules regulating the professional practice of advocates (particularly relating to their involvement in and with licensed providers) still apply unless some other necessary step is taken, such as revocation of a rule.

Section 89 – Particular rules

189. Section 89 requires that the Scottish Ministers must consult the OFT and approve a change in any professional practice, conduct or disciplinary rule which prevents advocates from forming partnerships, before such a rule can have effect. It supersedes a similar rule in section 31 of the 1990 Act (which is repealed by section 89(4) of the Bill).
CHAPTER 3 – SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

Section 90 – Qualified persons

190. Section 90 makes various amendments to the 1980 Act to remove certain practising restrictions so as to allow the formation of licensed providers and remove particular offences.

191. Subsection (1) amends section 26 of the 1980 Act (offence for solicitors to act as agents for unqualified persons) to ensure that a licensed provider is not deemed to be an “unqualified person”.

192. Subsection (2) amends section 30 the 1980 Act (liability for fees of other solicitor) so that when a solicitor (or incorporated practice) acting on behalf of a client employs a licensed provider, the solicitor (or incorporated practice) is responsible for the licensed provider’s fees unless other arrangements to the contrary have been made.

193. Subsection (3) amends section 31 of the 1980 Act (offence for unqualified persons to pretend to be solicitor or notary public) to ensure that a licensed provider is not deemed to be an “unqualified person”.

194. Subsection (4) amends section 32 of the 1980 Act (offence for unqualified persons to prepare certain documents) so that it is clear that a licensed provider can prepare writs relating to moveable or heritable estate, writs relating to actions or proceedings in court, and papers relating to an application for grant of confirmation in favour of executors.

195. Subsection (5) amends section 33 of the 1980 Act (unqualified persons not entitled to fees, etc.) which deals with unqualified persons not being entitled to fees or other reward or expenses to ensure that this section does not apply to licensed providers.

196. Subsection (6) amends section 65(1) of the 1980 Act (interpretation) to ensure that a licensed provider is not deemed to be an “unqualified person”.

197. Subsection (7) amends section 17 of the 1990 Act (qualified conveyancers) to ensure that independent qualified conveyancers can provide conveyancing services upon the account of, or for the profit of, licensed providers.

Section 91 – Changes as to practice rules

198. As with section 90 of the Bill, this section amends the 1980 Act to remove restrictions which would prevent the formation of licensed providers.

199. Section 34 of the 1980 Act is concerned with the practice rules made by the Council in respect of the professional practice, conduct and discipline of solicitors.
200. Subsection (1) inserts a new section 33C into the 1980 Act to ensure that any rules made under section 34 of that Act do not unduly restrict the involvement of solicitors in or with a licensed provider, or the employment of solicitors by a licensed provider. Subsection (2) makes various amendments to the 1980 Act consequential on subsection (1).

201. Subsection (2) also amends the 1980 Act and the 1990 Act to remove references to multi-disciplinary practices. Multi-disciplinary practices will be an available business option for licensed providers under this Bill.

The Law Society

Section 92 – Council membership

202. This section amends section 3 and Schedule 1 to the 1980 Act in order to allow the appointment of non-solicitor members to the Council. The amendment includes a provision (new paragraph 3A(4) of Schedule 1 to the 1980 Act) giving the Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors (or a proportion of them) in order to be eligible for appointment to the Council. This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council. Appropriate consultations are required before the Scottish Ministers can make any of these regulations.

Section 93 – Regulatory committee

203. This section amends the 1980 Act by inserting a new section 3B to establish that the regulatory functions of the Council must be carried out on its behalf by a regulatory committee which is to include lay members.

204. Subsection (4) of the new section 3B ensures that the regulatory committee can still function where the number of lay members is temporarily lower than it should be. Lay persons are defined in subsection (8).

205. The Scottish Ministers are given a regulation-making power in subsection (5) of the new section 3B to make further provision about the Council’s regulatory functions if necessary to ensure the regulatory functions are exercised independently and properly, and also to modify in certain respects the definition of the Council’s “regulatory functions”.

Section 94 – Removal from solicitors roll

206. Section 94 amends sections 10 and 53 of the 1980 Act. The effect of these two amendments is that the Scottish Solicitors’ Discipline Tribunal has the power to order that a solicitor, who has voluntarily removed his or her name from the roll, is prohibited from having his or her name restored to the roll except by order of that Tribunal.
CHAPTER 4 – OTHER BODIES

Scottish Legal Aid Board

Section 95 – Exclusion from giving legal assistance

207. This section amends section 31 of the 1986 Act. Currently, the Society and the Faculty have the power to prevent solicitors and advocates respectively (on the grounds of their conduct) from being instructed by a client to whom legal aid or advice and assistance is available. This amendment transfers the current powers of the Society and the Faculty to the Board. There is an appeal under the 1986 Act to the Court of Session.

Section 96 – Availability of legal services

208. Section 96 amends the 1986 Act in order to give the Board responsibility for monitoring the availability and accessibility of legal services in Scotland, and for giving advice to the Scottish Ministers regarding this. This is linked to the regulatory objective of promoting access to justice, as well as the objectives of promoting the interests of consumers, competition in the provision of legal services, and an independent, strong, varied and effective legal profession.

Section 97 – Information about legal services

209. Section 97 requires the Society, the Faculty, and the Scottish Courts Service to provide information that the Board might reasonably require in monitoring the availability and accessibility of legal services in Scotland. This is similar to the duty placed on approved regulators (section 25(1)).

Scottish Legal Complaints Commission

Section 98 – Minor amendments

210. This section makes several minor amendments to the 2007 Act.

FINANCIAL MEMORANDUM

INTRODUCTION

211. This document relates to the Legal Services (Scotland) Bill introduced in the Scottish Parliament on 28 September 2009. It has been prepared by the Scottish Government on behalf of Kenny MacAskill MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

212. The Policy Memorandum which is published separately explains in detail the policy intention of the Legal Services (Scotland) Bill. The purpose of this Financial Memorandum is to set out the costs associated with the reform measures introduced by the Bill, and as such it
should be read in conjunction with the Bill, the other accompanying documents, and the regulatory impact assessment (RIA).}

**BACKGROUND**

213. The Legal Services (Scotland) Bill will remove restrictions on solicitors entering into business relationships with non-solicitors and will allow investment by non-lawyers and external ownership. Thus it will allow solicitors, should they so choose, to enter into any type of licensed legal services provider (“licensed provider”). The Bill will provide for the licensing and regulation of such entities.

214. The Bill will also modify aspects of the governance of the Law Society of Scotland (“the Society”) and codify the regulatory framework that governs relationships between the Lord President and the Court of Session and the Faculty of Advocates (“the Faculty”). As this does not involve any change in the current regulation of advocates, there are no costs involved for any of these parties, nor for Government, nor for local government, nor for other stakeholders. The Society is modernising its governance arrangements irrespective of the Bill. Because of this, the financial implications for the changes to its governance required are likely to be cost-neutral. Detailed costs relating to the Bill are not available as yet.

215. Full details of the background, objectives and effect of the Bill’s provisions can be found in the accompanying Policy Memorandum. This also contains details of the consultation that the Scottish Government undertook early in 2009. A copy of the responses to the consultation (other than those given in confidence) have been made available on the Scottish Government’s website. A summary and analysis of these responses will be available at www.scotland.gov.uk/publications in October 2009. Copies of these documents will also be placed in the Scottish Government library with further copies in the Parliament’s Information Centre.

**COSTS ON THE SCOTTISH GOVERNMENT**

216. The approach taken by the Scottish Government is that the Bill will provide the regulatory framework for licensed providers and confirmation agents in Scotland. The Scottish Government does not intend to create a super-regulatory body (such as the Legal Services Board in England and Wales) and therefore there will be no costs involved in setting up and maintaining such a body.

217. Instead, it is intended that the Scottish Government will license and regulate approved regulators of licensed providers, and approving bodies of confirmation agents. These will be professional or other bodies that, on application to be approved regulators/approving bodies, will be required to set down a scheme by which they will regulate licensed providers/confirmation agents. The Scottish Government will incur costs in dealing with these applications. It is anticipated that these will possibly start in the financial year 2010/2011, but are more likely in the financial year 2011/2012. It is not intended to charge applicants and so these costs will not

---


be recoverable (though the Bill provides the Scottish Ministers with a power to charge a fee should they wish to do so in the future).

218. It is anticipated that between one and six bodies may apply to be approved regulators ⁴, and one or two to be approving bodies. There will be an initial loading on the Scottish Government whilst dealing with the first applications and it is estimated that this will last for 12 to 24 months. In addition, it is the intention that the team dealing with licensing and regulation will also be concerned with issues of policy.

Applications to be approved regulators

219. It is anticipated that this Bill will initially require the following staff for a one- to two-year period in order to process applications to be approved regulators. The staff costs are based on the Scottish Government pay scales for August 2009. A mid-range figure has been taken for each grade and band with 33% added for pensions and national insurance. The range of figures is dependent on how many applications are being dealt with at one time.

<table>
<thead>
<tr>
<th>1-2 applications</th>
<th>3-4 applications</th>
<th>5-6 applications</th>
</tr>
</thead>
</table>
| 1 x A3 (10%)
| £2,150           | 1 x A3 (20%)     | £4,300           | 1 x A3 (25%)     | £5,375 |
| 1 x B1 (25%)     | £7,500           | 1 x B1 (30%)     | £9,000           | 1 x B1 (35%)     | £10,500 |
| 1 x B2 (60%)     | £21,960          | 1 x B2 (90%)     | £32,940          | 2 x B2 (60%)     | £43,920 |
| 1 x C1 (10%)     | £6,100           | 1 x C1 (15%)     | £9,150           | 1 x C1 (20%)     | £12,200 |
| **Total**        | **£37,710**      | **Total**        | **£55,390**      | **Total**        | **£71,995** |

220. It is anticipated that these costs will be met from within existing budgets with the team that will implement the Act dealing with the applications, regulation and policy. The regulators/approving bodies can be licensed for unlimited periods or for a period stipulated by the Scottish Government and which can be renewed. The latter will put a greater burden on the Scottish Government, but it is anticipated that the work involved in renewal of a licence will be considerably less than for the initial licence and that it can be absorbed by the team dealing with regulation.

221. The Bill will also require the Scottish Government to monitor the approved regulators and their performance apply sanctions for breaches of the regulatory objectives and principles. The estimated staffing will be as follows. These figures represent the staffing requirements and costs after the initial bout of applications.

---

⁴ The Society has indicated to Government its interest and ICAS has discussed its interest with members of the Bill Reference Group. Other possibilities are the Royal Institution of Chartered Surveyors (RICS), the Royal Institute of British Architects (RIBA), the Financial Services Authority (FSA), and the Funeral Planning Authority.

⁵ Percentages refer to the estimated proportion of the staff member’s time which would be spent on the relevant tasks.
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

<table>
<thead>
<tr>
<th>1-2 approved regulators</th>
<th>3-4 approved regulators</th>
<th>5-6 approved regulators</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (10%)</td>
<td>1 x A3 (15%)</td>
<td>1 x A3 (20%)</td>
</tr>
<tr>
<td>£2,150</td>
<td>£3,225</td>
<td>£4,300</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>1 x B1 (20%)</td>
<td>1 x B1 (30%)</td>
</tr>
<tr>
<td>£3,000</td>
<td>£6,000</td>
<td>£9,000</td>
</tr>
<tr>
<td>1 x B2 (50%)</td>
<td>1 x B2 (65%)</td>
<td>1 x B2 (80%)</td>
</tr>
<tr>
<td>£18,250</td>
<td>£23,725</td>
<td>£29,200</td>
</tr>
<tr>
<td>1 x C1 (10%)</td>
<td>1 x C1 (10%)</td>
<td>1 x C1 (10%)</td>
</tr>
<tr>
<td>£6,100</td>
<td>£6,100</td>
<td>£6,100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td><strong>£29,500</strong></td>
<td><strong>£39,050</strong></td>
<td><strong>£48,600</strong></td>
</tr>
</tbody>
</table>

222. It is anticipated that these costs will be met from within existing Scottish Government budgets with the team that will implement the Bill and deal with policy issues monitoring the approved regulators/approving bodies.

223. It is not anticipated that there will be any other costs which will fall on the Scottish Government as a result of the provisions of the Bill unless it has temporarily to fulfil the function of an approved regulator.

224. If an approved regulator was unable to fulfil its functions, the Scottish Government may have to take over the role of the approved regulator for a limited time whilst alternative arrangements were put in place or a situation investigated. The options for alternative arrangements would be to transfer the regulation of the licensed providers to another approved regulator, the setting up of a new NDPB, or the use of an existing NDPB. The Scottish Government favours the first option. The cost of any interim regulation would depend on the number of entities to be regulated and the length of time that the Government had to directly regulate those entities. This is difficult to estimate as Government might be required to directly regulate fewer than 10 or more than 200 entities, depending on the number of licensed providers regulated by the approved regulator. The intention is that the team that will implement the Bill will be responsible for this short-term regulation. If the approved regulator involved was responsible for a large number of licensed providers, it may be necessary to temporarily employ an extra member of staff at B2 level at £36,600 a year.

Applications to be approving bodies

225. It is anticipated that this Bill will initially require the following staff for a one- to two-year period in order to process applications to be approving bodies. Again, the staff costs are based on the Scottish Government pay scales for August 2009. A mid-range figure has been taken for each grade and band with 33% added for pensions and national insurance.
226. It is anticipated that these costs will be met from within existing budgets with the team that will implement the Act dealing with the applications, regulation and policy. The approving bodies can be licensed for unlimited periods or for a period stipulated by Government and which can be renewed. The latter will put a greater burden on Government, but it is anticipated that the work involved in renewal of a licence will be considerably less than for the initial licence and that it can be absorbed by the team dealing with regulation.

227. The Bill will also require the Government to monitor the approving bodies and apply sanctions for breaches of the regulatory objectives and principles, and of the regulatory scheme. The estimated staffing will be as follows. These figures represent the staffing requirements and costs after the initial bout of applications.

<table>
<thead>
<tr>
<th>1-2 approving bodies</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (5%)</td>
<td>£1,075</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>£3,000</td>
</tr>
<tr>
<td>1 x B2 (20%)</td>
<td>£7,300</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£13,193</strong></td>
</tr>
</tbody>
</table>

228. It is anticipated that these costs will be met from within existing Scottish Government budgets with the team that will implement the Bill and deal with policy issues monitoring the approved regulators/approving bodies.

POTENTIAL PAYMENTS TO THE SCOTTISH GOVERNMENT

229. Under schedule 4 (which is introduced by section 29(3)), the Scottish Ministers can impose a financial penalty on an approved regulator where the regulator fails to:

- adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
- comply with a direction given in accordance with schedule 2.

230. It is estimated that such financial penalties will be imposed only rarely, and under exceptional circumstances.

231. Under sections 5(6) and 73(6), the Scottish Ministers have the power to impose a fee on applicants for the position of approved regulator or approving body, and to approved regulators on an ongoing basis. However, it is not the intent of the Scottish Government to charge such bodies in the first instance – this power will only be used if required to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. If such fees were to be charged, they would only be set at such a level to recover the administrative costs of regulating those bodies.
232. Any penalties or fees will be paid into the Scottish Consolidated Fund.

**COSTS ON LOCAL AUTHORITIES**

233. The Scottish Government does not expect local authorities to incur any additional costs as a result of the changes provided for in this Bill.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

**Approved regulators**

234. There are two aspects to the cost of being an approved regulator. Firstly, the costs of applying to be an approved regulator and, secondly, the costs involved in fulfilling the functions of an approved regulator.

235. The first thing to note is that, as mentioned in paragraph 231, the Scottish Ministers have the power to impose fees on approved regulators and applicants for that position. If this power were to be used, it would result in a cost to approved regulators.

236. As previously stated, it is anticipated that licensed providers will be regulated by one to six approved regulators. It is difficult to estimate how many licensed providers are likely to be established. The Scottish Government considers that in time it may be in the range of 150 to 250. The numbers of entities regulated by each approved regulator will differ and it is again difficult to give any estimates as an approved regulator may regulate only a few licensed providers, or it could regulate a large number.

237. Two bodies have shown interest in applying for approved regulator status. The Society has publicly expressed its intent to apply, while ICAS has indicated that it may be minded so to do and to adapt its own regulatory model of regulated non-members. Of course, it is not known at this stage whether either will, in fact, apply, nor whether either will be licensed as approved regulators. It is expected that the majority of licensed providers will come from the present medium-sized and large solicitor firms and it is anticipated that they would mostly opt to be regulated by the Society. It is also anticipated that there will be some interest in becoming licensed providers from firms of chartered accountants which, under this legislation, would be able to appoint a lawyer as a partner and offer legal services. Such firms may well opt to be

---

6 The Society has produced the following table of the breakdown of solicitor firms in Scotland.

<table>
<thead>
<tr>
<th>Year</th>
<th>Sole practitioner</th>
<th>2-4 partners</th>
<th>5-9 partners</th>
<th>10+ partners</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>571 46%</td>
<td>506 40%</td>
<td>111 9%</td>
<td>62 5%</td>
<td>1250</td>
</tr>
<tr>
<td>2006</td>
<td>559 45%</td>
<td>512 41%</td>
<td>110 9%</td>
<td>65 5%</td>
<td>1246</td>
</tr>
<tr>
<td>2007</td>
<td>569 46%</td>
<td>502 40%</td>
<td>111 9%</td>
<td>65 5%</td>
<td>1247</td>
</tr>
<tr>
<td>2008</td>
<td>569 46%</td>
<td>496 40%</td>
<td>112 9%</td>
<td>61 5%</td>
<td>1238</td>
</tr>
</tbody>
</table>

It is thought that medium to large solicitor firms are most likely to be interested in becoming licensed providers. The estimate is based on this and the likelihood that there will be other non-solicitor professional firms that might be interested in employing solicitors to offer legal services as licensed providers together with some interest shown by the supermarkets.

7 See footnote 4 above.
regulated by ICAS, but it is anticipated that the numbers of such firms would be small compared with the number of solicitor firms. Thus, the Society may require considerably more staff to regulate licensed providers than ICAS.

238. The above means that the number of licensed providers that an approved regulator will regulate could be between 10 and 200. Some economies of scale in the cost of regulation for the larger numbers is expected, but this might be negated if there is a requirement to rent more office space to accommodate staff involved in licensing and regulation.

239. Approved regulators will incur various costs associated with licensing. Costs will be incurred in the initial consideration of applications from businesses that wish to become licensed providers and then, further into the future, costs will be incurred with process of renewal of the licences. There will also be the costs of regulating those entities. The Government will require that each licensed provider provide the approved regulator with an annual self-assessment audit. In addition, the approved regulators should undertake spot-check audits on all entities within a given time period. Should either of these audits give rise to concern, resources will have to be devoted to investigation and possible enforcement measures.

240. The financial penalties possible under schedule 4 are a potential cost for approved regulators. However, it is expected that this provision will be used infrequently, and only under exceptional circumstances.

241. It is very difficult to estimate what the costs for approved regulators would be as it is not known which bodies will apply to become approved regulators (and therefore their current resources) or what, if any, charges it will apply to its licensed providers. The bodies applying to be approved regulators will be asked to provide an indication of the fees they will charge to licensed providers. It is anticipated that they will charge an initial application fee\(^8\) to each applicant, and an ongoing annual fee to each licensed provider. However, there will be no compulsion either to fund licensing and regulation in this way\(^9\) or to charge any fee whatsoever.

242. In order to give an estimate,\(^10\) consideration was given to what the potential cost would be for the Scottish Legal Complaints Commission (“the SLCC”) to be used as a regulator instead of the approved regulators envisaged (see paragraphs 243 and 244 for details). The assumption was made that a large approved regulator would incur similar start-up and regulatory costs. Set-up costs were estimated at £100,000, and the annual running costs at between £103,000 and £173,000. It should be noted that these figures relate to an existing body taking on the regulatory functions of an approved regulator – if a new body were to be created, the set up costs would be considerably greater.

---

\(^8\) This would be a fee to cover the cost in processing the application to be a licensed provider.

\(^9\) It would be possible for the Society, for example, to raise the revenue for regulation through an increase in the practising fee for all solicitors.

\(^10\) The Society has commissioned research into assessing the costs involved in licensing and regulating licensed providers but as yet no figures are available.
243. If the SLCC were to be used to fulfil the role of approved regulator, it is considered that the current accommodation is such that it could absorb the extra staff without increasing its accommodation costs. The estimated costs would be as in the table below.

<table>
<thead>
<tr>
<th>Core staff</th>
<th>With incremental staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 caseworker/policy adviser</td>
<td>1 caseworker/policy adviser</td>
</tr>
<tr>
<td>£38,000</td>
<td>£38,000</td>
</tr>
<tr>
<td>1 caseworker</td>
<td>3 caseworkers</td>
</tr>
<tr>
<td>£35,000</td>
<td>£105,000</td>
</tr>
<tr>
<td>1 admin support</td>
<td>1 admin support</td>
</tr>
<tr>
<td>£20,000</td>
<td>£20,000</td>
</tr>
<tr>
<td>IT, stationery and other costs</td>
<td>IT, stationery and other costs</td>
</tr>
<tr>
<td>£10,000</td>
<td>£10,000</td>
</tr>
<tr>
<td><strong>Total cost</strong></td>
<td><strong>Total cost</strong></td>
</tr>
<tr>
<td><strong>£103,000</strong></td>
<td><strong>£173,000</strong></td>
</tr>
</tbody>
</table>

244. In addition, set-up costs of £100,000 would be expected, made up as follows:

- Recruitment & HR                  £20,000
- Legal advice                      £30,000
- IT and telephony                  £10,000
- Training                          £15,000
- Website                           £5,000
- Miscellaneous and contingencies   £20,000

245. If an approved regulator were to regulate 200 licensed providers, the £100,000 set-up costs could be recovered through a licensing fee of £500, and the annual running costs of between £103,000 and £173,000 through a regulatory fee of between £515 and £865. It is expected that the unit cost of regulation would be higher if the operation was on a smaller scale. However, the Government does intend to reserve the right to consider the fees in relation to an approved regulator’s costs and to be able to make an order capping the fee if it considers that regulator’s fee to be unreasonable.

246. In summary, it is not anticipated that licensing and regulation costs will be a burden on approved regulators as they will have the ability to recover their costs through licensing and annual fees charged to the licensed providers.

**Approving bodies for confirmation agents**

247. It is anticipated that one or two bodies may apply to become approving bodies for confirmation agents.

248. As with approved regulators, approving bodies will incur various costs associated with licensing. Costs will be incurred in the initial consideration of applications from individuals who wish to become confirmation agents and then, further into the future, costs will be incurred in relation to the renewal of licences.
249. In addition, the Scottish Ministers have the power to require approving bodies to carry out annual reviews of the performance of confirmation agents, and prepare a report on this. Should this power be used, there will obviously be a cost involved to the approving bodies.

250. As the regulatory framework for confirmation agents is both simpler and more narrowly focussed than that for licensed providers, the costs involved for the approving body are expected to be considerably lower. In addition, it is not anticipated that there will be a new class of professionals exclusively carrying out the functions of confirmation agents. It is more likely that an existing profession (such as chartered accountants) may seek to incorporate this activity into their existing professional role, and that the approving body will be their existing professional body. In this case, the ongoing regulatory costs will largely be absorbed into the wider professional regulatory costs.

251. It is anticipated that those costs will be recouped by the approving body from the members seeking to be confirmation agents.

252. As mentioned in paragraph 231, the Scottish Ministers have the power to impose an application fee on bodies seeking to become approving bodies. If this power were to be used, it would result in an additional cost to approved regulators.

253. In summary, it is not anticipated that licensing and regulation costs will be a burden on approving bodies as they will have the ability to recover their costs through licensing and annual fees charged to the confirmation agents. They in turn will only seek to be licensed as agents if they can recoup more than the likely costs of authorisation from the new business they are able to undertake.

254. As a comparison, the current registration costs for a conveyancing and executry practitioner are £430 per year if independent, and £115 per year if non-independent. Because the numbers are small, the regulation by the Society of this group of professionals is financially supported by the Scottish Government. This year, the Government has budgeted to provide £45,000 to the Society for this function (for the avoidance of doubt, no similar Government involvement in funding the regulation of confirmation agents is proposed).

**Licensed providers**

255. The consequence of the Bill’s provisions is that there will be costs imposed on licensed providers in terms of licensing fees, annual regulatory fees, and the cost of compliance with regulation. However, it is anticipated that these costs will be outweighed by the economic benefits of operating as licensed providers, which would not be possible without the Bill.

256. As stated previously, the costs of the licensing and annual regulatory fees are difficult to estimate. If there are 200 licensed providers regulated by an approved regulator, it is tentatively estimated that the licensing fee, if imposed by an approved regulator, will be in the region of £500 and the annual regulatory fee roughly in the range £500 to £900 (see paragraph 245).
257. In addition, the Bill will introduce a new type of legal complaint into the Legal Profession and Legal Aid (Scotland) Act 2007 – a regulatory complaint. This is a complaint about failure to have regard to the regulatory objectives or adhere to the professional principles, failure to comply with the approved regulator’s regulatory scheme, or failure to comply with licence conditions. As the SLCC will deal with services complaints, complaints about the handling of complaints, and the new regulatory complaints described above, licensed providers will be required to pay an annual levy. An additional complaints levy will be imposed in the event that a complaint is upheld.

258. The levy paid by licensed providers will be separate from and may be different from that charged to individual practitioners and may differ from provider to provider depending on the services offered. At present, solicitors with 3 years or more experience pay £275 each year. Further, if a complaint is upheld, the SLCC will charge an additional amount which varies from £500 to £2000 depending on circumstances.

259. The economic costs and benefits are discussed in the “Costs and benefits” section of the RIA, The economic benefits are considered to outweigh the economic costs.

Confirmation agents

260. There will be costs imposed on confirmation agents in terms of application fees, annual regulatory fees, and the cost of compliance with regulation. However, it is anticipated that these costs will be outweighed by the economic benefits of operating as confirmation agents.

261. The annual cost to a confirmation agent is extremely difficult to anticipate, as it will depend on a number of factors, for example the total number of confirmation agents.

262. Confirmation agents will also be required to pay the annual general levy to the SLCC, as well as the complaints levy where it arises.

Solicitors in traditional firms

263. There will be no compulsion on sole practitioners or traditional solicitor partnerships to become licensed providers. They will continue to be regulated by the Society and, except in the situation outlined below, there is unlikely to be any change in the cost of their regulation levied by the Society.

264. Until it is known how the costs of regulation of licensed providers will be levied by approved regulators, it is difficult to be certain that the costs will be borne solely by licensed providers. It would be possible for a professional body to finance licensing and regulation through an increase in fees levied on the entire profession. For example, the Society could finance the regulation through an increase in the cost of the practising certificate for all solicitors. If that were the case, all practising solicitors, including sole practitioners and those in traditional partnerships, would be contributing to the costs of regulation of licensed providers. This would be for the Society to justify to its members if they decided to impose a levy across the board.
Individuals and businesses

265. It is anticipated that increased competition and the economic benefits of licensed provider status will result in economies of scope and scale for businesses, and that the benefits will be passed on to consumers in the form of reductions in the cost of legal services (see paragraph 259).

Scottish Legal Aid Board

266. The Bill provides the Scottish Legal Aid Board (“the Board”) with a new power of being able to decide to exclude advocates or solicitors from undertaking work involving legal aid on the grounds of conduct. It also requires the Board to monitor the availability and accessibility of legal services in Scotland.

267. These new responsibilities will have a cost to the Board, but that cost is expected to be small and it is not possible at present to provide any figures. The numbers of exclusions has in the past been very small, and it is anticipated that this role will require little additional work for the Board. Similarly, the monitoring role is only likely to require the additional assessment of reports from the Society, the Faculty, and the Scottish Courts Service, probably on an annual or bi-annual basis.
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

## TABULAR SUMMARY

<table>
<thead>
<tr>
<th>Costs to:</th>
<th>Licensed providers</th>
<th>Confirmation agents</th>
<th>Traditional solicitor firms</th>
<th>SLAB</th>
<th>Individuals &amp; businesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>SG for ARs</td>
<td>Possibly £500</td>
<td>Currently unknown</td>
<td>积极推动</td>
<td>Currently unknown</td>
<td>Reduced costs for legal services (para 259)</td>
</tr>
<tr>
<td></td>
<td>(licensing fee might be higher for smaller regulators)</td>
<td>(para 256)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SG for ABs</td>
<td>Possibly £500-£900</td>
<td>Currently unknown</td>
<td>积极推动</td>
<td>Currently unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(annual fee might be higher for smaller regulators)</td>
<td>(para 256)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Costs to:

<table>
<thead>
<tr>
<th>Costs to:</th>
<th>Licensed providers</th>
<th>Confirmation agents</th>
<th>Traditional solicitor firms</th>
<th>SLAB</th>
<th>Individuals &amp; businesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>SG for ARs</td>
<td>Initial</td>
<td>Initial</td>
<td>Set up possibly £100,000 each</td>
<td>Currently unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>£37,710-71,995pa</td>
<td>£18,989 - £34,372pa</td>
<td>(para 221)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(para 219)</td>
<td>(para 225)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SG for ABs</td>
<td>Ongoing</td>
<td>Ongoing</td>
<td>Annual possibly £103,000 - £173,000</td>
<td>Currently unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>£29,500-£48,600pa</td>
<td>£13,193 – £22,045pa</td>
<td>(para 221)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(para 221)</td>
<td>(para 227)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAs</td>
<td>Nil</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approved regulators (ARs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Set up possibly £100,000 each</td>
<td>(para 242)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approving bodies (ABs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

268. On 30 September 2009, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Legal Services (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

269. On 30 September 2009, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Legal Services (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
LEGAL SERVICES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Legal Services (Scotland) Bill introduced in the Scottish Parliament on 30 September 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 30–EN.

CURRENT STRUCTURE AND REGULATION OF THE LEGAL PROFESSION

The Scottish legal services market

2. The legal profession is a significant contributor to the Scottish economy, with an annual turnover estimated at over £1 billion. The profession performs a vital role in society by helping people at times of crisis, protecting the vulnerable and upholding the criminal justice system – all of which contribute to the Scottish Government’s Safer and Stronger objective. A strong, independent, high quality legal profession based in Scotland is viewed by the Scottish Government as a key part of the institutional framework of a modern democracy.

3. The profession currently faces significant challenges, including competition from English firms entering the Scottish legal services market, and has been significantly affected by the economic downturn. The proposals in the Bill offer the opportunity to be able to offer new forms of service, improve efficiency and innovation within solicitors firms, and have access to different methods of capitalisation. They seek to ensure that the Scottish legal profession will not be at a competitive disadvantage with the rest of the UK.

4. Legal services in Scotland are predominantly provided by solicitors and advocates. There were 10,434 solicitors holding practising certificates on 31 October 2008\(^1\) and 456 advocates as at 28 August 2009.

Scottish solicitors

5. 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

\(^1\) “Measuring up to the challenges in a time of change”, Law Society of Scotland annual report 2008, p54 can be viewed from a link on page http://www.lawscot.org.uk/Members Information/AGM/
statutory basis for the Society; the solicitors’ right to practice; and the conduct, discipline, professional practice, complaints\textsuperscript{2} and disciplinary proceedings relating to solicitors in Scotland. The Society has statutory responsibility for the promotion of the interests of the solicitors’ profession, as well as promotion of the interests of the public in relation to the profession.

6. Historically, solicitors have been “men and women of business” and there is no strict definition of the range of work which they undertake, or which might be covered by the term “legal services”. Solicitors provide advice and representation in areas including conveyancing, employment, personal injury, financial services and commercial business, criminal law, consumer law, family law and debt, welfare and housing law.

7. There are certain areas of business which are legally restricted to qualified professionals, primarily solicitors. There are in section 32 of the 1980 Act. In effect, these are conveyancing, applying for confirmation in executries, and preparing writs in court proceedings. All practicing solicitors are entitled to undertake these types of work. Section 32 does allow other categories of legal professionals to provide reserved legal services. These are advocates (in relation to court proceedings), conveyancing and executry practitioners (see paras 17 and 18), and those who have rights to conduct litigation or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”) (see paras 15 and 16).

8. All solicitors have rights of audience in the district and sheriff courts. Solicitors who are authorised to practice as solicitor advocates also have rights of audience in the Court of Session and High Court of Justiciary, the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. (The Appellate Committee and Judicial Committee will be replaced by the UK Supreme Court on 1 October 2009.)

9. There are currently restrictions in the 1980 Act and in the Society’s rules on the ways in which solicitors may organise their businesses. Solicitors are not allowed to form partnerships or incorporated practices with non-solicitors. Non-solicitors cannot own and cannot control legal practices and cannot share fees or profits. Although solicitors may work for private and public organisations as in-house lawyers, they cannot offer services to the public in that capacity.

10. Solicitors cannot form a business relationship with an advocate.

Advocates

11. The Faculty of Advocates (“the Faculty”) is an independent body of lawyers who have been admitted by the Court of Session to practise as advocates. 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.

\textsuperscript{2} Not all complaints about solicitors are dealt with under the 1980 Act; some are provided for under the Legal Profession and Legal Aid (Scotland) Act 2007, which established the Scottish Legal Complaints Commission.
12. The basis on which advocates are regulated is set out in the Faculty’s Guide to the Professional Conduct of Advocates as follows:

“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.”

13. Advocates have rights of audience in all courts in Scotland and in the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council. Advocates also provide specialist legal advice.

14. The current rules of the Faculty prevent advocates from holding client funds, and from entering into partnership, whether with another advocate or any other person. Advocates normally act on instructions from a solicitor, and there are restrictions on the extent to which they may offer services directly to individuals or businesses.

Bodies with rights to conduct litigation and rights of audience

15. Sections 25 to 29 of the 1990 Act provide that the Lord President of the Court of Session (“the Lord President”) and the Scottish Ministers may grant professional and other bodies rights to conduct litigation and rights of audience in the Scottish courts.

16. To date, the Association of Commercial Attorneys is the only body to have successfully applied for and been granted rights to conduct litigation and rights of audience. Its regulatory scheme can be found at http://www.scotland.gov.uk/Topics/Justice/legal/Rights-of-Audience-1-1/schemes/aca/acasch.

Conveyancing and executry practitioners

17. The 1990 Act made it possible for people other than solicitors to be licensed to practice as conveyancing or executry practitioners.

18. 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 eighteen practitioners.

Complaints regime

19. The complaints regime in the legal profession was reformed in the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”). This established the Scottish Legal Complaints Commission (“the SLCC”). It acts as a gateway to all complaints against the profession. Broadly, complaints about inadequate professional services are dealt with by the SLCC, while issues of professional conduct are handled by the relevant professional body (such as the Society or Faculty).

HISTORY OF PROPOSED REFORMS

20. The consideration of reform in the legal services market in the UK was initially driven by the 2004 European Commission report on competition in the liberal professions. In England and Wales, this was followed by the Review of the Regulatory Framework for Legal Services in England and Wales in 2004 (the “Clementi report”), and the Legal Services Act 2007 (“the LSA 2007”).

21. The Clementi report concluded that the regulatory framework of the English and Welsh legal services market lacked clear objectives and had insufficient regard to the interests of consumers; and that business structures had changed little while business practices had changed significantly. It favoured a new regulatory framework which permitted a high degree of choice for consumers in how they obtain legal services, and choice for lawyers in the type of business they worked within.

22. The LSA 2007 which followed created a new “super-regulator”, the Legal Services Board (“LSB”), to license the regulators of legal services, and established a comprehensive regulatory framework overseen by the LSB. Once the new system is fully in place, English solicitors and barristers will be able to operate in a variety of new business structures. From 31 March 2009, it has been possible for English law firms to operate as “legal disciplinary practices”, which can be owned and managed by lawyers from different branches of the profession (e.g. solicitors and barristers), and with up to 25% of the owners or managers being non-lawyers. The full range of alternative business structures are unlikely to be in operation until late 2011.

23. In Scotland, a Research Working Group (“RWG”) was set up by the Scottish Government to research the Scottish legal services market. The RWG reported in 2006. The RWG considered alternative business structures (“ABS”) for the legal profession, and concluded that this was a matter for further policy development by the Scottish Government. It recommended that sections 25 to 29 of the 1990 Act be commenced, and this was done on 1 March 2007.

---

5 http://www.legal-services-review.org.uk/content/report/report-chap.pdf
24. “Which?” submitted a super-complaint to the OFT on 8 May 2007 claiming that the current regulation of Scottish legal firms restricts choice to consumers and prevents the formation of alternative business structures. “Which?” argued that the lack of ABS reduced consumer choice and the potential for consumer savings, and advocated:

- removal of the current regulatory restrictions on solicitors and advocates working together on an equal footing, or bringing together lawyers and other professionals (for example accountants) to provide legal and other services to third parties.
- removal of the prohibition on consumers having direct access to advocates.
- the creation of an independent Scottish Legal Services Board, which would be responsible for the regulatory control of the Scottish legal bodies and consumer protection.

25. In its response, the OFT did not assume that the changes proposed for England and Wales through the LSA 2007 would automatically be suitable for the Scottish legal services 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.

26. In September 2007, the Cabinet Secretary for Justice set out the Scottish Government’s view that, although it did not agree that the Scottish legal system needed the radical changes being implemented in England and Wales, there was a need for reform. He challenged the profession to take a lead in identifying how to move forward. In a debate in the Scottish Parliament on 15 November 2007, MSPs generally welcomed the Scottish Government’s approach.

27. In December 2007, the Scottish Government published a policy statement in response to the OFT, noting the consultations which were underway within the Society and the Faculty and setting out the Scottish Government’s provisional views.

28. 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 ABS for a more modern and competitive legal service. The Society’s Council had no objection in principle to any business model and stated that 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.

29. The Faculty response, “Access to Justice: a Scottish Perspective: a Scottish Solution”, published in May 2008, favoured maintaining an independent referral Bar subject to the “cab...
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

rank” rule. Although the Faculty does not wish advocates to participate in ABS at this time, 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.

30. The Cabinet Secretary welcomed these proposals in a Parliamentary statement on 11 June 2008, and confirmed that legislative change would occur as soon as the Parliamentary timetable allowed, and that the focus of the legislation would be on the development of a robust system of regulation.

CONSULTATION

31. A Bill Reference Group was set up in autumn 2008 to support policy development and inform public consultation. The Group included representatives from the Society, the Faculty, Consumer Focus Scotland, the Scottish Legal Aid Board (“SLAB”), the OFT and Professor Alan Paterson of Strathclyde University. Discussions were also held with key stakeholders such as Which? and the Institute of Chartered Accountants of Scotland (ICAS). Minutes of the Group’s meetings can be found on the Scottish Government website.

32. The Scottish Government issued a consultation paper “Wider choice and better protection—a consultation paper on the regulation of legal services in Scotland” on 7 January 2009. It sought the public’s views on the proposed regulation of ABS for the delivery of legal services in Scotland. 47 responses were received, with around two thirds from organisations (i.e. law firms, representative bodies, consumer bodies etc.) and one third from individuals.

33. The consultation responses were broadly supportive of the introduction of ABS as it would enable better access to justice, with more choice, reduced prices, and the convenience of a one-stop shop. Balanced against this was a minority view that there was no need for ABS as it could threaten the independence of the legal system and there was not sufficient evidence to support its introduction. The consultation looked at three different models of ABS and the majority view was that any of the proposed ABS business structures (ABS involving non-lawyer ownership, ABS involving external ownership, multi-disciplinary practices) should be permitted.

34. Independent analysis of the consultation responses was commissioned but the final version of the report was not available for the preparation of this memorandum. However, the Scottish Government has considered the responses and has had access to interim reports on the official analysis. If the final report highlights any issues which have not been fully considered already, these will be considered before Stage 2 of the Bill. A copy of the responses to the consultation (other than those given in confidence) have been made available on the Scottish Government’s website. A summary and analysis of these responses will be available at www.scotland.gov.uk/publications in October 2009. Copies of these documents will also be placed in the Scottish Government library with further copies in the Parliament’s Information Centre.

---

12 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.
14 Available at: http://www.scotland.gov.uk/Publications/2008/12/29155017/0
15 Available at: http://www.scotland.gov.uk/Publications/2009/09/15151225/0
35. Any disagreements or contrary views expressed in the consultation responses are discussed further under each individual subject below. Similarly, alternative approaches which were considered are also discussed in relation to each topic.

POLICY OBJECTIVES OF THE BILL

36. The Scottish Government believes that the current restrictions on business structures are not necessary to secure public and consumer protection, and inhibit the options for Scottish solicitors to grow and innovate. Current structures are based on a partnership model which has historically had many strengths, but which is increasingly under strain from developments in the market – whether in relation to commercial firms or “high street” practices.

37. In relation to the “high street” or generalist local law firm:
   - increasing specialisation makes it harder to offer a general legal service in a modestly sized firm, and potentially creates opportunities for businesses operating outside the profession to enter the market (such as claims management companies)
   - some kinds of business such as re-mortgaging are increasingly “commoditised” – delivered by high volume businesses using large numbers of non-lawyers
   - people increasingly wish to use the internet to access services, including professional services, rather than develop a personal relationship with a local professional
   - the Society’s policy paper identifies that newly qualified solicitors appear increasingly to prefer careers in large commercial practices. The partnership model is dependent on new generations of lawyers who wish to take on the risk and responsibility of owning and managing a law firm, and may not be sustainable in the long term as the only option for those working in private practice.

38. The Scottish Government wishes to see a range of accessible legal services for the public. It believes that the high street law firm will remain a valuable and important part of Scottish life, but that the profession should be allowed the freedom to operate in new ways in order to address these challenges.

39. 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.

40. The great majority of this work is not subject to legal reservation to Scottish solicitors, who compete with English law firms and with other international businesses. Were the Bill not to go ahead, the risks are that:
   - Scottish law firms become increasingly unable to compete in these markets, particularly against English firms who have access to external capital and the ability to offer
combined services with other professionals, reducing the economic contribution made by the sector to Scotland

- Scottish law firms would either re-register as English firms, or be bought out by English firms, significantly eroding the scope and potentially the sustainability of the separate Scottish legal profession.

41. The third, and perhaps most important area of concern, is that of the consumers of legal services. The Research Working Group report and the Society’s policy paper both identify that there are aspects of the current legal services market where there is limited competition: clients can have difficulty in accessing services, including in the areas of family law and debt, welfare and housing law.

42. This is unlikely to be entirely attributable to business models, and the Scottish Government has made improvements in civil legal aid to support the provision of publicly funded advice by the private sector. But there is an increasing consensus that legal advice in these areas should be seen as part of a wider spectrum of support and advice, and that holistic models of mixed service provision may be better for clients and more efficient. Greater flexibility in how legal services can be delivered potentially creates opportunities to develop such models, whether by the private sector, social enterprises, the voluntary sector, or public sector provision.

43. The introduction of ABS is, then, intended to lead to greater flexibility, more competition and improved access to justice. The Bill aims to ensure that there are no unnecessary barriers to competition created by restrictions on business organisation, and that regulatory requirements on practitioners and organisations, and any restrictions on the way in which legal services are provided, are only those necessary and proportionate to secure the regulatory objectives.

44. The ABS framework will allow increased access to finance for firms alongside increased flexibility to provide a combination of professional services. It will facilitate the hire and retention of high quality non-legal staff through the ability to reward all staff on the same basis. It is anticipated that allowing ABS will lead to innovation and price reductions for the consumer.

45. With this in mind, the key policy proposals are to:

- liberalise the legal services market in Scotland by allowing solicitors, should they so choose, to practise in new business arrangements, which will be called licensed legal services providers (“licensed providers”); and
- create a supportive, robust and flexible regulatory framework.

46. It was originally envisaged that this regulatory framework would be “light touch”, but experiences in the banking and financial sector led to the Scottish Government reconsidering this in order to ensure that the regulatory regime is robust.

47. The Bill draws on the English and Welsh regulatory regime set out in the LSA 2007. However, there are key differences between the legal services markets north and south of the border, and a need to shape policy to fit Scottish circumstances.
48. The legal services market is much larger in England and Wales in terms of both turnover and numbers of legal professionals. In England and Wales, the largest law firms employ thousands of lawyers and are global players bringing substantial foreign earnings into the UK economy. There are about 108,000 solicitors and 14,000 barristers in England and Wales compared with 10,434 solicitors and around 460 advocates in Scotland.

49. The regulatory framework in Scotland is not complex and legal professionals are regulated by either the Society or the Faculty. This contrasts with the “regulatory maze” in England and Wales which the Clementi Report sought to address.

50. The key differences are that:
   - there will not be a “super-regulator” in Scotland equivalent to the LSB in England and Wales; and
   - existing business models will continue to be regulated under the current regulatory framework, rather than being brought into a completely new regime.

51. The Scottish Ministers will fulfil the regulatory role fulfilled by the LSB in England and Wales. This maintains oversight of bodies seeking to regulate ABS. However, the Scottish approach achieves this aim without the complication and expense of establishing a non-departmental public body. The Scottish Government believes this is more proportionate to the Scottish legal market. It also reflects the Scottish Government’s aims in terms of simplification of the public sector landscape.

52. The Bill, therefore provides for different levels of regulation as follows:
   - the Scottish Ministers will license and regulate approved regulators;
   - the approved regulators will license and regulate licensed providers;
   - licensed providers, as regulated bodies, will have obligations to manage and oversee people in their business entity – including lawyers, other professionals and non-professionals – in a way which is compatible with the regulatory regime imposed by the approved regulator; and
   - individual professionals within licensed providers will continue to be personally regulated by their own professional bodies.

53. It will be empowering rather than prescriptive legislation. The traditional business models – sole practitioners and solicitor firms and partnerships with no outside investment – will remain options for solicitors, albeit that the existing professional bodies will be required to comply with the regulatory objectives set out in the Bill.

54. The Bill will provide for:
   - regulatory objectives and professional principles which will apply to regulated businesses and legal professionals;
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

- powers allowing the Scottish Ministers to approve and authorise regulators to licence licensed providers, if they can demonstrate their capacity to do so properly, and have established a suitable regulatory scheme;
- requirements for all licensed providers to appoint suitably qualified persons responsible for ensuring that the business complies with the regulatory scheme and professional principles;
- safeguards to ensure that those owning or directing a licensed provider are fit-and-proper persons;
- measures to support the modernisation of the governance of the Society;
- statutory codification of the framework relating to the regulation of the Faculty; and
- SLAB to monitor the availability and accessibility of legal services in Scotland, with assistance from approved regulators and others.

55. The Bill will also make other regulatory changes, including:
- transferring the power to prevent solicitors from participating in the legal aid scheme from the Society and Faculty to the SLAB;
- providing a simpler route by which bodies can be approved to regulate the granting of confirmation in executries by non-solicitors;
- restricting the power of solicitors in disciplinary cases to remove themselves from the roll of solicitors to avoid the effect of disciplinary sanctions.

56. In line with the approach proposed by the Society, the Bill does not prescribe particular business forms, but provides an appropriate regulatory framework for whatever business structures emerge in the market. These could include law firms which are owned by third parties or benefit from external investment; firms offering a stake in their business to people with non-legal expertise (such as financial management or IT); and multi-disciplinary practices – firms offering a range of professional services (such as legal and accountancy services) to the public.

THE STRUCTURE OF THE BILL

57. The Bill is in five parts with nine schedules.

58. Part 1 of the Bill sets out the core regulatory objectives, which are intended to guide the actions of all regulators of legal services, and the professional principles which apply to any legal professional providing legal services. It also establishes the definition of legal services for the purposes of the Bill, and the responsibilities of the Scottish Ministers with respect to the regulatory objectives.

59. Part 2 establishes the regulatory framework within which approved regulators and licensed providers will operate.
• Chapter 1 sets out the requirements to be met by any organisation seeking to become an approved regulator, and the role of the Scottish Ministers in approving and authorising regulators, and in overseeing the regulatory system thereafter.
• Chapter 2 sets out the requirements and duties placed on licensed legal services providers.
• Chapter 3 contains further details of the regulatory framework, including the application of the regulatory objectives and professional principles to approved regulators, the role of the Office of Fair Trading (“OFT”), how complaints against licensed providers and approved regulators should operate, and various registers and lists which must be maintained.

60. Part 3 creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation – part of the process of winding up the estate of a deceased person.

61. Part 4 contains provisions affecting the regulation of individual legal professionals (as opposed to licensed providers) and modifying the duties of other public bodies.
• Chapter 1 imposes duties on the Society, the Faculty and others involved in the regulation of legal professionals with regard to the regulatory objectives in Part 1.
• Chapter 2 creates a statutory basis for the regulation of the Faculty.
• Chapter 3 amends the 1980 Act to remove restrictions on participation by solicitors in licensed providers, to involve non-solicitors in the governance of the Society, to establish a separation between the regulatory and representative functions of the Society. It also amends the 1980 Act, the effect of which is that the Scottish Solicitors Discipline Tribunal has the power to order that a solicitor, who has voluntarily removed his or her name from the roll, is prohibited from having his or her name restored to the roll except by order of that Tribunal.
• Chapter 4 creates new responsibilities for the SLAB and makes adjustments to the legislation governing the Scottish Legal Complaints Commission.

62. Part 5 contains general and ancillary provisions.

63. Schedules 1 to 6 set out how various powers and sanctions open to Ministers in respect of approved regulators should operate.

64. Schedule 7 sets out the procedure for surrender of authorisation of an approved regulator.

65. Schedule 8 makes provision in relation to investors in licensed providers.

66. Schedule 9 contains an index of expressions used in the Bill.
PART ONE – THE REGULATORY OBJECTIVES, ETC.

Regulatory objectives and professional principles

67. The approach adopted in the Bill is one of principle-based regulation. The Bill sets out regulatory objectives with which the Scottish Ministers and approved regulators will be required to comply as far as practicable\(^{16}\) in exercising their functions under the Act. Approved regulators will also be required to seek to ensure that licensed legal services providers have regard to the regulatory objectives.

68. There was much support from consultation respondents to the proposals regarding the principles of regulation. The vast majority of those who commented agreed that there should be a statement of regulatory objectives for providing legal services in ABS, and that regulatory objectives should be supplemented by setting out the considerations which should guide the actions of regulators.

69. On the whole, it was seen as important to keep regulation simple and proportionate, and to ensure that all solicitors were equally treated, whether working in ABS or traditional firms. The vast majority of those who provided a view agreed that ABS should be regulated at the entity level, with individual professionals regulated by their own professional bodies.

70. The objectives reflect the significance of the profession in upholding the rule of law, alongside the policy goals of competition, protection of the public interest and access to justice. They are similar to the regulatory objectives in the LSA 2007.

71. The main differences compared to the LSA 2007 are that the Bill has added “protecting and promoting the interests of consumers” and does not have “increasing public understanding of the citizen’s legal rights and duties”. Also, whereas the LSA 2007 encourages a “diverse” legal profession,\(^{17}\) this Bill seeks to ensure that the full meaning of “diverse” is clear. The objectives promote both a varied legal profession in types of business model, and diversity within the legal profession, for example in terms of gender and ethnic composition.

72. Some of the consultation responses considered that there was no need for consumer interest to be separately specified as it could be equated with the public interest. However, the Scottish Government considers that there is a distinction. The Westminster Parliamentary Joint Committee during the passage of the Legal Services Bill commented that: “The public interest and the consumer interest do not always equate to the same thing, particularly in matters of law.”\(^{18}\)

73. The public interest generally refers to the collective benefit of society. The approved regulators are being established to guard the public interest, and will do this as part of overseeing

---

\(^{16}\) The phrase “as far as practicable” is added because it is recognised that the objectives are generally broad aims rather than specific requirements – it is difficult to measure absolute compliance or non-compliance; and there may be situations where there are tensions between the objectives and a need to strike an appropriate balance.

\(^{17}\) See section 1(1)(f), LSA 2007.

\(^{18}\) Joint Committee on the Draft Legal Services Bill First Report can be viewed at http://www.publications.parliament.uk/pa/it200506/itselect/itlegal/232/23202.htm
the delivery of legal services. The consumer interest operates at the level of the individual clients who use legal services. The policy intention is that the Bill cover the more focussed interests of consumers as well as the general public interest.

74. The other substantial difference is the omission of the objective in the LSA 2007 of “increasing public understanding of the citizen’s legal rights and duties”. This was considered by the Bill Reference Group. The Scottish Government concluded that this was indeed an important policy aim, but it was difficult to see how it could be achieved through regulation of legal service providers. In view of the balance that needs to be maintained between policy aims and proportionate regulation, the Scottish Government decided not to include this regulatory objective.

75. The Bill provides that all regulators of legal services in Scotland should be subject to these regulatory objectives, whether regulating ABS, or legal professionals in traditional business models.

76. An alternative approach would have been to apply the objectives only to the regulators of ABS. This would have left regulators of traditional business models without any formal regulatory objectives (other than the Society’s statutory duty to “promote the interests of the solicitors’ profession and the interests of the public in relation to that profession”). The approach adopted in the Bill creates a level playing field between the regulators of different business models, and clarity on the aims of the regulatory function.

77. The regulatory objectives are not ranked. The Scottish Ministers and regulators are required to act in a way compatible with all, as far as is practicable, and it is considered that they are best place to resolve any conflict that might arise between two objectives. This requirement to act emphasises that these regulatory objectives are not just aspirational. They are significant requirements which, in the case of approved regulators, can result in sanctions (including the rescission of authorisation) if they are ignored.

78. These objectives include promoting and maintaining adherence to professional principles.

79. Maintaining high standards of professional conduct is an area of concern highlighted by the Society and by some of the consultees. The professional principles are intended to address those concerns. They are consistent with the expectations of solicitors and advocates set out in their respective codes of conduct, and the provision will help to ensure that appropriate professional standards are maintained by everyone who provides or owns regulated legal services.

20 See section 1(2)(a) of the 1980 Act.
80. The principles are similar to those in the LSA 2007. The one omission is that to keep the affairs of clients confidential. This is not included as the Scottish Government considers that to “act in the best interests of the client” means that a practitioner should observe the duty of confidentiality.

The regulatory approach

81. In March 2005, the Hampton Review of Inspection and Enforcement recommended that all regulatory agencies should adopt a risk-based approach to regulation.\(^{22}\) The UK Government accepted all its recommendations.

82. Effective regulation ensures that consumers are protected. However, too much regulation is damaging because it imposes costs, stops consumers getting what they need, and puts unnecessary burdens on providers. Regulation must be proportionate and based on an assessment of risk. Risk-based regulation means identifying and assessing the risk, determining the strategy for managing the risk and communicating it. Good regulators use the full range of tools at their disposal, such as providing good advice to facilitate better compliance as well as a proportionate response to non-compliance.

83. The Better Regulation Task Force has set out 5 principles of good regulation. These say that regulation should be:

- proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
- accountable: regulators must be able to justify decisions, and be subject to public scrutiny;
- consistent: Government rules and standards must be joined-up and implemented fairly;
- transparent: regulators should be open, and keep regulations simple and user friendly; and
- targeted: regulators should be focused on the problem, and minimise side effects.

84. The Better Regulation principles have been endorsed by the Regulatory Review Group which advises the Scottish Government. These principles have informed the Scottish Government in developing proposals for the regulatory framework. The Bill also incorporates them in the requirement on Ministers and regulators to adopt “best regulatory practice”.

Definition of legal services

85. The Bill defines “legal services” broadly, along similar lines to the definition of “legal activity” in section 12(3)(b) of the LSA 2007. This reflects the wide range of services provided by legal professionals, and establishes the nature of the services which will be regulated by approved regulators.

86. However, the Bill does not seek to regulate everyone who provides services which might come within this definition. This alternative approach was considered and ruled out as impractical and unnecessary to achieve the core policy aim of allowing the legal profession to provide services to the public using new business models.

87. Such an approach would potentially have brought into the scope of legal regulation other professionals such as tax advisers, planning specialists and accountants, as well as voluntary bodies such as Citizens Advice Bureaux and welfare benefits advisers. This would have greatly widened the “regulatory net”, without evidence of any significant public benefit. It would also raise questions of legislative competence, since many of the areas which would be covered by such a definition are in areas reserved to the UK Government, and are indeed already covered by other legislation (for example, financial services, immigration advice, and consumer credit.)

88. The areas of practice restricted to solicitors and other specific categories of legal professionals will remain as set out in section 32 of the 1980 Act, except for the addition of confirmation agents. A business or organisation which provides advice on a particular area of law which is not so restricted (such as tax or benefits) will only be subject to the provisions of the Bill if a solicitor or other relevant practitioner is involved in providing legal services in a licensed provider.

Claims management companies

89. Consideration was given to creating a new regulatory regime for claims management companies. These are businesses that offer advice or services in relation to claims for loss or damage, often personal injury claims, operated on a “no win, no fee” basis. In England and Wales, claims management companies are regulated under the provisions of the Compensation Act 2006.

90. Some such companies employ solicitors, or have some form of business association with a solicitors firm, but others do not, and are unregulated in Scotland. In future, it is possible that claims management companies will be regulated under the Bill as licensed providers, but this will not be possible if they do not involve a solicitor.

91. The vast majority of consultation respondents who commented on the issue considered that there should be regulation of claims management companies operating in Scotland. Recurring themes were that regulation would create a level playing field in this business area and address the current cross-border inconsistency.

92. However, the Scottish Government has decided on balance not to proceed with claims management regulation by means of this Bill, for a number of reasons. Most importantly, the consultation reinforced the Scottish Government view that there is little hard evidence of malpractice in Scotland and that it is difficult, therefore, to justify the expense to the taxpayer of establishing a new regulatory framework. Legal aid is still available for personal injury cases in Scotland (and eligibility limits have recently been increased), which appears to have inhibited the widespread growth of claims management companies – in England problems arose after legal aid for personal injury was removed.
93. The Scottish Ministers intend to consult on the possible lifting of prohibitions on contingency fees for solicitors in Scotland. If contingency fees are allowed for solicitors, this may also lessen the likelihood that claims management companies will enter the market. The Scottish Government will also wish to take account of the impact of any possible changes which may be introduced in respect of personal injury cases as a consequence of the Civil Courts Review by Lord Gill, which was published on 30 September 2009.

94. The Scottish Ministers will however keep the situation under review, and do not rule out legislation in future, should this prove necessary.

PART 2 – REGULATION OF LICENSED LEGAL SERVICES PROVIDERS

Approval and authorisation of regulators and regulatory schemes

95. The Scottish Ministers will require professional and other bodies applying to be licensed as approved regulators to submit a scheme detailing the kind of licensed providers they will regulate, the rules they will apply to those licensed providers, and how they intend to promote the regulatory objectives.

96. Consideration was given as to how much of this scheme should be prescribed in primary legislation and how much could be left to secondary legislation and guidance. It was decided that it would be potentially restrictive to prescribe in primary legislation the details of regulatory schemes, since these will depend on the nature of the businesses being regulated, and may require to be adjusted in the light of experience and developments in regulatory practice. Ministers will be able to specify in regulations matters which must be addressed in regulatory schemes. This is broadly the approach employed in the 1980 Act in relation to the Society’s regulation of solicitors.

97. However, the Bill specifies a range of matters which must be dealt with in the regulatory scheme, including how the regulator will deal with regulatory conflict, and requirements on licensed providers to have proper accounting and auditing procedures and professional indemnity.

98. The policy intention is to provide for equivalent consumer protection as exists for consumers who receive legal services from solicitors in traditional firms – for example in the requirements to establish and maintain sufficient indemnification arrangements against loss of client’s monies.

99. In paragraph 5.16 of the Scottish Government’s consultation document, the Scottish Government proposed that licensing of approved regulators should be by the Scottish Ministers “with the agreement of the Lord President”. However, further thought was given to the policy justification for such a requirement. It is not intended that the ABS regime should broaden the categories of those having a right of audience in the courts – namely solicitors, solicitor advocates, advocates and those granted rights of audience by virtue of section 27 of the 1990 Act.
100. Given the powers already available to the Lord President in respect of individuals having rights of audience in the courts, it was concluded that it should not be necessary also to require the Lord President’s approval of the regulatory regimes for businesses which employ such individuals. Instead, the Bill requires the Scottish Government to consult the Lord President (alongside others) in relation to an application by a body for a licence to be an approved regulator.

101. There are no restrictions on the type of body which will be able to apply to become an approved regulator. The Society has indicated its intention to apply to become an approved regulator. There will be no automatic approval for any body.

102. There is provision for the Scottish Ministers to charge fees to applicants and approved regulators. Whilst it is not the intent of the Scottish Government to charge such bodies in the first instance, this may become necessary to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. The Bill allows a charge for application and also an annual regulatory charge.

103. Consideration was given as to whether approval and authorisation should be a one- or two-stage process. The view was taken that the regulation of the approved regulators lends itself to being structured as a two-part process with approval of the regulator being the first and authorisation the second. This is similar in outline to the position in the LSA 2007, but differs in detail to suit the ABS system proposed for Scotland.

104. The approval of an approved regulator (and that regulator’s regulatory scheme) can be seen essentially as a qualification process (that is, every regulator must be up to at least a certain standard). The authorisation process then provides a means of overseeing the approved regulator on an ongoing basis. Conditions and restrictions may be imposed through the authorisation, such as the areas of legal practice which may be regulated, the types of licensed provider that a given approved regulator may regulate or the setting of a probationary period of regulation.

Combining regulatory and representative functions

105. Regulators frequently have representative functions as well as regulatory functions (for example, ICAS represents the interest of chartered accountants and also regulates their practice, as does the Society for solicitors). In such cases, the regulator must ensure that its regulatory function is properly resourced and operates independently, with appropriate involvement from people who are not legal professionals, and that persons exercising regulatory functions are not prevented from communicating with external bodies such as the OFT, SLAB and the Scottish Ministers.

106. There is no intention that the Scottish Ministers, when regulating an approved regulator with dual functions, interfere in the representative functions of the regulator, and they are specifically prohibited from so doing in the Bill.

107. There is a power for the Scottish Ministers to make regulations which might be about internal governance in general or the internal governance of a specific approved regulator. This
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

will safeguard the independence of the regulatory function in the event of unforeseen circumstances, but Ministers may not interfere in wholly representative functions.

**Regulatory conflict**

108. Regulatory conflict may arise where a licensed provider is subject to the approved regulator’s regulatory scheme, and individual professionals within licensed providers are also subject to their own professional regulation. There may also be different kinds of professionals in a licensed provider (e.g. solicitors, surveyors or accountants) who are subject to different, and potentially incompatible, professional rules.

109. Approved regulators are required to set out how they will address potential regulatory conflict as part of their regulatory scheme. Sections 52 to 53 of the LSA 2007 provided the model for the provisions in the Bill.

110. There is no duty on the Scottish Ministers to intervene in any unresolved regulatory conflict. It is envisaged that any organisation seeking to be an approved regulator will, before submitting its proposed scheme, work with the relevant professional regulators to identify where any such conflict might arise, and agree a resolution.

111. In relation to the solicitors’ profession, the Bill has been drafted so as to maintain the maximum consistency between the regulatory framework for solicitors and for licensed providers. Most of the non-legal professional groups who are most likely to participate in ABS are not regulated by statute, and their professional bodies can make any necessary changes at their own hand, should they so decide.

112. The Scottish Government considered the merits of arbitration and mediation in relation to resolving regulatory conflict. These may be employed, but are not required by the Bill. It is ultimately for the parties to resolve the conflict, if a particular model of business organisation is to remain viable. Ultimately, if a conflict proves irreconcilable, it may not be possible for particular combinations of professionals to operate in an ABS.

113. However, the requirement that an approved regulator must specify in its regulatory scheme how it will deal with any regulatory conflict which may arise within that scheme is designed to ensure that the issue is addressed at the beginning of the process, rather than left until a problem arises in practice.

114. The Bill provides for the Scottish Ministers to have a power to make further regulations in respect of reconciling regulatory conflicts. This is a safeguard to ensure that if, in practice, the approved regulators’ rules are insufficient to deal with the issue, the Scottish Ministers will have the flexibility and power to ensure that such conflicts can be resolved. Regulations might be very limited in scope to address a specific issue, or may be broader, to resolve wider issues.

**Proactive regulation**

115. The policy intention is that regulation should be proactive. In other words, regulators should not wait to act if something goes wrong, but should regularly assure themselves that
116. The Bill Reference Group considered this issue and suggested the Australian model as a useful example of a proactive regulatory regime. In Queensland, Australia, the Legal Profession Act 2007 established the Legal Services Commission and the Queensland Law Society as “relevant regulatory authorities” and empowers them in section 130 of that Act to conduct an audit (a “compliance audit”) “whether or not a complaint has been made” of an incorporated legal practice about:

- the compliance of the practice, and of its officers and employees, with the requirements of the Act or a regulation, the legal profession rules or the administration rules so far as they apply to incorporated legal practices; and
- the management of the provision of legal services by the incorporated legal practice, including the supervision of the officers and employees providing the services.

This is comprised of two types of audit – internal or self-assessment audits that incorporated legal practices will be required to undertake, through their legal practitioner directors, and external audits that the Queensland Law Society will undertake, looking in from the outside.

117. The intention is that the Bill should provide for a two-staged audit process:

- annual performance report (or self-assessment audits) by the licensed providers; and
- assessment (external audit) at least every three years by the approved regulators.

118. Consideration was given to the possibility of stipulating the details of performance monitoring in primary legislation, but it was decided that this would be better in the approved regulator’s regulatory scheme, as an approved regulator will be able to tailor it to its own procedures. As a safeguard, the approved regulator’s practice rules must prescribe a form which will require the Scottish Ministers’ approval.

119. The performance report will be the responsibility of the Head of Practice or the Practice Committee.

120. The external assessment should be a spot-check which will verify that the information provided by the licensed provider in its annual return to the regulator is accurate. It is envisaged that the external audits should fulfil the following criteria:

- they are seen as credible and robust;
- they are consistent with and complement the self-assessment audits, adding value;
- they do not add any unjustifiable regulatory burden; and

23 See also Incorporated legal practices: dragging the regulation of the profession into the modern era - a paper by John Briton and Scott Mclean given at the Third International Legal Ethics Conference, Gold Coast, July 2008 can be viewed at http://www.lsc.qld.gov.au/speeches/jwb_sam_ILEC_speech_130708(1).pdf
• the cost of compliance is proportionate to the potential significance of the information obtained.

121. In addition, the approved regulator must carry out an assessment if required so to do by the Scottish Ministers. The Scottish Ministers may require this if the SLCC have concerns about how a complaint against a licensed provider has been handled.

122. An unsatisfactory assessment may require the approved regulator to direct the licensed provider to take remedial action. Approved regulators should also be able to apply sanctions against the licensed provider including, should it be deemed necessary, the withdrawal of the authorisation to act as a licensed provider. These sanctions will be specified in the regulatory scheme.

Securing access to justice

123. One of the regulatory objectives is promoting access to justice. The provisions in the Bill, together with other measures taken by the Scottish Government such as improving the availability of legal aid, will support access to justice, by opening up the possibilities for new ways to provide legal services. This is a key aim of Scottish Government and is discussed more fully in the consultation paper.  

124. The Bill Reference Group considered whether the regulators should impose explicit access to justice requirements on licensed providers. This could be done through licence conditions, for example by requiring a licensed provider to offer services in less remunerative areas of law, or to provide support to other services operating in areas such as social welfare (such as by training, pro bono work, or technical assistance).

125. However, such provisions would be very difficult to operate fairly and effectively and the Scottish Government considers they would not be the best vehicle for securing access. The Bill provides that licensing rules should specify how an approved regulator will deal with an application which may cause a material and adverse effect on the provision of legal services (for example if it is likely to create a monopoly or near monopoly in a particular area or subject), although it is envisaged that licences would only be refused or restricted in exceptional cases. If an approved regulator believes that granting a particular licence may prevent or significant restrict or distort competition in the legal services market, it must consult the OFT.

126. The Bill does, however, provide (section 96) that SLAB must monitor the availability of legal services and if it considers there to be inadequate availability it may report that fact to the Scottish Ministers. This is an extension of the existing functions of SLAB, which already provides advice to Ministers on the legal aid scheme, and increasingly performs a strategic role in the development of holistic publicly funded legal advice services.

---

24 See the consultation paper, paragraphs 4.15 to 4.29.
The role of the Scottish Ministers in regulation

127. The Bill gives various powers to the Scottish Ministers to make further provision in relation to regulatory schemes and approved regulators, and to issue guidance. These allow any necessary changes to be made to the overall regulatory framework, in the light of experience.

128. In addition to the responsibility to consider and approve applications to become approved regulators, the Scottish Ministers will have the power to monitor approved regulators to ensure that they are effectively carrying out the regulation of the licensed providers.

129. In order to facilitate this monitoring, the Scottish Ministers will be able to require such information about the approved regulator’s performance as is pertinent and reasonable. This monitoring should be undertaken with specific reference to the approved regulator’s compliance with the regulatory objectives, and any performance targets set by the Scottish Ministers.

130. The policy intention is to provide the Scottish Ministers with powers of direction and sanctions to deal with an act or omission of approved regulators which has had, or is likely to have, an adverse impact on one or more of the regulatory objectives, or to deal with situations where the approved regulator has failed to fulfil its duties under this Bill. Such powers should also apply where an approved regulator has not complied with directions of the Scottish Ministers.

131. The sanctions provided for in the Bill include directions, public censure, financial penalties and rescinding authorisation. It is also possible for Ministers to issue performance targets to a regulator in relation to the exercise of its regulatory functions, or to amend the authorisation granted to the regulator.

132. Before imposing any sanction, there are notification and consultation requirements.

133. The consultation asked whether there should be an advisory panel which could offer advice to Ministers on applications for authorisation and keep the regulatory framework under review. This was supported by a substantial majority of those that offered a view, and many thought that any such advisory panel should include lay representatives with a consumer interest. The Scottish Government has concluded that such an advisory panel would be helpful, but that it is not necessary to make statutory provision for it. The Scottish Government already has powers to bring together a group for advice (as in setting up the Bill Reference Group) and it intends to use this non-statutory method of setting up a panel at the stage of implementation of the legislation.

Surrender, cessation and transfer of approved regulators

134. The Bill does not establish new statutory regulators, and so the policy depends on one or more bodies coming forward for approval as a regulator of ABS. It is of course possible that any such body might in future choose or be unable to continue to undertake this role, or have its authorisation removed.
135. The Bill therefore contains detailed provisions for the procedures to be followed when
authorisation is surrendered or removed, and gives power to the Scottish Ministers to direct the
approved regulator to act. This is intended to mitigate any disruption to licensed providers
affected by such a change, and particularly their clients.

136. In such cases, the preferred option, if possible, will be to transfer licensed providers to
another approved regulator, if one already is in place or comes forward. It is possible for
Ministers to establish a body to regulated licensed providers, or to assume the regulation of the
affected licensed providers themselves. It is not anticipated that these powers will be used, but
they are provided as a fall-back in case of regulatory failure.

**Licensed legal services providers**

137. A licensed provider will be any business which provides legal services under a licence
issued by an approved regulator. It will not include existing forms of regulated legal practice,
such as solicitors operating as sole practitioners, in partnership, or in an arrangement with a law
centre, all of whom will continue to be regulated by the Society.

138. Some consultees argued that the new regulatory regime should cover all legal services, in
traditional and new models. This might ensure consistency of regulation, but the Scottish
Government has concluded that to do so would not be desirable.

139. It would either require the creation of a body similar to the Legal Services Board, which
has been ruled out for the reasons set out in paragraph 51, or for Ministers (or some other
designated person, such as the Lord President) to oversee regulation of individual legal
professionals. It would, at least initially, inevitably involve a considerable degree of disruption
and expense as a new regulatory framework was established for existing businesses, which
expense would be borne by law firms and their clients. The involvement of Ministers in the
regulation of individual lawyers, even at one remove, may also raise constitutional concerns
about the independence of the profession.

140. Ministers have, however, concluded that certain changes should be made to the
governance of the Society, and these are discussed at paragraphs 202 to 217.

141. A licensed provider may take any business form provided it is compatible with the
regulatory rules of its approved regulator. For example, a licensed provider could consist of a
solicitor, an estate agent, a chartered surveyor and an accountant setting up business together. It
is also possible for persons or companies external to the core business of the licensed provider to
own or invest in the licensed provider, and for the licensed provider to employ persons who are
not members of any professional body.

142. However, in order to be a licensed provider, the entity must have at least one solicitor.

143. All licensed providers must:
   - have regard to the regulatory objectives and adhere to professional principles;
• act in accordance with the licensing rules and any other requirements of the approved regulator’s regulatory scheme;
• comply with any conditions of their licence.

In addition, the licensed provider must ensure that all the professionals working within it comply with their professional code of conduct.

144. All licensed providers must have:
• a Head of Legal Services; and either
• a Head of Practice or a Practice Committee.

There is no bar on someone in the licensed provider fulfilling both the roles of Head of Legal Services and either Head of Practice or member of the Practice Committee at the same time. These positions are discussed in more detail below.

Head of Legal Services, Head of Practice and Practice Committee

145. The intention behind the Head of Legal Services is that there should be a legally qualified person identified as being personally responsible for ensuring that the legal services the business provides are provided in accordance with the core values enshrined in the regulatory objectives and professional principles set out in the Bill. In addition, that person is responsible for ensuring that the licensed provider delivers legal services in compliance with any rules that the approved regulator may have about the delivery of those services.

146. Whereas the Head of Legal Services is responsible for the delivery of legal services by the licensed provider, the Head of Practice or Practice Committee has a broader oversight of the operation of the business, and particularly of its financial and administrative practices. These duties are similar to that of the person occupying the post of Head of Finance and Administration as set out in the LSA 2007, section 92.

147. The policy is that the licensed provider should have a choice of whether it should appoint a Head of Practice or form a Practice Committee. Both options will be responsible for carrying out the same functions in the licensed provider.

148. Both the Head of Legal Services and the Head of Practice or Practice Committee have a responsibility to report any failing by the licensed provider to meet its duties in the supply of legal services.

149. The Scottish Ministers have been given powers to make regulations about the details of these duties and any further duties that should be placed on the Head of Legal Services, Head of Practice or Practice Committee in order to ensure compliance with the regulatory objectives and the professional principles in the Bill and with the rules contained in regulatory scheme of the approved regulator.
150. It is important for the protection of the consumer and for confidence in the legal system in Scotland that those deemed unsuitable should be disqualified from holding the principal positions in a licensed provider and from providing legal services in that entity.

151. Approved regulators may challenge any potentially unsuitable appointment, and may ultimately require an appointment to be rescinded. There are also provisions for people involved in, for example, insolvency proceedings, to be disqualified from these posts, subject to a right of appeal to the sheriff.

**Designated persons**

152. As already happens with traditional practices, it will be possible for people to be involved in the provision of legal services in a licensed provider who are not solicitors. In order to ensure that it is clear who is providing legal services in a licensed provider, the Bill creates a category of “designated persons”, which corresponds to the provisions in the LSA 2007 in respect of “authorised persons”. They are designated by the Head of Legal Services, the Head of Practice, or the Practice Committee to carry out legal work in connection with the licensed provider’s provision of legal services and can be:

- someone who works as an employee, or manager in a licensed provider; or
- an investor in the licensed provider.

153. The licensed provider is required to keep an up-to-date list of all designated persons and make that list available to the approved regulator when required, and it is possible for a designated person to be disqualified by the approved regulator from acting as such.

**Outside investors**

154. It is one of the objectives of the Bill that firms providing legal services might attract outside investment, that is, investment from individuals or entities that are not otherwise involved in supplying legal services. This raises concerns that such persons may be unsuitable to be involved in the provision of legal services, or may seek to influence the licensed provider to behave improperly (for example, in relation to a conflict of interest).

155. In responses to our consultation, the vast majority of those providing a view agreed with the proposal in the consultation that there should be a “fit to own” test for investors specified by the approved regulator, with most agreeing with the proposed details of the test. The majority view was that the proposals provided sufficient safeguards to ensure that professional principles are not compromised in ABS which are externally owned.

156. In the consultation document, the proposal was that anyone owning all or part of, or operating as a principal in, a licensed provider, would be required to satisfy the approved regulator that they were fit-to-own. The policy has been modified so that the test is only applied to outside investors, and solicitors will be presumed to be fit to have an interest as an outside investor.
157. While it might be considered desirable to apply the test to everyone, the sheer number that could be required to undergo the examination might put a considerable strain on approved regulators and lead to significantly increased delay, cost and regulatory burden. The requirement is primarily a safeguard intended to maintain standards when outside ownership and investment is introduced into firms providing legal services and, therefore, the Scottish Government has concluded that the “fit-to-own” test can be justifiably restricted to those who are outside investors.

158. No firm may be licensed or continue to operate with an outside investor who has not passed the test. The approved regulator will set out in its licensing rules how it will determine if an investor is fit to be involved in a licensed provider but the Bill requires that an outside investor is presumed to be unfit if:

- insolvent;
- disqualified from being a company director or holding a position of business responsibility;
- has a conviction for dishonesty or other serious offence that is not spent.

159. In addition, the Bill gives examples of other criteria that should be considered, including:

- the investor’s financial position and financial record; and
- the investor’s probity and character.

160. Anyone determined to be unfit may appeal to the sheriff.

161. As well as meeting standards of probity and character, the Bill imposes standards of behaviour, so that an outside investor must not:

- act in a way that is incompatible with regulatory objectives and professional principles, or the licensed provider’s duties; or
- interfere in the provision of legal services by the licensed provider or exert undue influence on or encourage misconduct by anyone working within the licensed provider.

162. The concerns about outside investment led the Scottish Government to conclude that the Scottish Ministers require to be able to make further provision through regulation should Ministers consider it necessary or expedient in the light of experience.

Protecting clients in the event of business failure

163. The Bill contains a number of provisions designed to deal with the situation of a licensed provider which is in difficulties as a business (or which may stop acting as a licensed provider for any other reason) so that the interests of that firm’s clients may be safeguarded.

164. Licensed providers are under a duty to notify the approved regulator of various potential disruptions to business, including where it is in serious financial difficulty or intending to stop
providing legal services. Notice must also be given if there is no eligible person to be Head of Legal Services or Head of Practice, or a liquidator or receiver is appointed, and this will result in revocation of the licence, unless the regulator is satisfied that the situation is temporary and arrangements are in place to safeguard clients’ interests.

165. In a situation where a licensed provider has given notice of difficulty or impending cessation of legal services, or has had its licence revoked and there has been no statement from the approved regulator that it is satisfied that there are sufficient arrangements in place to safeguard clients’ interests, the licensed provider must prepare final accounts and comply with any directions the approved regulator might give in order to safeguard those interests.

166. Sums in clients’ accounts are to be distributed in the same way as required by section 42 of the Solicitors (Scotland) Act 1980 should the solicitor become insolvent – i.e. divided proportionately among the clients, should there be insufficient funds to cover everyone.

Protection against dishonesty and fraud

167. It is of paramount importance that the public can be confident that they are receiving legal services from people who are qualified to do so, and are who they say they are.

168. The 1980 Act has provision to protect the public against people who pretend that they are solicitors who can provide legal services to clients. The Bill seeks to put in place similar protections in respect of licensed providers, including offences of pretending to be licensed when this is not so, or concealing a disqualification. The prescribed penalties are fines not exceeding level 5 on the standard scale, which is £5000.

Professional privilege

169. Legal professional privilege generally protects legal advice and communications between solicitor and client and documents made in preparations for court proceedings from disclosure to third parties. This privilege extends further than the powers of other professionals to keep dealings with clients confidential, and is considered by the profession as fundamental to their relationship with their clients.

170. The Bill provides for clients of licensed providers to have the same legal professional privilege as they would have had if they had instructed a traditional sole practitioner or law firm, as long as the licensed provider is acting in the provision of legal services or a designated person (not being a solicitor) is so acting at the direction, and under the supervision, of a solicitor.

The role of the OFT

171. The Scottish Government consulted the OFT on its role in relation to ABS. The OFT’s preference was for similar provisions in the Bill (although framed as a discretionary role rather than as duties on the OFT) as found in the LSA 2007 to ensure a degree of symmetry of advice in both jurisdictions. Section 57 of the LSA 2007 gives the OFT the power to investigate if it perceives the behaviour of any approved regulator to be anti-competitive and to publish any report it may prepare.
172. The Scottish Government considered this carefully, but came to a different view. Rather than giving the OFT a wide power to investigate, it preferred that the OFT input be targeted at competition issues relating to applications by approved regulators, licensed providers, and approving bodies (see paragraphs 181 to 191 on confirmation services). The Scottish Government’s view is that this does not affect any powers of the OFT under the Competition Act 1998 and the Enterprise Act 2002 and that both the Scottish Ministers and approved regulators should have regard to any issues raised by the OFT under this legislation.

173. Consequently, the Bill makes provision for the OFT to have an advisory role in relation to competition issues arising out of the Scottish Ministers’ approving of regulators and approved regulators’ licensing of licensed providers.

Complaints about regulators and licensed providers

174. The Scottish Legal Complaints Commission will retain its function as a gateway for all legal complaints, including complaints about licensed providers and those working for them. The distinction made in the current arrangements between complaints about inadequate professional services (“service complaints”) and a failure to adhere to professional standards of conduct (“conduct complaints”) will be retained.

175. The SLCC will investigate service complaints and complaints about the handling of complaints about the conduct of legal practitioners practising in licensed providers. Complaints about the conduct of practitioners within licensed providers will be investigated by the practitioner’s professional body, for example, the Society in respect of solicitors. Likewise complaints about the conduct of other professionals in the licensed provider will be investigated by the relevant professional body, an example being ICAS in respect of a chartered accountant.

176. However, there is a potential gap, in that there may be concerns about the behaviour of a licensed provider which cannot be dealt with as service complaints (because they do not adversely affect a particular client) or conduct complaints (because they relate to behaviour by a non-professional person in the firm, or systemic practices which are not easily attributable to a particular professional).

177. To address these, the Bill introduces a third type of legal complaint – a “regulatory complaint”. This type of complaint applies only to licensed providers and can be made in relation to a failure by a licensed provider to comply with its approved regulator’s regulatory scheme and the terms of its licence, have regard to regulatory objectives, or adhere to professional principles. Such complaints will be remitted by the SLCC to the approved regulator, who will consider them in accordance with their regulatory scheme. The procedure and functions of the SLCC and the approved regulator will be analogous to those for a conduct complaint.

178. Complaints may be made to the Scottish Ministers in relation to any aspect of an approved regulator’s exercise of its regulatory functions, and, providing that the complaint is not frivolous, vexatious, or otherwise without merit, Ministers must investigate. There is power to delegate such investigation to the SLCC.
179. The Bill contains provision for a levy to be imposed on licensed providers to meet the costs of the SLCC in administering the complaints regime. It has been drafted to allow flexibility should the SLCC determine that it is reasonable to charge more to licensed providers than traditional firms if, for example, it considers there are differences in the level of risk.

180. The SLCC is also empowered to provide advice about making a complaint if requested and to issue guidance to approved regulators and licensed providers about how the latter deal with regulatory complaints.

PART 3 – CONFIRMATION SERVICES

181. The ability to apply for confirmation in executries is one of the areas of practice reserved to solicitors in section 32 of the 1980 Act. Confirmation services are those which consist of drawing or preparing papers on which to found or oppose an application for the confirmation of a person as the executor in relation to the estate of a deceased person.

182. It has been argued that seeking confirmation is a comparatively straightforward administrative process, requiring less specialist legal knowledge than other aspects of dealing with estates, such as tax advice, which are not reserved to solicitors.

183. The Scottish Government believes that confirmation services should continue to be restricted to properly qualified professionals, but it might be possible that other professionals, such as chartered accountants, could properly discharge the responsibilities of applying for confirmation. This might allow them to offer a holistic service in tax and estate planning, and is possible in England and Wales under the provisions of section 55 of the Courts and Legal Services Act 1990.

184. It is already possible in Scotland to make an application under sections 25 to 29 of the 1990 Act to be authorised to regulate non-solicitors carrying out this function. The Lord President, in his consultation response, expressed reservations about this possibility:

“But I have reservations about the extent to which confirmation rights may be “shoe-horned” into the legislation dealing with applications for rights of audience and rights to conduct litigation. In any event, I think that that legislative regime is not apt for the purpose.”

185. The Scottish Government agrees with the Lord President, and the Bill therefore makes provision for a tailored process to apply for approval to deal with confirmation applications.

186. Some of the responses to the consultation, particularly those from solicitors and bodies representing solicitors, expressed concerns over the regulation and qualifications of those who might provide confirmation rights under this provision. The Scottish Government agrees that dealing with the estates of deceased persons is an area which must be properly regulated, and the Bill contains a range of safeguards both in relation to the regulation of approving bodies by Scottish Ministers and of those licensed by approving bodies to operate as confirmation agents.
187. The Bill therefore provides that any body wishing its members to be able to have confirmation rights must make application to the Scottish Ministers to receive certification as an approving body. The Scottish Ministers will consult the OFT in respect of any competition issues.

188. The application will require that the approving body set out a regulatory scheme in much the same way that it would in an application for rights to conduct litigation or rights of audience under section 25 of the 1990 Act. This scheme will set out the qualifying criteria and procedures, the rules relating to the regulation of, and the code of conduct required of those authorised by the approving body (confirmation agents), together with complaints procedures and sanctions.

189. The Bill gives powers to the Scottish Ministers to revoke certification should an approving body fail to comply with a direction given by the Scottish Ministers (such as a requirement to review or amend its scheme).

190. In the interests of access to justice and transparency of the provision of confirmation services in this Bill, there is a requirement that the Scottish Ministers keep a register of approving bodies, and that each approving body keep a register of the confirmation agents it has authorised.

191. The Bill makes provision for complaints about confirmation agents by inserting provision into the 2007 Act. Both services and conduct complaints will be able to be made about confirmation agents and they will be handled by the SLCC and the approving body respectively in the same way that complaints against other types of legal services practitioners are handled by the SLCC and their professional bodies.

PART 4 – THE LEGAL PROFESSION

Applying the regulatory objectives

192. The Bill does not seek to impose a new regulatory framework on current business models (see paragraph 86), but will apply a consistent duty upon all regulators of legal services and legal professionals to promote the regulatory objectives, including the professional principles (see paragraph 75).

The Faculty of Advocates

193. The Faculty is not established by statute, but its role as the professional body to which all advocates belong has long been recognised by the Court. The Faculty exercises a dual role of representing the interests of advocates and regulating advocates in the public interest. Advocates in Scotland are bound by a rule25 that “[an advocate] cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate”.

25 The Guide to the Professional Conduct of Advocates, paragraph 1.2.4.
Involvement in ABS

194. The Faculty does not currently support participation of its members in ABS, though it has expressed its willingness and ability to embrace change and improvement. An example of this is removal of the “mixed doubles” rule, revoked by the Faculty on 23 September 2008. On balance, the Scottish Government is not persuaded that it is necessary to require the Faculty to remove the restriction that prevents its members forming partnerships or participating in licensed providers in the future, provided transfer between the two branches of the profession can be a straightforward procedure which does not involve substantial detriment to the practitioner. The Bill will not require the Faculty to allow advocates to participate in ABS. However, it will be possible for advocates to participate in licensed providers should the Faculty at some time in the future rescind its rule that would prevent them from so doing.

195. A majority of respondents to our consultation who expressed a view agreed 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. However, over a quarter of those providing a view were in favour of advocates participating in ABS, envisaging that this would reflect a modernised approach which would result in a better service to clients.

196. On easing of the process for advocates to become solicitor advocates, the Scottish Government has had discussions with both the Society and the Faculty and has come to the view that legislation is not necessary. The aim can be achieved through discussion between the Society and the Faculty and the Scottish Government will support and encourage such further discussion.

Regulation of advocates

197. The Bill makes provision to set out in statute the regulatory framework of the Faculty. This reflects concerns expressed within the Bill Reference Group that the current regulatory framework, and the respective roles of the Court, the Lord President, the Dean and the Faculty were not well understood, and that this has led to the perception that the Faculty is entirely self-regulating. In fact, the Court and Lord President exercise ultimate regulatory oversight, albeit that many of the functions of regulation are delegated to the Dean.

198. The majority of respondents to our consultation who commented on the issue favoured the Faculty’s regulatory framework being organised into a code set out in law.

199. Some respondents, including Consumer Focus and the OFT, believe the regulatory framework should be more radically reformed, with greater non-lawyer involvement and a separation of the representative and regulatory functions. The Faculty’s view is that this would be disproportionate and unnecessary, adding considerably to the cost of regulation with little

26 The “mixed doubles” rule prohibited members of the Faculty of Advocates from appearing in court with a solicitor advocate representing the same party.

27 Any changes that take place will have to take into account any recommendations that might result from a planned review of rights of audience following the opinion of the Lord Justice Clerk in the appeal of Woodside against Her Majesty’s Advocate.
evidence of public benefit, and would raise issues about the historical link between the Faculty and the College of Justice.

200. The Scottish Government is, on balance, not persuaded that major reform of the Faculty’s regulatory framework is necessary to achieve the aims of the Bill, but believes that greater transparency is desirable.

201. The Bill therefore sets out that the Court of Session is responsible for, and will continue to be responsible for:

- admitting and removing persons from the public office of advocate;
- prescribing the criteria and procedure for the above; and
- regulating the professional practice, conduct and discipline of advocates.

The Court may delegate the second and third responsibilities above to the Lord President or the Faculty.

The Law Society and the regulation of solicitors

202. The Bill provides for changes to be made to the governance of the Society, both to reflect modern thinking about regulatory practice, and to make the Society better placed to apply successfully to be an approved regulator.

203. In particular, these changes will increase lay involvement in the governance of the Society, and more clearly demarcate its regulatory function from its function of representing the interests of the solicitors’ profession. These changes have been developed in consultation with the Society, which has been undertaking its own governance review.

204. That 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 to provide an efficient and flexible environment for regulation, policy and management decision-making.

205. Given the scale of change anticipated and the level of detail involved, this is a long-term review which will be implemented on a phased basis.

206. The Bill retains the general approach of the 1980 Act of setting a broad framework for governance. The detailed constitutional arrangements are established by the Society itself, within that statutory framework.

207. The current legislative framework is set out in Part 1 of the 1980 Act. This provides for the establishment and the functions of the Council of the Society and membership of the Society. Schedule 1 to the 1980 Act also provides for its constitution and proceedings and Schedule 2 powers in respect of membership and the roll.
208. The business of the Society is conducted through a Council which exercises its authority itself, through a variety of Committees, and through the Executive Officers of the Society. The form of Council is set out in the Society’s Constitution.\(^{28}\)

209. The current constitution, dating from 1988, provides that the Council has 44 elected members from different geographical constituencies and up to nine co-opted members representing other interest groups. All of these members are solicitors. Four non-solicitor observers also sit on the Council.

210. The Bill makes it possible for the Society to appoint suitable non-solicitor members to the Council. The Society has indicated that it intends to provide for a 20% non-solicitor membership of the Council. The Scottish Government believes this to be acceptable.

211. Of those who commented, a majority of consultation respondents supported a significant non-lawyer membership on the Council. This was seen as promoting public confidence in the Society in terms of fulfilling its public interest role and adding depth to its decision-making. Consumer Focus Scotland and other bodies have called for non-solicitor membership to be significantly higher than 20%.

212. The proposal that the regulatory and representative functions should be separated was less widely supported.

213. Almost two thirds of those providing a view were opposed to any clear separation of the representation and regulatory roles of the Society. These were seen by supporters as working well, and it was argued that clearer segregation, if required, was achievable through the modernisation of the Society’s governance. However, one-third of those expressing a view envisaged the separation of the Society’s representation and regulatory roles to be essential. To a large extent this dichotomy represents the difference in views between legal profession and non-legal profession respondents.

214. Part 2 of the Bill provides that there must be a degree of demarcation between representative and regulatory roles, and the Scottish Government believes that this is essential if a body which represents the interests of a single profession is to regulate businesses which may include other professionals in their management and oversight. It believes that such demarcation is possible within the overarching framework of the Society and the Council, but that the protection of the separate regulatory role must be present and clearly expressed.

215. The Bill therefore provides for a regulatory committee to carry out the Council’s regulatory functions, namely to regulate solicitors, firms of solicitors, incorporated practices and licensed providers and to make appropriate regulatory rules. This committee should be

independent of any other person or interest and have at least 50% lay membership. The committee must have a lay convenor and must always be chaired by a lay person.

216. The Scottish Ministers may make further provision about the Council’s regulatory functions and modify the Council’s regulatory functions by regulations. This power is only intended to be used if the Society’s regulatory committee does not perform its functions satisfactorily.

217. The Society raised a concern with the Scottish Government that a solicitor facing disciplinary action could avoid some of the consequences of being struck off the roll of solicitors by voluntarily removing his or her name from the roll before the sanction was applied. The Bill corrects this by allowing the Scottish Solicitor’s Discipline Tribunal to prohibit later restoration to the roll in such cases.

PART 4 – OTHER BODIES

Scottish Legal Aid Board

Exclusion from giving legal assistance

218. Under section 31(3) of the Legal Aid (Scotland) Act 1986 currently a designated “relevant body” can exclude advocates or solicitors on conduct grounds from undertaking work funded in terms of that Act. Subsection (10) defines “the relevant body” to mean the Faculty in relation to advocates and, in relation to solicitors, either the Society or the Scottish Solicitors’ Discipline Tribunal. There was a proposal that it would be more proper for SLAB to fulfil this role.

219. SLAB consulted the Society and the Faculty about this change and both were in agreement. In light of this, the Scottish Government wishes to transfer the role of the said bodies to the SLAB. This reflects the fact that the SLAB is best placed to identify if a solicitor or advocate has been misusing the legal aid scheme and should be excluded.

Availability of legal services

220. The Bill will amend the Legal Aid (Scotland) Act 1986 to require the SLAB to monitor the availability and accessibility of legal services in Scotland and to provide information and advice on this to the Scottish Ministers. This is to support the regulatory objective of access to justice, discussed at paragraphs 123 to 126 above.

221. The Bill requires the Society, the Faculty and the Scottish Courts Service to provide the SLAB with information that it reasonably requires in discharge this function.

29 Lay persons are those who are not solicitors, advocates, conveyancing or executry practitioners, or those who have rights of litigation or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.
Scottish Legal Complaints Commission

222. The Bill makes minor amendments to the 2007 Act, which correct various incorrect references. The Bill also makes minor amendments to schedules 1 and 3 to the 2007 Act to put it beyond doubt that the SLCC can delegate to its staff the taking of decisions under section 2(4)(a) that a complaint is not frivolous, vexatious or totally without merit.

PART 5 – GENERAL

223. This part of the Bill contains a range of technical provisions, including:

- stipulation as to which regulations are subject to affirmative or negative procedure
- power for the Scottish Ministers to make supplemental provision or incidental, consequential, transitional, transitory, or saving provision by regulations
- definitions of various terms.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

224. The Bill provides that the encouragement of equal opportunities within the legal profession is one of the regulatory objectives. This objective will influence, amongst others, the Scottish Ministers, approved regulators, the Society and the Faculty, in discharging their regulatory functions.

225. This should encourage these bodies to work individually and together to identify and address barriers to equality within the profession, particularly in terms of its regulation. These might include restrictions on business structure which may make it harder for particular groups to enter the profession.

226. In the current business model, advancement primarily depends on investing personal capital in a firm and assuming partnership responsibilities, often at a relatively young age. It is reasonable to assume that this model might have disadvantages for those with child-bearing responsibilities, or less access to personal finance, and that the development of different business structures might provide more diverse career opportunities within the profession.

227. Access to justice is another regulatory objective. There are a range of areas where the current legal services market may not be operating effectively, including family law, employment and social welfare law. These areas of law have a differential impact on groups such as women and economically disadvantaged people. The opportunities for new forms of legal service, and the new duties on the SLAB to monitor supply of legal services should help to improve access to justice, although it will also be necessary to monitor carefully the risk of any negative impact caused by consolidation of supply.  

---

30 See comments in paragraph 122 of the Regulatory Impact Assessment.
Human rights

228. The Bill contains appeal mechanisms in areas where regulation might impact on the human rights of a person involved in the provision of legal services – such as a decision that someone is not a fit person to be an external investor, or should be disqualified from a particular role within a licensed provider.

229. It is possible that ABS could create opportunities for people and organisations with an interest in human rights to operate a mixed practice combining solicitors specialising in human rights law with other related work.

Island communities

230. The main issue for island and other remote communities will be the impact of the Bill on local access to justice. The possibility of combining legal services with other professional services (such as accountancy) may provide an opportunity to maintain a “one stop shop” local service when separate individual businesses would not be commercially viable.

231. Against this, there is a concern that small local law firms may be unable to compete effectively against ABS run by non-lawyers which specialise in the more remunerative areas of work, leading to a reduction in local access to justice. This would be a risk even without the Bill, and there are provisions in the Bill to mitigate the risk, including the option of restricting licences to ABS where they will affect access to justice, and the monitoring role of SLAB. Overall, it is the Scottish Government’s view that access to justice in island communities is more likely to be improved by the provisions of the Bill.

Local government

232. The Bill does not have an impact on local government.

Sustainable development

233. Other than the issues around local access discussed above, it is not considered that the Bill will have an impact on sustainable development.
LEGAL SERVICES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Legal Services (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The principal effect of the Legal Services (Scotland) Bill (“the Bill”) is to liberalise the legal services market in Scotland by allowing solicitors who offer legal services to operate using certain business models which are currently prohibited. It will do this by making amendments to the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to remove restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and by creating a regulatory framework which supports the freeing up of the market while ensuring public protection and the maintenance of quality. It is permissive rather than prescriptive legislation, as the traditional business models will remain an option for those solicitors who choose to carry on practising within that structure.

4. The Bill will create a supportive tiered regulatory framework, as shown below—
   - the Scottish Ministers will license and regulate approved regulators;
   - the approved regulators will license and regulate licensed legal services providers (“licensed providers”);
   - licensed providers, as regulated bodies, will have obligations to manage and oversee people in their business entity – including lawyers, other professionals and non-professionals - in a way which is compatible with the regulatory regime imposed by the approved regulator; and
   - individual professionals within licensed providers will continue to be personally regulated by their own professional bodies.
5. The Bill also includes—
   - regulatory objectives and professional principles which will apply to all regulated legal professionals, whether or not they choose to join licensed providers;
   - measures to support the modernisation of the governance of the Law Society of Scotland (“the Society”);
   - statutory codification of the framework for the regulation of the Faculty of Advocates (“the Faculty”);
   - provisions to extend rights to obtain confirmation to the estates of deceased persons.

6. Part 1 of the Bill sets out the core regulatory objectives, which are intended to guide the actions of all regulators of legal services, and the professional principles which apply to any legal professional providing legal services. It also establishes the scope of legal services for the purposes of the Bill.

7. Part 2 establishes the regulatory framework within which approved regulators and licensed providers will operate.
   - Chapter 1 sets out the requirements to be met by any organisation seeking to become an approved regulator, and the role of Ministers in approving and authorising regulators and in overseeing the regulatory system thereafter.
   - Chapter 2 sets out the requirements and duties placed on licensed providers.
   - Chapter 3 contains further details of the regulatory framework, including the application of the regulatory objectives and professional principles to approved regulators, the role of the Office of Fair Trading (“the OFT”), how complaints against licensed providers and approved regulators should operate, and various registers and lists which must be maintained.

8. Part 3 creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation - part of the process of winding up the estate of a deceased person.

9. Part 4 contains provisions affecting the regulation of individual legal professionals (as opposed to licensed providers) and modifying the duties of other public bodies.
   - Chapter 1 imposes duties on the Society, the Faculty and others involved in the regulation of legal professionals with regard to the regulatory objectives in Part 1.
   - Chapter 2 creates a statutory basis for the regulation of the Faculty.
   - Chapter 3 amends the 1980 Act to remove restrictions on participation by solicitors in licensed providers, to involve non-solicitors in the governance of the Society, to establish a separation between the regulatory and representative functions of the Society, and to strengthen the sanctions available to solicitors facing disciplinary action who seek to remove themselves from the Roll of solicitors.
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

- Chapter 4 creates new responsibilities for the Scottish Legal Aid Board (“the Board”) and makes adjustments to the legislation governing the Scottish Legal Complaints Commission (“the SLCC”).


11. Schedules 1-6 set out how various powers and sanctions open to Ministers in respect of approved regulators should operate.

12. Schedule 7 sets out the procedure for surrender of authorisation of an approved regulator.

13. Schedule 8 makes provision in relation to investors in licensed providers.

14. Schedule 9 contains an index of expressions used in the Bill.

Rationale for subordinate legislation

15. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against—

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

16. In general, the approach adopted has been to create an enabling framework, which provides scope for new business models to be appropriately regulated. Regulatory practice changes over time, as markets change and as more targeted forms of intervention are developed. Furthermore, a key policy aim is to support greater innovation in the legal services market, which may lead to business models emerging which have not been identified at this stage. For both these reasons, it is important not to be too prescriptive in primary legislation about the detailed process of regulation, or the kinds of business which may operate in the market; but it is necessary to ensure that the Scottish Ministers and approved regulators have sufficient flexibility to act quickly should it be necessary to protect the public and consumer interest.

17. The relevant provisions are described in detail below. For each provision, this memorandum sets out—

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

18. Subordinate legislation is required to implement the Scottish Government’s policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative resolution procedure, the Scottish Government have considered carefully the degree of Parliamentary scrutiny that is thought to be required for the orders, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

GENERAL SUBORDINATE LEGISLATION PROVISION

19. Section 99 contains the general subordinate legislation provisions. Subsection (1) requires all powers to make regulations to be exercised by statutory instrument. Subsection (2) allows different provision to be made for different purposes and permits the powers to be used to make incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient. The general position is that the powers exercisable by statutory instruments are subject to negative resolution (subsection (3)(b)). The exceptions are those sections listed in subsection (3)(a) which are subject to affirmative resolution (section 8(2)(c) or (5), 26(1), 29(6), 35(1), 55(10), 75(2)(f) or 81(5)), as well as the commencement order in section 102(2) for which there is no Parliamentary procedure.

SUBORDINATE LEGISLATION POWERS - DETAIL

Section 5(6) - Approved regulators

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

20. Section 5 sets out how a professional or other body must apply to the Scottish Ministers to become an approved regulator of licensed providers, and what its application must include.

21. Section 5(6) gives the Scottish Ministers the power to make regulations prescribing fees which they can charge approved regulators, or applicants for the position of approved regulator. This allows both a charge for application, and an ongoing fee. If implemented, it is expected that this ongoing fee would be charged on an annual basis.

Reason for taking power

22. While the Scottish Government does not intend to charge approved regulators or an applicant to become an approved regulator when the Bill is implemented, this may become necessary to protect public funds should the number of applicants or the resources required to
administer the process be higher than expected. Subordinate legislation is considered a suitable way of introducing fees, given that it is to deal with a contingency we anticipate will not arise, it only affects a small class of people (potential approved regulators), and the appropriate level of fees depends on factors we cannot yet determine accurately, and will be likely to vary over time.

Choice of procedure

23. As this power is narrow in scope, and intended only to be used to recoup costs, the negative resolution procedure is considered to offer sufficient parliamentary scrutiny.

Section 6(7) - Approval of regulators

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

24. Section 6 provides the criteria which an applicant must meet before the Scottish Ministers can approve it as an approved regulator of licensed providers. This is the first stage of a two-stage process for becoming an approved regulator.

25. Section 6(7) gives the Scottish Ministers the power to make further provision about approval of approved regulators by regulations, including the process for seeking approval, the criteria for approval (including things that applicants must be able to demonstrate), and what categories of bodies may (or may not) be an approved regulator.

Reason for taking power

26. The details of the approval process and criteria for approval are considered best addressed through subordinate legislation, as they are likely to involve a significant amount of detailed procedural provisions. They may also require revision at short notice in order to refine the process or to deal with any unforeseen issues. The Bill already spells out the main factors which should inform the decision of the Scottish Ministers on an application, but it is possible that other issues will emerge as significant, and the power to add to the criteria will allow this to be taken into account. The ability to specify which categories of body may or may not be approved regulators allows for the possibility that particular kinds of body (whether in terms of organisational form or other functions) may be identified as being particularly suitable or unsuitable for regulating licensed legal services providers.

Choice of procedure

27. As this power will be used to set out the operational details of a process already outlined in the Bill, the negative resolution procedure is considered appropriate.
Section 7(10) - Authorisation to act

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

28. Section 7 sets out the criteria which must be met before the Scottish Ministers can give an approved regulator authorisation to undertake regulatory functions. This is the second stage in the process of allowing a body to act as an approved regulator, with approval (section 6) being the first.

29. Section 7(10) gives the Scottish Ministers a regulation-making power to make further provision regarding the process for authorising an approved regulator to exercise its regulatory functions (as described in section 7(1)-(9)). In particular, this includes the process and criteria for authorisation.

Reason for taking power

30. As with the approval process in section 6, the details of the authorisation process are considered best addressed through subordinate legislation, as they concern matters of operational detail. They may require revision at short notice in order to refine the process or deal with any unforeseen issues which arise.

Choice of procedure

31. As this power will be used to set out the operational details of a process already outlined in the Bill, the negative resolution procedure is considered appropriate.

Section 8(2)(c) - Regulatory schemes

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

32. Section 8 requires approved regulators to make a regulatory scheme for licensing and regulating the provision of legal services by its licensed providers, and to apply that scheme to them. The provision also outlines the required content of such schemes.

33. Section 8(2)(c) gives the Scottish Ministers the power to make regulations specifying matters which must be addressed in the regulatory schemes of approved regulators, in addition to those set out in section 8(2)(a) and (b).
Reason for taking power

34. This gives the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory schemes, if this proves necessary (for example, to add clarity, or to address unforeseen issues). As such details are likely to change once it is known how the regulatory schemes operate in practise, subordinate legislation is considered the best approach – parliamentary time would not be best spent amending primary legislation to reflect changing operational details.

Choice of procedure

35. Whereas the powers in sections 6 and 7 concern operational detail, this power has the potential to alter the content of the regulatory schemes of approved regulators, adding new requirements which could impose significant additional regulatory burden on both approved regulators and licensed providers. The greater parliamentary scrutiny offered by the affirmative procedure is therefore considered appropriate.

Section 8(5) - Regulatory schemes

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

36. Section 8(5) gives the Scottish Ministers a regulation-making power to allow the regulatory schemes of approved regulators to cover the provision of designated non-legal services by their licensed providers, in addition to the core provision concerning regulation of legal services.

Reason for taking power

37. Section 8 states that the regulatory schemes must cover only the provision of legal services by licensed providers, with “legal services” defined in section 3. This power allows the Scottish Ministers to widen the scope of regulatory schemes should it be discovered that this restriction creates problems in practice – for example where it is difficult in some business models to distinguish legal services from other services, or doing so risks creating duplication or overlaps in regulation within a single business, or creates possibilities for relevant aspects of the business to avoid appropriate regulation. As this is likely only to become apparent once the regulatory schemes are developed, it is considered best addressed through subordinate legislation.

Choice of procedure

38. As with section 8(2)(c), the power in section 8(5) has the potential to significantly change the regulatory schemes of approved regulators, with an impact on the regulators and licensed providers. Therefore, it is considered appropriate that this power be subject to the affirmative procedure.

7
Section 9(3) - Reconciling different rules

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament  

**Provision**

39. Section 8(2)(b) provides that the approved regulator’s regulatory scheme must include appropriate provision for dealing with regulatory conflict between it and any professional or regulatory rules of any other body which regulates the provision of legal or other services. For example, conflict between a regulatory scheme and the Society’s rules governing individual solicitors. Section 9 states that such provision must provide for the preventing and resolving of regulatory conflicts, and the avoiding of unnecessary duplication of regulatory rules. Section 9(3) gives the Scottish Ministers a regulation-making power to make further provision about regulatory conflicts which may involve an approved regulator.

**Reason for taking power**

39. This is a fall-back provision – the general approach is that it is for the approved regulators to resolve regulatory conflict, in discussion as appropriate with other regulators. However, should this prove impossible, or unduly complicated (e.g. because more than one approved regulator is simultaneously negotiating with other regulators), this power allows the Scottish Ministers the flexibility to ensure that such conflicts can be resolved. As the provisions to be made will depend on the detailed circumstances of any particular conflict which may arise, and addresses an issue which is likely to require quick resolution, subordinate legislation is considered appropriate.

**Choice of procedure**

40. The negative resolution procedure is considered most appropriate in this instance, as the power addresses a narrow area which is well defined in the Bill. Section 9(1) describes the scope of the provision which must be in the approved regulator’s regulatory scheme, and section 9(2) defines “regulatory conflict” for the purposes of the section.

Section 22(1) - More about governance

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament  

**Provision**

41. Section 22 relates to the provisions on the internal governance arrangements of approved regulators, as covered in sections 20 and 21. Sections 20 and 21 include, for example, provisions to ensure that such arrangements allow the effective and independent exercise of regulatory functions, that any representative functions are clearly separated from regulatory functions, and that individuals within approved regulators are free to notify the Scottish Ministers of any adverse impact on regulatory independence arising from the representative role of the regulator.
42. Section 22(1) gives the Scottish Ministers a regulation-making power to make further provision regarding these internal governance arrangements. This is limited to arrangements relating to the regulatory function of the approved regulators (as opposed, for example, to the representative functions of an approved regulator which was also a professional body).

Reason for taking power

43. This power is intended to allow further detail to be added to the internal governance arrangements described in sections 20 and 21, should this be necessary. Examples of how the power could be used might be to provide more specific provisions regarding the level of lay representation required as a consequence of section 20(2)(c), or to specify some further additional safeguard to ensure the body can operate as a credible and effective regulator. To ensure that the regulatory framework remains robust, any additional provisions will require to be created without unnecessary delay. Therefore, the use of subordinate legislation is considered appropriate.

Choice of procedure

44. As there is provision in the Bill for consultation with the affected parties (approved regulators), and the underlying principles relating to internal governance arrangements are stated clearly in sections 20(1) and 21(1), and the power would only be used to add further detail to this, the negative resolution procedure is considered appropriate.

Section 24(9) - Assessment of licensed providers

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

45. Section 24 provides that approved regulators are responsible for conducting periodic assessments of their licensed providers, to review their compliance with the key duties set out in section 38, and other matters which may be considered appropriate. These assessments must take place at least once in every 3 year period. Section 24(9) gives the Scottish Ministers the power to make further provision, by regulations, about such assessments.

Reason for taking power

46. As with the operational details of any new regulatory framework, the processes and requirements of this assessment process are likely to require some elaboration once the Bill provisions come into force. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

Choice of procedure

47. Further provision made using this power will deal with the operational details of the assessment process. Given this, the negative resolution procedure is considered appropriate.
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

Section 26(1) - Additional powers and duties

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

48. Section 26 relates to the regulatory functions of approved regulators, as set out in sections 23, 24 and 25. Section 26(1) gives the Scottish Ministers the power to make regulations giving approved regulators additional functions as are considered necessary or expedient for them to have for the purposes of regulating licensed providers.

Reason for taking power

49. This is so that if an omission is discovered, or if in the light of experience, the Scottish Ministers consider additional functions to be necessary or expedient, they can require approved regulators to take on those functions.

Choice of procedure

50. This power has a potentially significant impact, in that it can require approved regulators to take on functions which are not set out in the Bill. This is reflected by the requirement for consultation with all approved regulators and the Lord President (plus others as considered appropriate) prior to use of the power. It is also considered appropriate that any regulations made using this power be subject to the affirmative resolution procedure, in order to ensure a proper level of parliamentary scrutiny.

Section 29(6) - Measures open to Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

51. Section 29 sets out the measures open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. These include, for example, setting performance targets, imposing financial penalties, and the rescission of an approved regulator’s authorisation to regulate. More information can be found in schedules 1-6.

52. Section 29(6) gives the Scottish Ministers a regulation-making power to specify other measures which may be taken by them (subsection (6)(a)), and to make further provisions relating to measures that they can take, including the procedures to be used when taking them (subsection (6)(b)).

Reason for taking power

53. The Bill creates a range of measures of differing intensity to allow the Scottish Ministers to ensure that approved regulators carry out their functions effectively and appropriately in the
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

public interest. Subsection (6)(a) is intended to be used should it be discovered in practice that further additional measures would be helpful in carrying out this function. This could be because some of the existing suite of powers are found to be insufficiently robust or, at the other extreme, are disproportionately severe for the issues at hand. This power prevents such a situation frustrating the policy intention behind this section, by allowing the Scottish Ministers to ensure that they have the appropriate tools to tackle poor performance on the part of approved regulators.

54. Subsection (6)(b) is intended to be used to give further details around the specifics of the measures which can be taken, and the procedures involved. The exact details of the measures and the procedures surrounding them are considered best set out in subordinate legislation, as this allows greater flexibility to make changes/updates as may be required in the future.

Choice of procedure

55. The power in section 29(6) is one which creates new sanctions on approved regulators, which will be defined in the regulations themselves. Given the potential impact of these sanctions on approved regulators, and the breadth of the power, the affirmative resolution procedure is considered appropriate.

Section 33(1) - Extra arrangements

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

56. Sections 32 and 33 cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator, owing to the circumstances described in section 32. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded. Section 32 sets out the process and timescales involved in such a transfer. Section 33(1) gives the Scottish Ministers the power to make regulations relating to the transfer arrangements for licensed providers which are required to change approved regulator.

Reason for taking power

57. This power is intended to be used to address any unforeseen circumstances which might occur in the transfer process described in section 32 and, as such, the flexibility of secondary legislation is considered appropriate. It is also intended to be used in two particular situations, described in subsection (2). In both such situations, the issue is likely to arise from a specific case or small number of cases, and secondary legislation is felt appropriate to respond to the particular issues which may arise in such a case.

58. The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their
choice (subject to that approved regulator’s consent). This may be necessary to ensure continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.

59. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the old approved regulator, in relation to the current licence of the licensed provider. This may be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to the old regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.

Choice of procedure

60. This power will be used to address mostly procedural matters relating to transfer arrangements, with no significant impact on the purpose of the appropriate sections. The negative resolution procedure is therefore considered sufficient in this case.

Section 34(6) - Change of approved regulator

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

Provision

61. Section 34 provides for a voluntary transfer by a licensed provider to a new regulator, and sets out the timescale and requirements involved.

62. Section 34(6) gives the Scottish Ministers a regulation-making power to make further provision concerning this voluntary transfer of a licensed provider from one approved regulator to another.

Reason for taking power

63. This allows the Scottish Ministers to deal with any unexpected issues which arise around the transfer of licensed providers, and which are not covered sufficiently by the approved regulator’s regulatory scheme. Given the limited and procedural nature of this power, in addition to the need to address such an issue promptly, the use of subordinate legislation is considered appropriate.

Choice of procedure

64. As this power relates to mainly procedural matters, the negative resolution procedure is considered appropriate.
Section 35(1) - Step-in by Ministers

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

65. Section 35(1) gives Scottish Ministers a regulation-making power to make provision allowing them to establish a body with a view to it becoming an approved regulator.

Reason for taking power

66. In the unlikely event that no existing bodies apply to become approved regulators, or none pass the application process, or an approved regulator ceases to operate and there is no other regulator to which licensed providers can transfer, a new regulatory body would be required in order to implement the provisions of Part 2 of the Bill.

67. This is a fallback provision which we do not envisage being used. Given that the remit of the new body would be limited to those regulatory functions described in this Bill, it would not be an effective use of the Scottish Parliament’s time to create such a body by subsequent primary legislation. It is also possible that such provision will be required urgently to deal with a regulatory gap, particularly if an existing regulator has ceased to operate. Therefore, it is considered appropriate to address this through subordinate legislation.

Choice of procedure

68. The power is, as section 35(4) makes clear, only to be used where necessary to ensure that licensed providers can continue to be effectively regulated. It is likely that the provisions will require to be implemented urgently if there is a regulatory gap, but given the financial and policy implications of creating an entirely new public body, affirmative resolution is considered appropriate.

Section 35(2) - Step-in by Ministers

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

69. Section 35(2) gives the Scottish Ministers a regulation-making power to allow them to act as an approved regulator in circumstances set out in those provisions.

Reason for taking power

70. This power ensures that there is always an approved regulator in place. For example, should an approved regulator fail, or no body applies to become an approved regulator, the Scottish Ministers can take on the regulatory duties until such time as an appropriate body can be found, or established using section 35(1). Such a step would likely be required at short notice to
plug a regulatory gap, and is a safeguard rather than something which is anticipated will be needed, so subordinate legislation is considered appropriate.

Choice of procedure

71. This is a fall-back provision and is only intended to be used if the Government’s policy intention of providing for the regulation of licensed providers might otherwise be frustrated. As the Scottish Ministers would be regulating in accordance with the various details set out for approved regulators in the Bill, and the matter may require urgent resolution the negative resolution procedure seems to offer an appropriate level of scrutiny without adding in undesirable delay.

Section 37(6) - Eligibility criteria

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

72.Section 37 sets out which types of entity would, and would not, be eligible to become a licensed provider. Section 37(6) gives the Scottish Ministers a regulation-making power to make further provisions around the criteria for eligibility (subsection (6)(a)). It also allows them to expand the list of persons who are classed as “legal practitioners” for the purposes of this section (subsection (6)(b)(i)), and to add an additional type of legally qualified person to section 36(2) (subsection (6)(b)(ii)).

Reason for taking power

73. Subsection (6)(a) gives the Scottish Ministers the flexibility to add further detail around the conditions of eligibility, as may be necessary once the provisions of the Bill are in force. This allows refinement of the current provisions – an example might be to provide further specification of the nature of separation required between a licensed provider and the larger entity of which it forms part, for section 37(3). It also provides the ability to address any unforeseen circumstances.

74. Subsection (6)(b)(i) relates to section 36(2), which provides that an entity is only eligible to be a licensed provider if it employs at least one solicitor providing legal services. Subsection (6)(b)(i) is intended to be used should an additional type of legally qualified individual seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, section 36(2) could be changed to give advocates the same status as solicitors – section 36(2) would then require that either a solicitor or an advocate must be employed in order to be eligible to be a licensed provider.

75. Subsection (6)(b)(ii) allows an additional type of legal practitioner to be added to the list in subsection (5). This is to allow the addition, if appropriate, of any new types of legal practitioner which might be created in the future, thus keeping the Bill up to date.
76. Subordinate legislation is deemed appropriate in this case, as all the cases described above in subsection (6) will require action once the Bill comes into force, and are consequent on changes which may or may not happen. The changes do not undermine the essential safeguard provided for in section 36(2), that a legally qualified professional must be involved in every licensed provider.

Choice of procedure

77. Given the limited nature of the power which is likely to be used, if at all, for clarification and technical additions to the requirements of section 37, the negative resolution procedure is considered appropriate.

Section 39(9) - Head of Legal Services

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

78. Section 39(9) gives the Scottish Ministers the power to make further provisions about Heads of Legal Services of licensed providers, and the functions of such Heads (subsection (9)(a)). It also allows the Scottish Ministers to modify subsection (2) to add an additional type of legally qualified person who would then be eligible to become a Head of Legal Services (subsection (9)(b)).

Reason for taking power

79. The operational details around the position of Head of Legal Services may require to be expanded (under subsection (9)(a)) as it is determined how the position operates in practice, or in response to any unforeseen circumstances. This may provide, for example, for further responsibilities to be specified for the Head of Legal Services to ensure an identifiable individual in the licensed provider takes personal responsibility for ensuring the business is complying with regulatory requirements.

80. The power in subsection (9)(b) is intended to be used where an additional class of legally qualified individuals seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, subsection (2) could be changed to give advocates the same status as solicitor, allowing them to take the position of Head of Legal Services.

Choice of procedure

81. This power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. Therefore, the negative resolution procedure is considered appropriate.
Section 40(7) - Head of Practice

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

82. Section 40 describes the position of Head of Practice, along with the requirements, duties and responsibilities associated with the role. Section 40(7) gives the Scottish Ministers the power to make further provisions about Heads of Practice of licensed providers, and the functions of such Heads.

Reason for taking power

83. The operational details around the position of Head of Practice may require to be expanded as it is determined how the position operates in practice, or in response to any unforeseen circumstances. As this is an operational matter, subordinate legislation is considered appropriate.

Choice of procedure

84. As with section 39(9), this power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. Therefore, the negative resolution procedure is considered appropriate.

Section 41(5) - Practice Committee

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

85. Section 41(5) gives the Scottish Ministers the power to make further provisions relating to the Practice Committees of licensed providers, and the functions of such Committees.

Reason for taking power

86. The operational details around Practice Committees may require to be expanded in the light of experience as to how they should operate in practice, or in response to any unforeseen circumstances. As this is an operational matter, subordinate legislation is considered appropriate.

Choice of procedure

87. As with the powers relating to the other named positions within licensed providers in sections 39 and 40, this power is not likely to raise any contentious issues. Therefore, the negative resolution procedure is considered appropriate.
Section 52(2) - More about investors

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

88. Section 52 relates to sections 49-51 which address outside investors in licensed providers (for example, setting out the criteria which must be met by such investors in terms of financial position and behaviour). Section 52(2) gives the Scottish Ministers power to make regulations to make further provision about such outside investors, and for licensing rules about individuals who have an interest in a licensed provider.

89. Such provision may include imposing requirements on licensed providers or those with an interest in licensed providers, defining or clarifying the terminology, specifying the criteria or circumstances by reference to which an outside investor is presumed or held to be fit or unfit, and modifying the definition of investor or outside investor as described in section 52(4).

Reason for taking power

90. This power allows the Scottish Ministers to set out further detail on what must be covered in the “fit to own” test which must be applied by approved regulators to any outside investor in a licensed provider (as described in sections 49 and 50), or in how outside investors should behave.

91. The Bill provides the framework and key issues to be addressed in the fit-to-own test, and provides for the detail to be addressed in regulatory schemes, particularly the licensing rules (see section 49(2) which requires that licensing rules relating to outside investors must explain the basis on which an outside investor’s fitness is determinable). It also sets out in section 51 the behaviour required of outside investors.

92. The safeguards to ensure that outside investors are suitable and behave properly are highly important in ensuring that the public interest and professional standards are protected. It may prove desirable to add further specification to these safeguards, to ensure consistency between the approach taken by different regulators, or to reflect further qualifying tests which are identified in future.

Choice of procedure

93. This power applies to a restricted class of people (outside investors) and is essentially provided to clarify or expand on provisions which are already in the Bill, so as to maximise public protection. Negative resolution procedure is therefore considered appropriate.
Section 55(10) - Safeguarding clients

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

94. Section 55 makes provision to safeguard the interests of clients of a licensed provider which is ceasing, or has already ceased to provide legal services. It sets out the requirements placed on the licensed provider in question, and allows the approved regulator to issue directions to it in order to protect the interests of clients. Such directions may concern making certain documents and information, or money held on behalf of clients or in trust, available. For example, where the licensed provider has ceased to exist, clients may find it difficult or time consuming to gain access to documents and information, or money, not least if the former point of contact is no longer available. The approved regulator’s ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could be used therefore to mitigate the impact on clients.

95. Section 55(10) gives the Scottish Ministers a regulation-making power to make further provision about the steps which are to be taken to safeguard the interests of clients of licensed providers in the circumstances described in subsection (1).

Reason for taking power

96. This power gives the Scottish Ministers the flexibility to deal with unforeseen circumstances, and allows for further elaboration of steps should this be necessary in order to safeguard clients of licensed providers which are ceasing to provide legal services. Given that action may need to be taken quickly in order to ensure that consumers interests are protected, subordinate legislation is considered appropriate.

Choice of procedure

97. Many of the other regulation-making powers in the Bill essentially relate to the specification of who is entitled to undertake a certain role, or the general way in which they should carry out their responsibilities. By contrast, these regulations could impose specific and potentially onerous requirements on licensed providers to do certain things in order to safeguard the interests of individual clients. As such, affirmative procedure is felt to be appropriate.
Section 64(7) - Complaints about regulators

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

98. Section 64 requires the Scottish Ministers to investigate all complaints about approved regulators unless a complaint is considered vexatious, frivolous or without merit and unless it is about the way in which the approved regulator has handled a complaint.

99. Section 64(7) gives the Scottish Ministers the power to make regulations to make further provision about complaints made against approved regulators, and how these are to be dealt with.

Reason for taking power

100. The details of the complaints process are considered best addressed through subordinate legislation, as they have limited scope and are operational in nature. This also allows for revision at short notice in order to refine the process, or deal with any unforeseen issues which arise.

Choice of procedure

101. As the underlying principles behind complaints against approved regulators are set out in the Bill, and this power is concerned with setting out mainly procedural matters, the negative resolution procedure is felt to offer sufficient parliamentary scrutiny.

Section 65 - Complaints about providers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

102. Section 65 amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”), to insert into the 2007 Act a new Part 2A which contains provisions dealing with complaints about licensed providers. It generally provides that Parts 1 and 2 of the 2007 Act should apply in broadly the same way for complaints about licensed providers as it does for legal practitioners. The amendments also provide for how sections 23 to 25 (“handling complaints”) of the 2007 Act apply in relation to how approved regulators deal with the new “regulatory complaints” (created in new section 57B of the 2007 Act). This will operate in broadly the same way as complaints about relevant professional organisations (as defined in section 46 of the 2007 Act).

103. New section 57A(2(b)) of the 2007 Act allows for modification of how complaints are dealt with about practitioners under that Act in respect of complaints about licensed providers,
and section 57D(2) of the 2007 Act allows for modification of how handling complaints are dealt with under the 2007 Act in respect of complaints about approved regulators.

Reason for taking power

104. These powers are fall-back provisions to modify the application of the existing regime to licensed providers and approved regulators, should it prove that the way in which the 2007 Act operates creates any unintended problems when translated into this new context.

Choice of procedure

105. The intention behind these powers is to allow for technical adjustments to be made to the existing complaints regime, so that it can continue to operate effectively in relation to the new forms of licensed provider and approved regulator. They are not intended to substantially alter the rights and obligations of the various parties and, as such, negative resolution procedure is considered to be appropriate.

Section 67(5) - Registers of licensed providers

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

106. Section 67 provides that approved regulators must keep and publish a register of their licensed providers, and lists the information which is to be included. Section 67(5) gives the Scottish Ministers the power to make regulations to make further provision about the information to be contained in the registers of licensed, and to prescribe the manner in which the registers are kept and published.

Reason for taking power

107. The Scottish Ministers may wish to provide more detail on the exact content of such registers and the procedure to be used in keeping and publishing them, and amend such details as necessary once the regulatory framework is in operation. As this power relates to a largely administrative function, it is considered appropriate for the details to be set out in subordinate legislation.

Choice of procedure

108. The negative resolution procedure is considered appropriate in view of the non-contentious and administrative nature of the power.
Section 68(6) - Lists of disqualified persons

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

**Provision**

109. Section 68 provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider (see section 44), and those it has determined to be unfit to be an investor in a licensed provider (see section 49).

110. Section 68(6) gives the Scottish Ministers a regulation-making power to make further provision about the information to be contained in the list of people disqualified from holding a position in a licensed provider, and to prescribe the manner in which those lists are to be kept and published.

**Reason for taking power**

111. The Scottish Ministers may wish to provide more detail on the exact content of such lists and the procedure to be used in keeping and publishing them and amend such details as necessary once the regulatory framework is in operation. As this power relates to a largely administrative function, it is considered appropriate for the details to be set out in subordinate legislation.

**Choice of procedure**

112. The negative resolution procedure is considered appropriate in view of the non-contentious and administrative nature of the power.

Section 73(6) - Approving bodies

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

**Provision**

113. Section 73 sets out the requirements of the application to the Scottish Ministers to become an approving body of confirmation agents. Section 73(6) gives the Scottish Ministers a regulation-making power to prescribe fees which they may charge applicants to become approving bodies.

**Reason for taking power**

114. While the Scottish Government does not intend to charge applicants to become approving bodies when the Bill is implemented, this may become necessary to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. Subordinate legislation is considered a suitable way of introducing fees in such a case.
This document relates to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

Choice of procedure

115. As this power is narrow in scope, and intended only to be used to recoup costs, the negative resolution procedure is considered to offer sufficient parliamentary scrutiny.

Section 74(7) - Certification of bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

116. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. Section 74(7) gives the Scottish Ministers power to make regulations to make further provision regarding the process for seeking certification, the criteria for certification, and what categories of bodies may or may not be an approving body.

Reason for taking power

117. The details of the certification process are considered best addressed through subordinate legislation, as they may require revision at short notice in order to refine the process, or deal with any unforeseen issues which arise. The ability to determine which types of body may or may not be approving bodies is intended to address any issues which may arise with particular types of body in the future.

Choice of procedure

118. As this power will be used to set out the operational details of a process already outlined in the Bill, the negative resolution procedure is considered appropriate.

Section 75(2)(f) - Regulatory schemes

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

119. Section 75 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to provide confirmation services, and which regulates those members in the provision of those services. It also sets out what must be included in such schemes.

120. Section 75(2)(f) gives the Scottish Ministers a regulation-making power to require approving bodies to cover such regulatory matters as the Scottish Ministers specify in their regulatory schemes, in addition to those already listed in section 75.
Reason for taking power

121. As with section 8(2)(c) in respect of approved regulators, this gives the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory schemes for confirmation services, if this proves necessary (for example, to add clarity, or to address unforeseen issues).

Choice of procedure

122. The level of parliamentary scrutiny offered by the affirmative resolution procedure is considered appropriate in this case, as the power has the potential to significantly alter the focus of the regulatory schemes of approving bodies, and to impact on the regulatory burden on approving bodies and confirmation agents.

Section 81(5) - Ministerial intervention

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

123. Section 81(5) gives the Scottish Ministers power to make regulations to make further provision about approving bodies and confirmation agents.

Reason for taking power

124. A broad power has been taken here to allow the Scottish Ministers to prescribe further safeguards in relation either to those who grant powers to deal with confirmation, or those who carry out this work. Given that the work involved is of a specialist nature, may involve significant amounts of money and potentially vulnerable clients, and is currently restricted to solicitors, it is felt appropriate to retain a reserve power to create further regulatory safeguards, should they prove desirable.

Choice of procedure

125. Given the potentially wide scope of this power, affirmative resolution procedure is considered appropriate.

Section 83 - Complaints about agents

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

126. Section 83 makes provision for complaints about confirmation agents by inserting a new Part 2B into the 2007 Act which contains provisions for confirmation agents.
127. As with section 65, this applies the existing complaints regime set up in the 2007 Act, with approving bodies being generally comparable to professional organisations, and confirmation agents being comparable to other legal practitioners. New sections 57F(2)(b) and 57G(2) of the 2007 Act allow for modification of the existing scheme in respect of these new approving bodies and confirmation agents.

Reason for taking power

128. These powers are fall-back provisions to modify the application of the existing regime to confirmation agents and approving bodies, should it prove that the way in which the 2007 Act operates creates any unintended problems when translated into this new context.

Choice of procedure

129. The intention behind these powers is to allow for technical adjustments to be made to the existing complaints regime, so that it can continue to operate effectively in relation to the new forms of provider and regulator. They are not intended to substantially alter the rights and obligations of the various parties and, as such, negative resolution procedure is considered to be appropriate.

Section 92 - Council membership

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

130. Section 92(2)(c) adds a provision (3A(4)) to the Solicitors (Scotland) Act 1980 giving the Scottish Ministers the power to specify either the minimum number or the proportion of members of the Council of the Law Society of Scotland (“the Council”) who must be non-solicitors.

131. Scottish Ministers are also given the power to specify any additional criteria for appointability as non-solicitor members as they consider appropriate, and the minimum number or proportion of those non-solicitor members in relation to whom the additional criteria are to apply.

Reason for taking power

132. The presence of suitably qualified non-solicitors on the Council is an important part of the reform of its ongoing regulatory function, and section 92 makes relevant changes to the Solicitors (Scotland) Act 1980 to allow this. Should the Society fail to appoint an adequate number/proportion of such suitably qualified members, however, this power allows the Scottish Ministers to intervene. This power will only be required should the Society’s actions be deemed inadequate. The scope of the change is restricted by the Bill to the narrow issues of: (a) the criteria for appointability as non-solicitor members; and (b) the appropriate number or proportion of non-solicitor members, and this number or proportion will depend on the overall make-up of
the Council, which is not specified in primary legislation. For all these reasons, subordinate legislation is considered appropriate.

Choice of procedure

133. As such an action would involve a significant intervention in the composition of the Council, which plays an important statutory role in maintaining the independence of the solicitors’ profession, it is considered appropriate that any such regulations be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 93 - Regulatory committee

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

134. Section 93(2) adds a provision (section 3B(5)) to the Solicitors (Scotland) Act 1980, giving the Scottish Ministers the power to make further provisions about the Council’s regulatory functions. This can be used if it is deemed necessary in order to ensure that the exercise of those functions is in accordance with the purpose stated in subsection (2) (that the Council’s regulatory functions are exercised independently of any other person or interest, and properly in other respects, in particular with a view to achieving public confidence).

135. The power can also be used to modify the definition of “regulatory functions”, as given in subsection (9), if it is believed that such modification is appropriate.

Reason for taking power

136. The distinction between regulatory and representative functions is important to the scheme of the Bill. The Bill imposes requirements on regulators, and allows those to be adjusted in certain respects by regulation, but it is not considered appropriate for Ministers to interfere with the representative functions of any professional body, including the Society. However, the distinction is not always clear cut, in that some issues (such as continuing professional development) have a regulatory aspect but may also be linked to a professional support and development function. The Society is currently undertaking a governance review, and is considering how the distinction should operate within the Society’s own internal governance. This power will allow flexibility to refine the definition of regulatory function as this work develops.

Choice of procedure

137. As this power would involve altering primary legislation, and would have a significant impact on the governance of the Society, which plays an important statutory role in maintaining the independence of the solicitors’ profession, it is considered appropriate that any such regulations be subject to the level of parliamentary scrutiny that the affirmative procedure provides.
Section 100(1) - Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative/negative resolution of the Scottish Parliament

Provision

138. Section 100(1) gives Scottish Ministers the power to make such supplemental provision, or incidental, consequential, transitional, transitory or savings provisions as they consider necessary or expedient in connection with the Act.

Reason for taking power

139. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. This power is considered necessary in order to ensure a smooth transition to the new regulatory regime.

140. The power to make supplemental or incidental provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that with legislation opening up new areas as this does that it is discovered when the policy is implemented that there are unforeseen issues, and this power would allow such changes to be made without the need for further primary legislation. Consequential provision may be required in order to make necessary changes to related legislation - a number of consequential amendments are identified in the Bill as introduced (see, for example, sections 90 and 91), but this power would allow the Scottish Ministers to make further changes should there be an unforeseen interaction with existing legislation. Whereas every effort has been made to try and ensure that there will be no need for transitional or transitory provision, it is not possible to be certain that unforeseen issues will not arise at the time of implementation and this provision is intended to cover that eventuality. Finally, savings provisions allow the operation of provisions in repealed or amended legislation to be preserved in certain circumstances.

141. Without such a power it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either Parliament’s or Government’s resources.

Choice of procedure

142. Where such regulations are clearly limited in scope and effect, such as transitional or transitory provisions intended to address temporary issues, the negative resolution procedure is considered appropriate. Such provisions would not have a lasting effect, and would be intended to resolve operational difficulties. However, where any such regulations add to, replace, or omit any part of the text of any Act (including this Act), the affirmative procedure will be used. As such amendment to primary legislation has the potential to have a significant impact on the effect of the Bill, this level of parliamentary scrutiny is considered appropriate.
Section 102(2) - Commencement and short title

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No procedure

Provision

143. Section 102(1) provides for sections 99, 100 and 101 to come into force the day after Royal Assent. Section 102(2) gives the Scottish Ministers the power to appoint the day on which all other provisions come into force.

Reason for taking power

144. This power allows the Scottish Ministers to control the commencement of the various provisions as they consider appropriate.

Choice of procedure

145. As is usual for commencement orders, no provision is made for laying the order in Parliament. The power is to commence provisions Parliament has already scrutinised, and the timing of such commencement is an administrative issue for the Scottish Ministers.

Schedule 4 Paragraph 2(2) and 11(2) - financial penalties

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

146. Schedule 4 paragraph 2 provides that the Scottish Ministers may impose a penalty, not exceeding a prescribed amount, on approved regulators, in respect of a failure to adhere to their own internal governance arrangements, or to comply with a direction by Scottish Ministers given in accordance with Schedule 2. Paragraph (2)(2) provides that the maximum penalty should be prescribed in regulations. Paragraph 11 allows for interest to be charged in respect of a penalty which is not paid as required, and for regulations to prescribe the rate of interest (paragraph 11(2)).

Reason for taking power

147. The power to prescribe the maximum penalty in regulations allows flexibility to tailor penalties to the likely size and resources of approved regulators, which will only become clear once the Bill is passed. It also allows for flexibility to adjust the maximum level from time to time to reflect inflation or changes in the market. The power to set and vary the interest rate in regulations allows flexibility to set the rate at levels consistent with the general level of interest rates at the time of implementation, and to adjust in the light of subsequent interest rate changes.
Choice of procedure

148. The maximum level of financial penalty and the appropriate interest rate for unpaid penalties are each a single, relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity or principle and the negative resolution procedure is considered appropriate.
Justice Committee

4th Report, 2010 (Session 3)

Stage 1 Report on the Legal Services (Scotland) Bill

Published by the Scottish Parliament on 12 March 2010
Justice Committee

4th Report, 2010 (Session 3)

CONTENTS

Remit and membership

Report

Introduction 1

Background and consultation 2
Developments in England and Wales 2
Early developments in Scotland 3
The Which? super-complaint and the OFT response 4
The Scottish Government’s approach and development of the Bill 4

Consultation by the Committee and evidence received 6

The context for this legislation 7
Competition in the legal services market and the consumer interest 8
Maintaining the competitiveness of larger Scottish law firms 13
The Scottish Government’s arguments in favour of the Bill 21

Part 1 – The regulatory objectives etc. 23

Part 2 – Regulation of licensed legal services 25
Number of regulators 26
Combined regulatory and representative function 27
Independence of the Scottish legal profession 30
Regulatory schemes 36
Reconciling different rules 37
Professional indemnity 39
Step-in powers 40
Licensed legal services providers 41
Designated persons 43
Outside investors 45
Professional privilege 48
Complaints about regulators 49
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanctions</td>
<td>50</td>
</tr>
<tr>
<td><strong>Part 3 – Confirmation services</strong></td>
<td></td>
</tr>
<tr>
<td>Confirmation agents</td>
<td>53</td>
</tr>
<tr>
<td>Will writing</td>
<td>54</td>
</tr>
<tr>
<td><strong>Part 4 – The legal profession</strong></td>
<td></td>
</tr>
<tr>
<td>The Faculty of Advocates</td>
<td>54</td>
</tr>
<tr>
<td>Solicitor Advocates</td>
<td>55</td>
</tr>
<tr>
<td>Scottish Legal Aid Board</td>
<td>60</td>
</tr>
<tr>
<td>Prospective stage 2 amendments</td>
<td>61</td>
</tr>
<tr>
<td>Financial Memorandum</td>
<td>62</td>
</tr>
<tr>
<td>General conclusions</td>
<td>63</td>
</tr>
<tr>
<td>Specific conclusion</td>
<td>64</td>
</tr>
<tr>
<td><strong>Annexe A: Subordinate Legislation Committee Report</strong></td>
<td>65</td>
</tr>
<tr>
<td><strong>Annexe B: Finance Committee consideration</strong></td>
<td>82</td>
</tr>
<tr>
<td><strong>Annexe C: Extracts from the Minutes</strong></td>
<td>92</td>
</tr>
<tr>
<td><strong>Annexe D: Index of oral evidence</strong></td>
<td>95</td>
</tr>
<tr>
<td><strong>Annexe E: Index of written evidence</strong></td>
<td>96</td>
</tr>
</tbody>
</table>
Justice Committee

Remit and membership

Remit:
To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:
Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
James Kelly
Stewart Maxwell

Committee Clerking Team:
Andrew Mylne
Anne Peat
Andrew Proudfoot
Christine Lambourne
INTRODUCTION

1. The Legal Services (Scotland) Bill was introduced in the Parliament on 30 September 2009 by Kenny MacAskill, Cabinet Secretary for Justice. The Parliament designated the Justice Committee as the lead committee to consider and report on the general principles of the Bill at Stage 1.

2. The Subordinate Legislation Committee (SLC) considered the delegated powers contained in the Bill and reported to the Parliament on 6 January 2010. In its report, the SLC made detailed comment about 11 provisions and noted that in most, if not all, instances the Scottish Government proposed to bring forward amendments at Stage 2 to address the concerns raised. The SLC’s report is contained in Annexe A to this report.

3. The Finance Committee considered the Bill’s Financial Memorandum and adopted level 1 scrutiny\(^1\). It did not take oral evidence, nor produce a report, but it did seek written comments from relevant organisations by way of a questionnaire. Three submissions were received and were passed to this Committee\(^2\) and are included in Annexe B to this report.

4. Standing Orders require the lead committee to consider and report on the Bill’s Financial Memorandum, taking into account any views submitted to it by the Finance Committee, and to consider and report on the Policy Memorandum. Any comments on either the Financial Memorandum or the Policy Memorandum are made at the relevant points throughout this report and paragraphs 299 to 303 summarise the responses made to the Finance Committee on the Financial Memorandum.

---

\(^1\) The Finance Committee seeks written evidence from organisations financially affected using a standard questionnaire and any responses received are passed directly to the lead committee considering the Bill. This is completed in advance of the lead committee’s evidence session with the relevant minister at Stage 1.

\(^2\) Submissions were received from the Institute of Chartered Accountants in Scotland, the Law Society of Scotland and the Scottish Legal Aid Board.
BACKGROUND AND CONSULTATION

5. The Bill is intended to be a Scottish response to a wider drive towards greater competition in the legal services market.

6. One of the original drivers for change was the European Commission (the Commission), which reviewed competition in the liberal or self-regulating professions (lawyers, notaries, accountants, architects, engineers and pharmacists) during 2003. Although the review covered all member states, the study of the UK market was limited to England and Wales. The Commission’s report, published in 2004, targeted restrictive practice in five areas: price-fixing; recommended prices; advertising; entry requirements and reserved rights; and regulations governing business structure and multi-disciplinary practices. Also in 2004, the Commission consulted on a draft directive to facilitate the free movement of services, including professional services, in the internal market.

Developments in England and Wales

7. In England and Wales, change was driven by the UK Government's response to a 2001 report by the Office of Fair Trading (OFT) challenging restrictions on competition in certain professions, including the legal profession. Following an initial review and consultation by the then Department for Constitutional Affairs (DCA), Sir David Clementi was appointed in 2003 to conduct an independent review of the regulatory framework for legal services in England and Wales.

8. In his report, published in 2004, Sir David agreed with the DCA’s view that the existing regulatory framework was “outdated, inflexible, over-complex and insufficiently accountable or transparent”. He concluded that complaints systems were unsatisfactory at a number of levels and that business structures were unduly restrictive. His report set out six objectives for a new regulatory regime, including promotion of the public and consumer interests. It proposed a structure involving an oversight regulator (a Legal Services Board), with a non-lawyer chair, which would delegate its regulatory powers to front-line regulatory bodies. Those bodies, in turn, would be required to separate internally their regulatory and representative functions. The report also proposed that non-lawyers should be permitted to become principals of “legal disciplinary practices” so long as lawyers remained in majority control and non-lawyers were subject to a “fit to own” test, acknowledging that this was a move towards allowing multi-disciplinary practices. In addition, the report recommended a single independent complaints body (an Office for Legal Complaints) and systems for determining which legal services should be “reserved” and so carried out only by authorised persons.

9. The UK Government took forward the Clementi proposals in legislation which became the Legal Services Act 2007. In particular, the Act created the Legal Services Board as a super-regulator at the head of a new system of regulation and allowed solicitors and barristers in England and Wales to operate in a variety of new business structures. Already, those solicitors and barristers are able to establish legal disciplinary practices (LDPs) in which up to 25% of the owners or managers are non-lawyers. Further provisions allowing the creation of multi-disciplinary practices (MDPs) are due to come into force in due course. These
provisions, which will enable alternative business structures (ABS), are expected to be commenced in mid 2011.

**Early developments in Scotland**

*Justice 1 Committee report*

10. During the first session of the Scottish Parliament\(^3\), the Justice 1 Committee conducted an inquiry into the regulation of the legal profession. The resulting report mainly focused on the handling of complaints, but also looked at how the profession regulated itself.\(^4\) While the Committee concluded that self-regulation should continue, it recommended reforms to make the system more acceptable to consumers and more representative of the public interest, for example by enhancing the independent oversight of the Scottish Legal Services Ombudsman.

11. Some of the recommendations of that report were taken forward by the professional bodies, while others were picked up by the then Scottish Executive in Session 2\(^5\). The resulting Legal Profession and Legal Aid (Scotland) Act 2007 created, in particular, the Scottish Legal Complaints Commission.

*Research Working Group report*

12. In early 2004, the Scottish Executive established a research working group to look at the Legal Services Market in Scotland, consisting of representatives of consumer interests, legal professional bodies and academic researchers, and chaired by the Justice Department. The group’s research aims were to look at Scotland’s legal services market; to identify restrictions which could be limiting competition and any factors relating to justice, the public interest or consumer protection justifying such restrictions; and to examine alternative systems and structures in comparable jurisdictions.

13. The working group reported in May 2006.\(^6\) Its report made some recommendations to the Scottish Ministers, in particular on reform of arrangements for taxation of solicitors’ fees, and that statutory provisions which extend the rights of audience and rights to conduct litigation should be commenced.\(^7\) However, in relation to most of the topics considered, the report limited itself to a consideration of the various arguments without reaching a final view. On alternative business structures, the report said that “policy development work would be required to establish the extent to which they suited Scottish circumstances and how they might best be regulated if they were to become a reality in Scotland”.\(^8\)

---

\(^3\) May 2009 to 31 March 2003  
\(^4\) Available at: [http://www.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-11-vol01-01.htm](http://www.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-11-vol01-01.htm)  
\(^5\) May 2003 to April 2007  
\(^6\) Available at: [http://www.scotland.gov.uk/Publications/2006/04/12093822/0](http://www.scotland.gov.uk/Publications/2006/04/12093822/0)  
\(^8\) Executive summary, paragraph 26; see also paragraph 8.82.
The Which? super-complaint and the OFT response

Which? super-complaint
14. In May 2007, Which? submitted a “super-complaint” (under section 11 of the Enterprise Act 2002) to the OFT stating that the consumer interest was being harmed by:

- restrictions on advocates’ business structures (which require them to operate as “sole traders”);
- restrictions on solicitors and advocates providing services jointly (preventing the formation of legal disciplinary practices (LDPs));
- restrictions on third party entry to the legal services market (i.e. rules preventing outside ownership in law firms or the formation of multi-disciplinary practices (MDPs)), and
- restrictions on direct access by the public to the services of advocates.

15. Which? is a UK-wide independent consumer organisation and registered charity. Its work is funded by sales of its magazines and other services, such as its own legal service. Which? argued that solicitors and advocates should be able to work together, or with other professionals; that the public should have direct access to advocates; and that an independent body should be established for regulating Scottish legal bodies and for consumer protection.

The OFT response
16. In its response to the “super-complaint”, the OFT said it was supportive of greater liberalisation of the market, and the lifting of the restrictions identified by Which?, while recognising that the context in Scotland was different from that in England and Wales. The OFT called on the Scottish Executive and the Scottish legal profession to take matters forward and “to consider how these restrictions might best be lifted in Scotland, subject to appropriate safeguards being put in place in order to protect the interests of consumers and the integrity of the profession in Scotland”.9

The Scottish Government’s approach and development of the Bill
17. The Cabinet Secretary for Justice set out the Scottish Government’s initial response to the OFT recommendations in a speech to a Law Society of Scotland (Law Society) conference in September 2007. He accepted that reform was needed, but agreed with the OFT that following the England and Wales model was not necessarily appropriate in a Scottish context. Instead, he encouraged the profession to initiate appropriate proposals for change. This general approach was endorsed by the Parliament following a debate on 15 November 2007.10

18. The following month, the Scottish Government published a policy statement in which it committed itself to four main aims: a Scottish legal system able to

9 OFT response, paragraph 9.3.
10 Available at: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1115-02.htm#Col3407
compete internationally and more attractive to major businesses; regulation and business structures that support the availability of competitive legal services in local communities; the retention of an independent referral bar; and protection of the core values of the legal profession, in order to protect the interests of justice and of consumers.\textsuperscript{11}

\textit{The Law Society proposals}

19. The Law Society initiated a three-month consultation on alternative business structures with the publication of a discussion paper on 31 October 2007. This built on the establishment of its working group in February 2007 and initial efforts to promote discussion on the subject among its members. In April 2008, the Law Society published a policy paper\textsuperscript{12} which, taking account of responses to its consultation, argued that allowing ABS was in the interest both of the profession and the public so long as it was subject to a regulatory framework that protected the core values of the legal profession. This policy was endorsed by the Law Society’s annual general meeting in May 2008.

\textit{The Faculty response}

20. The Faculty of Advocates (the Faculty) published its own response to the Scottish Government policy statement in May 2008.\textsuperscript{13} This supported the retention of an independent referral bar in which each advocate operates as a sole practitioner subject to the “cab rank” rule (which requires each advocate to accept any instructions regardless of his or her view of the client or the client’s case, so long as the advocate is available and qualified to deal with it, and a reasonable fee is offered). Accordingly, the Faculty supported retaining the rule prohibiting advocates from entering into partnerships with other advocates or with other professionals, on the grounds that this maximised the number of advocates available to meet consumer needs. It did not see this rule as anti-competitive so long as it was straightforward for advocates who wished to participate in ABS to do so by becoming solicitor advocates instead. The paper recognised a case for change in some areas particularly revocation of the “mixed doubles” rule that prohibits an advocate and a solicitor advocate appearing jointly as senior and junior counsel.

21. The Cabinet Secretary welcomed the approach of the Law Society and the Faculty in a statement to the Parliament on 11 June 2008.\textsuperscript{14}

22. In his second legislative programme statement to the Parliament, on 3 September 2008, the First Minister announced that the Scottish Government would introduce a “legal profession bill” which would contain the first significant reform of the legal profession since 1980. This would “introduce alternative business structures to the legal profession while maintaining its independence and strength”.\textsuperscript{15}

\textsuperscript{11} Available at: http://www.scotland.gov.uk/Resource/Doc/1097/0055045.pdf
\textsuperscript{12} Available at: http://www.lawscot.org.uk/uploads/ABS/ABS%20Policy.pdf
\textsuperscript{13} Available at: http://www.advocates.org.uk/downloads/news/accesstojustice.pdf
\textsuperscript{14} Available at: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0611-02.htm#Col9509
23. Around the same time, a Bill reference group was established to support policy development and public consultation. This included representatives of the Law Society, the Faculty of Advocates, Consumer Focus Scotland, the Scottish Legal Aid Board, the OFT and Professor Alan Paterson of the University of Strathclyde.

24. The Scottish Government published a consultation paper, *Wider choice and better protection*, in January 2009. This attracted 47 responses, a majority of which supported the introduction of ABS, defined as including non-lawyer ownership, external ownership and multi-disciplinary practices.\(^\text{16}\)

25. By the time of the third legislative programme statement, on 3 September 2009, the legislative proposal had been renamed as a “legal services bill”. The First Minister said—

> “The legal profession is a strong contributor to the Scottish economy, with an estimated turnover of more than £1 billion per annum. The Bill will remove outdated restrictions on the legal profession’s business models, while protecting its core values. It will encourage greater competition and allow our leading law firms to compete effectively not just with English companies but internationally.”\(^\text{17}\)

26. The Bill was introduced that month by the Cabinet Secretary for Justice.

CONSULTATION BY THE COMMITTEE AND EVIDENCE RECEIVED

27. The Committee issued a call for written evidence in October 2009. 30 submissions were received by the deadline in December 2009. The Committee took oral evidence over four meetings in December 2009 and January 2010 from the following individuals and organisations:

- the Office of Fair Trading (OFT);
- Which?;
- Professor Alan Paterson, University of Strathclyde;
- the Faculty of Advocates (the Faculty or FOA);
- the Society of Solicitor Advocates;
- the Law Society of Scotland (the Law Society);
- the Scottish Law Agents Society (SLAS);
- the Scottish Legal Action Group (SCOLAG);


• Robert Pirrie and Caroline Docherty of the WS Society;
• the Scottish Legal Aid Board (SLAB);
• the Institute of Chartered Accountants of Scotland (ICAS);
• Consumer Focus Scotland;
• Unite Trade Union, Scottish Region;
• Gilbert M Anderson, solicitor; and
• the Minister for Community Safety and Scottish Government officials.  

28. The Committee is very grateful to all those who took the time to provide evidence, both written and oral. The Committee would also like to record its thanks for the advice and assistance provided by its adviser, Professor Frank Stephen, Head of the School of Law at the University of Manchester, throughout its consideration of the evidence and the general principles of the Bill.

THE CONTEXT FOR THIS LEGISLATION

29. Although the seeds of this Bill were sown some years ago and there has been ample time for discussion, the economic and regulatory backdrop has altered somewhat since the idea of liberalising the legal services market in Scotland was first mooted. The Policy Memorandum which accompanies the Bill acknowledges that the Scottish legal profession is facing significant challenges, such as competition from English firms entering the Scottish legal services market and the effects of the economic downturn. The Memorandum explains that the proposals are intended to offer new forms of service, improve efficiency and innovation in solicitors firms, provide access to different methods of capitalisation and ensure that the Scottish legal profession is not at a competitive disadvantage to the rest of the UK.

30. The policy objectives can therefore be summarised as follows—

• to enable the Scottish legal profession to operate in new ways if it wishes,

• to enable Scottish commercial law firms to have access to non-legal expertise in order to deliver new business models and for non-lawyers to have an ownership stake in the business,

• to address the risks of Scottish law firms being unable to compete against English firms in the wider market, re-registering as English firms or being bought out by English firms, and

• to increase access to justice through increasing competition in the legal services market by removing unnecessary restrictions on the way legal services can be delivered.

18 Full details of witnesses are given in Annexe D (extracts from the Minutes of the Justice Committee).
31. The economic downturn and the legislation introduced for England and Wales are undoubtedly relevant factors to be taken into account when considering what is being proposed in this Bill. Indeed, they may in themselves be the very reasons why one of the original drivers for legislative change in Scotland, protection and enhancement of consumer interests, now arguably takes second place to the more urgent driver: the protection of the commercial interests of the larger Scottish law firms.

32. Protection of such commercial interests is of course important. It is widely acknowledged that the legal profession makes a significant contribution to the Scottish economy. Around 10,500 Scottish solicitors currently hold practising certificates and there are more than 460 practising members of the Faculty of Advocates.

33. In relation to protecting the public and the consumer interest, the Scottish Government believes that the current restrictions on business structures for those delivering legal services are not necessary.

34. For those in favour of the Bill and the provisions for ABS, there are two main arguments: one about increasing competition in the legal services market and in so doing increasing access to justice and driving down costs; the other about ensuring that Scottish law firms are able to compete in the market against their English and Welsh counterparts and do not feel forced to re-register as English firms. The Committee has been keen to establish whether and to what extent there is an evidence-base to support the arguments made both in favour and indeed against the Bill.

**Competition in the legal services market and the consumer interest**

35. In her oral evidence, Sarah O'Neill for Consumer Focus Scotland, said that there would be benefits to consumers from other providers entering the legal services market, for example greater convenience if services could be provided at times that suited people better, or improved consumer focus if new providers were concerned about maintaining customers' existing brand trust. Ms O'Neill explained—

“consumers like supermarkets because they offer a much greater choice than existed in the past, including a much greater selection of goods and more convenient opening hours. However, whether supermarkets will want to offer legal services is another question. Tesco law is the phrase that is being bandied about, but we are not sure that lots of supermarkets will want to provide such services. The point has been made that supermarkets will do work that is profitable, but I question what that is. The research working group found conveyancing to be one of the most competitive markets. I am not convinced that there is a lot of potential profit in there for supermarkets, banks and others.”

36. Consumer Focus Scotland suggested that some legal markets are not competitive, that there is a lack of supply in some areas of legal provision and that

---

people cannot always access the advice and assistance that they need. It conceded that it was difficult to say what the demand was from consumers for the proposed changes but in its view, the potential to consider other ways of delivering services that meet people's needs, particularly by enabling advice agencies to employ solicitors, as proposed by the Bill, was welcome.

37. Consumer Focus Scotland argued that the Bill, when taken with other proposed reforms, such as those in Lord Gill's civil courts review, would be important in achieving modern, consumer-focused legal services in Scotland.

38. The OFT made similar points: that ABS are likely to create consumer benefits such as greater choice, higher quality services and lower costs and contribute positively to competition in the supply of legal services throughout Scotland, thereby benefitting the Scottish economy and the public as a whole. Kyla Brand for the OFT said—

“The success of any new system depends on how robustly it is regulated. For us, consumer protection is a high priority, and we believe that competition among services is one of the ways in which that protection can be delivered. However, there must also be the kind of built-in protection that will give the consumers of legal services in Scotland at least the same protection that they currently have. We believe that that is embedded in the Bill.”

39. In its written evidence Citizens Advice Scotland (CAS) said it too was supportive of liberalising the legal services market to create more competition and provide choice. However, it observed—

“it is our view that the Bill has been drafted focusing toward commercial enterprise and has not fully considered not-for-profit or charitable organisations who may wish to utilise new business structures.”

40. The Scottish Legal Aid Board (SLAB) said that a more pluralistic model, in which different types of provider could work alongside each other, was the way forward and the more that different types of providers could be added to the mix, the more likely it was that the varied needs of those who wished to access legal services across the country could be met.

41. As one of the original drivers for this Bill was the claim of a lack of competition in the provision in the legal services market which had led to the “super-complaint”, the Committee asked Which? what evidence it had and what research had been conducted before making the “super-complaint”. Julia Clarke responded—

“We do not necessarily have huge numbers of complaints, so I cannot say that that is the case. We sometimes cannot prove consumer detriment, but

---

22 CAS. Written submission to the Justice Committee.
we know that, as a general principle, choice and competition opens doors for consumers to receive better-quality but cheaper services. I suppose that that general principle is our evidence base, as opposed to having specific evidence on legal services.  

42. She added—

“some companies want to modernise and streamline their services and cut some of the associated costs. Frankly, we could use a bit of competition in this area in Scotland to improve services and drive down costs a little bit.”

43. Which? said it expected that the Bill would result in different models emerging, that the market would adapt to what consumers wanted and that prices would reflect the benefit to consumers. Both the OFT and Which? spoke in support of one-stop shops, Which? saying—

“Our experience is that consumers particularly like one-stop shops, especially with regard to the selling and purchasing of houses. We think that the changes will deliver economies that will affect prices in favour of the consumer, which is obviously a good thing.”

and the OFT—

“we have heard that people favour the idea of a one-stop shop – the demand might still be theoretical, but it has been reported to us.”

44. Professor Alan Paterson agreed that one-stop shops sounded like a good idea in relation to multi-disciplinary practices, but he sounded a note of caution—

“there is an inherent conflict of interest. If a lawyer finds that someone who has come through their door is also in need of an accountant, they will most likely send that person to their accounting partner rather than to a niche specialist down the road. In most circumstances, however, the convenience of using the internal accountant—who will, we hope, deliver a good service—will outweigh the fact that that service might not be quite as good as the one that would have been provided by the niche specialist down the road.”

45. Professor Paterson said that it would be difficult to object to supermarkets providing exactly the same or a better legal service, to a higher quality and at a cheaper price but it was not clear that that would be the case. He explained that one argument was that, being smart businesses, the supermarkets would enter the areas of legal practice and legal services from which they could make significant profits, whereas they might not be so attracted to the areas in which there was less money to be made. In rural areas there was not a huge amount of money to be made from legal aid work. He was concerned that supermarkets would not choose to do legal aid work particularly in rural areas: “That might lead...
either to high street firms going under or, more likely, to high street law firms not doing work that they regard as non-remunerative.”

46. However the Scottish Law Agents’ Society (SLAS) said that access to justice was unlikely to be a significant consideration for third party providers. In its view, a real danger in the medium term was that high street firms striving to compete against other entrants into the legal services market might withdraw from unprofitable areas of practice or be forced out of business leaving legal services less available than at present. SLAS suggested—

“There may be other ways in which SLAB might wish to fund the provision of legal services in relation to housing and welfare matters with a greater role for the not-for-profit sector. This however does not require the scale of changes or complexity of the Bill. And if this is the intention behind the Bill then we do not consider the response proportionate.”

47. Unite Trade Union said it was concerned about the “marketisation of legal services under the Bill”. It said that it was not opposed to change but had concerns. The first concern was that opening up the legal services market could result in inequalities in the availability of justice to the public and to its members in Scotland, with the most lucrative parts of legal services being creamed off and the less attractive parts being left. The second concern was about how external providers and investors would be regulated. Fiona Farmer summarised—

“our concern is that profit would be the motivation and that we would end up with a very unequal justice system that could be accessed only by those who could afford it, rather than by those who had the most demanding or pertinent cases”.

48. Gilbert M Anderson, a solicitor, agreed that there were improvements that could be made to the system in relation to access to justice, but argued that there was no point in making them if it would only be those at the margins who benefited. He argued that the focus should not be to “dumb down” or dilute the quality of the legal services on offer on the basis that poorer quality could be provided at cheaper cost. He highlighted Lord Gill’s report and said—

“Lord Gill has suggested that there is an urgent need for a thorough review of the funding of dispute resolution. I believe that at the very least the present Bill should be put on hold pending implementation of the Gill recommendations. Furthermore, I would urge the Scottish Government to commission thorough and robust research into the most appropriate and cost effective way of funding litigation so as to ensure access to the courts for all with genuine equality of arms.”

49. The Committee asked the Minister for Community Safety to respond to the argument that opening up the legal services market to banks, supermarkets or others could result in them cherry picking the most profitable areas of work with

---

30 SLAB. Written submission to the Justice Committee.
the risk of reduced availability of non-profitable services. He said that his response was on a number of levels—

“First, to ensure that access is available to those who are perhaps most vulnerable and those whose problems may involve areas of law that are least likely to be regarded as profitable—such as welfare law, debt law and family law—we have obviously taken steps to make legal aid available, as appropriate and as far as we can reasonably afford in Scotland today.

“Secondly, the Bill provides a specific legal duty on the Scottish Legal Aid Board to assess and monitor the extent to which legal aid is available. That is an important duty.

“…we have set out the most robust regulatory framework. If I may say so, the Bill provides a Scottish solution to a Scottish problem, without involving a hugely expensive new quango, by providing a pretty smart and, I believe, effective way of regulating the new system.”

50. The Minister added—

“I really do not think that the areas of law that we are talking about are likely to be of great interest to supermarkets...they are likely to be interested in areas of work that they perceive to be more profitable. The Bill could help to sustain local services.”

51. The Minister acknowledged the concern raised by CAS and others that section 36 of the Bill seemed to restrict the way in which voluntary or not-for-profit organisations could provide legal services. The Minister said, without giving any undertaking, that he would consider the point raised and whether any amendment was needed to the provision.

52. It appears to the Committee that section 36 potentially does the opposite of the Bill’s stated intentions, namely to allow different models to emerge and to broaden consumer choice, by for example restricting the way in which voluntary or not-for-profit organisations can provide legal services. The Committee is sympathetic to the concerns raised by Citizens Advice Scotland and therefore welcomes the Minister’s undertaking to consider this provision, and its effect, further. The Committee looks forward to hearing back from the Scottish Government on this point.

53. On the level of support for ABS and MDPs, the Minister said that he was not aware of members of the public calling for ABS. He conceded that in trying to assess consumer demand there was neither the evidence that might have been liked nor much likelihood of it being obtained. He explained—

---

“consumers do not focus much on the sorts of models that are operated. They look at the end product, which has to be competitive, fair and which must charge reasonable fees.”

54. Colin McKay, deputy director of the Scottish Government’s legal system division, pointed to the research working group’s findings that the benefits and costs of MDPs were hypothetical—

“Basically, the argument at paragraph 8.76 of the research working group’s report is that, if people do not want MDPs, they will not make any money, therefore they will not exist. Essentially, the purpose of the Bill is to allow them to happen. If consumers want them, they will thrive. If consumers do not want them, they will not thrive. That will have to be tested once they are available.”

55. The Committee concludes that although in theory there is a case to be made in terms of increased access to justice for allowing alternative business models or structures and one-stop shops or multi-disciplinary practices, there was little in the way of hard evidence received. The Committee is aware that there are concerns about the availability of legal services in rural areas and indeed in urban areas outside of town or city centres. The Committee accepts that ABS, in the form of one-stop shops, could provide the economies of scale or scope which would maintain the viability of small local businesses. On the other hand, there is a risk that ABS could result in banks or supermarkets entering the local market, where they already have the outlets, thereby taking that local business away.

56. On the “consumer interest” argument, the Committee concludes that although increased competition in the legal services market could bring about gains for consumers, increased competition can be seen as a risk for local or high street firms and in the longer term for the consumer interest as a result of the diminished competition, if banks or supermarkets enter the legal services market.

Maintaining the competitiveness of larger Scottish law firms

57. The other main argument in favour of the Bill was the need to maintain the competitiveness of Scottish law firms, specifically ensuring that they were able to compete in the market against their English and Welsh counterparts and did not re-register as English firms.

58. Professor Alan Paterson said that the Bill’s provisions would make it less likely that larger Scottish firms would move down south. He explained—

“Fortunately, most large law firms value being Scottish solicitors—whether it is because of the brand or the independence that they enjoy—so it is less likely that they will move south as a result of the changes. Indeed, it is more

likely that they will move south—or, at least, register there—if we do not have the changes.”38

59. The Faculty agreed. Richard Keen QC, Dean of the Faculty, said that he would be concerned for the Scottish legal profession if the enabling provisions in this Bill were not taken forward, he argued—

“Although the arrangements would not impact on the bar, if we do not embrace the proposed model but the larger firms want it, they might be tempted effectively to reincorporate themselves in England. We do not want to see that happen … I do not think that there is a real risk of English firms storming in and taking us over. I believe that we can fight our own corner and that, as long as we deliver the service that the consumer and the public need and want and provide suitable means of access to justice, we can maintain our independence. My greater fear is that if a business model is available in England but not in Scotland there will be a temptation for some larger firms to go down and join the English Law Society and leave the Law Society of Scotland.”39

60. The Law Society said that it supported the Bill for a number of reasons. Ian Smart, the President of the Law Society, said that one of these reasons was that the structure of the legal profession was changing anyway—

“Three quarters of all solicitors are now employed in one capacity or another. Some are employed by the state—locally or nationally—and others by the private sector directly, but a good number of them are actually employed. The old partnership model is in steady decline.”40

61. The Law Society has approximately 10,500 members. Around one third are in-house solicitors, one third work in the traditional high street model either as partners or employees and the remaining third are in the big (more than 20 partners) firms. At its 2008 annual general meeting vote on the issue of the Law Society’s proposed policy on ABS, approximately 1,000 votes were cast, 801 in favour of ABS and 132 against. On a show of hands of those actually in attendance, the vote was 49 to 18. Voting was undertaken on the basis of one member one vote, but the Law Society was not able to provide a breakdown of the votes cast between those in traditional high street firms, in-house solicitors or those in the big firms.

62. Given the numbers of votes cast, it is difficult to draw the conclusion that the profession was overwhelmingly in support of the Bill. Indeed this was conceded, to some extent at least, by Mr Smart who said—

“We would not kid the committee that there is no difference of opinion. We can say only that at the annual general meeting vote on the matter, it was

---

agreed by a margin of more than four to one to endorse the principle of alternative business structures.”41

63. The Committee asked Mr Smart to what extent the Law Society’s support for the Bill had been driven by the large firms. He pointed to the important role played by the larger partnerships in the Scottish legal services market. He agreed that it was fair to say that larger firms saw themselves as most immediately in a position to take advantage of the proposed changes—

“I make no bones about emphasising that we feel that the Bill will primarily be in the interests of commercial users of legal services, who are a huge part of the market. We cannot give you a percentage, but the bigger legal firms overwhelmingly do commercial work. There is clearly a demand from their client group for what the Bill proposes; otherwise it would not be happening.”42

64. He also drew attention to one of the potential effects of the legislation introduced for England and Wales—

“The danger is that we could see our big firms choosing to go to and be regulated in England and Wales, which is an option for them, given current cross-border provisions. If they have an office in London, as almost all our big firms do, the tail can wag the dog, because the firms can choose to be regulated in England and Wales if that allows them a more liberal business structure. The other danger is that if English firms are allowed external capital, they will be capitalised to the extent that they could start simply taking over even some of our biggest firms and treating them as subsidiaries.”43

65. There are 250 active Scottish solicitors working in London and 10 in Brussels. The Committee is aware of published research showing that London is the pre-eminent centre for legal work. The financial value of London’s legal services market was £14 billion in 2007-08 whereas the value of the Scottish legal services market as a whole was around £1 billion.44 Clearly, London’s legal services market in one in which the larger Scots law firms need to be able to operate competitively.

66. The law firm, Messrs Maclay Murray and Spens, said that it welcomed the Bill and its permissive nature as firms would be able to remain regulated as they are now or could seek to avail themselves of the new structure—

“Our key concerns as a firm operating across the UK (and indeed, in terms of our client base, globally) are to ensure that we have an appropriate mix of resource available so as to be able to respond to client needs. We also believe it is in our interests as a firm that the legal profession should maintain a good reputation for high quality advice backed up by a strong complaints process and insurance arrangements; such that users of our services

44 IFSL Research Legal Services 2009 [Link no longer operates]
understand that there is real merit in using high quality legal services providers. 45

67. Despite the Law Society’s conclusion that further liberalisation of the legal services market would not present any ethical difficulty 46, the Committee formed the view that there were ethical and other difficulties to be considered. The following paragraphs detail some of the difficulties outlined to the Committee in evidence.

Developments elsewhere

68. There is nothing in either the Bill’s Policy Memorandum or the Explanatory Notes about what consideration has been given to the issue of ABS and MDPs in other jurisdictions, other than the references to the Legal Services Act 2007 (not yet fully in force) and the regulatory arrangements in Australia.

69. So far as the Committee is aware, the only other country to have gone down this route is Australia. Professor Paterson said—

“Not many other countries have gone for multidisciplinary partnerships or external ownership of investment and law firms … The Americans, who we might think would have gone for it, have hitherto been fairly resistant, although there are one or two weakenings. The big drive in the States towards MDPs came from the accountants, and the Enron scandal put a stop to that for several years.” 47

70. Professor Paterson added that in one or two instances tax accountants and lawyers could form partnerships in certain European countries. He noted that tax accountancy was a very specialised profession and those arrangements did not mean that management consultants or accountants could go into partnership with lawyers. 48

71. In his oral evidence, Michael Clancy of the Law Society said that changes were taking place in Europe. He drew members’ attention to a pre-Clementi review, sponsored by the European Commission, and undertaken by Commissioner Monti which had “resulted in a relaxation of restrictions in countries such as France, Germany and Italy”. Mr Clancy said that the legal profession in France could not necessarily be compared to that in Scotland, but explained —

“It is possible in France for certain arrangements to be made in terms of what is called la société pluridisciplinaire. In Germany, under the Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France, the règlement intérieur national (RIN) allows for similar changes. In Italy, all the restrictions have been removed on certain forms of relationship between lawyers. We tend to think of Europe as fortress Europe, with no change

45 Maclay Murray and Spens. Written submission to the Justice Committee.
happening there. That is not entirely true. I understand that Spain and some of the Nordic countries now permit external ownership.\textsuperscript{49}

72. In their written evidence, Walter Semple and Catriona Walker said that no such changes had been proposed in the USA and that other EU Member States had consistently refused to accept this type of change—

“An EU Directive on the Right of Establishment of Lawyers (98/5/EC at Article 11.5) specifically allows a Member State to refuse to admit to practice any lawyer qualified elsewhere who is a member of a law firm where some of the owners are not members of the legal profession. The attack on independence in the Legal Services Bill has been rejected in other countries. Law firms with international aspirations will avoid ownership by non lawyers. These changes would pose a threat to international legal practice by Scottish solicitors.”

73. In a later written submission, Semple and Walker argued that the RIN referred to by Mr Clancy “strictly forbids profit sharing between \textit{avocats}\textsuperscript{50} and others and any submission of \textit{avocats} to the control of others.”

74. Gilbert Anderson argued that the roots of Scotland’s “mixed legal system” had far more in common with continental Europe than with England and Wales. He too said he was unaware of any demand in Europe for the creation of business models to allow law practices which provide professional legal advice and services to the general public to be owned and controlled by non-lawyers.\textsuperscript{51}

75. In its written submission, SLAS said that this area was problematic—

“As Walter Semple has convincingly argued there is a real danger that the passage of the Bill into law would hamper those Scottish solicitors who wish to practise abroad. The Establishment of Lawyers Directive 98/5/EC permits the competent authority in host member states to refuse to recognise lawyers employed by non-lawyer firms [article 11.5]. Such lawyers are almost certainly going to be from those very commercial firms which are likely to seek external ownership. This is surely an unintended consequence of the Bill.”

76. The Committee has little, if any, evidence of ABS or MDPs working elsewhere and it has proven difficult for us to reach a conclusion on this issue. The Committee is concerned at the suggestion that this Bill might make it more difficult for Scottish lawyers to work abroad. The Committee would therefore be grateful if the Scottish Ministers would set out clearly what the effects of this Bill might be on Scottish lawyers who wish to work in Europe or further afield.

\textit{The effect on Scottish law firms}

77. SLAS is the largest voluntary national organisation of solicitors in Scotland and represents more than 1,600 members, many of whom are high street


\textsuperscript{50} The French term for a lawyer or advocate.

\textsuperscript{51} Gilbert Anderson. Written submission to the Justice Committee.
practitioners. Michael Scanlan, the President of the SLAS, said that there was no necessity for the Bill and certainly no necessity to introduce the concept of ABS in Scotland.\(^{52}\)

78. SLAS argued in its written submission that the Bill did not offer a principled approach to the regulation of legal services, paid no attention to the interests of consumers, which was the only reason which justified regulation in the first place and pointed out —

“There has not been, as far as we are aware, any demand from real consumers for the proposed changes. We simply observe that the supercomplaint which was in some ways the catalyst for this Bill was made by a body with a vested interest, as it is a provider of legal services. While the Bill may offer some competitive advantage for a small number of legal firms it offers nothing but an uncertainty for the vast majority of legal practices operating in high street practice.”

79. In the view of SLAS, the Policy Memorandum—

“fails completely to address the prospect that with external ownership it is more likely that Scottish firms will re-register in England or be taken over by English legal firms should the Bill be enacted.”\(^{53}\)

80. SLAS felt very strongly that the introduction of ABS was likely to lead to smaller firms being forced out of the market, saying—

“For a solicitor who is a sole general practitioner offering services in a rural community there will be little cross over with the practice of an accountant in the same community who will not deal with family law, crime, conveyancing or wills and succession.”\(^{54}\)

81. Given the complexity of the arrangements proposed in the Bill, SLAS said it was hard to imagine small legal firms being remotely interested in taking advantage of the proposed reforms. In its view, smaller law firms were likely to be forced into trying to protect their existing business from new entrants in the shape of ABS providers. It said that its members had recently been asked whether they were in favour of ABS or against it. Of the 400 responses received, 85 per cent were against the introduction of ABS in Scotland.\(^{55}\)

82. SLAS said that “the elephant in the room is that ABS really means large legal firms getting together with chartered accountants and bankers.” Michael Scanlan pointed out that, in Scotland, a tremendous number of small firms provided a range of services in areas reserved to Scottish solicitors, whereas a substantial proportion of the services that the larger firms provided were not in the reserved areas. He drew attention to “two fairly high-profile failures, not of ABS as such, but of parallel partnerships involving accountants and firms of solicitors. That in itself is


\(^{53}\) SLAS. Written submission to the Justice Committee.

\(^{54}\) SLAS. Written submission to the Justice Committee.

evidence that such an approach simply cannot work, no matter how you might try to legislate for it." 56

83. Robert Sutherland, convener of the Scottish Legal Action Group (SCOLAG) agreed with the views of SLAS and said that he found some of the Law Society’s comments made in support of the Bill unconvincing. He explained—

“In particular, the Law Society’s main justification, which is that Scottish firms may decide to go down to England and register there, resulting in harm to the provision of legal services in Scotland, does not fly. It is a bit like suggesting that Rangers and Celtic will go off and play in the English Premier League and that that will harm Scottish football. We think that it is unlikely that the big firms in Scotland would desert the Scottish legal market, although we expect that they would want to take part in the bigger English legal market.” 57

84. Gilbert Anderson agreed. He said he could not see why a major firm in Scotland with an established client base would want to “up sticks” and move south simply to try to compete in the “magic circle” market in London. In his view, being bought out by large English firms seemed equally unlikely. He argued that if an English firm under an ABS structure wanted to move into ABS-free Scotland that firm would require to be regulated by the Law Society of Scotland. He concluded that an ABS-free Scotland would have an entirely neutral effect on competition. 58

85. Walter Semple and Catriona Walker questioned the argument made by the Law Society that lawyers, if faced with the power of big supermarket brands, would need to structure their businesses in such a way as to compete successfully. In their view, to say that lawyers could not compete effectively with supermarkets in providing legal services was absurd unless supermarkets were to be subject to less onerous conditions than lawyers were. 59

86. Robert Pirrie, chief executive of the Society of Writers to Her Majesty’s Signet (the WS Society), said it was difficult to say whether the Bill would have a beneficial effect. He saw dangers but would not want to stand in the way of the permissive aspects of the Bill. His members’ principal concern was what the consequences of the Bill would be “for the considerable virtues of the current system” and especially the independence of the profession. 60

87. A number of those giving evidence pointed out that as the great majority of the work undertaken by commercial firms was outside the areas reserved to Scottish solicitors, there were currently no barriers to practising as non-solicitor legal advisers with external shareholders or external ownership.

Other models
88. SLAS, SCOLAG and others contended that with a little ingenuity other ways could be found to enable law firms to give non-solicitor professionals, such as directors of Human Resources, finance or IT, more of a stake in the business.

58 Gilbert Anderson. Written submission to the Justice Committee.
59 Walter Semple and Catriona Walker. Written submission to the Justice Committee.
This could be done, for example, by introducing loan capital secured by floating charge and providing remuneration in such a way that bonuses could be paid, which would represent a share of profits, without contravening any existing restrictions. Robert Pirrie agreed and spoke of his own experience—

“I was once a partner in a multidisciplinary practice; back in 1997, Dundas and Wilson became part of Andersen Legal, which was a global professional services firm. Although the structure might have been complicated and although ways had to be found of adapting it to the regulatory scheme, we were able to do it and it worked. I believe that the same is true of the structuring of law firms and the way in which non-lawyers are incentivised or allowed to participate in the business.”

The ICAS model
89. ICAS suggested that another alternative would be an adapted version of its existing regulated non-member model. It said that this model could be applied to the legal profession at a lower cost than what was being proposed in the Bill. Vivienne Muir (ICAS) advised that chartered accountant firms can comprise non-members and chartered accountants. Non-members are brought into the regulatory system by way of contractual arrangement and can become regulated non-members. As such, they can become principals in a firm of chartered accountants although any at least 50 per cent of the principals of such a firm must be chartered accountants. She explained—

“The advantage is that when we go out to a firm we can monitor the whole firm, as opposed to looking just at our members. We are therefore bringing non-members into the regulatory framework. It is a simple way of doing things and means that we can go out and assess the firm for quality and competence. The method has worked well for the accountancy profession.”

90. The Committee notes that the criteria for becoming a regulated non-member are that the person is a fit and proper person and agrees to be bound by all the ICAS rules and regulations. ICAS described its fit and proper test as a fairly rigorous test covering financial integrity and reliability, previous convictions or civil liabilities, and reputation and character, together with a requirement to provide references.

91. The Minister was asked what consideration had been given to other business models for the legal services market. He responded that the Bill did not prescribe a particular business structure—

“The model that we espouse, and which is in the Bill, has emerged from lengthy discussion and consultation, principally with the legal profession. The legal profession sought the model and we have provided it with it. We believe that it offers slightly more flexibility than the ICAS model.”

---

The Scottish Government's arguments in favour of the Bill

92. Given the extent of the reservations expressed, it was important that the Committee was clear on the Scottish Government's justification for bringing this Bill forward. The Minister acknowledged that there was “no groundswell of overwhelming acclamation and support for the Bill among all 10,000 or so solicitors in Scotland” but he said that he had not expected that because, in his view, the Bill was unlikely to affect every solicitor. He agreed that the main opportunities that the Bill would provide—certainly financially—would probably be for the larger firms, those in which one third of the profession work.64

93. He stated—

“One facet that has emerged from almost all the evidence is that not passing the Bill presents some very real risks for the Scottish legal profession. If we do not pass the Bill, solicitors in England and Wales will, through the Legal Services Act 2007, be entitled to enter into alternative business structures. Solicitors in Scotland will not, which I think will tie one hand behind the back of many Scottish legal firms.”65

94. The Minister said that the evidence from the President of the Law Society and the Dean of the Faculty was that the Bill was essential because without it, the Scottish legal firms would not have the opportunity to avail themselves of the business opportunities created by the Bill and, in order to obtain those opportunities, some of them would remove themselves from regulation in Scotland and move to England and Wales. He concluded—

“That clear suggestion has been made in evidence by those at the top of our legal profession in Scotland. I am sure that the committee agrees with me that that is a serious warning indeed. Furthermore, even among those who oppose the Bill, there is general recognition that that is a real risk.”66

95. The Minister argued that there is a positive case for the Bill. He acknowledged that much of the work that the largest firms in Scotland did was in areas that are not reserved to solicitors qualified in Scots law and that many of the top firms competed not simply in Edinburgh and Glasgow, but in London and internationally. He said that they would probably not be competing in domestic conveyancing or family law but in commercial law, aviation law, mercantile law, the law of shipping, the law of telecommunications, the law of telegraphy, the law of patents and copyrights, arbitration or construction law.67

96. The Minister argued that those areas of law were the areas in which law firms might want to enter into business relationships with experts in aviation or shipping law, for example, or experts in construction in relation to arbitration work for complicated commercial construction disputes. The Minister stressed—

---

“All those areas are highly lucrative and each has massive markets and huge potential. Unless we pass the Bill, our Scottish solicitors will not be able to avail themselves of the opportunities that exist in areas of law that, unlike the framing of writs, litigation and conveyancing, are not reserved to Scottish solicitors but in which activities can be carried out by all solicitors in the United Kingdom.”

97. It is clear that there could be benefits in ABS for the larger Scots law firms as outlined by the Minister; however, it is much less clear that there will be obvious benefits for other users or indeed smaller law firms. The Minister himself said that the benefits to ordinary consumers would depend on the extent to which the alternative business structures were taken up. In the short term, clients of small and medium law firms would continue as before in terms of how they sought legal advice. In the longer term, the Minister and others hope that by removing barriers to how solicitors can carry out business, there would be reductions in fees. This may be the case but the Committee is not in a position to say that it expects this to be the case.

98. The Minister was asked specifically about the extent to which he envisaged there would be advantage to the public/consumers and solicitors who operate in a general high street model. The Minister said again that the Bill—

“seeks to offer opportunities that are not compulsory or mandatory. It may well be that the majority of traditional small or medium-sized firms will choose to remain as they are. First, we do not envisage that all solicitors will take up the Bill's opportunities. Secondly, by removing the restrictions against ownership by, and partnership with, non-solicitors, the Bill will open up opportunities.”

99. The Minister said that he did understand the views expressed strongly to the Committee that the Bill would threaten small and rural firms and he responded—

“I can definitely understand that fear, particularly in the current economic climate. However, I can also see the opportunities that the Bill presents for such firms. Where small practices might struggle to survive in towns and rural areas, a one-stop shop offering a variety of professional services might present a solution that allows lower overheads and the combination of business experience and expertise. That could give small professional practices, whether legal or not, an opportunity to flourish and continue to provide key services in communities throughout Scotland.”

100. The Minister also accepted that there were already ways in which different professionals who wanted to work together could do so, however, he said that the opportunity to develop different models to offer different expertise was not currently available.

---

101. In relation to the “protection of commercial interests” argument, again it is difficult for the Committee to come to a conclusion. On the one hand, there seems to be little argument that ABS will be welcomed by larger firms for whom there could be real immediate benefits and the Committee recognises the proportion of the Scots legal services market represented by the larger firms. Apart from anything else, for larger Scottish law firms, the Bill is a precaution against the loss of any competitive advantage brought about as a result of the legislation introduced in England and Wales. On the other hand, the Committee is mindful that for smaller Scottish law firms, the Bill could create more risk, as a consequence of other new competitors being able to enter the market.

102. Having asked itself what the effects on the legal services market in Scotland would be of not bringing forward the provisions in this Bill, the Committee concludes that the likely detriment to the larger Scottish law firms is real. Without this Bill, and recognising that the legislation for England and Wales has already been enacted and will come into force over the next year or so, Scottish law firms may be less able than their competitors to take advantage of the opportunities arising in areas of law not reserved to Scottish solicitors.

PART 1 – THE REGULATORY OBJECTIVES ETC.

103. Part 1 of the Bill sets out the core regulatory objectives, the statutory guide for all regulators of legal services and the professional principles which will apply to any legal professional providing legal services, in whatever business model. An obligation is also placed on the Scottish Ministers to, so far as practicable, act in a way which is compatible with the regulatory objectives.

104. To “ensure that the current standard of quality in the delivery of legal services is safeguarded”, section 1 sets out the following six regulatory objectives—

- supporting the constitutional principle of the rule of law,
- protecting and promoting the interests of consumers and the public interest generally,
- promoting access to justice and promoting competition in the provision of legal services,
- promoting an independent, strong, varied and effective legal profession,
- encouraging equal opportunities, and
- promoting and maintaining adherence to the professional principles.

105. The regulatory objectives are similar to those contained in the Legal Services Act 2007. The main differences are stated to be that this Bill includes “protecting and promoting the interests of consumers” but does not include “increasing public understanding of the citizen’s legal rights and duties”. The Scottish Government’s
view is that although increasing public understanding is important, it would be difficult to achieve through the regulation of legal services providers.\textsuperscript{71}

106. Section 2 sets out six professional principles which will apply to all solicitors whether in ABS or not. The professional principles are intended to be a codified version of the standards already required of Scottish solicitors. Later in the Bill, section 38 provides that licensed legal service providers must have regard to the regulatory objectives and adhere to the professional principles. The professional principles are that persons providing legal services should—

\begin{itemize}
  \item support the proper administration of justice,
  \item act with independence and integrity,
  \item act in the best interests of their clients,
  \item maintain good standards of work,
  \item where exercising before any court a right of audience, or conducting litigation in relation to any proceedings in any court, comply with such duties as are normally owed to the court by such persons, and
  \item meet their obligations under any relevant professional rules.
\end{itemize}

107. The Law Society said that the regulatory objective of “promoting an independent legal profession” and the professional principle of “independence” were compromised at various points in the Bill. It argued that section 1 should make reference to the “interests of justice” and that this together the rule of law should assume “paramountcy” within section 1 of the Bill. The Law Society also pointed out that it was only in section 62 that it was clearly set out that an Approved Regulator or a licensed legal services provider (LLSP) would be required to comply with the regulatory objectives and professional principles. The Law Society proposed that in the interests of clarity, this requirement should be moved to Part 1.

108. The OFT observed that while LLSPs must have regard to the regulatory objectives, there is no requirement for “traditional providers” to do so. It called for a level playing field in this respect.

109. Thompsons Solicitors took the view that the reference to consumers in the regulatory objectives was too narrow and that the word citizen should be substituted. They and the OFT said they were disappointed that the objective of “increasing public understanding of a citizen’s legal rights and duties” had not been included despite the Scottish Government’s acknowledgement of its importance.

110. Professor Alan Paterson said that although the professional principles in section 2 were intended to enshrine the core values of the legal profession, on balance he felt that these had been insufficiently spelt out. He suggested

\textsuperscript{71} Legal Services (Scotland) Bill. Policy Memorandum, paragraphs 71 to 74. Available at: http://www.scottish.parliament.uk/s3/bills/30-legalServices/b30s3-introd-pm.pdf
expanding the list of professional principles and making some of them more explicit because of the difficulty he envisaged in regulating providers of legal services who would be subject to differing professional standards and the danger of the lowest common denominator of regulatory standards prevailing.72

111. Section 3 defines legal services for the purposes of the Bill. In its written submission, the Law Society pointed out that because the Bill omits any reference to reserved legal activities, the regulatory provisions would apply to the delivery of all services. A similar point was made by the Scottish Legal Aid Board.

112. Section 4 requires that the Scottish Ministers should, so far as practicable, act in a way which is compatible with the regulatory objectives. This is an important provision and is considered in more detail later on in this report in the context of the roles and powers being given to the Scottish Ministers.

113. In his evidence, the Minister stressed—

“To use a phrase used by the Dean of the Faculty of Advocates, the regulatory objectives are the pillar of the Bill. Those objectives, in part 1, include the professional principles set out in section 2 that require licensed legal services providers to display the high standards that are expected of solicitors. We seek to ensure parity of standards.”73

114. It is clear that the regulatory objectives are intended to be the driver for this Bill. If the regulatory objectives are too narrowly defined, they could prevent different or innovative approaches emerging. On the other hand, the regulatory objectives need to be sufficiently defined and complied with to ensure that the necessary standards and ethos are clearly understood by those wishing to enter the legal services provision market. The Committee invites the Scottish Ministers to confirm that their intention is for the regulatory provisions to apply to the delivery of all services.

115. The Committee is not convinced by the OFT argument that traditional legal services providers should be required to have regard to the regulatory objectives. This Bill addresses issues relating to the regulation of new entities which might enter the legal services market.

PART 2 – REGULATION OF LICENSED LEGAL SERVICES

116. Part 2 of the Bill establishes the regulatory framework within which Approved Regulators and LLSPs will be expected to operate. The Bill proposes that the Scottish Ministers will be responsible for approving applications to be an Approved Regulator but, before so doing, must consult with the Lord President, the OFT and other organisations representing the consumer interest in Scotland and any other person or body that the Scottish Ministers consider appropriate.

---

72 Professor Alan Paterson. Written submission to the Justice Committee.
Number of regulators

117. The Bill does not propose that there will be any restriction on the number of Approved Regulators that may exist at any one time.

118. CAS, in its written evidence, said that if the regulatory function was undertaken by too many bodies, there would be a lack of consistency in terms of approach, regulatory framework and licence fee tariffs which could act as a deterrent to some organisations entering the market.

119. Walter Semple and Catriona Walker questioned how realistic it would be, given Scotland’s small jurisdiction, to have more than one regulator. They pointed out that regulation was extremely onerous, high profile and expensive and that it depended on a huge amount of voluntary effort. They asserted that it was not credible that this task should be duplicated by others.74

120. The Minister said that he was looking at between one and six Approved Regulators, although he expected that the number would be nearer one than six. He accepted that it was unlikely that the consumer would benefit from there being more than one regulator, but that it might be of advantage to businesses to be able to choose which regulator was most applicable to them. He gave the following example—

“If a business entity is orientated primarily towards accountancy and taxation and is regulated by ICAS, it may, as an alternative business structure, want to continue to be regulated by ICAS, rather than by ICAS and, perhaps, the Law Society of Scotland. On the other hand, if an ABS is largely a solicitors practice with some accountants, it may prefer to deal with the Law Society of Scotland, with which it deals anyway.”75

121. Approved Regulators under Part 2 of the Bill are to be regulators of licensed legal services providers (i.e. of those entities adopting ABS) and not of the individual professionals. The Approved Regulators would therefore be entity regulators. Their function would be to ensure that LLSPs (Licensed Legal Services Provider) operate in a manner which meets the regulatory objectives and professional principles enunciated in Part 1 of the Bill.

122. There are potentially many ways in which a regulator could ensure that these objectives are achieved. These different ways are likely to give rise to different administrative and compliance costs for the entities and may differ depending on whether the licensed provider is an MDP or involves external owners. If there were only one Approved Regulator the Committee sees how this could potentially inhibit the development of ABS. On the other hand, multiple regulators could result in higher administrative and compliance costs which would be passed on to consumers of the services and could also inhibit the development of ABS.

123. Given that Scotland is a small jurisdiction, the Committee is not persuaded that there will be any great benefit in having more than one or

74 Walter Semple and Catriona Walker. Written submission to the Justice Committee.
two Approved Regulators. The Committee is particularly concerned about the prospect of bodies, external to Scotland, becoming Approved Regulators and seeks assurances from the Scottish Government in this respect.

Combined regulatory and representative function

124. The Law Society has already made clear that, assuming this Bill is passed, it intends to seek approval as an Approved Regulator. It is, therefore, necessary to consider what implications there might be for an Approved Regulator with dual functions of representation and regulation.

125. The Bill’s Policy Memorandum states that regulators frequently have representative functions as well as regulatory functions and that in such cases the regulator must ensure that its regulatory function is properly resourced and operates independently with appropriate involvement from people who are not legal professionals. In addition, regulators must ensure that persons exercising regulatory functions are not prevented from communicating with external bodies such as the OFT, SLAB and the Scottish Ministers. 76

126. The Law Society said that within its unified structure practical distinction of its regulatory and representative roles was already a reality. In its written submission, it explained that since the Council of the Law Society of Scotland Act 2003, all the Law Society’s committees dealing with complaints have had delegated powers to decide cases without reference to the Council. Its complaints committees have 50 per cent solicitor and 50 per cent non-solicitor members to ensure transparency and balance between the solicitors and the consumer. The Law Society added that many of its other committees (including the Guarantee Fund, insurance and professional practice committees) had non-lawyer members. It believed that the governance changes in relation to the regulatory committee and the provisions in section 92 of this Bill reinforce the practical distinction of functions and enable it to comply with section 20(2)(b) of this Bill.

127. In her evidence, Lorna Jack, the Chief Executive of the Law Society, said—

“...There has been a lot of confusion about what the separation of regulation and representation means. How we interpret it is how it is set out statutorily, which is for the potential regulator such as the Law Society of Scotland to have an obligation to the profession and the public in relation to the profession. That does not challenge any voluntary representation that others might have in other ways. There are already bodies such as the WS Society, which provides terrific support services, and organisations such as the Glasgow Bar Association and the Family Law Association. There are a number of voluntary bodies that support the profession.” 77

128. Ms Jack argued that the Law Society’s current obligation to the profession and the public was no different from the responsibilities of other professional bodies. She cited the examples of ICAS and the professional bodies for surveyors and architects which all carried obligations to uphold the integrity of their

76 Policy Memorandum, paragraph 105.
profession in the interests of the customers whom they served. Ian Smart, the Law Society's President, said—

“The matter is visited from time to time within the profession. I have been on the council of the Law Society for 11 years, and during that time it has been debated periodically. On each occasion, we came to the conclusion that the current situation was the best available, as did the Parliament during its early days when it looked into the matter in an inquiry into the regulation of the legal profession in Scotland. We can easily point to flaws in the system from the point of view of the consumer's interest or that of the profession, but we have a compromise for a profession of 10,500 in a relatively small country, and there is a degree of clarity.”\(^\text{78}\)

129. Professor Alan Paterson said that the division between regulatory and representative functions was tricky as some of the functions would contain elements of both. He said that this was one of the reasons why he was not in favour of following the English model of requiring professional bodies to split themselves into two different entities, the regulatory part and the representative part. He explained—

“However, I equally do not think that professional bodies or approved regulators can be sole arbiters as to which heading a particular function comes under, which is why I disagree with the wording of section 23(1) of the Bill. Originally, the Law Society of England and Wales regarded legal education, admission and professional training as regulatory matters. In Scotland the Law Society regarded them as representative matters. In my view the English approach is more in accord with the public interest, although I could be persuaded that there is an element of a representative function as well.”\(^\text{79}\)

130. Consumer Focus Scotland said—

“if we are going down the road that it is proposed we go down, it is even more important that there is public confidence in the professional body and the regulatory body. We are pleased that the Law Society is moving towards 50 per cent lay representation on its regulatory committee, but we believe that 20 per cent lay representation on its council is insufficient. Given its dual role of promoting the profession's interest and the public interest, we think that there should be 50 per cent lay representation on the council as well.”\(^\text{80}\)

131. Which? and the OFT said that for reasons of public perception and to avoid any tensions or conflicts of interest their preference was for a clear separation of the two roles. The OFT said that the separation of roles was the model used now in dentistry and in medicine with the British Medical Association and the British Dental Association representing members and the General Medical Council and General Dental Council regulating those professions.\(^\text{81}\)


\(^{79}\) Professor Alan Paterson. Written submission to the Justice Committee.


\(^{81}\) OFT. Written submission to the Justice Committee.
132. In their written submission, Robert Pirrie and Caroline Docherty of the WS Society said that the effect of the Bill would be to tighten government control of the regulatory function in relation to legal services. They explained that this would arise partly from the provisions in part 2 of the Bill which provided for government approval of non-traditional providers (ABS). They said it would also arise in relation to traditional business models (law firms and in-house providers) as a consequence of part 4 of the Bill which would, introduce government control over the composition of the Council of the Law Society (section 92) and require a regulation committee of at least 50 per cent lay members (section 93). They added—

“If both regulatory and representative functions sit within the same body (as the Bill contemplates), it has to be recognised that, whatever the intended safeguards, the inevitable effect of closer government control of the regulatory function will be closer government control of the representative function. It is fundamentally untenable to have the representative function for solicitors within a body whose Council is indirectly controlled by the government and whose responsibility it is to regulate the legal profession through a non-solicitor controlled committee. We question how the independence of the solicitors’ profession will be protected under these arrangements.”

133. In his oral evidence Robert Pirrie observed that membership of the Law Society was effectively compulsory and that it was unusual to have a representative body where those being represented had no choice by whom they were represented. In his view, although the balance had worked fairly well until now, the question now arose as to whether the Bill made the crucial shift that tipped the balance.

134. Michael Scanlan for SLAS went further and said that in the view of SLAS, more than a balance was involved; the Law Society faced a dichotomy. He stated—

“One difficulty for the society is that, as the society advised the committee, it represents three elements of the profession—small firms, in-house lawyers and large firms. Such a gulf lies between what large and small firms do that it is difficult to see how the society can represent all its constituents evenly and effectively.”

135. Walter Semple and Catriona Walker argued that as the Law Society’s powers were regulated by its statutory objectives “to promote the interests of the solicitors’ profession in Scotland and the interests of the public in relation to that profession”, it therefore would have no power to promote the interests of other professions. Their conclusion was that the Law Society could not therefore act as an approved regulator.

82 WS Society. Written submission to the Justice Committee.
85 Walter Semple and Catriona Walker. Written submission to the Justice Committee.
136. The law firm Thompsons Scotland also expressed concerns about divided interests. In its view, an Approved Regulator could not on the one hand represent its members and on the other be charged with regulating them. This would be a clear conflict of interest with one militating against the other and it would be almost impossible to fulfil both objectives. Douglas Mill agreed saying that to combine regulation and representation was in terms of both actuality and perception “an impossibility”. In his view—

“The Law Society’s apparent acceptance of section 92 of the Bill which simply allows the Scottish Ministers to control the representative body is, in the view of many, the final nail in its coffin as a representative body.”

137. The Minister said that from the point of view of this Bill, it was not considered necessary for the Law Society to become a purely regulatory body. He added that much of the debate in the evidence was about the Law Society’s role, which was primarily a matter for the Law Society and its members to discuss. The Minister concluded—

“the Bill provides for the separation of regulatory and representative functions for all approved regulators, and it makes specific provision for the Law Society to have a regulatory committee with 50 per cent non-lawyer membership to regulate licensed providers, independently of any representative function of the Law Society. Our provisions in the Bill are therefore designed entirely to ensure that the regulatory framework and functions are set out appropriately and properly; they are not intended in any way to interfere with the non-regulatory, representative functions of the Law Society, which are entirely its domain.”

138. The Committee observes that any body seeking to combine regulation and representation is likely to face some difficulties as a result of the inherent tension between the two roles. The Committee recognises that there are indeed tensions with and conflicting viewpoints about the Law Society’s dual role but is of the view that these are for the Law Society and its members to consider and resolve.

Independence of the Scottish legal profession

139. In broad terms, the Bill follows the approach to regulating ABS adopted by the Legal Services Act 2007 for England and Wales. A major difference, however, is that under this Bill there is no “super regulator” as there is under the English Act in the form of the Legal Services Board with responsibility for the oversight of front-line regulators. Given the smaller size of Scotland as a jurisdiction with far fewer solicitors and advocates than solicitors and barristers in England and Wales, the creation of a super regulator in Scotland would be unnecessarily expensive.

140. The absence of a “super regulator” means that the Scottish Ministers are to exercise the role of oversight similar to that of the super regulator in England and Wales. This proposal has given rise to concerns about the Scottish Ministers

---

86 Douglas Mill. Written submission to the Justice Committee.
having a direct role in regulating the legal profession and the extent to which this could, or be seen to, undermine the independence of the legal profession. Schedules 1 to 7 of the Bill give the Scottish Ministers the power to set performance targets for authorised regulators, give directions to them, censure them, impose financial penalties on them or amend or rescind their authorisation.

Costs
141. As the Scottish Government does not intend to create a super-regulatory body there will be no costs involved in setting up and maintaining such a body. The Scottish Ministers will licence and regulate Approved Regulators and approving bodies of confirming agents which will give rise to costs for the Scottish Government. The Financial Memorandum estimates staff costs in years one and two of £37,710 (based on one or two applications), £55,390 (for three or four applications) or £71,995 (for five or six applications). These costs are to be met from within the existing Scottish Government budget.  

142. The Scottish Ministers will also be required to monitor the Approved Regulators and their performance and apply sanctions for any breaches. The ongoing staff costs of this are estimated at £29,500 (for one or two regulators), £39,050 (for three or four regulators) or £48,500 (for five or six regulators). Again it is anticipated that these costs will be met from within existing Scottish Government budgets.

143. The requirement on the Scottish Ministers to process applications to be an approving body (such as those for confirmation agents) is estimated to give rise to a cost of £18,989 (in respect of one or two applications) and a further £13,193 for monitoring and applying sanctions for breaches etc (in respect of one or two approving bodies).

Independence and the absence of a super-regulator
144. Some of the written submissions were critical of the absence of a “super regulator” and many who provided evidence were in favour of either establishing a statutory advisory panel to assist the Scottish Ministers in carrying out the oversight functions, a completely separate Scottish Legal Services Board or giving the Lord President a greater role.

145. In her evidence for Which?, Julia Clarke explained her view—

“there should be complete separation between the two functions. If that cannot be done, the proposed committee to advise the Government on future regulation is a way forward. It is important that its membership should be drawn from beyond the legal profession. It should certainly have a lay majority and a lay chair. It should be a statutory body because it is proposed that the Government will regulate the regulators. That is not ideal but, if it is to happen, it is important that we have a strong advisory body.”

88 Financial Memorandum, paragraph 219.
89 Financial Memorandum, paragraph 221.
90 Financial Memorandum, paragraphs 225-227.
146. Both the OFT and Consumer Focus Scotland said that they were disappointed that the Bill did not contain any provision for establishing an advisory panel to advise the Scottish Ministers on applications for authorisation and to keep the regulatory framework under review. Consumer Focus Scotland explained—

“As stated within the Policy memorandum, the Scottish Government does agree that such a panel would be helpful, but does not believe it requires to be put on a statutory footing. We do not agree with this position. We stated in our response to the ‘Wider Choice and Better Protection’ consultation that establishing an advisory panel was a necessary safeguard, given the potential for a regulatory body to have the dual or multiple responsibilities for regulating a licensed legal services provider, regulating individual professionals and promoting the interests of the public and the profession.”

147. Consumer Focus Scotland added that such a panel could also play an important role in monitoring the regulatory bodies’ performance against the regulatory objectives and suggested that, as with the Consumer Panel in England and Wales, the Scottish panel should be made up entirely of non-lawyers and should include representation of the consumer interest. Making statutory provision for the panel would allow its remit to be clearly established and would “secure the long-term sustainability of the Panel.” Both Consumer Focus Scotland and the OFT pointed out that that the proposals for establishing an advisory panel had been supported by more than three quarters of the consultation respondents.

148. Professor Alan Paterson, the Scottish Law Agents Society, Thompsons Scotland and the OFT argued that the absence of a “super regulator” created problems. However, whilst Professor Paterson suggested that a perception might be created that the Scottish Ministers, in the exercise of their oversight role, might cut across the independence of the legal profession, he did not see this as a major threat.

149. Nevertheless in later oral evidence, Professor Paterson said—

“On independence from the Government, I can see that there is an argument for bringing in the Lord President in the kind of role that we discussed earlier. However, the situation would be awkward. Who would decide on an application? Would it be the minister or the Lord President? Would the Lord President have a veto? Would they decide jointly? I am not sure that I quite see the answers. I wonder whether, at the end of the day, we are going to be forced into having a legal services board. You might say that that is bureaucratic, but it would be a super-regulator, and the way in which the Legal Services Board is set up in England and Wales guarantees independence.”

150. The Law Society said that although it agreed with the Scottish Government that there was no need for a “super regulator”, it too was concerned about the

---

92 Consumer Focus Scotland. Written submission to the Justice Committee.
93 Consumer Focus Scotland. Written submission to the Justice Committee.
94 Professor Alan Paterson. Written submission to the Justice Committee.
implications for the independence of the legal profession (but perhaps from a different perspective).

151. The Law Society argued that the independence of the legal profession was compromised at various points in the Bill (namely sections 6 (Approval of regulators), 29 (Measures open to the Scottish Ministers on performance of regulators), 35 (Step-in by the Scottish Ministers) and 39 (Head of Legal Services)) despite the fact that independence had been included in both the regulatory objectives and professional principles. The Law Society suggested that some of their concerns might be addressed by bringing the provisions contained in sections 62 and 86 (which require regulators and regulatory authorities to act in ways compatible with the regulatory objectives) into part 1 and to tighten up the phraseology in section 4 to ensure that the Scottish Ministers would be obliged to act in a way that was compatible with the regulatory objectives.  

152. In its original consultation paper, the Scottish Government proposed that it would authorise regulatory bodies with the agreement of the Lord President. The Bill, however, does not require the Lord President’s agreement, merely that the Lord President would be a consultee alongside the OFT, consumer bodies and such other persons as the Scottish Ministers consider appropriate. The Law Society said that the Lord President’s role should be reinstated to that of giving agreement.

153. In contrast, Consumer Focus Scotland and the OFT did not agree that the Lord President should be given a greater role than that of consultee. In their view such a move could in itself create a public perception of a conflict of interest. Sarah O’Neill explained—

“It is entirely proper that the Lord President should be consulted on the issues, but we are concerned, for a number of reasons, about the suggestion that approval by the Lord President should be required. It is not clear how such a role would sit with the Lord President’s other roles as a member of the Faculty of Advocates and as head of the Scottish Court Service.”

154. The Lord President said that he saw the approval of regulators as an important safeguard in the Bill and his view was that the agreement of the Lord President should be required before a regulatory body was authorised. The proposal in the Bill that the Lord President merely be consulted was insufficient.  

155. Kenneth Swinton, for SLAS, said that although it might be argued that extending the role of the Lord President would be a proportionate approach in Scotland, the preference of SLAS was for a legal services commission. Mr Swinton explained—

“We are concerned that that regulatory scheme drills right down to the practice rules and so on, so that there is a possibility that direction could come from the Scottish ministers and prejudice the independence of the

96 Law Society of Scotland. Written submission to the Justice Committee.
98 Lord President. Written submission to the Justice Committee.
profession, although we do not suggest for a moment that that would happen under the current Administration. We have heard about the Law Society's proposal to extend the role of the Lord President. There might be an argument that that would be a proportionate approach in Scotland. However, our preference—albeit with a cost attached—would be to distance that involvement through a legal services commission, which would create a definite distance. It is a matter of perception—the perception, not only domestically but internationally, that the legal profession has independence from the Executive. That is the crucial issue.99

156. Thompsons Scotland said that it was concerned about both the State (through the Scottish Ministers) being involved in approving regulators since “the State is the litigant in 100% of the criminal cases and 50% in civil cases” and more generally the extent of the powers being given to the Scottish Minsters. For those reasons it agreed with SLAS that consideration should be given to establishing a legal services commission for Scotland. Thompsons also questioned the level of resources being allocated by the Scottish Government to its “super-regulatory” functions, describing them as “paltry, alarming, wholly inadequate and an attempt to do justice on the cheap”. Thompsons said that the consequences of a lack of monitoring could be serious and could mean that “legal services would be open to control by criminal minds”. Thompsons said that it had no confidence whatsoever that the Scottish Ministers’ monitoring would be in any way capable of policing such a situation.100

157. ICAS questioned whether the powers given to the Scottish Ministers were appropriate and argued that the administration of justice should be independent from political influence. In its view there was a role for independent regulation and it believed that trust should be placed in those who would be Approved Regulators. Conversely, ICAS argued that some other features that should sit at the policy and oversight level were being inappropriately delegated in the Bill to the regulators. For example, in the opinion of ICAS the regulatory objective of “promoting access to justice and competition in the provision of legal services” should not be responsibility of the professional bodies. Its written evidence said—

“It is not the role of a professional body in exercising its regulatory functions to apply the government’s competition policies or promote access to justice. Such considerations would lead to new regulatory procedures, the potential for expensive appeals, and would be further complicated where there is more than one regulator.” 101

158. The Minister said that he was satisfied that the Bill set out a regime in which the role to be played by the Scottish Ministers would not interfere with the independence of the legal profession. He said that section 4 clearly delimited the role that the Scottish ministers would play, that regulators would only be appointed after consultation and that the regulators themselves would make the decisions about who did or did not meet the tests to become a licensed legal services provider. The Minister stressed that all those involved, including the Scottish

100 Thompsons Scotland. Written submission to the Justice Committee.
101 ICAS. Written submission to the Justice Committee.
Ministers, would be subject to the regulatory principles that enshrine the independence of the legal profession in statute. ¹⁰²

159. The Minister confirmed that he was considering whether the Lord President should have a greater role but that he did not believe that establishing a statutory panel was necessary. Colin McKay, deputy director of the Scottish Government’s legal system division, added that the Scottish Government’s view was that any statutory advisory panel would not have flexibility as to who was on the panel and how it should operate. He confirmed—

“The preference at the moment, in line with Government policy around the simplification of the public sector, is not to create yet another public body, as it were, although I am not sure whether such a panel would count as a public body. We think that we can secure the benefits through non-statutory means.”¹⁰³

160. The arguments presented in evidence against a super regulator appear to relate solely to cost. The Committee agrees that it would be disproportionate in a jurisdiction as small as Scotland to create a public body whose sole function would be to consider applications from between one and six bodies to become Approved Regulators of ABS, to receive annual reports from Approved Regulators and every three years to review the operation of each Approved Regulator. Whilst some witnesses have expressed a degree of scepticism that the costs of carrying out these functions by the Scottish Ministers will be as low as estimated in the Financial Memorandum, it does seem that the set up costs of a wholly new public body would be likely to be disproportionate when compared to the ongoing costs once the small number of regulators were approved.

161. The Committee notes that much evidence was received which suggests that but for the disproportionate cost that would be involved, a Legal Services Board would be desirable as it would avoid the direct regulation of the legal profession by the Scottish Ministers. As already noted, a number of witnesses have argued that the direct involvement of the Scottish Ministers in the approval and supervision of Approved Regulators raises issues concerning the independence of the legal profession. The proposed solutions offered by witnesses reveal major philosophical differences in approach. Broadly speaking, witnesses from the legal profession argue for an enhanced role for the Lord President and those from consumer bodies argue for a statutory consumer panel to advise the Scottish Ministers. The Committee observes that either option is likely to raise the costs of the proposed system beyond that envisaged in the Financial Memorandum.

162. The Committee is not of the view that a sufficient case has been made for establishing a new body similar to the Legal Services Board. Despite this, the Committee shares the concerns expressed in much of the evidence about the extent of proposed ministerial involvement and the perceived threat to the independence of the legal profession as a consequence of the involvement of the Scottish Ministers. Ensuring independence from the Scottish Government is crucial and the Committee agrees that the Lord

President should have a greater role in the process of approval of regulators and that his agreement should be given before any regulator is so approved.

Regulatory schemes

163. Section 8 of the Bill requires all Approved Regulators to create and implement a regulatory scheme for their licensed providers (as entities) and sets out what must be included in those schemes.

164. The regulatory framework for ABS proposed in the Bill introduces a form of entity regulation for the first time with respect to the legal service market in Scotland. It is the organisational entity (the ABS) which will be regulated by the Approved Regulator not the individuals providing the legal services. Entity regulation, as outlined in the Bill, involves certain requirements relating to the internal organisation of ABS e.g. the posts of Head of Legal Services and Head of Legal Practice. Licensed Legal Services Providers or ABS will be required to carry out annual reviews and send reports to their Approved Regulator. Approved Regulators will be required to carry out three-yearly reviews of all licensed providers to assess the extent to which they have had regard to the regulatory objectives and professional principles and how well they have complied with the their approved regulator’s regulatory scheme.

165. The Bill does not require that any regulatory scheme would apply to ‘traditional’ forms of legal practice (sole practitioners, partnerships, law centres). These ‘traditional’ practices would be regulated only through the Law Society of Scotland’s regulation of individual solicitors and accounts rules. Individual solicitors within an ABS would still be subject to regulation by the Law Society of Scotland.

166. In England and Wales, under the Legal Services Act 2007, entity regulation is applied to both ABS and ‘traditional’ forms of legal practice. If in Scotland traditional firms are not to be subject to entity regulation, it has been argued that there will be no level playing field between traditional firms and ABS in that the latter will have additional costs of regulatory compliance. This could give rise to a competitive advantage in favour of traditional forms. Further, if the Law Society becomes an Approved Regulator there would be the paradox that the Law Society would be in the position of regulating the entities which operated as ABS but not the traditional entities in which its own members provided legal services.

167. The law firm, Shepherd and Wedderburn, said it was concerned about this and that the Bill missed a fundamental point—

“we made the point that, to the extent traditionally constituted firms and licensed providers will be in direct competition, then traditionally constituted firms should not be prevented from making the same choice of regulator as their competitors. It is one thing to avoid the disruption which is (quite properly) identified in the policy memorandum at para.139 by requiring all
traditionally constituted firms to submit to alternative regulation – it is quite another to prevent such firms choosing to do so if they wish.”\textsuperscript{104}

168. Consumer Focus Scotland said that it would prefer the regulatory scheme to cover both traditional firms and the new ABS. Sarah O’Neill said—

“from the consumer perspective, it should not matter how the business the consumer deals with is set up; they should be entitled to the same form of protection. For example, traditional firms are not necessarily required to comply with the regulatory objectives and adhere to the professional principles, but we think that the same principles should apply to both types of providers.”\textsuperscript{105}

169. In his response, the Minister responded that he was aware of the argument that traditional firms could be placed at a disadvantage compared to licensed legal services providers. He said that at the most obvious level, a licensed legal services provider’s first requirement would be to pay a fee. The Minister said that it was not possible to be absolutely certain as to how much that fee would be, but it would not be payable by traditional legal practices that decided not to become an ABS. The Minister’s argument therefore was that there would be an additional cost under the new system for being an ABS.\textsuperscript{106}

170. As noted earlier in this report, the Committee is not persuaded that it is necessary to set up a further tier of regulation for existing law firms.

Reconciling different rules

171. Section 9 requires that all Approved Regulators make provision in their rules for preventing and resolving conflict. Conflict in this context is defined as conflict between the regulatory scheme of an Approved Regulator and professional or regulatory rules of a particular profession. The Committee observes that the provisions in the Bill do not appear to cover conflicts between the professional or regulatory rules of two different professional bodies within the same ABS.

172. Professor Alan Paterson said that when dealing with divergences between professional and other standards and codes of conduct an obvious risk would arise if the legal services provider was permitted to adopt the standards of practice and conduct of the lowest common denominator within the entity. He observed that regulating an entity against the standards and conduct of its Approved Regulator would ensure that the legal services provider would be held to the standards of the current branches of the legal profession in Scotland, provided the Approved Regulator was a branch of the legal profession. However, where an Approved Regulator was a professional body with less demanding professional standards than those currently expected of legal professionals e.g. in relation to conflicts of interest, then the protection for the public could be diminished.

173. Professor Paterson said that the Bill did not provide a satisfactory framework for dealing with divergences from and differences between professional standards
and codes of conduct. For example, with regard to conflict of interest, lawyers had the stronger standards and offered the greatest protection to the public. It followed that in a multi-disciplinary practice there would be pressure to move away from the stricter standards that apply to lawyers in Scotland. If someone or several people in an entity breached the conflict of interest standards, the issue would be policed and the entity disciplined through a regulatory complaint mechanism. The lawyers in the entity would be disciplined according to their standards, while any accountants involved would be disciplined according to their standards, which, as far as conflict of interest was concerned, were more relaxed and permitted more information barriers. He concluded—

“we will get into a regulatory mess and have what I call ethical Esperanto. What ethical code will apply?”

174. ICAS said that it was content with what was being proposed. In its view conflicts would be dealt with quite easily because there would only be difficulties when a conflict arose between the Approved Regulator obligations and what the licensed provider had to do to satisfy the approved regulator. ICAS argued—

“Conflict has to be dealt with by each of the institutes. We all have codes of practice and ethical guides that deal with our own conflicts of interest. The regulation of individual professions will continue. We have to sit down and see whether, from an entity and licensed provider perspective, there are any potential conflicts that we have to address, but that could be done by way of a memorandum of understanding.”

175. Gilbert Anderson said that he did not know whether conflict could be resolved by regulatory rules but that the issue was another example of a difficulty that would not arise if we were not going down the MDP route. He said—

“Common sense suggests that there must be increased potential for conflict of interest if more professionals are involved in a situation and are providing a variety of services to clients. That is a concern, because the avoidance of conflict of interest is a core value of our profession.”

176. The Law Society said that the Bill was only permissive and provided a sufficient framework for dealing with different professionals with different codes of practice, although it agreed that more work would be required in order to decide what models and business groupings could be that allowed to operate as MDPs. It stated that the most obvious group with whom many solicitors had associations was independent financial advisers. The Law Society said that as financial advisers were professionals, were regulated by the Financial Services Authority and had a similar regulatory code, it expected that any regulatory conflicts could be worked through.

---

177. SLAS said that there was “a major possibility of conflict at all levels of ABS”\textsuperscript{111} In its supplementary written submission it provided some examples of the issues that could arise as a consequence of certain business models. In its view, the most obvious business model would be a conveyancing solicitor and an estate agent. SLAS said that estate agents were subject to “a very light touch regulatory regime” that offered a very weak protection for consumers; a solicitor and financial adviser business model would give rise to difficulties between the two different standards operating in the same business as solicitors and chartered accountants had different cultures and obligations for dealing with conflicts of interests.

178. SCOLAG was concerned that solicitors could go into business with virtually anybody. It said that accountants were likely to be the most obvious candidates; however, the idea that an independent financial adviser could go into a business partnership of some sort with solicitors would cause considerable ethical problems and would not be in the public interest. SCOLAG asked why legislation was required if only a very small group of people would be considered acceptable.\textsuperscript{112}

179. Robert Sutherland, SCOLAG, said—

“It is not correct to say, as the Law Society did, that there is no ethical difficulty here at all. It is clear that, even on the basis of the Law Society’s evidence, there have been difficulties. The Law Society is looking to the regulations to sort out the ethical difficulties.”\textsuperscript{113}

180. Reconciling regulatory differences must be governed by the regulatory objectives. It is difficult to resolve the competing arguments in the absence of evidence of how the issue has been resolved elsewhere. Such evidence will become available only after Approved Regulators have attempted to resolve the conflicts in practical situations. If this cannot be done MDPs and ABS will not remain a viable option.

181. The Committee is of the view that satisfying the regulatory objective of protecting and promoting the interests of consumers requires that as far as the provision of legal services is concerned, any regulatory conflict should be resolved by the application of the ethical standard which currently applies to solicitors. The Committee notes that this is the approach taken in section 60, which extends professional privilege to a licensed legal services provider when providing legal services.

Professional indemnity

182. Section 19 provides that the practice rules of all LLSPs must require that sufficient arrangements for professional indemnity are kept in place. Both Which? and the OFT agreed that this was a matter for the LLSPs and in turn the Approved Regulators.

183. Consumer Focus Scotland was pleased that LLSPs would be obliged to have such arrangements in place but both it and the OFT pointed out that it would be


important for consumers using LLSPs to also have access to a Guarantee Fund or an equivalent provision to ensure that they were afforded the same level of protection as consumers of traditional business models.  

184. Similarly, Gilbert Anderson pointed out that the lack of access to the Guarantee Fund or equivalent by clients of a licensed provider would, on the face of it, put such clients at a considerable disadvantage when compared to the benefits enjoyed by clients of a traditional firm of solicitors. Professor Paterson agreed that the provisions in section 19 were insufficient as no provision was made for a Guarantee Fund of a Compensation Fund to recompense clients whose funds were stolen by a member of a LLSP. He said that fidelity cover only operated where one member of a LLSP was not involved in any fraud. If a LLSP was to be taken over by persons with criminal intent, the lack of an adequate compensation fund, would be a major weakness. He concluded that it was essential for any Approved Regulator to have in place a fully audited scheme equivalent to the Guarantee Fund.

185. When asked about this apparent omission, the Minister said that his intention was that the Bill would include provisions on compensation in cases of fraud. He said that a compensation fund and fidelity insurance were presently being considered and that he anticipated the Bill being amended at stage 2 in this regard. He confirmed—

“the paramount interest is protection of the public, so nothing will be done that would adversely impact on the protection that rightly exists for people who deal with solicitors.”

186. The Committee welcomes the Minister’s undertaking to give further consideration to this aspect of consumer protection and to bring forward appropriate amendments at stage 2. The Committee expresses surprise that this important area of consumer protection was not considered at an earlier stage and brought forward as part of the Bill before us.

Step-in powers

187. Section 35 provides that the Scottish Ministers may by regulations either establish a new regulator or set themselves up as an Approved Regulator “where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by the licensed providers.” In the absence of a suitable Approved Regulator, the Scottish Ministers would be able to “step-in” and regulate LLSPs.

188. The Law Society said that the Scottish Ministers should be obliged to consult with interested parties on any regulations made under this section and that—

115 Gilbert Anderson. Written submission to the Justice Committee.
116 Gilbert Anderson. Written submission to the Justice Committee.
118 Explanatory Notes, paragraph 84.
“There needs to be further definition of the basis on which section 35 would be operated and what safeguards should be put in place to prevent the inappropriate use of this power.”\textsuperscript{119}

189. Douglas Mill argued that the potential for direct governmental control of the legal profession contained, for example, in this section, “could reduce Scotland to the type of legal profession seldom seen outside South America and Equatorial Africa.”\textsuperscript{120}

190. Andrew Mackenzie, Scottish Government Constitution, Law and Courts Directorate, explained the policy intention behind this section—

“The section makes provision for a worst-case scenario in which there is no other approved regulator. The provision is a last resort or safeguard to ensure that there will always be somebody to deal with the role of an approved regulator.”\textsuperscript{121}

191. The Minister added—

“the provision envisages the case where an approved regulator, for whatever reason, either ceases to act as the regulator or is struck off from being the regulator, for which provisions exist. Section 35 is a fall-back or last-resort provision and is intended as such.”\textsuperscript{122}

192. The Committee notes that the step-in power is only intended to be used as a last resort but agrees with the Law Society that the Bill should detail when this provision might be used. The Committee also agrees that there should be an obligation on the Scottish Ministers to consult on any regulations made under this section and that the use of any such power should be for as short a period as is practicable. The Committee asks the Scottish Government to consider these issues and report back.

Licensed legal services providers

193. Chapter 2 of Part 2 makes specific provisions with regard to LLSPs which are defined in section 36 as—

“a business entity which, through the designated and other persons within it provides (or offers to provide) legal services to the general public or otherwise, and for a fee, gain or reward, and does so under a licence issued by an approved regulator in accordance with the approved regulator’s licensing rules.”

\textsuperscript{119} Law Society of Scotland. Written submission to the Justice Committee.
\textsuperscript{120} Douglas Mill. Written submission to the Justice Committee.
194. A business entity is eligible to be a licensed provider only if it has within it, for the provision of legal services, at least one solicitor who holds a practising certification that is free of conditions.\textsuperscript{123}

195. ICAS said that it had concerns about branding and detailed them in its written and oral evidence. Charlotte Barbour explained—

“I doubt that it serves the consumer interest well to call a firm primarily comprising chartered accountants with only one or two solicitors a legal services provider because one would assume that such a provider would be a firm of solicitors rather than a firm that primarily provided accountancy-related services as well as some legal services. As the Bill is currently structured, it is a moot point whether under the separate regulatory vehicle the firm will be a "legal services provider" or whether that will just be a subtitle and we will still be able to refer to such a firm as a firm of chartered accountants and solicitors regulated as a legal services provider. However, I cannot imagine that a firm of chartered accountants that took in one solicitor would be interested in adopting such an approach at the moment, because it simply does not lend itself to allowing such firms to make it clear exactly what they do.”\textsuperscript{124}

196. In relation to the provision in section 36(2), the Minister said that the requirement that an entity must have at least one solicitor who holds a practising certificate in order to be eligible to be a licensed provider was a minimum requirement. This minimum requirement would apply in the case of a sole practitioner who wanted to enter into a partnership with an accountant. The Minister said that he did not want sole practitioners to be prevented from being part of an ABS.

197. As noted earlier in this report, CAS said that the eligibility criteria designated to qualify as a LLSP had been drafted purely with the commercial sector in mind and had not considered that voluntary advice organisations could benefit from adopting the alternative business structure model. This point was also raised by Consumer Focus Scotland and Scottish Women’s Aid.

198. The Committee has already welcomed the assurance by the Minister that he would consider this issue and whether any amendment was needed.

199. Evidence from ICAS has highlighted the fact that the Bill does not make any reference to how licensed legal services providers should describe themselves. It is clear that ICAS was not calling for a LLSP with a majority of partners who are chartered accountants to be prohibited from describing itself as “Chartered Accountants and Licensed Legal Services Provider” or “Chartered Accountants licensed as a legal services provider”. However, it would appear to be the case that an ABS with a majority of solicitor owners would not be entitled to describe itself as “Solicitors and Licensed Legal Services Provider” since the title “solicitor” is restricted to use by appropriately qualified individuals. Similar issues could arise with the terms

\textsuperscript{123} Legal Services (Scotland) Bill. Section 36(2).
“lawyer, “accountant” and indeed in relation to other professionals. The Committee observes that there is, potentially, an issue here about transparency. It is vital that members of the public have sufficient clear information about the various business models that could exist under this Bill to enable them to make an informed choice when electing where to take their business. The Committee asks the Scottish Government to consider how it intends to address this situation.

Designated persons

200. Section 47 defines “designated persons” and who will designate them. A designated person is a person (whether or not a legal professional and whether or not paid) who carries out legal work in connection with the provision of legal services by a licensed provider. Designation is made by the Head of Legal Services or the Head of Practice (or Practice Committee), who is required to keep a list of those who are designated.125 A person can be designated if he or she is an employee or manager of the LLSP or an investor in it. It appears from the Bill that no action can be taken against an investor if he or she is not a “designated person”. In light of the ambiguity that seems to exist in this section, the Scottish Government is asked to explain more clearly its thinking behind this section.

201. Gilbert Anderson said—

“There is a danger in allowing what the Bill terms ‘designated persons’ to come into the market to provide legal services without any requirement for training. As I read the Bill, I cannot see any provision that would require designated legal services providers to undergo strict training, or indeed any training. All that seems to be required is a head of legal services or a head of legal practice, and everything will be all right. That head could be responsible for 100 providers, but nothing in the Bill requires those designated providers to undergo strict training, or indeed any training. That is a massive and obvious concern.”126

202. Walter Semple and Catriona Walker said—

“The principle behind the Bill is that there is no requirement for providers of legal services to have education or training in law provided that they are not solicitors (section 37(4)). The firm or organisation who is the legal service provider will take care of the competence and professional issues. The proposal that unqualified persons can provide legal services to the public at all, far less provide them more efficiently, does not bear examination.”127

203. Mr Semple and Ms Walker said by way of example—

“A patient who visits a doctor does not expect a consultation with a medical services provider who is not required to be medically trained, on the basis that there is at least one doctor in the medical practice. The scheme of the

125 Explanatory Notes, paragraph 116.
127 Walter Semple and Catriona Walker. Written submission to the Justice Committee.
Bill would create problems and difficulty for users of legal services in Scotland.\textsuperscript{128}

204. However, Consumer Focus Scotland said that it was important to be clear that it was solicitors who would still be providing legal services. Sarah O’Neill pointed out that people should still have the same protections that they have presently and that the same level and quality of service should be provided. She argued—

“In this debate, sight is sometimes lost of the fact that we are talking about solicitors providing the services. The only difference is that they will be employed by different entities from those that employ them at the moment.”\textsuperscript{129}

205. Andrew Mackenzie, for the Scottish Government, said that the purpose of section 47 was to enable people such as paralegals to work in the new entities and that, at present, unqualified persons could work in reserved areas when they were working for solicitors. He explained that for the new entities, there were further safeguards in the Bill to allow the head of legal practice to be responsible for those persons.\textsuperscript{130}

206. The Minister reiterated—

“Plainly, in licensed legal services providers, a range of people will operate as principals in the business, but the Bill makes no change to the law on the way in which work is carried out. Those areas of law that require specific training are reserved to Scottish solicitors; no one who is not a Scottish solicitor can carry out, for fee or gain, work such as litigation, conveyancing or the preparation of writs, excepting wills. If a non-solicitor does such work, they commit an offence.”\textsuperscript{131}

207. The Committee notes that the Bill is intended to formalise the existing position whereby unqualified staff are able to work in areas reserved to solicitors, under the supervision of solicitors. Under the Bill’s provisions a person who is formally “designated” could also have that designation removed. The Committee understands the rationale for the “designation” provisions but is of the view that a requirement should be placed on Approved Regulators to set appropriate standards which require to be met by anyone seeking such designation. Issues of training and education have been raised in evidence and the Committee agrees that consideration should be given to these as there is likely to be a legitimate expectation on the part of the public that a “designated person” is so designated by virtue of his or her training or experience.

\textsuperscript{128} Walter Semple and Catriona Walker. Written submission to the Justice Committee.
Outside investors

208. One of the central policy intentions of the Bill is to allow outside investment in legal firms. Section 49 requires that an Approved Regulator must satisfy itself as to the fitness of every outside investor in a LLSP. Section 50 sets out factors as to fitness and gives examples of matters that would be deemed relevant when considering an outside investor’s fitness for having an interest in a LLSP. Section 51 requires that outside investors “behave properly” which would include acting in a way that was compatible with the regulatory objectives and professional principles. These areas of the Bill provoked many comments in the evidence received by the Committee.

209. The OFT and Consumer Focus Scotland both said that they supported the introduction of a “fitness to own” test. They assumed that the presumption in the Bill that an outside investor would be fit to own if qualified to practise as a solicitor was because a solicitor’s fitness to own would be dealt with by the regulation of the individual solicitor. They observed that this deviated from the position in England and Wales where it had been proposed that there should be one test for all owners of an ABS, whether they were lawyers or non lawyers. The objective of such a provision was to ensure consistency across all licensed authorities so that an ABS regulated by one licensed authority was not perceived to be any riskier than an ABS regulated by another licensed authority.¹³²

210. SLAS said it was concerned about the risks of external ownership. It pointed out that there was a difference between a professional and someone who invests with a view to making a profit; as the latter would not have the same ethical or educational background or the qualifications that professionals had. Kenneth Swinton said—

“There will be a compulsory element of professional ethics in every solicitor’s training, which will cover confidentiality and conflicts of interest. I cannot speak for the requirements of other professions, but I do not see that being the case for external shareholders who are not professionals.”¹³³

211. Professor Paterson said he was concerned at how effective the fitness for involvement tests would be. He suggested that it would be possible to follow the Solicitors Regulation Authority in England and to set out a series of tests to exclude people with recent criminal convictions from being able to invest in firms but that it would be difficult to do and that people would think up all kinds of ways to try and avoid the regulations.¹³⁴ Robert Pirrie said that by its very nature the Bill was trying to increase the diversity of people involved in legal services provision and there was no question but that risk would be increased.¹³⁵

212. Professor Paterson drew attention to the Australian standards on third-party ownership and said that although their fitness to own tests were not particularly

¹³² OFT and Consumer Focus Scotland. Written submissions to the Justice Committee.
clear, from what he had been advised by two of the lead regulators there, the solution appeared to be very pro-active regulation by the regulators.  

213. The Faculty said that it was not in favour of non-lawyer ownership of legal firms and that in its view there were potentially very real risks. The Faculty drew attention to the Bain report in Northern Ireland, which concluded that the risk there was very significant, largely because of the historical background. Richard Keen concluded—

“It is possible to put safeguards in place, but as soon as somebody puts up a fence, someone else finds a way round, over or under it. Professor Paterson candidly acknowledged that earlier. With shadow directors and shadow owners, the business can be difficult to regulate. There is a real issue there. The question, if I may put it back to the committee, is a political one: is the risk such that you should not take that step as far as outside ownership is concerned?”

214. The Law Society said that it was strongly of the view that the fitness to own test was an essential part of the proposals and that sections 50 and 51 were essential to the Bill and that without these sections the Bill would not have its support.

215. Michael Scanlon said notwithstanding the SLAS view on the Bill generally, SLAS was generally content with the fitness to own test.

216. However Douglas Mill stated “the Bill quite simply facilitates ownership of legal firms and their use as money laundering portals”. Walter Semple and Catriona Walker said that Bill would set up a system where the right to provide legal services could be bought and sold by investors which could well attract buyers and sellers and their advisers but would threaten the integrity of professional ethics and the administration of justice and offer nothing to consumers.

217. SCOLAG said that the fitness for involvement test looked good on paper but questioned how people carrying out underground criminal operations who were not yet necessarily at the forefront of police attention would be prevented from investing before they were identified.

218. Gilbert Anderson said that he could be persuaded to support minority investment to help management of practices, for example through more effective use of technology, provided that the entity was and would always be a law firm. He argued—

140 Douglas Mill. Written submission to the Justice Committee.
141 Walter Semple and Catriona Walker. Written submission to the Justice Committee.
“Such an approach would avoid the pitfalls of and enormous problems to do with conflicting regulatory matters and, much more fundamental, would overcome the serious problem in relation to the client's right to legal privilege. In other words, the firm would be a firm of lawyers, even though someone who was not a lawyer had a stake in the business and was doing work that was incidental to the law firm's work, so all the rules that concern legal professional privilege would stick to the firm.”

219. Mr Anderson added that he was in favour of opportunities for law firms in Scotland to grow and innovate but only on the understanding that the sacrosanct independence of the law firm was transparently preserved through ownership and ultimately control by the lawyers themselves. He suggested that a fallback compromise position could be a minority investment by non-lawyers in a law firm up to 25 per cent and that this would deal with the difficulties with conflicting regulatory codes.

220. The Minister acknowledged that third-party ownership was understandably viewed with some trepidation and that some believed that allowing non-solicitors to own a stake in legal firms was a threat to the independence of the legal profession and the core principles that have been at the heart of the practice of law in Scotland for centuries.

221. The Minister said—

“We have spent considerable time developing safeguards against those potential threats, such as the introduction of regulatory objectives in section 1, as I mentioned, and professional principles in section 2, and robust provision has been made to ensure that only fit and proper persons are allowed to own firms that provide legal services.”

222. The Minister also acknowledged the suggestion that outside ownership could threaten Scots law by allowing those with little knowledge or understanding of the Scottish legal system to become involved in it. He stressed—

“the continuation of a strong, independent Scottish legal system is something that the Scottish Government supports strongly, and the Bill does not jeopardise that.”

223. The Committee recognises and has sympathy with much of the concern expressed around the fitness for involvement test. Clearly, no test can provide a guaranteed protection against undesirable third party investment but the Committee is clear that if we are going down the route of third party investment and ownership being a possibility, the fitness for involvement test must be as robust as possible. The Committee asks the Scottish Government to consider again the provisions in the Bill in this respect and

give assurances that the Bill will provide the highest levels of safeguards and checks.

224. The Committee notes that very recently (24 February 2010) SLAS lodged a Requisition with the Law Society requiring a meeting and vote on the issue of external ownership of law firms. The Law Society is obliged to hold the meeting within 28 days of receipt of any such Requisition. The meeting is expected to take place after publication of this report and the Committee awaits with interest the outcome of that meeting and any vote.

Professional privilege

225. The Explanatory Notes state that section 60 ensures that the clients of a LLSP have essentially the same legal professional privilege as they would have had a sole practitioner or law firm been instructed.

226. SLAS pointed out that there were two aspects to legal professional privilege; one was the litigation privilege and the other was the advice privilege. Kenneth Swinton said that recent case law suggested that the advice privilege is as important as the litigation privilege and that advice might be given at any stage—even in a conveyancing transaction but that as drafted, this Bill deals only with the litigation privilege.

227. Gilbert Anderson stated that his understanding was that in terms of section 60, in order to secure professional privilege, the client would need to be aware of the precise status of the person in the licensed legal service provider with whom he or she was communicating at the material time and that—

“Section 60 to my mind creates considerable uncertainty. Such uncertainty does not exist in a situation involving an independent law firm solely owned, or at least with appropriate majority ownership and control by lawyers.”

228. The Law Society proposed that there should be a specific provision for an obligation of confidentiality to apply to the licensed provider and its employees and that such a provision should be reinforced by a criminal sanction where those employees were not subject to professional rules of conduct.

229. In response the Minister explained—

“there is an argument that the Bill should say that licensed legal services providers will be subject to the same provisions about confidentiality to which solicitors are subject. That is not in the Bill because we took the view—it was

---

148 The motion is “The members of the Law Society of Scotland in general meeting find that it is essential in the public interest in the retention of an independent legal profession that the ownership of any business authorised to carry out work which is reserved to persons qualified to practise as solicitors in terms of the Solicitors (Scotland) Act 1980, should be vested in persons so qualified, and call upon the Scottish Parliament to set out and maintain that position in the statutes and regulations of the Scottish Parliament and, in particular, to amend the terms of the Legal Services (Scotland) Bill, presently before the Parliament to that effect.”
150 Gilbert Anderson. Written submission to the Justice Committee.
151 Law Society of Scotland. Written submission to the Justice Committee.
the view of our expert parliamentary draftsmen—that the matter is covered in section 2, on the professional principles to which all licensed providers will be subject.\textsuperscript{152}

230. The Minister said that although his advice was that the issue was covered adequately by section 2, as it had been raised in evidence, he would seek further advice.

231. The Committee welcomes the Minister’s undertaking to consider further the issue of legal professional privilege.

Complaints about regulators

232. Sections 64 and 65 concern complaints about Approved Regulators and LLSPs. Section 64 provides that the Scottish Ministers must investigate any complaint made to them about an Approved Regulator but that they may delegate this (and other functions related to complaints) to the Scottish Legal Complaints Commission (SLCC).

233. Consumer Focus Scotland and the OFT said that they were disappointed that complaints about Approved Regulators were to be made to the Scottish Ministers rather than the SLCC as this would have the effect of removing the single gateway for complaints and causing confusion for consumers.

234. The OFT said that consumer confidence in the complaints handling function would be crucial but it was not convinced that there would be confidence in a complaints process if a decision as to the merit of the complaint lay with the Scottish Ministers. Scottish Women’s Aid pointed out that a member of the public would have to decide whether their complaint fell under the new regulatory complaint heading, was a handling complaint, or a service or conduct complaint and whether it was against a LLSP or a member of that entity who may or may not be a professional. Scottish Women’s Aid agreed with others that having a single gateway for complaints would be of great benefit.

235. The Law Society questioned whether it was appropriate for the Scottish Ministers to delegate any of their functions to the SLCC and why, if it was thought to be appropriate, the SLCC should not deal with all complaints about Approved Regulators rather than involving Scottish ministers.\textsuperscript{153}

236. The SLCC noted that that the reasons for treating service and conduct complaints differently had been considered during the passage of the Legal Profession and Legal Aid (Scotland) Act 2007 but questioned whether it was necessary or desirable for consumers and practitioners for such a separation to continue under the proposed legislation. Jane Irvine, the Chair of the SLCC, said that the interests of the consumer and practitioner would be better served if only one organisation had the right to investigate conduct complaints in addition to


\textsuperscript{153} Law Society of Scotland. Written submission to the Justice Committee.
service complaints and that this Bill was an opportunity to make services better for customers.\(^\text{154}\)

237. The SLCC also said that it was not clear whether the intention was for complaints to be delegated after the Scottish Ministers had determined whether the complaint was a regulatory handling complaint or frivolous, vexatious or totally without merit in terms of section 64(2), or whether it would be left to the SLCC to decide the status of the complaint. The SLCC said that if it were to handle complaints about Approved Regulators under delegation by the Scottish Ministers, thereby relieving the Scottish Ministers of that expense, consideration should be given to the Scottish Ministers contributing to the cost of the investigation of such complaints and a complaint levy being imposed on an Approved Regulator if a complaint is upheld. Both the SLCC and the Law Society said that the additional work expected to come the SLCC’s way had not been properly taken into account.

238. In response the Minister advised—

“It is correct to say that the Bill makes provision for the making of a new type of complaint called a regulatory complaint, for which we have not included an estimate of the cost. We do not really think that the cost will be hugely significant, which is why it is currently not included.”\(^\text{155}\)

239. The Minister undertook to make checks to establish whether any further provisions were required. Colin McKay noted that the SLCC was funded by a levy on the profession rather than from the public purse and that if the existence of ABS led to more complaints to, and costs on, the SLCC, the ABS would bear that in their subscriptions to the commission.\(^\text{156}\)

240. The Committee welcomes the Minister’s undertaking to check whether any further provisions are required in relation to complaints about regulators. The Committee draws the Scottish Government’s attention to the evidence of the Scottish Legal Complaints Commission and invites the Scottish Government to respond to the points made on the issue of complaints handling.

Sanctions

241. The Scottish Ministers are responsible for monitoring the performance of any Approved Regulator. The Approved Regulator is responsible for monitoring the performance of its LLSPs.

242. Section 29 details the powers available to ministers where they are of the view that an Approved Regulator is not performing its duties satisfactorily. The measures include setting performance targets, directing that particular action be taken, publishing a statement of censure, imposing a financial penalty, amending the authorisation to act and rescinding an authorisation. Schedules 1 to 6 give more detail about when such measures will apply and the procedures to be

\(^{154}\) SLCC. Written submission to the Justice Committee.


followed. The Committee notes that schedule 4 relates to financial penalties and provides that the maximum penalty will be set by way of regulations.

243. Approved Regulators are given a range of powers to enable them to exercise their regulatory functions in respect of the LLSPs. For example, section 8 prescribes in general terms what must be included in the regulatory schemes that each Approved Regulator must establish. Section 10 provides that each scheme must contain both licensing rules and practice rules and that the licensing rules should set out the circumstances in which licences may be revoked or suspended. Suspension or revocation of a LLSP’s licence will have the effect of preventing an entity from operating as a legal services provider and is the ultimate sanction provided for in the Bill. Section 15 makes provision for the financial penalties which may be imposed by an Approved Regulator on a LLSP. Any such fine must not exceed the maximum amount permitted by the Scottish Ministers when approving a body as an Approved Regulator but the specifics of this provision are left to regulations.

244. Section 18 refers to accounting and auditing and requires that the Practice Rules of an Approved Regulator must contain an equivalent to sections 35 and 37 of the Solicitors (Scotland) Act 1980. Failure to comply with section 18 will attract sanctions commensurate with professional misconduct under the 1980 Act.

245. In a letter to the Committee after giving his evidence\(^{157}\), the Minister advised that although regulation will essentially be at entity level, there were a number of provisions which related to individuals within a LLSP. The Minister drew attention to the following provisions—

- Section 39(3) provides that the Head of Legal Services can be disqualified from that position,
- Sections 44, 45 and 46 provide for disqualification from the positions of Head of Legal Services, Head of Legal Practice, membership of the Practice Committee and designated person either for a fixed period or indefinitely,
- Section 51 forbids an outside investor from acting in a way which is incompatible with the regulatory objectives and professional principles (although the Committee notes that there are no specific sanctions applicable to an outside investor deemed to have committed an offence under this section. Any sanctions for an offence under this section would apply to the LLSP as an entity (by way of sections 16 and 38) as opposed to the outside investor as an individual),
- Section 57 provides that a LLSP, knowing that a person is disqualified from practice, must not employ or pay that person and section 58 makes it a criminal offence for such a person to seek or accept such employment,

\(^{157}\) Scottish Government. Letter from the Minister for Community Safety to the Convener of the Justice Committee dated January 2010.
Section 68 provides that an Approved Regulator must keep and publish a list of the persons it has disqualified from holding a position in a LLSP,

Section 71 makes clear that the Bill does not effect any professional rules which regulate a professional (other than a solicitor or advocate), including sanctions,

Sections 88(5) and 91(3) deal with the effect of professional rules of solicitors and advocates,

Section 91(2) amends section 34 of the 1980 Act to allow Law Society rules to cover solicitors working in LLSPs.

246. The Minister concluded his letter by saying—

“I believe that all this provides a robust set of sanctions that can be applied against licensed providers and those who work within them. Finally, there is a further backstop. As I said in my evidence, the general criminal law applies.”

247. The Bill provides that an Approved Regulator must satisfy itself that all outside investors are fit to have an interest in the LLSP and must have rules setting out how an investor's fitness is to be determined. The Bill gives some examples of the factors which are to be regarded as relevant when an Approved Regulator makes such a determination and provides that the rules must prescribe that, where the Approved Regulator determines that the investor is unfit, if issued, the licence is to be revoked or suspended. In his letter to the Committee, the Minister explained—

“This means that the sanction for breach of the behavioural requirements set out in section 51 is that the Approved Regulator must either revoke or suspend the licensed provider's licence. As a result, the licensed provider would cease to be able to operate. The intention is that a licensed provider will ensure that an outside investor behaves properly or it will face the consequences of this robust sanction. Should the licence be suspended or revoked, the licensed provider would be able to make representations to the Approved Regulator, or the investor in question could take steps to rectify matters (for example, by resigning from the entity).”

248. The Committee is concerned about how the sanctions applicable to outside investors will operate in practice and what the effects on the licensed provider and its clients could be. The Committee recommends that consideration be given to a more targeted approach to sanctions for outside investors which would result in a sanction being available against the offending individual, in certain situations, other than the suspension or revocation of the licensed provider's licence. The Committee also requests that the Scottish Ministers explain what safeguards exist for the customers and clients of an entity whose licence is suspended or revoked.

158Letter from the Minister for Community Safety to the Convener dated 26 February 2010.
PART 3 – CONFIRMATION SERVICES

Confirmation agents

249. Part 3 of the Bill provides for a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation (the formal document issued to an executor for the purposes of winding up a deceased person’s estate).

250. At present section 32 of Solicitors (Scotland) Act 1980 restricts authority to solicitors in relation to the preparation of papers on which to obtain or oppose an application for confirmation or to wind up a deceased person’s estate, although investigation, ingathering and realising the estate are not reserved to solicitors. It is still possible for others to be granted the rights reserved by solicitors by way of an application for the right to conduct litigation and have a right of audience. The Bill’s Explanatory Notes state that this part of the Bill “provides a more direct route by which other professional groups (such as accountants) might be authorised to deal with executries, without seeking a wider power to conduct litigation.”159 This provision was welcomed by Consumer Focus Scotland in the interests of greater competition and consumer choice.

251. The Law Society said that if people were to be able to practice as confirmation agents it should be on a level playing field with other practitioners who provide confirmation services, namely solicitors and executry practitioners. In its written submission the Law Society argued—

“the creation of any approving body and any regulations made under sections 73 and 74 should require the consent of the Lord President. Confirmation agents should require to hold an annual licence from the approving body and should hold professional indemnity insurance and either fidelity guarantees or maintain a compensation fund to ensure consumer confidence and public protection.”

252. SLAS accepted that the Bill was merely enabling but noted that no mention was made of educational requirements or continuing professional development. Training was mentioned but there was nothing specified in the Bill about the length or nature of such training. SLAS suggested that the Bill should be amended to rectify this. SLAS also pointed out that one of the benefits of a solicitor undertaking work of this nature was that a solicitor was required to maintain a client account and to ensure that the sums in the client account were sufficient to meet all clients’ claims in full. Compliance was certified by six-monthly returns and by inspections every two years or so and, in the event of insolvency of a solicitor, the client funds were held separately underpinned by the Guarantee Fund. SLAS observed that the Bill was silent on such requirements.

253. The Committee notes that section 75(2)(c) of the Bill requires a confirmation agent to keep in place sufficient arrangements for professional indemnity but draws the Scottish Government’s attention to the written evidence of the Scottish Law Agents Society. The Scottish Government is

---

159 Explanatory Notes, paragraph 160.
asked to comment on whether there is a gap in protection for those who may choose to use a professional, other than a solicitor, for confirmation services.

Will writing

254. Subsequent to the Bill’s introduction, the Minister wrote to inform the Committee of the main Stage 2 amendments which were under consideration. One of these was an amendment to allow for the introduction of regulation of will writers. It was envisaged that any regulation would be similar in operation to that proposed for confirmation agents in terms of this Bill. The Committee notes that this matter is being consulted on.

255. The Law Society said that it had concerns about unregulated will writing services and that it would be seeking an extension of regulation to will writers. Consumer Focus Scotland said that it was not aware of a particular difficulty and that traditionally it had been more of an issue in England. Nevertheless, its view was that if will writers provided services in Scotland, they should be regulated adequately.

256. SLAS said that there was emerging evidence of consumer detriment, such as firms advertising wills for a particular fixed price then charging a higher price and claiming that this was because of the customer’s particular circumstances, advice given on the basis of English as opposed to Scots succession rights and extravagant claims in relation to tax savings. SLAS noted that will writers were not required to have professional indemnity insurance and could find themselves in a position of trust as executors and have opportunities for misfeasance. Robert Pirrie said that his concern was that there should be a solicitor left in the vicinity to get redress for the person who had been missold a will.

257. In his oral evidence, the Minister repeated that he was extremely sympathetic to the view that non-solicitors who were involved in preparing wills should be regulated and that amendments would be lodged at Stage 2, one of which could introduce a regulatory framework for non-lawyer will writers.

258. The Committee agrees that unregulated will writing is an issue that requires to be addressed and welcomes the Minister’s undertaking to consider what amendments should be lodged at Stage 2 to rectify the situation.

PART 4 – THE LEGAL PROFESSION

259. Part 4 of the Bill makes provision for the legal professionals (as distinct from the licensed legal services providers) and their regulators.

Applying the regulatory objectives
260. Section 86 creates a duty across the board for all regulators of legal services, legal professionals and those who provide legal services (whether in an ABS or in

---

160 Scottish Government. Letters from the Minister for community safety to the Convener of the Justice Committee dated 17 November 2009 and 4 December 2009.
a traditional business model) to, so far as practicable, act in a way that is consistent with the regulatory objectives as set out in section 1.

261. Consumer Focus Scotland said it was disappointed that the Bill did not impose the new regulatory framework on current business models. It was concerned that if no statutory duty to comply with the regulatory objectives and professional principles existed for traditional forms of practice, consumers accessing legal services in these models would not have the same level of protection as those accessing licensed legal services providers.

262. The Committee has already said that it is not convinced by the argument that traditional legal services providers should be required to have regard to the regulatory objectives. This is an enabling Bill and no changes are being imposed on those who do not wish to avail themselves of the new business models. However, for the sake of clarity, the Committee would be grateful if the Scottish Government would confirm its reasons for not requiring current business models to comply with the regulatory objectives as set out in section 1 of the Bill.

The Faculty of Advocates

Participation in ABS

263. The Faculty of Advocates has never been established by statute but has long been recognised. The Court of Session is responsible for admitting and removing persons from the office of advocate and for regulating their professional practice, conduct and discipline. In practice most of these matters are delegated to the Dean of Faculty. Advocates in Scotland are specifically precluded from entering into a partnership with another advocate or with any other person in connection with his or her practice as an advocate.

264. The Faculty does not support participation of its members in ABS. The Bill’s Policy Memorandum states that on balance the Scottish Government is not persuaded that it is necessary to require the Faculty to remove the current restriction that prevents its members from forming partnerships provided that transfer between the branches of solicitor and advocate can be made straightforward.

265. As detailed earlier in this report, the Faculty supports the retention of an independent referral bar with advocates as sole practitioners subject to the “cab rank” rule. In its written evidence, the Faculty argued that the current prohibition on partnerships at the bar benefits the consumer because it provides the maximum range of availability of counsel to meet the needs of clients wherever they live and whatever their circumstances. In the view of the Faculty, while it might be commercially beneficial for some advocates to form business partnerships, the practical result in a jurisdiction the size of Scotland would be a significant reduction in consumer choice.

266. On the other hand, Consumer Focus Scotland argued that all restrictions on competition should be removed unless there were clear and justifiable reasons for retaining them. Consumer Focus Scotland was not convinced that there was sufficient justification for retaining the current restrictions on advocates
participating in ABS. It believed that lifting the current restrictions would open up the possibility of new and innovative ways of providing legal services, which would be in the interests of consumers. Sarah O'Neill added that in relation to the “cab rank rule”, she had been seeking greater clarity about how the rule was operated and enforced. She said—

“In the absence of transparency about the operation of this rule, it is difficult to measure its actual benefits to consumers. We therefore do not believe that this argument offers sufficient justification on its own for prohibiting advocates from participating in alternative business structures.”

267. Consumer Focus and others stressed that the proposals in the Bill were permissive—nobody would be forced to participate in ABS but they should be allowed to do so, if they wished and that this should apply to advocates. Sarah O'Neill said that there seemed to be an assumption that advocates who were in the same area of work would band together but that she was unclear as to why that would be the case in practice as it was not what happened generally in the case of solicitor firms. In support of ABS for advocates, Ms O'Neill summarised—

“It might make it easier for consumers to get access to the advocate whom they need or lead to reduced prices for them. If advocates could have the structures that are proposed, it would lead to a more consumer-focused service.”

268. The OFT said it was disappointed that the Faculty would not permit the participation of advocates in ABS, as the OFT’s view that it had the potential to increase the availability of advocates, by attracting practitioners to new areas of practice and would pave the way for young advocates to gain varied legal experience. The OFT agreed with Consumer Focus Scotland that the operation of the “cab rank” rule did not justify the restriction and also questioned whether the rule did in fact ensure the right of representation since advocates may already decline a brief on the grounds of work load. The OFT said that the ability of advocates to transfer to the solicitor advocate branch if they wished to participate in ABS did not alleviate their competition concerns. In the view of the OFT, the current arrangements for transfer lacked transparency, appeared to incur costs of time and loss of perceived status and did not appear to be reciprocal for advocates who had become solicitor advocates and who then sought to rejoin the Faculty.

269. In his written submission, Gilbert Anderson argued that it was somewhat anomalous that the Bill allowed solicitors to participate in ABS but not advocates. He said that he could only assume that the fundamental rationale behind the Faculty’s position was its concern about the loss of transparent independence.

270. In his evidence, the Minister confirmed that the Scottish Government had decided, on balance, that as ABS had not been demanded by the Faculty, it should not be imposed. The Minister pointed out that Scotland’s bar is smaller – 460 advocates—than that in England, which has more than 10,000 barristers and

---

162 OFT. Written submission to the Justice Committee.
that it was plain that the situation in Scotland was entirely different from that south of the border. The Minister concluded—

“The Bill does not require the Faculty to allow advocates to participate in alternative business structures, but it is so drafted that advocates will be able to participate in licensed providers, should the Faculty rescind in the future its rule that prevents them from so doing.”\textsuperscript{163}

271.\textbf{The Committee agrees with the Scottish Government that in a jurisdiction the size of Scotland and given the relatively small number of advocates, there is no need to impose ABS on the Faculty of Advocates.}

\textit{Access to advocates}

272. When questioned on the issue of direct access to advocates, Richard Keen said that there was a system of direct access but that it was generally limited to professionals seeking opinion work. He said that in addition to solicitor firms, a firm of accountants or surveyors could instruct an advocate directly when it wanted an opinion. But, on the specific issue of giving direct access to the general public, he said—

“That simply could not happen under the existing model. Let us take, for example, a criminal case. If someone has been charged on indictment, they go to a solicitor. If, in due course, they need to be represented in court, that solicitor may instruct counsel. If, however, the person who is charged with an offence goes directly to counsel, counsel is not equipped to make the inquiries and undertake the preparation that is always essential in such a case. Counsel is not in a position to go out and take statements or liaise with police officers—that is not our business model. We simply cannot function in that way; we are a referral bar.”\textsuperscript{164}

273. He said that the Faculty had recently considered changes in its regulations to allow direct access for areas such as employment tribunal work and observed that advocates no longer have a monopoly over any particular service, in that solicitor advocates can offer the same services as advocates in relation to pleading in the higher courts. He concluded that if consumers wished to avail themselves of direct access to a pleader in the higher courts they had the option of going to a solicitor advocate.

274. In their written submission, Walter Semple and Catriona Walker drew attention to the Report of the Review of Civil Justice in Scotland and the need for a change to the structure of the legal profession. They argued that as a consequence it was likely that a great volume of work would be transferred from the Court of Session to the sheriff courts where there would be greater specialisation. In their view—

“The existing arrangements where advocates need to be instructed by a solicitor cannot survive such a change. The sheer number and cost of lawyers involved in pursuing litigation in the sheriff court will be
unsustainable. Not only clients but also the legal aid fund should not support such a system. Advocates will need to work directly with clients in future as they do in most countries, apart from the UK. If senior advocates wish to work only with solicitors they are free to do that."

275. The Faculty did not address the potential for change as a consequence of the Lord Gill review. The Committee envisages that there could well be changes but that such changes should be discussed in due course in the context of consideration of the Report of the Gill review.

276. On the issue of direct access to advocates, the Committee has not been made aware of any significant demand for this and is not persuaded that there would be any real benefit for members of the public in making such a change. The Committee notes that those who wish to have direct access to an advocate have the option of instructing a solicitor advocate. For these reasons, on the issue of access to advocates, the Committee is content with the status quo and does not make any recommendation for change.

Regulation of the Faculty

277. The Court of Session is responsible for admitting and removing persons from the office of advocate and for regulating the professional practice, conduct and discipline of advocates. The Court of Session may delegate any of these functions (except the admission and removal) to either the Lord President or the Faculty. In practice, regulation in the main is delegated to and undertaken by the Dean of the Faculty, including rules of professional conduct and disciplinary procedures. Section 87 sets this existing position out in statute.

278. Section 88 requires that unless a rules or a change to a rule relating to the criteria or procedure for admission or removal of advocates, or the regulation of the professional practice, conduct and discipline is published by the Faculty, then the rule will have no effect.

279. The OFT said it was disappointed with the provisions relating to the governance of the Faculty and did not believe that the provisions in the Bill offered sufficient clarity to allay fears about the lack of independent oversight. The OFT commented—

“We consider that the Faculty should have regulatory responsibility only where it can demonstrate that this will not conflict with its representational responsibilities. Consumers and the public at large are unlikely to trust any regulatory framework unless and until they are satisfied that it is separate and independent from representative self-interest”\textsuperscript{165}

280. Consumer Focus agreed and said that although advocates work for the courts ultimately their clients were consumers who should be represented in the regulation. Sarah O’Neill said,—

“We think that the same arrangements should apply to the Faculty of Advocates’s as we think should apply to the Law Society. In other words, we

\textsuperscript{165}OFT. Written submission to the Justice Committee.
think that there should be 50 per cent lay representation on the Faculty of Advocate's council and that there should be a lay chair. We feel that the faculty could be more transparent with regard to how it regulates advocates. Although we welcome the fact that the regulatory arrangements are being put in statute, it is still not entirely clear how they will operate and in what circumstances the Court of Session may delegate the powers to the Lord President and/or the Faculty of Advocates.”166

281. On the issue of regulation of the Faculty, Professor Alan Paterson went further, saying—

“The statutory framework for the regulation of the Faculty of Advocates is skeletal in the extreme, and goes against the whole thrust in the Bill towards transparent regulation of legal services providers. In my view, in the 21st century the case for a more fleshed out regulatory framework (including laypersons) for Scotland’s independent referral bar speaks for itself”167

282. Professor Paterson said that regulation by the court was not now adequate. He argued—

“in the 21st century the notion that there should be consumer and public input into the regulation of professions is becoming widely accepted across a range of professions. The Faculty of Advocates has accepted that in relation to complaints, and it should accede that it is the way forward for regulation, as it is for the Law Society of Scotland, the Law Society of England and Wales and the Bar Standards Board in England and Wales. It is the way forward in many professional organisations, as it ensures that the public interest is fully recognised. I do not believe in separating the regulatory and representative arms of the profession. It is important—indeed, vital—for the future of a healthy profession that it keeps the professional interest and the public interest in mind, and holds them together in tension, as section 1 of the 1980 act requires.”168

283. Responding to these points, Richard Keen said that in his view the Faculty’s regulatory framework was concise as opposed to skeletal. He said that section 86 of the Bill (which provided that the Faculty and others must, so far as practicable, act in a way that is compatible with the regulatory objectives) was the umbrella under which its regulatory regime proceeded. In his view, as the regulatory objectives were the pillar around which the Bill was constructed, the regulatory framework for the Faculty, although concise, was effective.169

284. Further he argued that in the context of the regulation of the Faculty, which was principally involved in advocacy before the Supreme Courts, the Court effectively regulated the behaviour of an advocate who appeared before it. He advised that this had operated on two levels for more than 300 years and explained—

167 Professor Alan Paterson. Written submission to the Justice Committee.
“First, ultimately the court approves all regulations of the faculty—and indeed may veto the regulations of the faculty—on admission and conduct. That is an overarching regulatory role. Secondly, there is a more fundamental and immediate form of regulation, which is connected to that. When an advocate appears in front of the court, he knows that the judge before whom he appears has the right to regulate his conduct and to ensure that he behaves properly and professionally, in the interests of his client and in no other interest. The judge may intervene in the course of a hearing, although that would be exceptional, to point out that he is not happy with the conduct of an advocate or the manner in which representation is being carried on.”\(^ {170}\)

285. Richard Keen was asked whether involving non-lawyers in the regulation of advocates would alter their independence, he responded—

“If you are looking to future regulation, you can address various models of regulation. Scotland has maintained the model of regulation by the court over a long period. That model is not unique to Scotland—it is employed in many of the states of the United States and elsewhere in the Commonwealth—but it is effective in ensuring direct regulation.”\(^ {171}\)

286. He said that regulation by the court did not exclude the interest of the public or the consumer because, under section 86 of the Bill, the Lord President and the Court of Session in general were bound to proceed in accordance with the regulatory objectives when looking to the regulation of the legal profession. He concluded—

“If a more complex model for Scotland such as the bar standards board in England was imposed on the relatively small bar in Scotland, we would be imposing an enormous overhead in relative terms on the delivery of legal services. At the end of the day, the customer—the consumer—pays the overheads.”\(^ {172}\)

287. Colin McKay, for the Scottish Government said—

“It would not be impossible for Parliament to impose on the Lord President rules on how the Faculty should be regulated, but that would be a significant change to the Faculty’s historical regulatory relationship with the Court of Session and the Lord President.”\(^ {173}\)

288. The Committee is not aware of there being any significant degree of dissatisfaction with how the regulatory arrangements for advocates presently operate but nevertheless would invite the Faculty to consider what steps it might take to modernise its regulatory regime.


Solicitor Advocates

289. As noted already in this report, the Scottish Government decided that it was not necessary to require the Faculty to remove the restriction that prevents its members forming partnerships provided transfer between the two branches of the professions could be a straightforward procedure which did not involve substantial detriment to the practitioner.

290. In his evidence, Richard Keen advised that the costs for an advocate becoming a solicitor advocate would be minimal. He said there had been instances in the last year of people leaving the Faculty and becoming solicitors within a short period (days) and that 95 per cent of advocates in Scotland have the requisite qualifications to be a solicitor. However, Mr Keen said that there was a difference going the other way (solicitor to solicitor advocate) as many practitioners become solicitor advocates only for the purposes of criminal work. He agreed that it was easy to transfer out (of the Faculty) to become a solicitor advocate but not so easy to get in to the Faculty, from a position of solicitor advocate.174

291. A review into the exercise of rights of audience before the Supreme Courts is under way and is expected to report to the Scottish Ministers in March. Pending the report of the review, the Committee notes the comments of Tom Marshall, Society of Solicitor Advocates, who said—

“Solicitor advocates feel that there may be scope for changes that would achieve the original objective of ensuring that solicitor advocates are treated exactly the same as advocates and that disciplinary procedures and issues of conduct can be dealt with in exactly the same way. At the moment, the system does not quite achieve that even though that was the intention.”175

292. The Committee also notes what the Minister said in his letter of 4 December 2009—

“We do not intend to include any controversial or complex changes to rights of audience at Stage 2. However, we expect that the review being carried out by Ben Thomson into this matter will report in March, with an interim report in January. Therefore, where primary legislation is necessary to implement relatively straightforward changes which we consider to be clearly beneficial, particularly if they relate to matters already covered in the Bill we may consider amendment at Stage 2.”176

293. The Committee awaits with interest the final report of the review into the exercise of rights of audience before the Supreme Courts.

176 Scottish Government. Letter from the Minister for Community Safety to the Convener of the Justice Committee dated 4 December 2009.
Scottish Legal Aid Board

294. Chapter 4 of Part 4 relates to the Scottish Legal Aid Board and requires SLAB to monitor the availability and accessibility of legal services in Scotland and provide information and advice on this to the Scottish Ministers.

295. These provisions were welcomed. In particular, SLAB welcomed the provision in section 96, to transfer from the relevant bodies to the Board, the power to exclude solicitors and counsel from giving legal assistance (at present SLAB only has powers to register and deregister practitioners from providing criminal legal assistance). One further change suggested by SLAB was that it should be able to require bodies other than those listed in section 97 to provide specified information and that the simplest way of achieving this would be to give SLAB general powers to require specified information from other bodies.

296. The Committee sees merit in the suggestion by SLAB that it should be able to require bodies, other than those listed, to provide information and invites the Scottish Government to consider this and other suggestions made by the Scottish Legal Aid Board.

PROSPECTIVE STAGE 2 AMENDMENTS

297. The Scottish Government has indicated the main areas in which Stage 2 amendments are being considered. One of these concerns the regulation of will writing, the others are outlined below.

Contingency fees
298. Although the Minister initially advised that he was considering whether it would be desirable to remove some of the current restrictions on contingency fees in litigation in Scotland, he subsequently advised that it was not now intended to do this at Stage 2. The Minister said that he was committed to consulting but that he expected this to be as part of a wider review of the regime governing fees dependent on success as recommended by Lord Gill in his Report of the Scottish Civil Courts Review.

McKenzie Friends
299. A “McKenzie friend” is a lay person who assists someone who is representing themselves in court. A McKenzie friend can help by giving advice, taking notes and providing moral support. The Minister has advised that he is considering whether those without a right of audience (such as McKenzie friends) should be able to address the court in certain circumstances.

Various amendments to the Solicitors (Scotland) Act 1980
300. The Minister advised that some changes to this Act are being sought by the Law Society of Scotland. The Minister has advised that most of the changes are small but that some consideration is being given to issues surrounding the Scottish Solicitors Guarantee Fund. In particular, the Minister advised that discussions are taking place about introducing a cap on payouts from the Guarantee Fund and about the way in which the fund currently operates.
301. The Financial Memorandum (FM) sets out the costs that the Scottish Government expects to arise as a consequence of this Bill. The costs expected to be incurred by the Scottish Government are considered earlier in the report at paragraphs 141 to 143. In addition to the costs on the Scottish Government, there will be costs on those bodies which seek to become Approved Regulators. As stated in the FM there are two aspects to the cost of being an Approved Regulator; firstly, the costs of applying to be an Approved Regulator and, secondly, the costs involved in fulfilling the functions of an Approved Regulator. The FM was scrutinised by the Finance Committee, which sought written evidence but did not take oral evidence or produce a report. Submissions were received from ICAS, the Law Society and SLAB.

302. In its submission, ICAS said that the Bill would have cost implications if it decided to apply to be and became an Approved Regulator. ICAS noted that establishing a new regulatory regime would be costly to both create and operate. As it was not possible at this stage to say how many applications might be received from potential LLSPs, the costs per application and the absolute costs could be high or indeed onerous. For this reason, and as noted earlier in this report, ICAS recommended that consideration be given to using regulatory schemes already in place. ICAS drew attention to its own regulated non-member model.

303. The Law Society noted that some of the costs were dependent on the number of LLSPs which would be established. It noted that, although it had been accepted by the Scottish Government that it was difficult to estimate the number, the FM states that it could be in the range of 150 – 250 and uses the figure of 200 to estimate the unit cost of regulation. The Law Society said that it was not clear where these figures came from and that it was concerned that these figures were overly optimistic, especially as a starting point, in the current economic climate. The Law Society pointed out that most firms that choose to become an ABS will be those currently constituted as Incorporated Legal Practices and that there were currently only 197 of these. The Law Society also pointed out that there would be costs for regulators in setting up a new ABS regulatory regime and that such costs are likely to be more substantial than is suggested in the FM. The Law Society concluded that the estimates set out in the FM were based on insufficient empirical evidence and noted that no consideration appeared to have been given to the potential cost implications for the Scottish Legal Complaints Commission which would be given an extended oversight role.

304. SLAB noted that the transfer to it of the power to exclude advocates or solicitors from undertaking legally aided work and the new function of monitoring and reporting on the availability and accessibility of legal services in Scotland would have some small financial implications.

305. Clearly, there are concerns in some quarters about how robust the estimates in the Financial Memorandum are. The Committee shares some of these concerns. The Scottish Government is invited to reconsider the figures used and provide clearer justification for the assumptions made in arriving at the illustrative costs.
GENERAL CONCLUSIONS

306. The Committee notes that this Bill is permissive and that it has the support of the Law Society of Scotland. While the Committee is in no doubt that the Bill may be of significant importance for the larger Scottish law firms, the advantages are less clear for smaller Scottish law firms and indeed for consumers.

307. As indicated earlier in this report, the Committee is aware of the debates that have recently reignited within the profession and that the Law Society will be holding a special general meeting to debate certain matters. This report has been prepared by the Committee on the basis of the evidence provided during its inquiry. The Committee awaits responses from the Scottish Government on a number of issues where concerns arise and it may be that the Scottish Government will wish to be informed by the outcome of the Law Society’s special general meeting before making its response.

SPECIFIC CONCLUSION

308. The Committee agrees, albeit with some reservations, to recommend to the Parliament that the general principles of this Bill be agreed to.
ANNEXE A: SUBORDINATE LEGISLATION COMMITTEE REPORT

Subordinate Legislation Committee Report on the Legal Services (Scotland) Bill at Stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 17 November\(^\text{177}\) and 15 December\(^\text{178}\) 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Legal Services (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill\(^\text{179}\).

3. The Committee’s correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 5(6), 8(2)(c), 8(5), 9(3), 22(1), 24(9), 26(1), 29(6), 33(1), 35(1), 34(6), 39(9), 40(7), 41(5), 52(2), 55(10), 64(7), 65, 67(5), 68(6), 73(6), 75(2)(f), 83, 93, 100(1) and 102(2).

---


\(^{178}\) Scottish Parliament Subordinate Legislation Committee. Minute 15 December 2009

\(^{179}\) Delegated Powers Memorandum (‘DPM’)
Provisions of the Bill

Section 6(7) - Approval of regulators

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

6. The approval of regulators of licensed legal services providers is the first stage of the two stage approval/authorisation process undertaken by the Scottish Ministers. It is accordingly a key element of that process. The bodies which are approved (and authorised) will in turn regulate the licensed service providers.

7. Section 6(1) specifies criteria on the basis of which the Scottish Ministers, if satisfied that the criteria are met, may approve the applicant as an approved regulator. Section 6 also provides for consultation, for notification to an applicant of the Scottish Ministers’ intention with respect to approval or otherwise and for an applicant to make representations to the Scottish Ministers consequent on a notification.

8. Section 6(7) provides that the Scottish Ministers may by regulations make further provision about the approval of regulators including (in particular)—

   a) the process for seeking their approval,

   b) the criteria for their approval (including things that applicants must be able to demonstrate),

   c) what categories of bodies may (or may not) be an approved regulator.

9. The Committee questioned whether negative procedure was appropriate, given that the express inclusion of criteria for approval, and the specification of categories of bodies which may or may not be an approved regulator, demonstrated that the scope of the power goes beyond matters of detail and administration and into matters of substance.

10. The Committee notes that the Scottish Government’s intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section, rather than make any substantive changes. The Government states that it is not currently intended that the power will be used to add new criteria which are unrelated to what is in the Bill. While this assurance is welcome, it does not address the Committee’s concerns as to the scope of the power.

11. The Scottish Government acknowledges that, with regard to paragraph (c) (which relates to the categories of bodies which may or may not be an approved regulator), the power is very wide. The response recognises that this power could be used to exclude bodies prior to their suitability being assessed through the application process. This is therefore a matter of significance rather than of mere operational detail.
12. However, the Committee noted that the Scottish Government is considering whether there should be an amendment to narrow the provision, or whether all applications should be considered, in which case there would be an amendment to dispense with it.

13. The Committee notes that the Scottish Government proposes to amend section 6(7)(c) to address the Committee’s concern that it is too widely drawn. The Committee will therefore reconsider this power after Stage 2.

Section 7(10) - Authorisation to act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

14. This power is identical to the power under section 6(7) to make regulations with respect to the approval of regulators (with the exception of the reference in section 6(7) to categories of bodies which may be an approved regulator).

15. As with section 6(7), the Committee questioned whether negative procedure was appropriate.

16. The Committee noted that the Government’s stated intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section, rather than make any substantive changes. They state that it will not be used to add new criteria which are unrelated to what is in the Bill. The Committee noted that the power is framed in similar terms to section 6(7), 37(6) and 74(5). All are powers to make “further provision” about criteria for the approval or authorisation as the case may be. It was not clear to the Committee how section 7(10) could be read more narrowly in terms of what “further provision” may be. The Government’s response did not address the Committee’s concerns.

17. Accordingly, the Committee considers that the power in section 7(10) to make further provision as regards “criteria for authorisation” can include matters of substance, not merely operational detail. The Committee is not content that this power is subject to negative procedure and recommends that the Scottish Government reconsiders this power in a manner consistent with its proposed approach to sections 6(7), 37(6) and 74(7). The Committee will reconsider this power after Stage 2.

Section 27(1) – Guidance on functions

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None – publication only

18. Section 27(1) provides that, in exercising its functions, an approved regulator must have regard to any guidance issued to it, or to approved regulators generally, by the Scottish Ministers for the purposes of, or in connection with, Part 2 of the
Bill. It appeared to the Committee from the manner in which section 27(1) is expressed that guidance could be issued to a particular approved regulator or to approved regulators generally, however, it was not clear whether the Scottish Ministers are required to consult every approved regulator with respect to guidance which it is proposed to direct to a particular approved regulator, or to consult only that particular regulator. The Committee sought clarification on this matter from the Scottish Government.

19. The Committee noted that the Scottish Government does not intend that guidance should be issued to a particular approved regulator, but that any guidance should be issued to every approved regulator. The Committee noted the Scottish Government’s acknowledgement that there had been a mistake in the drafting of this provision and that an amendment will be brought forward to address this issue.

20. The Committee notes that the Scottish Government proposes to amend 27(1) to reflect the Government’s intention that guidance be issued generically to all regulators. The Committee will reconsider the power after Stage 2.

Section 35(2) - Step-in by Ministers

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

21. This is the second of the two fall-back provisions in section 35 (the first is section 35(1)) which deal with a situation where there are no approved regulators or where, in circumstances where a licensed service provider is required to transfer, there is no approved regulator where a provider can find a new “home”. Section 35(2) provides that the Scottish Ministers may by regulations make provision which allows them to act as an approved regulator in such circumstances as the regulations may provide. Section 35(4) provides that regulations may be made only where the Scottish Ministers believe that they are necessary or expedient in order to ensure that the provision of legal services by licensed providers is regulated effectively.

22. Should an approved regulator fail, or no body applies to become an approved regulator, the Scottish Ministers can (by virtue of the power in section 35(2)) take on the regulatory duties until such time as an appropriate body can be found, or established by the Scottish Ministers under section 35(1).

23. The Committee considered that while the procedure under section 35(1) may be the optimum procedure to be adopted by the Scottish Ministers, it may be necessary for them to take action immediately. The Committee considered that one way to achieve this would be by negative procedure combined, if necessary, with a breach of the 21/28 day rule.

24. However, the Committee considered that Class 3 procedure would also allow action to be taken immediately by the Scottish Ministers while at the same time
requiring the approval of the Parliament for the measures taken to be kept in place. The Committee therefore asked the Scottish Government whether it had considered the use of Class 3 procedure (rather than negative procedure) in circumstances where action is required at short notice.

25. The response makes it clear that the Scottish Government did consider the use of Class 3 procedure but was of the view that it was not appropriate as the need for the power would not arise in an emergency. The Committee noted that the Scottish Government regards the power as a safeguard to plug a regulatory gap and to ensure that the Scottish Ministers would have enough time to properly prepare them for taking over the regulatory functions of an approved regulator.

26. The Committee considers that, having obtained confirmation that the Scottish Government considered the use of Class 3 emergency procedure, and having received further explanation from the Scottish Government on the use of negative procedure, it finds the proposed power acceptable in principle and that negative procedure is appropriate.

Section 37(6) - Eligibility criteria

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

27. Section 36(1) sets out what is meant by a licensed legal service provider (otherwise referred to as “a licensed provider”). Section 36(2) provides that an entity is eligible to be a licensed provider only if it has within it at least one solicitor who holds an unqualified practising certificate. Section 37 sets out eligibility criteria for the purposes of licensing an entity as a licensed provider. It specifies which types of entity would, and would not, be eligible to become a licensed provider.

28. There are three elements to the power in section 37(6). Section 37(6)(a) provides that the Scottish Ministers may by regulations make further provisions about eligibility to be a licensed provider. Section 37(6)(b)(i) provides that the Scottish Ministers may modify section 36(2) to specify an additional type of legally qualified person (as an alternative to a solicitor). Section 37(6)(b)(ii) provides that the Scottish Ministers may modify section 37(5) so as to add an additional type of legal practitioner to the list of “individual practitioners” for the purposes of section 37(2)(a)(ii) and (b).

29. The Committee considered that subordinate legislation was appropriate for these purposes and accordingly agrees with the power in principle.

30. The second and third elements of the power provide for modification of specified provisions of the Bill. They are Henry VIII powers. The Committee considered that these elements of the power are expressed in very narrow terms, that the scope of their exercise is constrained and that the exercise of these elements of the power would not in itself impose duties on any person or body. Accordingly, although the Committee would usually consider affirmative procedure
appropriate for a Henry VIII power, it was content with negative procedure in respect of these two elements of the power.

31. However, section 37(6)(a) (the first element of the power) permits further provision to be made with respect to eligibility to be a licensed provider. The Committee considered that any further provision with respect to eligibility could materially alter the eligibility criteria and could have a material and significant impact on potential licensed providers, on their prospects for meeting the eligibility criteria or on the costs involved. The Committee sought further explanation from the Scottish Government as the Committee considered that the DPM did not give adequate justification for negative procedure for a power which could extend to substantive matters and where it appeared to the Committee that a greater level of scrutiny might be appropriate.

32. The Committee’s concerns that the power could be extended to substantive matters were confirmed by the final sentence in the Scottish Government’s response. The Committee considered that its concerns would be addressed if an appropriate amendment is made.

33. The Committee notes that the Scottish Government proposes to amend section 37(6)(a) to address the Committee’s concern that it is too widely drawn. The Committee will therefore reconsider this power after Stage 2.

Section 52(2) - More about investors

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

34. Section 52(2) provides that the Scottish Ministers may by regulations make further provision with respect to outside investors—

(a) relating to interests in licensed providers, including (in particular) by—

(i) imposing requirements to which licensed providers, or investors in a licensed provider, are subject for the purposes of Part 2,

(ii) defining (or elaborating) what amounts to ownership, control or another material interest,

(iii) specifying criteria or circumstances by reference to which an outside investor is presumed to be fit or unfit,

(iv) modifying (by elaboration or exception) the definition of “investor” or “outside investor” in section 52(4);
(b) for licensing rules in connection with persons who have an interest in a licensed provider.

35. The Committee considered that the power is potentially very wide, although it applies to a restricted class of people namely outside investors in legal services providers. The Committee appreciated that it might be necessary to make further provision in respect of outside investors in the light of experience and that, having regard to detail and flexibility which might be required, subordinate legislation would be appropriate for that purpose.

36. However, the Committee noted that the regulations will not be restricted to matters which are administrative or of technical detail, but that substantive provision could be made. Reference in the DPM to the limited scope of the power and its purpose did not, in the opinion of the Committee, provide adequate justification for negative procedure in circumstances where it appeared to the Committee that a greater level of scrutiny might be appropriate. The Committee asked for further justification for the choice of negative procedure.

37. The Scottish Government response acknowledged that the power is wide ranging. However, the Committee was concerned not with the width of the power per se but with the adequacy of the level of scrutiny. That concern was not addressed by the response which has not, in the opinion of the Committee, adequately explained why affirmative procedure is not more appropriate than negative procedure.

38. However, the Committee noted that the Scottish Government intends to consider an amendment at Stage 2, although no details of a possible amendment were given.

39. The Committee notes the Scottish Government’s proposal to amend section 52(2) to address the Committee’s concern that the power could extend to substantive matters. The Committee will reconsider this power after Stage 2.

Section 74(7) - Certification of bodies

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** Regulations made by statutory instrument
- **Parliamentary procedure:** Negative resolution of the Scottish Parliament

40. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body in relation to confirmation agents. Confirmation agents are persons who draw up papers in relation to confirmation of deceased persons’ estates. Section 74(7), which contains the regulation making power, enables the Scottish Ministers to make further provision about certification under section 74. It goes on to state that this can include (in particular) the process for seeking certification, the criteria for certification, and what categories of bodies may or may not be an approving body.
41. Procedure, so far as any regulations made under section 74(7) is concerned, is by way of negative resolution. It was stated in the DPM that this is considered appropriate since the power will be used “to set out the operational details of a process already outlined in the Bill”.

42. Again, it was noted that this is a similar power as that contained at section 6(7) of Part 2 of the Bill, which is concerned with the regulation of licensed legal services.

43. While acknowledging the need for this power the Committee was concerned that it would permit regulations to address issues which go beyond matters of detail. The exercise of the power is not restricted to the matters which are specifically mentioned in section 74(7) and the Scottish Ministers can (in terms of the opening provision contained within section 74(7)) make further provision about certification under section 74.

44. As in relation to section 6(7), the Committee questioned whether negative procedure was appropriate.

45. The Scottish Government advised, in replying, that the intention is to use the power to make provision in respect of operational details of processes of the type already outlined in the Bill, rather than to make any substantive changes, or to add new criteria unrelated to what is in the Bill.

46. The Scottish Government acknowledged that, with regard to paragraph (c), the power is very wide. However, the Scottish Government is considering whether there should be an amendment to narrow the provision, or indeed to dispense with it. The Committee’s concerns would be addressed if the provision in sub-paragraph (c) is either suitably narrowed or dispensed with.

47. The Committee notes that the Scottish Government proposes to amend sub-paragraph (c) of section 74(7) to narrow the provision or dispense with it in order to address the Committee’s concern that the power is too widely drawn. The Committee will reconsider this power after Stage 2.

Section 81(4) - Ministerial intervention

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

48. Section 81 requires an approving body to provide such information about its performance as the Scottish Ministers reasonably request. It also makes provision in regard to the review of an approving body’s scheme, and its amendment.

49. Clarification was sought from the Scottish Government as to the reason for taking the provision and the choice of procedure, as there was no comment on it in the DPM.
50. While at present that power is to the effect that regulations can make provision requiring an approving body to carry out an annual review, and to send a report on that review to the Scottish Ministers, the reply indicates that the intention is now that the Bill is to be amended so as to make provision for these matters on the face of the Bill. The position will therefore be made plain within the primary legislation itself.

51. The reply goes on to state that a delegated power would still be required to make further provision about these reviews. This would be similar to that provided at section 24(9) in relation to the assessment of licensed providers.

52. The Committee notes that the Bill is to be amended so that what is currently set out as a power in favour of the Scottish Ministers by regulations to make provision requiring an approving body to carry out an annual review and to send a report on it to the Scottish Ministers is now to be inserted as a requirement on the face of the Bill.

53. The Committee notes that, as a delegated power is still required to make provision about these reviews, which is stated will be in terms similar to that provided at section 24(9), it is content in principle with such provision being taken, and that the power is subject to negative procedure. The Committee will reconsider the power as amended after Stage 2.

Section 81(5) - Ministerial intervention

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

54. The power contained in section 81(5) is in very general terms. It is a very wide power which would allow the Scottish Ministers to make further provision about approving bodies and confirmation agents. That would extend to anything which is concerned with such bodies and agents.

55. It was stated in the DPM that it would allow further safeguards to be prescribed in relation either to those who grant powers to deal with confirmation, or those who carry out this work. It was considered appropriate to retain what is effectively a reserve power to create further regulatory safeguards, should they prove desirable.

56. This power could be used to make provision about a very wide range of matters concerned with approving bodies or confirmation agents. It is arguable that other provisions in the Bill themselves afford sufficiently generous powers to make wider provision about approving bodies and confirmation agents.

57. The Committee asked the Scottish Government to explain more fully this “reserve power” to create further regulatory safeguards, and when it might be used. The need for this “reserve power” was questioned and clarification as to the circumstances in which it might be used was sought. The Committee queried whether provisions contained elsewhere in the Bill were not themselves sufficient.
58. The reply does not adequately deal with these matters. It notes briefly the subject areas to which the various other provisions to which we had referred relate, but does not indicate why it is considered these do not suffice. Furthermore, the reply does not give any examples of circumstances in which the power might be used. It is simply stated that it is still a provision which it is considered is required.

59. However, the width of the power is acknowledged within the reply. It is stated that it is intended to consider an amendment to narrow the power by reference to particular purposes. This was welcomed by the Committee, on the basis that it does result in some tightening of the provision, with it being anchored with reference to particular purposes.

60. The Committee notes that the Scottish Government intends to amend section 81(5), to narrow the terms of the power by reference to particular purposes in order to address the Committee’s concerns that the power is too widely drawn. The Committee will reconsider this power after Stage 2.

Section 92 - Council membership

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

61. Section 92 deals with Council membership of the Law Society of Scotland, and is concerned in particular with allowing for the appointment of non-solicitor members to the Council. The regulation making provision is contained within an insertion made by section 92(2) of the Bill, to the Solicitors (Scotland) Act 1980. This enables the Scottish Ministers to specify any additional criteria for appointment as non-solicitor members as they consider appropriate, and the number or proportion of those non-solicitor members in relation to whom the criteria are to apply. The Scottish Ministers can also, by regulations, prescribe a minimum number of non-solicitor members, or proportion of the membership that is to comprise non-solicitor members.

62. Paragraph 132 of the DPM set out why this power has been taken. It would allow the Scottish Ministers to intervene should the Society fail to appoint an adequate number/proportion of suitably qualified non-members. It was also stated that this action will only be required “should the Society’s actions be deemed inadequate”.

63. It was unclear to the Committee, from the DPM, what might be deemed to be inadequate action on the part of the Society. The Committee was unsure where the threshold triggering Ministerial intervention lies as the power appears to provide the Scottish Ministers with a wide discretion as to when they may resolve to intervene by means of regulations.

64. Questions in relation to this power were asked with the aim of understanding what lay behind it, and the circumstances in which it might be used. A full appreciation of the need for the power seemed to require some further information
being provided as to the current provision, which was not set out in the DPM. Clarification was also sought as to what might be deemed to be inadequate action on the part of the Society.

65. The reply is of assistance in providing background/contextual information, although it does not answer in any detail the specific point which was raised concerning how the Society’s actions are to be deemed inadequate. However it does indicate that the power is considered important in order to ensure that the required changes are made, and to resolve any disagreements regarding the proportion of lay members.

66. Taking into account that this power is exercisable subject to affirmative procedure, the further information provided enables the view to be taken that this power and the procedure to which it is subject is satisfactory.

67. The Committee considers that having obtained further explanation from the Scottish Government, it finds the proposed power acceptable in principle and that it is subject to affirmative procedure.

Schedule 4 Paragraph 2(2) and 11(2) - financial penalties

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

68. Section 29(1) provides that the Scottish Ministers may, in relation to an approved regulator, take one or more of the measures mentioned in section 29(4) if the Scottish Ministers consider that to be appropriate in the circumstances of the case. The measures which the Scottish Ministers can take include the imposition of a financial penalty (section 29(4)(d)). Schedule 4 makes further provision with respect to financial penalties. Paragraph 2(2) of the schedule provides for regulations to prescribe the maximum penalty which the Scottish Ministers can impose on an approved regulator. Paragraph 11(2) of the schedule provides for regulations to prescribe the rate of interest to be paid on the unpaid amount of any penalty.

69. If provision is made in a Bill for criminal sanctions, the Committee would expect to see the maximum penalty specified on the face of the Bill. A financial penalty is not a criminal sanction but, in this respect, the Committee considers that there is no distinction in principle between the two. The Committee considers that the maximum penalty should be specified on the face of the Bill and that it is not satisfactory to provide for the maximum penalty to be specified in regulations which are subject to negative (rather than affirmative) procedure.

70. While noting the Scottish Government’s response, the Committee commented that placing a ceiling on the penalty in primary legislation did not prevent the penalty in a particular case being set at a level appropriate to the circumstances of that particular case. The Committee noted that this is expressly provided for and required of Scottish Ministers in paragraphs 2(1) and 3(1) of
The Committee accordingly remains of the view that the maximum penalty should be specified on the face of the Bill.

71. The Committee also remained concerned at the combination of a maximum penalty being specified in the regulations and with those regulations being made by negative procedure.

72. The Committee recommends that the Scottish Government specify, on the face of the Bill, a ceiling on the maximum penalty which may be prescribed in regulations made in exercise of the power in paragraph 2(2) of schedule 4; and that the Committee will reconsider this power after Stage 2.

73. The Committee recommends that, in the event that the Scottish Government does not specify a ceiling on the maximum penalty which may be prescribed in regulations made under paragraph 2(2) of schedule 4, the Scottish Government specify affirmative procedure for those regulations.

74. In light of the Government’s response, the Committee recommends that negative procedure is acceptable in respect of regulations which specify a rate of interest.
Section 6(7) - Approval of regulators

Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for approval and the specification of categories of bodies which may or may not be an approved regulator) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section, rather than make any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met.

The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. For example, this power may be used to set out exactly what criteria must be met with regard to financial and other resources. This would not involve adding new, unrelated criteria, but rather would be expanding on criteria which are already mentioned (see section 6(1)(a)(ii)).

A similar example where negative procedure was prescribed can be found in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 in relation to the draft scheme of a regulatory body seeking rights to conduct litigation and rights of audience for its members (see section 25(5) and (6) of the 1990 Act).

However, with regard to paragraph (c) (which relates to the categories of bodies which may or may not be an approved regulator), we recognise that the power is very wide. It was included as a safeguard in case experience throws up situations where it may be useful to exclude certain types of body. It was recognised that unsuitable applicants could be excluded by reference to their application, but this power would allow their exclusion without having to consider the application. At present we are considering whether there should be an amendment to narrow the provision, or whether all applications should be considered and thus there would be an amendment to dispense with it.

Section 7(10) - Authorisation to act

Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for authorisation) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section rather than make
any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met. For example, this power could be used to expand on the information which must be made available to the Scottish Ministers under section 7(9). The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill.

Section 27(1) – Guidance on functions
Given that the guidance may be directed at a particular approved regulator, is it intended that every approved regulator will be consulted in respect of guidance to be issued to a particular regulator or that only that particular regulator will be consulted; and how is this reflected in section 27(2)?

We are grateful to the Committee for drawing this to our attention. We recognise that section 27(1)(a) implies that different guidance could be issued to different approved regulators. However, our intention is that the same guidance should be issued to every approved regulator (and that every approved regulator should be consulted on the guidance). So we intend to bring forward an amendment at Stage 2 with a view to ensuring that the provision meets this intention.

Section 35(2) - Step-in by Ministers
Has the Scottish Government considered whether the use of Class 3 procedure (rather than negative procedure) would not address the Scottish Ministers concerns about the need to take action at short notice but at the same time give the Scottish Parliament an opportunity to consider and, if the Parliament considered it appropriate, approve the action which had been taken by the Scottish Ministers?

Yes, the Scottish Government has considered the use of Class 3 procedure and its view is that it is not appropriate in the circumstances. The emergency affirmative procedure is meant to deal with expected emergency situations which may arise, such as is often found in emergency food orders, or emergency orders for the slaughter of livestock under the Animal Health Act 1981 (see paragraph 9(3) of Schedule 3A). Usually such orders only remain in force for a specified period, such as 28 days. Section 35 allows the Scottish Government to act as an approved regulator. While the Scottish Ministers may be required to step in at short notice, it is not envisaged that the use of the power would arise in an emergency; the power in this provision is there as a safeguard if a gap in regulation should appear and to ensure that the Scottish Ministers would have enough time to properly prepare for them taking over regulatory functions of an approved regulator. The power is required but it is intended to be used only where necessary. Therefore, the negative procedure is sufficient.

Section 37(6) - Eligibility criteria
Given that the exercise of the first element power (in section 37(6)(a)) is not restricted to matters of clarification or technical addition but may extend to substantive matters which could have a material and significant impact on potential licensed providers, on their prospects for meeting the eligibility criteria or on the costs involved in meeting those criteria, can the Scottish Government...
explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make further provision about eligibility within the context of the section, rather than make any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met. Therefore, the Scottish Government considers negative procedure to be appropriate. However, we acknowledge that the power could be extended to substantive matters and we intend to consider an amendment at Stage 2.

**Section 52(2) - More about investors**

Given that the exercise of the power is not restricted to matters which are administrative or of technical detail but may extend to substantive matters (as reflected by the express inclusion of requirements on licensed providers and the modification of definitions in section 52(4)) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

This power was intended to be fairly wide, as the area it covers is one in which safeguards (and their performance and fitness for purpose) are crucial. This is reflected in the level of detail given in sections 49-51 relating to the fitness and behaviour of outside investors. In order to ensure that the safeguards provided are sufficient in practice, and that involvement of outside investors does not compromise the core principles of the legal profession in any way, the Scottish Government considers it important to have a wide ranging power to make further provision in this area if necessary. As mentioned in the Delegated Powers Memorandum, the negative procedure is considered appropriate as, despite the fact that the power could be extended to substantive matters, it is quite narrowly focussed on one class of people and is intended to be used to expand on the areas already covered in the Bill. However, we do acknowledge the Committee’s concerns, and we intend to consider an amendment at Stage 2.

**Section 74(7) - Certification of bodies**

Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for certification and the specification of categories of bodies which may or may not be an approving body) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make provision in respect of operational details of processes and criteria of the type already outlined in the Bill rather than to make any substantive changes. For example, any criteria set out to expand on section 74(1)(a) (applicant’s suitability to be an approving body) would be designed to ensure that the applicant was able to perform the functions of an approving body, as described in the Bill. This might include financial resources, or other things which any approving body would require, but would be consistent with the functions as set out in the Bill.
The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. However, with regard to paragraph (c) (which relates to the categories of bodies which may or may not be an approving body), we recognise that the power is very wide and we intend to consider an amendment to narrow, or dispense with it.

Section 81(4) - Ministerial intervention
In relation to the power contained within section 81(4), can the Scottish Government comment on the reason for taking this provision and the choice of procedure?

The Scottish Government apologises that the regulation making power in section 81(4) was not addressed in the Delegated Powers Memorandum. This was an unintentional oversight.

After further consideration, we intend to amend the Bill to insert the requirement to carry out an annual review and to send the report on it to the Scottish Ministers on the face of the Bill. A delegated power would still be required to make further provision about these reviews, similar to that provided at section 24(9) in relation to assessments of licensed providers. However, the Scottish Government is of the view that scrutiny provided by negative procedure would be sufficient.

Section 81(5) - Ministerial intervention
In regard to section 81(5), having regard to the very wide scope of this power, can the Scottish Government explain more fully the need for this ‘reserve power’ to create further regulatory safeguards? In particular, the Committee asks whether existing powers such as those contained at sections 74(7), 75(2)(f), section 81(4) and section 83 are not sufficient, and whether the Scottish Government can provide any examples of circumstances in which the power might be used.

Sections 74(7), 75(2)(f), 81(4) and 83 of the Bill contain provisions giving the Scottish Ministers specific powers in relation to, respectively, approving bodies and certification, regulatory scheme, performance and complaints about agents. We recognise that the power in section 81(5) is very wide, but it is still a provision which we consider is required and, therefore, we intend to consider an amendment to narrow the terms of the power by references to particular purposes.

Section 92 - Council membership
Can the Scottish Government provide examples of the circumstances in which this power might be used? What provision is currently made in relation to determining numbers/criteria for non-solicitor members, and how might it therefore be determined that the Society’s actions are to be deemed inadequate, such as to necessitate the use of this regulation making power?

Currently, the members of the Council of the Law Society of Scotland are elected in accordance with the provisions of the scheme made under paragraph 2 of Schedule 1 to the Solicitors (Scotland) Act 1980. The Law Society’s constitution provides for the membership of the Council which at present consists of 44 from
different geographical constituencies and up to 9 co-opted members. At present, there are no non-solicitor members (although there are 4 non-solicitor observers).

The Scottish Government considers that there should be a significant proportion of lay members. The Law Society agrees but considers that the composition of the Council cannot be changed immediately. As a consequence, no proportion is specified in the Bill.

Although the policy has been agreed in principle with the Law Society, the Scottish Government considers it important to have this power in order to ensure that the required changes are made, and to resolve any disagreements regarding the proportion of lay members.

Schedule 4 Paragraph 2(2) and 11(2) - financial penalties

Can the Scottish Government provide further explanation why it is not considered appropriate to have a ceiling on the maximum penalty specified on the face of the Bill?

The Scottish Government does not consider it appropriate to have a ceiling on the maximum penalty specified on the face of the Bill as to do so would take away the flexibility to adjust that amount as necessary to reflect an appropriate penalty for the failure of an approved regulator to adhere to its internal governance arrangements or comply with a direction by the Scottish Ministers. It is not a new proposition for maximum financial penalties to be prescribed in subordinate legislation or by other means. For example, the Legal Service Complaints Commissioner (Maximum Penalty) Order 2004 specifies the maximum penalty the Complaints Commissioner can impose under section 52(3) of the Access to Justice Act 1999.

In addition, the equivalent provision in the UK’s Legal Services Act 2007 deals with financial penalties imposed by and paid to the Legal Services Board. Section 37(4) and (5) of that Act states that the Board must make rules prescribing the maximum amount of a penalty which must have the consent of the Lord Chancellor but no other procedure is required.

Can the Scottish Government explain in more detail why the maximum penalty and the rate of interest are not matters which should be considered and determined by Parliament under affirmative procedure?

The Scottish Government’s view is that the negative procedure is more appropriate for this matter. We intend to set the maximum penalty and the rate of interest at a reasonable level and do not think that it is desirable to have recourse to primary legislation if and when change is wanted in respect of these two matters. However, the Scottish Government will give the Committee an indication of the range of penalties which are under consideration at Stage 2.
ANNEXE B: FINANCE COMMITTEE CONSIDERATION

Letter from the Convener of the Finance Committee

LEGAL SERVICES (SCOTLAND) BILL – FINANCIAL MEMORANDUM

The Finance Committee considered its approach to the Financial Memorandum of the above bill and agreed to adopt level 1 scrutiny.

This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee will not take oral evidence, nor will it produce a report. It will, however, seek written comments from relevant organisations through its agreed questionnaire, and then pass these comments to your committee.

All submissions received are enclosed with this letter.

Andrew Welsh MSP
Convener
Thank you for your letter of 8 October 2009 to ICAS requesting our views on costs that may arise as a result of the provisions in the Legal Services (Scotland) Bill. ICAS may be minded to apply to be an approved regulator of alternative business structures and also of those CAs who wish to apply for confirmation rights. Our responses to your questionnaire are set out below.

As the Institute’s Charter requires, we act in the public interest, and our proactive projects, responses to consultation documents etc. are therefore intended to place the general public interest first, notwithstanding our charter requirements to represent and protect our members’ interests.

We consider the public interest in this instance to be the availability of legal, and other professional, services of a high quality that provide value for money. High quality in this instance reflects expertise, independence, competence, and client confidentiality.

Consultation

1. **Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

ICAS has participated in the consultation exercise preceding the publication of this Bill; having commented to the Law Society of Scotland on its paper ‘The Public Interest: Delivering Scottish Legal Services – A Consultation on Alternative Business Structures’, which was published in December 2008. We also submitted our views to the Scottish Government paper ‘Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland’ and we have been consulted periodically by the Bill Reference Group.

We did not comment on any financial assumptions in relation to the paper ‘Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland’.

2. **Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

Not applicable.

3. **Did you have sufficient time to contribute to the consultation exercise?**

Yes.
Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Bill will have financial implications for ICAS if it applies for, and becomes, an approved regulator. We note that paragraphs 242 and 243 in the Financial Memorandum seek to estimate such costs, although this is not an easy task prior to implementation.

The provisions of the Bill indicate that a separate, new licensing regime will be required for Licensed Legal Service Providers. The establishing of a new regime, with the devising and drafting of scheme rules, and the creation of reporting, risk assessment and monitoring regimes will be costly both to create and to operate. At this stage, we are unsure of the potential number of applications that ICAS might receive from potential licensed legal service providers and therefore not only will the absolute costs be high but costs per application could be relatively high.

In our earlier submissions, we recommended that consideration be given to using the existing regulatory regimes in place. For example, ICAS has a regulated non-member model whereby a solicitor could be a principal in a firm of chartered accountants (currently the ICAS rules would permit this; changes would be required to the LSS rules). In such a scenario the entity regulation would be provided by the existing ICAS regime and individual regulation of the solicitor would be by the LSS. Further tailoring of the scheme may be required but this would broaden choice in the professional services market and could be undertaken at a minimal cost. It is a model that serves the accountancy profession well and we believe it could be adapted to the legal profession at far less cost that the current proposals which would require a new regulatory scheme.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The additional costs of being an approved regulator are twofold: (i) there are the costs to ICAS of applying to be an approved regulator and setting up an appropriate regulatory regime, and (ii) there are the on-going costs of regulating licensed providers. As discussed above, the costs associated with (i) may be onerous to ICAS and this would also be affected if costs were passed on to the regulator from the Scottish Government. Costs associated with (ii) would probably be recharged to those firms that are licensed providers and would be a part of their commercial decision as to whether to apply to operate as an alternative business structure.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes.
Wider issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Further costs will depend on whether and to what extent further secondary legislation is introduced.
The Law Society of Scotland (the ‘Society’) welcomes the opportunity to comment on the Legal Services (Scotland) Bill – Financial Memorandum and has the following comments to make:

Consultation

Question 1 – Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

There were no questions regarding financial assumptions in the consultation exercise.

Question 2 – Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable.

Question 3 – Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

Question 4 – If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

If the Society seeks to become an approved regulator and the application is approved, there will be financial implications for the Society in that capacity.

The Financial Memorandum correctly states that there are two broad categories to the costs of being an approved regulator, namely:

- The costs of becoming an approved regulator; and
- The costs of running the licensing regime once approved.

Some of these costs will depend on the number of licensed providers likely to be established. The Financial Memorandum correctly states that this is a difficult estimate to make. However, the memorandum goes on to say that it may be in the range of 150-250 (paragraph 236), and later uses the figure of 200 licensed providers to estimate the unit costs of regulation (paragraph 245). It is not clear where these figures come from. The Society is concerned that the figures are overly optimistic, especially as a starting point, in the current economic climate. The Society expects most firms that choose to become ABSs will be those which are currently Incorporated Legal Practices. There are currently 197 of these practices operating. It is unreasonable to expect that all or a very high percentage will become ABSs, but that would be the only way to reach the number of firms
suggested in the Financial Memorandum. Furthermore, even if many firms eventually becomes ABSs, it may take some time for the option to gain popularity - by way of example Incorporated Legal Practices began in 2001 and uptake was slow initially.

The Society believes that the costs of setting up an ABS regulatory regime will involve costs for regulators. This cost is not discussed in the Financial Memorandum except in passing, but is likely to be more substantial than is suggested in the Memorandum. As set out in section 5 of the Bill, applying to become a regulator will involve:

- Developing a proposed regulatory scheme for licensing and regulating legal services, which includes the development of licensing rules and practice rules
- Developing a statement of policy
- Providing a description of its constitution and composition, its representative functions and other activities
- Providing other information as required
- Paying any fees that are charged

The development of a regulatory scheme to fit the new regime is likely to involve considerable time and expense for those hoping to become approved regulators. The Financial Memorandum does not set out how these costs are to be covered by approved regulators.

The Financial Memorandum goes on to estimate costs per LSP, based on the SLCC becoming an approved regulator. The Society again notes that estimate is based on the figure of 200, which may be overly optimistic, at least at the beginning of the licensing regime. Furthermore, the accounting given is simplistic and does not fully consider of some of the necessary costs such as governance costs which cannot be simply based on an organisation created for a very different purpose (e.g. complaints handling work). The Society notes that even though it is apparent that estimating costs is very difficult, approved regulators are being asked to provide information about proposed fees, assumed to be an initial application fee and an annual renewal fee.

The Society is currently beginning work on the financial modelling for a regulatory scheme, but until more details about regulations are known, it is very difficult to create a useful model. For example, section 24 requires an approved regulator to assess each LSP at least once every three years and prepare a report on the assessment. 24(9) allows Scottish Ministers to make further provisions about this section. The cost of this duty may vary substantially depending on what will be required for the report. A desktop assessment based on paper forms completed by the LSP is likely to cost an approved regulator substantially less than an assessment where the approved regulator must visit each LSP. This is just one example of a case where more guidance is needed before the Society will be able to estimate costs.

Finally, the Society believes there are some implications that have not been taken into account. For example, the Bill includes among its objectives the promotion of
access to justice and competition. It is possible that the Bill may have an adverse impact on these objectives which may have knock on costs, such as the requirement under section 11(2) to consult the OFT.

Question 5 – Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Society believes it would meet its financial costs out of existing resources, in anticipation of recouping losses through licensing. That is of course predicated on the Society being accepted as a regulator, and receiving a reasonable number of applications to become LSPs.

The Society notes that under section 35 of the Bill, Scottish Ministers have step-in powers to act as an approved regulator should the need arise, which would require a substantial budget. In light of these powers, there may be scenarios where it would be prudent to support approved regulators, particularly with start-up costs.

Question 6 – Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

As discussed above, the estimates set out in the Financial Memorandum are based on insufficient empirical evidence. The Society is concerned that they may fall outside a reasonable margin of uncertainty, particularly with respect to the estimate of take up by 200 licensed providers.

Question 7 – If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

Question 8 – Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes. The Bill provides Scottish ministers with a broad ability to make a number of regulations. There may very well be costs associated with these regulations. The Bill currently gives Scottish Ministers the power to make regulations under 35 different provisions within the Act. Given these powers, it appears quite likely that there will be new subordinate legislation and developed guidance. It is difficult to quantify these costs.

Furthermore, there is a need to consider knock on costs to the Society, such as the potential impact the Society is concerned that as some firms choose to take the ABS route, the Bill may have an impact on both our Guarantee Fund and Master Policy. There is currently no provision in the Bill for a compensation fund. The Society believes a compensation fund is necessary to protect consumers.
Also, if LSPs are not required to pay into a compensation fund, it creates an uneven playing field between LSPs and traditional firms.

No consideration seems to have been given to the possible cost implications for the Scottish Legal Complaints Commission in terms of its oversight regulation role which currently only extends to The Law Society of Scotland and the Faculty of Advocates but would require to extend to all regulators involved in the regulation of legal services providers to ensure a level playing field. Consideration also needs to be given to how the costs of the Commission would be recovered with this wider remit and if it was asked to carry out specific tasks for Scottish Ministers, for example the investigation of a regulatory complaint. As provided for in section 27(1) of the Legal Profession and Legal Aid (Scotland) Act 2007, it is only practising solicitors, advocates, conveyancing and executry practitioners and those non-legal professionals with rights of audience who pay an annual general levy to the Commission.

Finally, the Society welcomes the fact that the Bill does not contain provision for a Legal Services Board similar to the one in operation in England and Wales. This extra layer of governance has resulted in significant costs, which will ultimately be borne by the consumer of legal services or the tax payer.
SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD

Please find below the Scottish Legal Aid Board’s response to the invitation from the Finance Committee to submit evidence on the financial assumptions set out in the Explanatory Notes for the Legal Services (Scotland) Bill.

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Board has been fully involved in the lengthy process of research, development and consultation that has led to the Bill. The Board was a member of the Legal Markets Research Working Group from 2004 to 2006, responded to the Law Society of Scotland’s consultation in February 2008, is a member of the Bill Reference Group set up in autumn 2008 and responded to the Scottish Government’s consultation in April 2009. The Board was not asked for its views on the financial implications of the Bill’s provisions, and none were offered.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

N/A

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum states that two aspects of the Bill will have financial implications for the Board; the transfer to the Board of the power to exclude advocates or solicitors from undertaking legally aided work, and the creation of a new function of the Board to monitor and report to Scottish Ministers on the availability and accessibility of legal services in Scotland.

The Board agrees that these are the two areas of the Bill that could have direct financial consequences for the Board. The Board also agrees that the costs of each will be small. On the exclusion power, this is an extension of the work the Board already does to investigate issues arising in solicitors’ and advocates’ delivery of legally aided services. Following the investigation of such issues, the Board may at present report a solicitor or advocate to their professional body. As a result of the provision in the Bill, the Board will still investigate such issues but will come to a view itself on whether to exclude. Given the relatively small number of relevant investigations undertaken each year, this change in process will not require specific additional resource.
On the monitoring role, this is again an extension of work the Board currently undertakes to monitor the supply of legal aid services. As the Board’s role has evolved in recent years, for example into the direct employment of solicitors and the grant funding of other advisers, the Board has worked more closely with others to ensure that its assessment of the supply of legal aid services has regard to the services provided by other agencies, such as Citizens Advice Bureaux and local authority money and welfare rights teams. The Bill broadens further the scope of the Board’s current work to encompass legal services more widely.

While the Board is able to analyse legal aid supply using its own data, at least some of the evidence the Board would need to perform this wider monitoring function would need to come from other bodies. This is recognised in the Bill, as it requires approved regulators, along with the Law Society of Scotland, Faculty of Advocates and Scottish Court Service to provide the Board with information to enable it to perform its monitoring function.

We envisage the proper performance of this function will require the Board to continue to be proactive and, as well as assessing reports from each of these other bodies, may involve for example periodic surveys of both service users and providers. This would build on the work the Board already undertakes with providers and we would expect it to focus on information they already collect. Until such time as the range of approved regulators and therefore forms of legal services provision becomes clearer, it is difficult to assess what additional cost may arise. We would not, however, expect it to be significant.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Assuming that the Board remains adequately resourced to perform its current functions, including monitoring the availability of legal aid services and working with the legal profession and advice sector in the development and delivery of its grant funding powers and use of its own employed solicitors, it is unlikely that the Board would request any specific addition to its grant-in-aid to enable it to perform its new functions.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

N/A

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?
ANNEXE C: EXTRACTS FROM THE MINUTES

27th Meeting, 2009 (Session 3), Tuesday 6 October 2009

Decision on taking business in private (in private): The Committee agreed to take item 3 in private.

Legal Services (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1. The Committee agreed a draft call for written evidence and a draft schedule of oral evidence. It agreed to invite an informal briefing from Scottish Government officials, and to invite the Scottish Parliament Information Centre to consider whether there were suitable candidates for appointment as an adviser.

28th Meeting, 2009 (Session 3), Tuesday 27 October 2009

Legal Services (Scotland) Bill (in private): The Committee agreed to seek approval for the appointment of an adviser to assist with its scrutiny of the Bill at Stage 1.

30th Meeting, 2009 (Session 3), Tuesday 10 November 2009

Decision on taking business in private: The Committee agreed that its consideration of a list of candidates for the role of adviser to assist with its scrutiny of the Legal Services (Scotland) Bill at Stage 1 should be taken in private at a future meeting.

31st Meeting, 2009 (Session 3), Tuesday 17 November 2009

Legal Services (Scotland) Bill (in private): The Committee considered a list of candidates for the post of adviser to assist with its scrutiny of the Bill at Stage 1, and agreed a ranked list of suitable candidates, subject to confirmation of one candidate’s availability. The Committee then reviewed and agreed, subject to some changes, a list of witnesses to be invited to give oral evidence on the Bill.

32nd Meeting, 2009 (Session 3), Tuesday 24 November 2009

Legal Services (Scotland) Bill (in private): The Committee received a briefing from Scottish Government officials.

33rd Meeting, 2009 (Session 3), Tuesday 1 December 2009

Decision on taking business in private: The Committee agreed that any consideration of written evidence received on the Legal Services (Scotland) Bill at Stage 1, as well as any consideration of the main themes arising from oral evidence sessions, should be taken in private at future meetings.

34th Meeting, 2009 (Session 3), Tuesday 8 December 2009
Legal Services (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Sue Aspinall, Team Leader, Professions, and Kyla Brand, OFT Representative in Scotland, Office of Fair Trading;
Julia Clarke, Principal Public Affairs Officer, Which?;
Professor Alan Paterson, Centre for Professional Legal Studies, Strathclyde University;
Richard Keen QC, Dean of Faculty, Faculty of Advocates;
Tom Marshall, Vice President (Civil), and Paul Motion, Secretary, Society of Solicitor Advocates.

Legal Services (Scotland) Bill (in private): The Committee considered the written evidence received so far and agreed to invite Gilbert Anderson, the Institute of Chartered Accountants of Scotland and Unite (Scottish Region) to give oral evidence at its meeting on 5 January 2010.

Legal Services (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.

35th Meeting, 2009 (Session 3), Tuesday 15 December 2009

Legal Services (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Ian Smart, President, Lorna Jack, Chief Executive, Michael Clancy, Director of Law Reform, and Katie Hay, Law Reform Officer, Law Society of Scotland;
Michael Scanlan, President, and Kenneth Swinton, Council Member, Scottish Law Agents Society;
Robert Sutherland, Convenor, Scottish Legal Action Group;
Robert Pirrie, Chief Executive, and Caroline Docherty, Deputy Keeper of the Signet, WS Society;
Tom Murray, Director of Legal Services and Applications, and Colin Lancaster, Director of Policy and Development, Scottish Legal Aid Board.

Legal Services (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.

1st Meeting, 2010 (Session 3), Tuesday 5 January 2010

Legal Services (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Vivienne Muir, Executive Director, Regulation and Compliance, and Charlotte Barbour, Project Director, Regulation and Compliance, Institute of Chartered Accountants of Scotland;
Sarah O’Neill, Head of Policy, Consumer Focus Scotland;
Fiona Farmer, Regional Industrial Officer, Unite Trade Union, Scottish Region;
Gilbert M Anderson, solicitor.
Legal Services (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.

2nd Meeting, 2010 (Session 3), Tuesday 12 January 2010

Decision on taking business in private: The Committee agreed that its consideration of an options paper and then of a draft Stage 1 report on the Legal Services (Scotland) Bill should be taken in private at future meetings.

Legal Services (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing MSP, Minister for Community Safety;
Colin McKay, Deputy Director, Legal System Division, and Andrew Mackenzie, Bill Team Leader, Scottish Government.

Legal Services (Scotland) Bill (in private): The Committee considered the main themes arising from the oral evidence heard earlier in the meeting.

3rd Meeting, 2010 (Session 3), Tuesday 19 January 2010

Legal Services (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence received, in order to inform the drafting of its Stage 1 report.

6th Meeting, 2010 (Session 3), Tuesday 9 February 2010

Legal Services (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to. The Committee agreed to continue consideration at its next meeting.

7th Meeting, 2010 (Session 3), Tuesday 23 February 2010

Legal Services (Scotland) Bill (in private): The Committee further considered a draft Stage 1 report. Various changes were agreed to. The Committee agreed to consider a revised draft at its next meeting.

8th Meeting, 2010 (Session 3), Tuesday 2 March 2010

Legal Services (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to. The Committee agreed to consider a further draft at its next meeting.

9th Meeting, 2010 (Session 3), Wednesday 10 March 2010

Legal Services (Scotland) Bill (in private): The Committee considered a final draft Stage 1 report. Various changes were agreed to and, subject to confirmation of one change by correspondence, the report was agreed for publication.
ANNEXE D: INDEX OF ORAL EVIDENCE

34th Meeting, 2009 (Session 3), Tuesday 8 December 2009

Sue Aspinall, Team Leader, Professions, and Kyla Brand, OFT Representative in Scotland, Office of Fair Trading;
Julia Clarke, Principal Public Affairs Officer, Which?;
Professor Alan Paterson, Centre for Professional Legal Studies, Strathclyde University;
Richard Keen QC, Dean of Faculty, Faculty of Advocates;
Tom Marshall, Vice President (Civil), and Paul Motion, Secretary, Society of Solicitor Advocates.

35th Meeting, 2009 (Session 3), Tuesday 15 December 2009

Ian Smart, President, Lorna Jack, Chief Executive, Michael Clancy, Director of Law Reform, and Katie Hay, Law Reform Officer, Law Society of Scotland;
Michael Scanlan, President, and Kenneth Swinton, Council Member, Scottish Law Agents Society;
Robert Sutherland, Convenor, Scottish Legal Action Group;
Robert Pirrie, Chief Executive, and Caroline Docherty, Deputy Keeper of the Signet, WS Society;
Tom Murray, Director of Legal Services and Applications, and Colin Lancaster, Director of Policy and Development, Scottish Legal Aid Board.

1st Meeting, 2010 (Session 3), Tuesday 5 January 2010

Vivienne Muir, Executive Director, Regulation and Compliance, and Charlotte Barbour, Project Director, Regulation and Compliance, Institute of Chartered Accountants of Scotland;
Sarah O’Neill, Head of Policy, Consumer Focus Scotland;
Fiona Farmer, Regional Industrial Officer, Unite Trade Union, Scottish Region;
Gilbert McAnders, solicitor.

2nd Meeting, 2010 (Session 3), Tuesday 12 January 2010

Fergus Ewing MSP, Minister for Community Safety;
Colin McKay, Deputy Director, Legal System Division, and Andrew Mackenzie, Bill Team Leader, Scottish Government.
Legal Services (Scotland) Bill: Stage 1

10:12

The Convener: Our substantive business today is our first oral evidence-taking session on the Legal Services (Scotland) Bill. Let me formally introduce Professor Frank Stephen, who is head of the school of law at the University of Manchester and the committee’s adviser on the bill.

I welcome our first panel of witnesses: Sue Aspinall, who is team leader of the professions team at the Office of Fair Trading; Kyla Brand, who is the OFT representative in Scotland; and Julia Clarke, who is principal public affairs officer for Which?. Ladies, thank you very much for attending this morning. We will move straight to questioning, which will be opened by Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. How will the bill, and in particular the establishment of new business structures, benefit consumers of legal services in Scotland?

Kyla Brand (Office of Fair Trading): I thank the committee for inviting us to help it in its consideration of the bill.

We believe that allowing law firms to adapt their business models to a model of their choice, including allowing them to operate with other professionals, will give consumers more choice, deliver economies of scale and enhance access to justice.

The way in which that might work is that legal professionals who choose to operate in the same business with other professionals will be able to share overheads and perhaps offer a one-stop shop. That will provide more flexibility in the services that they can offer and will be of real benefit in local communities, where a business or individual consumer might wish to employ the services of, for example, both a lawyer and an accountant or both a lawyer and a surveyor.

10:15

The provisions that will allow firms to attract non-legal staff with managerial skills will assist them in providing new models of service and better customer service. We heard that a lot—from solicitors and consumer bodies—when we were conducting our inquiry in response to the Which? super-complaint.

The larger firms tell us that the ability to use outside finance will allow them to develop more dynamic models of service, which will enable them
to compete in the wider international arena and deliver client services more effectively.

Those are our principal comments about aspects of multidisciplinary partnerships.

Sue Aspinall (Office of Fair Trading): With regard to the specific provisions in the bill, we feel that providing for regulatory objectives and lay involvement in the governance of the Law Society will greatly contribute to consumer confidence in the legal services market. However, we feel that the consumer benefit would have been greater if members of the Faculty of Advocates had been allowed to become members of the new business models.

Bill Butler: We will take that on board. I am sure that the Faculty of Advocates will also note that point.

Julia Clarke (Which?): We agree pretty well with the OFT on this matter. The lack of competition in legal services is what caused us to launch our super-complaint. We feel that there are much newer ways of doing business that will provide benefits for consumers. Our experience is that consumers particularly like one-stop shops, especially with regard to the selling and purchasing of houses. We think that the changes will deliver economies that will affect prices in favour of the consumer, which is obviously a good thing.

Bill Butler: You talk about the benefits of the provisions in the bill. However, is there a danger of disbenefits to consumers? For instance, some people have said that there is perhaps a danger that outside ownership might lead to law firms offering only profitable legal services. What do you think of that?

Kyla Brand: I think that it would be a mistake to imagine that many unprofitable services are being offered now. We already hear of deserts in legal provision. There are ways in which the limitations of the current arrangements restrict the supply of some types of legal services in certain areas, such as family law, housing and debt services. That is already a feature of the market and is, perhaps, an argument for including new models that would make it easier to meet some of those market needs.

Bill Butler: Can the deserts that you speak of be made to grow again by the bill?

Kyla Brand: If you open a system up and allow people to create new models that they believe will meet a market need, you might well find that there are new areas of service.

Bill Butler: So, you envisage no disbenefits to the consumer.

Kyla Brand: The success of any new system depends on how robustly it is regulated. For us, consumer protection is a high priority, and we believe that competition among services is one of the ways in which that protection can be delivered. However, there must also be the kind of built-in protection that will give the consumers of legal services in Scotland at least the same protection that they currently have. We believe that that is embedded in the bill.

Bill Butler: Do you have anything to add, Ms Aspinall?

Sue Aspinall: Just that protecting the interests of the consumer and the public form one of the regulatory objectives of the bill.

Julia Clarke: That is right. Further, people can continue to practise as they have if they wish to; nobody will be forced into a new arrangement. A sole practitioner might still choose to operate in a certain way. However, in these difficult times, the sharing of expenses with a local surveyor or accountant might be what saves some sole practitioners. The bill gives people scope to move forward in whatever way they see fit.

Bill Butler: Thank you for laying out the theory so clearly.

Stewart Maxwell (West of Scotland) (SNP): Julia Clarke said that the one-stop shop would benefit consumers, particularly with regard to housing. How do the bill’s proposals differ from what we already have? After all, people already go to large suppliers such as the Edinburgh Solicitors Property Centre, the Glasgow Solicitors Property Centre, the Aberdeen Solicitors Property Centre and so on.

Julia Clarke: I think that different models will emerge. Someone with a bit of entrepreneurial spark will see a space for, say, an accountant to team up with a local lawyer to provide a certain set of services. We will also find information technology specialists and others coming into the market, doing things in a different way, driving things in a different direction and providing different opportunities for people to buy and sell houses. The introduction of the home report has already brought something different into the market. I think that the market will adapt to what consumers want and that prices will reflect that benefit to consumers.

Stewart Maxwell: I see your general point about the involvement of accountants, managerial services, IT and so on; but surely, as far as housing is concerned, the large suppliers that I mentioned already pretty much provide a one-stop shop. I am trying to envisage the difference that the bill will make to me if I want to sell my house.
Julia Clarke: At the moment, different fees are paid at different stages of the home buying and selling process. That aspect could become more transparent if you dealt with a set of professionals who offered different services. I think that the bill presents all sorts of opportunities that we cannot yet see; as I have said, the market will, as usual, adapt itself to consumer preferences.

Robert Brown (Glasgow) (LD): I want to develop that point. At the moment, the Law Society of Scotland has arrangements to prevent conflicts of interest between solicitors acting on opposite sides of the same transaction. On your suggestion about lawyers, solicitors and surveyors acting together on domestic conveyancing operations, I find it extremely difficult to envisage how, for example, single seller surveys could be carried out by the same provider without enormous conflicts of interest arising that would be hugely disadvantageous to the consumer. Will you comment on that? What services did you have in mind?

Julia Clarke: As far as home reports and single seller surveys are concerned, the fact that surveyors have a legal obligation to buyers and sellers is very important and, indeed, the keystone to consumer confidence. I do not think that that is an issue—

Robert Brown: I am sorry to interrupt, but are you seriously suggesting that a firm acting on behalf of a seller should, as part of its in-house service, be able to instruct a surveyor to produce the survey on which the purchaser might rely? Such situations are notoriously difficult and can lead to all sorts of disputes between parties about, for example, dry rot that has not been identified and so on.

Julia Clarke: The bill contains protections to ensure that such regulatory conflicts are worked out.

Robert Brown: Can you take that a little further and tell us about the practical operation of such a system?

Julia Clarke: On the preparation of the survey by the sellers—

Robert Brown: Are you suggesting that the new entities that you are proposing would provide such services?

Julia Clarke: Not necessarily, but such a move would allow those services to be provided together. The same company would not necessarily act for both buyer and seller, but the home report would be prepared by the seller’s team.

Robert Brown: In other words, by the legal entity.

Julia Clarke: Yes.

Robert Brown: What is the Office of Fair Trading’s view on what I may say is a rather extraordinary proposition?

Kyla Brand: I just want to add one consideration. The OFT is in the process of doing a market study of home buying and selling and is looking at the operation of the home report as part of that. One of the questions that arises is who will be the surveyor. Obviously, there are other interests; in particular, we hear about the interests of the lenders and whose surveyor they want to use. A number of parties direct which service supplier is appropriate and which will therefore be chosen. It might be appropriate for the surveyor who is in the same firm as the lawyer who is involved in the transaction to be chosen; it might not be. However, that does not, in itself, reduce the opportunities to put the survey service in the right place to achieve the independence that someone might be looking for.

Robert Brown: I am really asking whether there would be a conflict of interest in such a situation. How would the public interest be advanced by that arrangement, given the notorious potential, if you like, for conflict between the buyer and the seller in relation to the details on which the survey has reported?

Kyla Brand: As I understand it, the purpose of the home report is to take some of the sting out of that and to provide an objective study that is available to both sides of the transaction.

Robert Brown: Does it not take away a substantial measure of the buyer’s confidence in the home report if everything is dealt with not even at arm’s length but by the same entity that is acting for the seller? I am sorry to press the point, but it is quite fundamental.

Kyla Brand: As has already been said, control has been built into the bill to ensure the highest level of professional service, whether professionals from different professions work together or as individuals. We do not anticipate that there will be any reduction in levels of professionalism, or in the confidence that consumers have in the services that are made available.

Robert Brown: We might as well say that the same solicitor should act for the purchaser and the seller and do the whole thing in-house, so that we get rid of the associated additional costs of separate representation.

Julia Clarke: No, I do not think so.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): On that point, when she talked about the consumer’s interests, Julia Clarke said that the market will adapt to what consumers want.
Stewart Maxwell helpfully made the point that a lot of large companies work almost as one-stop shops for house sales and purchases. However, there are still solicitors working in small high street offices who are able to provide those services. Consumers choose what they want.

I still have not heard any satisfactory answers about how the proposals in the bill will benefit consumers. Probably the majority of the people I represent go to see their lawyer about house transactions rather than anything else.

Julia Clarke: That is absolutely right, and there will always be a place for the solo high street lawyer whom everyone knows and trusts and to whom they have always gone. However, some companies want to modernise and streamline their services and cut some of the associated costs. Frankly, we could use a bit of competition in this area in Scotland to improve services and drive down costs a little bit. If we free up lawyers to offer services in that way, people will take advantage of it.

Kyla Brand: There are two aspects to the issue. First, consumers have not had the choice of being able to make one visit to a local firm that might offer them legal and accounting services, for example. We have heard that people favour the idea of a one-stop shop—the demand might still be theoretical, but it has been reported to us.

The second aspect involves the profitability of services, which was referred to earlier. If a different approach does not work, firms will not stick with it. However, they tell us that they believe that there is an opportunity to reduce costs and therefore to make services cheaper for consumers, and they would like to be able to develop that approach. Firms will not have to do so: if they wish to stay as individual practitioners offering just one service, that will remain part of the market mix. However, what is proposed will allow firms to do things in new ways that might drive more imaginative and better services.

10:30

Cathie Craigie: Some people would say that the system is not broken, so why fix it? Why do you think the current approach not working? My big concern is about what will happen to the small firms of solicitors on the high street in the area that I represent if the new approach does not work and if firms do not, as you suggest, stick with it? They will disappear when bigger firms come in and take business from them for a time. The small firms might not come back because the solicitors retire or go to work for one of the big firms.

Kyla Brand: The sustainability of services is of great importance. At the moment, sole practitioners in the high street are having a difficult time sustaining their services. In offering new models, there is every opportunity for them to have a greater chance of being able to sustain their services.

Consumers are accessing all sorts of services in many new ways, and wish to be able to do so in even more wide-ranging ways. IT and buying online have been mentioned. There is a dramatic change in relation to face-to-face transactions in all areas, and there is no reason why legal services will be any different. We are seeing online transactions in house buying and selling, and there are other ways of accessing important but still customised services that do not necessarily come through an office on a high street.

Stewart Maxwell: I opened up this line of questioning because I was trying to get to the bottom of the practical difference that the bill will make to individual consumers; I am still trying to get to the bottom of that. Ms Brand stated that consumers would benefit from having joint legal and accountancy services. Who are those consumers? I can see that businesses might find joint services an advantage, but the bulk of my constituents, like Cathie Craigie’s, are not businesses but individuals, and they will seek legal services, not legal and accountancy services. Is it just that some businesses, whether small or otherwise, would benefit from the bringing together of legal and accountancy services, or is there some wider benefit that I have not envisaged?

Kyla Brand: I do not want to give the impression that people will be flocking to acquire legal and accountancy services on the same day in connection with the same issue. However, many of us find that we need a lawyer, an accountant or both at different times in our lives. I suppose the intention is that people would not have to make different searches to discover who would be a good provider for them.

Other aspects might have arisen already in the work that has been done on the Legal Services Act 2007 in England and Wales.

Sue Aspinall: First, I should say that small businesses are included in our definition of “consumers”. Stewart Maxwell asked about demand. Let me give the example of a sole practitioner in a rural area where there might be other professional firms. Some of those firms might find it easier to exist together and form partnerships that mean that they can keep going and offer their services to consumers, whereas being a sole practitioner might not be viable.

Stewart Maxwell: That is about the viability of two businesses coming together to make a more efficient business.

Sue Aspinall: Yes—to offer a range of services.
Stewart Maxwell: So those services would remain in place as opposed to being lost to smaller communities. I can see that argument, but I am still struggling slightly to understand what the advantages would be. If I wanted legal services today, I would go to see a lawyer. If I wanted accountancy services next year, I would go to see an accountant. I am trying to understand the difference between what currently exists and what might exist in future.

Sue Aspinall: I was trying to make the point that there might be firms that do not have enough clients to enable them to keep going on their own, and if they were to band together with other services, they might be able to make their businesses more viable and therefore continue to exist. The bill will enable such firms to bring in non-professionals, such as IT experts, who could help their businesses to innovate.

Stewart Maxwell: I accept that point, but I was making a slightly different point. There is a wider issue about the benefit of the approach and what difference it would make to consumers. We can explore that as we go on.

Nigel Don (North East Scotland) (SNP): Ms Aspinall has given examples of situations that she said might arise. I understand that, given the world of economics. However, under the current model, if a high street lawyer and a high street accountant want to work together, what is there to prevent them from setting up under the same roof, sharing a secretary and hiring in someone who understands computing? Why on earth do they need a new business model, whether it is a partnership or some other limited liability company, to do something that they can do anyway as sole traders? They can just work together, can they not?

Julia Clarke: Yes, they can, but they do not have the opportunity to develop a different model that offers different expertise. An IT expert who comes in to help a business will not own it and therefore have a direct stake in moving it forward through the kind of modernisation that the area sometimes lacks.

Under the bill, a surveyor would be able go into partnership with a lawyer and offer their expertise as part of the business. Currently, some banks charge fees for surveys—home reports, for instance—so a surveyor who was partnering a lawyer might offer the service for less money, as part of a one-stop-shop service. That is just one example of what might be possible.

Nigel Don: I understand the economics of the example that you gave, but what is to stop the lawyer and the surveyor doing that now, if they choose to co-operate?

Julia Clarke: The trouble is that people are not doing that now. We need the door to be opened, to let people think about the joint services that they could offer. Because that has not happened, services are not being offered. We need the door to be pushed open, so that people say, “We could do things differently. Why don’t we have a go?”

Nigel Don: Forgive me, but I can open the door by telling sole traders that they can work together. Why do we have to change the legal structure to tell people about a door that is already open?

Julia Clarke: Because people are not working together, I suppose. The chance to own a business that crosses the professions would make such innovation far more likely. There can be economies of innovation, and the introduction of management expertise from outside the industry will be beneficial for legal services in Scotland. Things will perhaps be done in a more consumer-friendly way. We have found that people want legal services to be more user-friendly and a bit more modern.

The Convener: I will open the door for Bill Butler.

Bill Butler: Thank you, convener. It was remiss of me not to mention that some people fear that undesirable third parties might take over law firms if outside ownership is allowed in the way that is proposed. How will consumers be protected from such people?

Sue Aspinall: The ownership of law firms and law practices must be fit for purpose. It is a question of ensuring that there is robust regulation. Indeed, however many rules are in place undesirables might currently be working in law practices—

Bill Butler: I will not ask you to name any.

Sue Aspinall: I do not think that I could do so—

Bill Butler: There are likely to be some.

Sue Aspinall: The New South Wales model allows external ownership, and we are not aware of major problems having arisen in Australia. External ownership is envisaged in England and Wales from 2011, I think. It is a question of robust regulation.

Julia Clarke: That is exactly right. There will be a fit-to-own test—

Bill Butler: Are you talking about the provisions on fitness for involvement?

Julia Clarke: Yes. Those provisions will provide protection for consumers, along with all the other measures that are proposed.

Bill Butler: Is the fitness-for-involvement test robust enough?
**Julia Clarke:** I think so. We have no evidence that it is not.

**Bill Butler:** Do you have any evidence that it is?

**Julia Clarke:** That is always the difficulty with things that have not yet been implemented.

**Bill Butler:** Exactly—that was your previous answer.

**Kyla Brand:** As Sue Aspinall said, we know that the fitness-to-own approach has been made to work elsewhere in the world. In Australia, for example, the use of that approach in New South Wales has been expanded into other states. That example shows that outside ownership does not necessarily bring the kind of hazards that others have suggested may arise in this country.

**Bill Butler:** Do you know of instances in which there have been problems, or is the model working perfectly?

**Kyla Brand:** The fact is that Australia has adopted a similar approach to the approach that is proposed in the bill, with a rigorous set of conditions for those who wish to own firms. The Australian approach includes monitoring and the other provisions that the Government envisioned when it drafted the bill. As far as we are aware, no problems have been encountered thus far. You may regard the example as a slightly peripheral evidence set, but it is an example nonetheless.

The key is to have transparent conditions up front. In that way, anyone who proposes to own a firm that provides legal services as part of its service provision will be absolutely clear about the hurdle that they will have to clear. It must also be made clear to consumers. It is important that we have a strong advisory body.

**Bill Butler:** I am grateful for your explication of the theory.

**The Convener:** We must move on. If we are to get through what we want to get through, only one OFT representative should answer the question, unless one feels the need to augment what the other has said.

We turn to questions on the regulatory approach.

**Cathie Craigie:** I will be as concise and quick as I can be, convener. What evidence is there that the existing regulatory approach is not working? Do we need a fully independent regulatory body for the legal services market in Scotland that separates the representative and regulatory functions?

**Sue Aspinall:** From the evidence, we know that we are talking about public perception. If a body were to try to further the interests of both its membership and the public, tensions—even conflict—would arise. The best way in which to avoid conflict is to have a separation of the two roles.

**Julia Clarke:** Which? believes that there should be a separation between the two functions. The system does not work satisfactorily, so it cannot be said that it is perfect. At the very least, particularly in terms of public perception, separating the two functions would be an improvement.

**Cathie Craigie:** You referred to that in your submission. Do you want to add anything?

**Julia Clarke:** Obviously, the proposal for a lay majority and a lay chair is good news. That is progress, but our view is that there should be complete separation between the two functions. If that cannot be done, the proposed committee to advise the Government on future regulation is a way forward. It is important that its membership should be drawn from beyond the legal profession. It should certainly have a lay majority and a lay chair. It should be a statutory body because it is proposed that the Government will regulate the regulators. That is not ideal but, if it is to happen, it is important that we have a strong advisory body.

10:45

**Cathie Craigie:** What advantages to consumers would arise from having more than one approved regulator for licensed providers? What would be the benefit of regulatory competition?

**Sue Aspinall:** Competition should normally have benefits for consumers unless there is a particular market in which it is best to have only one provider. The OFT’s position is that approved regulators have an important role to perform in the way that they license and we hope that, if there is demand for a choice of approved regulator, that will develop the number of licensed legal services providers coming through, which will mean that there will be more such firms for consumers to choose from.

**Cathie Craigie:** Did Julia Clarke want to say something?

**Julia Clarke:** No, I was just going to reiterate what Sue Aspinall said, so I will not take up your time.

**Robert Brown:** Scotland is a jurisdiction one-tenth the size of England. The submission from the Institute of Chartered Accountants of Scotland
indicates that we could get some of the advantages of wider choice and one-stop shops by extending the system under which ICAS can approve a solicitor to be a principal in a firm of chartered accountants. ICAS suggests that that might be applied to the Law Society in reverse, to adapt a much less bureaucratic model that, I guess the institute would argue, is appropriate to Scottish circumstances. Do the witnesses have a view on that? Can we achieve the same objectives by that sort of approach?

Sue Aspinall: I wondered how many solicitors had taken that route.

Robert Brown: I have no idea.

Kyla Brand: The model to which ICAS works was on the table in the discussions that led to the bill that is before you. My understanding is that it was considered somewhat too radical and a much greater departure from the existing arrangements than those in the bill. The OFT would certainly not discount that sort of simple arrangement. If we can build in adequate consumer protection, an unbureaucratic system is obviously preferable.

Robert Brown: There is a coalescence of interest on matters such as tax advice and certain things to do with divorce. A one-stop shop might have greater relevance in such an arrangement than in a partnership with surveyors, of which I was critical earlier.

Sue Aspinall: Yes.

The Convener: I take it, Ms Aspinall, that your position is the same as it has always been. I note that when you gave evidence to the Legal Profession Bill reference group you were clear that you would approve of the adoption of a separate regulatory committee.

Sue Aspinall: Do you mean for the Law Society of Scotland?

The Convener: Yes.

Sue Aspinall: The proposals amount to a separate regulatory committee. There is just no name change, as there was in England and Wales.

The Convener: Are you happy with that?

Sue Aspinall: The preference is for a clear indication of separation. The Law Society will have a separate regulatory committee, but how will that be perceived externally by consumers? Will they be aware that there is a separate regulatory committee?

Nigel Don: Given that three of the four grounds of the Which? super-complaint related to advocates, is Which? happy with the bill?
Julia Clarke: We are not saying that the system does not work for the majority of people. The bigger point is that, under the bill, advocates will not join ABS arrangements and there will still be no clear separation of regulation and representation in the Faculty of Advocates. That should be corrected in the bill. Unfortunately, it will not be.

Nigel Don: I hope that our other witnesses will answer my questions in a moment, but I would like first to pursue this point with Julia Clarke. I am told that 460 advocates practise in Scotland. That is a fairly small bunch of professional, highly qualified people. Do we really need a complicated structure for the regulation of 460 people who are regulated by the court anyway?

Julia Clarke: The consumer principles are the same wherever people live in the United Kingdom. People are entitled to the same level of transparency and the same protections in the industry with which they are dealing. If services do not modernise, the consumer has no way of demanding their modernisation—they are just presented with what is available. If there is no opportunity for choice, the consumer cannot make their needs felt and must keep taking whatever is delivered. Unfortunately, that is the case at the moment.

Nigel Don: Would you not prefer to have a service—especially a legal one—that is regulated by the judges of the High Court rather than by some consumer watchdog? If I want lawyers, whose business is speaking to a court, to act professionally in my interests and the interests of justice, would I not much prefer them to be guided and regulated by the Lord President rather than by another organisation?

Julia Clarke: I cannot see what is wrong with independent regulation that is properly regulated and comes with all the necessary safeguards. I think that everyone was keen that that should be in place and, by and large, that is what is proposed in the bill.

Nigel Don: Does the OFT have a view on the ground that I have covered?

Sue Aspinall: On the direct access aspect, I appreciate that we are talking about small percentages, but it is really a question of the small amount of people who are sufficiently educated and familiar enough with court process having the choice to take a direct route. Further, it would be up to individual advocates to decide whether they wanted to offer their services in a direct manner. Direct access exists in England and Wales and a number of barristers there have not chosen to go down that route.

There is a small number of advocates—some 460. The bill now provides for the Faculty of Advocates to be subject to the regulatory objectives. That does not affect the role of the Lord President. The members of the faculty can choose whether they wish to provide their services via the independent referral bar or, instead, form partnerships or join with others.

Nigel Don: So, you are concerned that advocates might feel restricted in their current environment and might want to do something different.

Sue Aspinall: Yes. I think that there is evidence that there are advocates who wish to adopt different business models.

James Kelly: You will be aware of the solicitors guarantee fund, which ensures that no member of the public can be defrauded by a solicitor. It provides essential protection. Do you agree that that scheme benefits the public?

Julia Clarke: It does, and we would not want that protection lessened for people who used legal services under any other arrangement.

James Kelly: Do you accept that the introduction of alternative business structures might undermine that fund and, therefore, lessen the amount of protection that the public receives?

Julia Clarke: I do not see how that would necessarily happen.

James Kelly: How do you see the fund being implemented as we extend into alternative business structures?

Julia Clarke: I suppose that that is a matter for the people who are taking part in the scheme to work out. It is like the master policy. We would like more competition to be introduced so that there is not just one provider, because that involves a potential conflict of interests. This might be a good time to look at the issue.

James Kelly: Do you agree that there are difficulties in changing from the current system, which involves all solicitors contributing to the fund, to a system that involves other professionals, such as accountants? Do you think that there will be difficulties in imposing such a levy on them?

Julia Clarke: That is part of the regulatory conflict that has to be worked out between the professions so that consumers are as protected as they are now. Different professions have different schemes, and that has to be worked out by the professions that might want to be involved.

James Kelly: Does the OFT have any views on the matter?

Sue Aspinall: We would like the guarantee fund to apply to ABSs, as we wish consumers to be protected regardless of whether they go to a traditional practice or an ABS. I think that there is
a way to ensure that the fund can apply to ABSs, but how that is done is a regulatory matter. I believe that in England and Wales—which they have a similar fund called the compensation fund—a levy is placed on anyone who is registered to practice and offers legal services in an ABS.

11:00

James Kelly: The minister has indicated that he does not intend to proceed with contingency fees. Do you have any views on the application of contingency fees?

Sue Aspinall: The OFT’s view is that any funding mechanisms that give consumers choice to secure funding for legal services can only be a good thing. We would have to see the proposals on how that would be done and how it would be regulated.

James Kelly: Do you accept the principle that some people have put forward, which is that if someone wins a case for compensation and is awarded £100,000, that sum should be awarded in full to the claimant and any costs should be attributed to the losers in the case?

Sue Aspinall: There are many different funding systems in England and Wales, and that is one of the many flaws that have been identified. It cannot be right that legal fees are recouped from damages, so different ways will have to be devised whereby the consumer and the provider both get their appropriate share of the outcome.

James Kelly: Ms Clarke, do you have any views on the issue?

Julia Clarke: There are difficulties with contingency fees and conditional fees, but if it is a case of fees or no access to justice, fees are obviously better than no access to justice.

James Kelly: How easy will the new regulatory regime be for consumers of legal services to understand?

Julia Clarke: The average person rarely uses legal services, except perhaps when they buy a house. They want the system to be accessible and understandable, and to know who is paid a fee for what, what that cost is and whether there is competition to ensure that they get a good deal. I am not saying that every consumer will understand the whole regulatory background, but if the safeguards are in the bill, to some extent that does not matter, just as it does not matter, in some ways, that they do not understand the present framework. It just has to be easy to use at the time and easy to access if something goes wrong.

James Kelly: Does the OFT have a view?

Kyla Brand: Yes. There are two additional points. We believe that consumers need to understand the rules, systems and services that are available to them. In that context, various comments have been made about the possibility of covering public legal education because, as citizens, we rarely have enough of an understanding of how our legal system works for us. The bill might be a trigger for providing consumers with some of that new information. Its provisions are bound to be complicated. The issue will be how that complexity can be communicated effectively to consumers. Regardless of whether that is done in one of Consumer Focus Scotland’s inimitable guides, it will need to be made clear what the changes are, why they are being made and what they will mean for consumers. That is for further down the road. It might even be important to provide a diagram that demonstrates where all the different bodies sit. There is the wider issue of how much we understand how our legal services work for us as consumers.

Robert Brown: I was not entirely sure of the thrust of the OFT’s evidence on the guarantee fund. One of the advantages of solicitor regulation is the existence of the professional indemnity policy and the guarantee fund. Is it your view that, however this is done, there will need to be a guarantee fund in place for other providers?

Sue Aspinall: We would like to have reciprocal arrangements for consumers so that that does not become an important factor in the choice about which provider they go to. We want them to know that they are sufficiently covered whether they go to an ABS or to a traditional practice.

Robert Brown: Does that mean yes or no?

Sue Aspinall: The guarantee fund would relate to providers of legal services.

Robert Brown: Okay. Through organisations such as the Association of British Travel Agents we try to provide increased protection against travel agents running off with people’s funds, going bust and so on. Should not the provision of the same level of protection for the consumer be a principal objective of the regime that we put in place with the bill?

Julia Clarke: Yes. The consumer should certainly have a level of protection equal to that which is available under the traditional arrangements.

Robert Brown: The Scottish Government is considering lodging amendments at stage 2 to regulate will providers. Does Which? support that proposal?

Julia Clarke: Frankly, we think that there is some opportunity for people other than lawyers to write wills. We would like that to be examined. We
have no evidence that that would result in any difficulty, provided that things are properly done. We think that there is opportunity for competition in that area, which would benefit consumers.

Robert Brown: Let me explore that a little bit further. What is the relationship between Which? and Which? legal services?

Julia Clarke: As part of our organisation, Which? legal services offers legal services to the public for a set fee.

Robert Brown: The written submission from the Scottish Law Agents Society mentions Which? legal services—I must confess that I knew little about such services before—as an example of what it calls “execution only” legal services. Referring to Which? legal services, the submission states that its

“terms and conditions in relation to Wills provide ... ‘The Service does not provide legal advice’. ‘The Service uses software for the assembly and drafting of a Will based on the answers you have given in your Will Interview Questionnaire. Your Will will therefore be generated automatically to reflect the answers you have given. You alone are responsible in ensuring that the answers and information you provide are correct and accurate’.

I think that the terms and conditions also make it clear that the service operates under English law. That sounds like not so much a legal service as a technical IT service, which has little regard for the intricate complications of will drafting. Will you comment on that?

Julia Clarke: I suppose that that is part of the opportunity that people should have to access different legal services, which is partly what we are hoping will happen. We hope that there will be a variety of service provision in Scotland, so that people can pick the service that is appropriate to them. Obviously, people who have a hugely complex estate would want to go to a solicitor for a will, but someone who has very simple affairs to settle might want to choose that way. It really depends on who you are and what your circumstances are. Certainly, I think that the provision of a plethora of services is important.

Robert Brown: Most lawyers would say that the interpretation of wills and the effects of intestate law are among the most complex and difficult areas of law because of the challenges and disputes that they lead to. Do you accept that?

Julia Clarke: I accept that that is sometimes the case, but in other cases people have fairly straightforward affairs. It really depends on who you are. Finding the appropriate level of support and services is very sensible.

Robert Brown: That leads on to the more complex question of the place of professional knowledge. Obviously, there is competition among solicitors and advocates, who are trained by quite a lengthy process. One would not expect a brain surgeon to have his business opened up to competition.

Julia Clarke: We would not expect a brain surgeon to take out someone’s tonsils, for example. Having the right professional for the right piece of professional work is important. We need the right safeguards.

Robert Brown: That is my point. Where do professional standards and training come into all this?

Julia Clarke: Which? has properly trained lawyers to hand among its staff. That is where that sits.

Robert Brown: Under the bill, would that be a necessary requirement for alternative providers? Would they need to have fully qualified lawyers if they were operating in the legal sphere?

Julia Clarke: In Scotland, for instance, we have independent conveyancers. We would like to see more competition in that area, as people use such legal services quite frequently. Added competition could drive down prices and benefit the consumer. At the moment, such services are regulated by the Law Society of Scotland, which we feel is not appropriate.

Robert Brown: My point is, where does professional competence come into it? What standards of competence will be required of people who operate in such fields? I do not think that licensed conveyancers are trained solicitors per se.

Julia Clarke: They have legal training, but I cannot say exactly to what standard.

Sue Aspinall: Licensed conveyancers undergo training to get the qualification, which is obviously more focused on their role. I do not believe that it is as detailed or lengthy as solicitor training. Similarly, will writers in England and Wales are members of a number of bodies and have to undergo training and continuous professional development.

Robert Brown: I suppose what I am getting at is the division between different sorts of areas of the law. There are clear areas, such as appearing in court as a McKenzie friend, for which a preponderance of legal training would be important, but other areas may not require that as much. For example, for issues of welfare law, citizens advice bureaux and others may come into the field and give very good advice. Does the Office of Fair Trading have a view on which core legal services require professional legal training?

Sue Aspinall: Any professional training or skill has to be appropriate to the service that is offered.
Robert Brown: Can you say in what areas that has to be the case and in what areas it is maybe more of an overlap with other professions?

Sue Aspinall: That is a bit more difficult to do. Obviously, if someone deals with complex cases, their required training and level of qualification must be higher than for someone doing regular, everyday procedures that do not need such a steep learning curve and for which the skills are different. To use the surgeon analogy, I imagine that someone would need far more skill to be a brain surgeon than to offer accident and emergency help in an ambulance.

Robert Brown: Where does the expertise come from for feeding into the regulatory body? If it is not from the Law Society, ICAS or another professional body of that kind, where does the expertise come from that enables the regulatory body to set standards for other groups or people as to the level of training and so forth?

Sue Aspinall: Obviously, organisations such as the Faculty of Advocates and the Law Society have been around for many generations, if not centuries, so they have evolved over time. Some of the newer bodies may well have been approved under statutory provisions whereby they must provide a suitable scheme of arrangements to the Lord Chancellor or the Scottish ministers, who then ask for input from the Lord President and the OFT. They will therefore all start in that way, then be developed over time and monitored and reviewed, as are the rules of the Law Society and the Faculty of Advocates.

The Convener: I think that that is as far as we are going to get, although Cathie Craigie has a final, brief point.

Cathie Craigie: Would the OFT have made such strong representations in support of the bill if Which? had not lodged its super-complaint? Which? is a charitable organisation representing consumers. Members around the table have pointed out that we recognise consumers as members of the public and not necessarily as large business. Before the super-complaint was submitted, what sort of consultation did you undertake with the public? What do you say to the perception out there that the bill is for big business and will drive down the business in the high street? What do you say to the point that the bill is an open door for third parties to come in and profit, rather than for consumers to receive justice?

Julia Clarke: Obviously, when we launched the super-complaint, the idea was to improve things for consumers. We still believe very firmly that that will be the case.

Cathie Craigie: What was your evidence? We have not heard any of that this morning. What was your evidence and research before submitting the complaint?

Julia Clarke: We knew that there continued to be problems with legal services.

Cathie Craigie: How did you know?

Julia Clarke: Just from consumers bringing complaints to us and—

Cathie Craigie: Well, you would know how many complaints were coming in then.

Julia Clarke: We do not necessarily have huge numbers of complaints, so I cannot say that that is the case. We sometimes cannot prove consumer detriment, but we know that, as a general principle, choice and competition opens doors for consumers to receive better-quality but cheaper services. I suppose that that general principle is our evidence base, as opposed to having specific evidence on legal services.

11:15

Cathie Craigie: So there are no facts or figures that you can share with the committee.

Julia Clarke: No more than there are on the side of the status quo to prove what consumers want. The issue is difficult. We simply have to apply general consumer principles as best we can.

Cathie Craigie: What about the point about profits?

Julia Clarke: In general, competition drives down prices for consumers and offers a range of ways of doing things that throw up benefits for people. We have seen that time and again over the 50 years of our history. When fair competition is introduced and consumers have choices, they tend to benefit. We believe that that will happen with the proposals that have been made.

Sue Aspinall: Before the Which? super-complaint, the OFT was involved in the research working group, along with members of the Law Society of Scotland, the Faculty of Advocates and the Scottish Consumer Council. The Scottish Consumer Council brought many concerns about consumer issues to the table in 2005 and 2006. The catalyst for the bill was the super-complaint; it was the work that was done before that in the research working group.

Cathie Craigie: Did you refer to the review working group?

Sue Aspinall: The research working group. Its name does not slip off the tongue.

Cathie Craigie: I understand that that group concluded that a couple of minor changes were needed, but that a lot more research had to be done before legislative change should be made. Where has that research been undertaken?
Sue Aspinall: The OFT and the Scottish Consumer Council often thought one thing while the Law Society and the Faculty of Advocates thought something else. I am afraid that I cannot recall the areas in which research has been undertaken.

The Convener: Stewart Maxwell will ask the final question.

Stewart Maxwell: I want to pick up on a small point. Julia Clarke talked about straightforward wills. Let us consider a will being made up for me by Which? legal services using the system that Mr Brown described. I and all my relatives and friends live in Scotland, and I own property only in Scotland. In Which?’s view, is it appropriate for that will to be drawn up under English law?

Julia Clarke: I do not have a great deal of information about that, so I cannot be very helpful to you, I am afraid. I am sorry. However, I can certainly find out about the matter and come back to you on it, Mr Maxwell.

Stewart Maxwell: It seems odd to me.

Julia Clarke: I take your point.

The Convener: Julia Clarke has given an honest response, for which I am grateful.

Thank you very much for your attendance, ladies. There will now be a brief suspension.

11:18

Meeting suspended.

11:19

On resuming—

The Convener: The second panel consists of, in splendid isolation, Professor Alan Paterson from the centre for professional legal studies at the University of Strathclyde.

Good morning and thank you for attending, Professor Paterson. We will go straight to questions. How satisfied are you that the bill addresses the specific issues that were examined by the working group on the legal services market in Scotland?

Professor Alan Paterson (University of Strathclyde): I should start by declaring an interest. I have connections with the Scottish Legal Complaints Commission, Citizens Advice Scotland, the Scottish Legal Aid Board and the joint standing committee on legal education. I have also had connections with the Law Society of Scotland in that I served on its council. However, I make it clear that I am here in my personal capacity as an independent academic.

You asked to what extent the bill addresses the issues that the research working group raised. I think that the working group left a number of questions up in the air, and in some ways I am not sure how far the debate on the fundamentals has moved on. However, the Law Society has voted in favour of the proposals and the Government is in favour of them, so we now have the bill.

The Convener: We have the bill, but we do not have the act.

Professor Paterson: That is true.

Cathie Craigie: It seems like you have a foot in every camp in the legal profession, Professor Paterson. The Law Society’s opinion on the whole issue changed considerably in the space of a year or so. Have you any idea why solicitors were able to come together in that way to change their view?

Professor Paterson: That is a very interesting question. I was on the council of the Law Society when it happened, but I cannot answer your question. Being on the council of the Law Society does not mean that one is privy to all the internal debates that go on at the upper reaches of the society. I suspect that the large law firms made their views very clear and that that had an influence, but I must also report to you—I do not think that this information is private—that the vote in the council on alternative business structures was very clear. Those of us who were in the minority were clearly in the minority and those who were in favour had a strong, solid majority. Those in favour were not individuals from large law firms; they were from high street firms, rural firms and so on. I was surprised by the degree of support that the ABSs attained. It must be the case that many of those individuals see opportunities in them.

The Convener: I take it that you do not think that the status quo is an option.

Professor Paterson: I am not sure that the status quo has been fully understood or developed. The status quo allows multidisciplinary practices, and there is no problem with multidisciplinary practices with different professionals working in the same firm, provided that one professional grouping—for legal services, it would be the lawyers—are in charge of the firm, are regulated to be in charge of the firm and have the responsibilities of running the firm and complying with the professional standards and the regulatory objectives. To me, that does not pose problems.

There can be disciplinary problems for the non-lawyer professionals in the practice, but that can be dealt with by holding the lawyer partners responsible for their non-lawyer colleagues. That is how it works and it is an effective mechanism. A multidisciplinary practice has all the advantages of a multidisciplinary partnership, except that the
non-lawyer members cannot take a share of the profits. However, with a bit of imagination, ways of doing that, which are quite legal, can be found.

I never understood those who wanted what was called the legal disciplinary partnership to allow the human resources or IT staff who were important to the organisation to have equivalency in its operation. I always thought that it was possible to do that anyway with a degree of imagination, but others felt that those staff needed to be made partners, which is why there was a drive to multidisciplinary partnerships at that level.

Nigel Don: I want to pursue that issue briefly. I was speaking to the previous witness panel about the fact that it seems that the door is already open to doing precisely the type of thing that you have suggested. Surely, if the HR boss, but not the director, was on a performance-related pay system, it would not be particularly difficult to get most of the economic benefits that we are talking about—although I appreciate that bonuses are not flavour of the month—without having to change the legal structure.

Professor Paterson: I agree with you on that, but I am afraid that my viewpoint did not prevail.

Nigel Don: I will return to the subject of advocates. Your written evidence to the committee describes the statutory framework as “skeletal”, which is fair comment, given that you were referring—I presume—to section 82 of the bill, which does not say very much at all. What additions do you think should be made?

Professor Paterson: If you examine the provisions for improved regulation in the Solicitors (Scotland) Act 1980, you can see that, on regulation, we can go a lot further than the three sections that appear in the bill. I am not necessarily saying that we should go that far, but in the 21st century the notion that there should be consumer and public input into the regulation of professions is becoming widely accepted across a range of professions.

The Faculty of Advocates has accepted that in relation to complaints, and it should accede that it is the way forward for regulation, as it is for the Law Society of Scotland, the Law Society of England and Wales and the Bar Standards Board in England and Wales. It is the way forward in many professional organisations, as it ensures that the public interest is fully recognised.

I do not believe in separating the regulatory and representative arms of the profession. It is important—indeed, vital—for the future of a healthy profession that it keeps the professional interest and the public interest in mind, and holds them together in tension, as section 1 of the 1980 act requires.

Nigel Don: Forgive me—I was actually referring to chapter 2 in part 4 of the bill, beginning with section 87, which deals with regulation. I wanted to get that correct on the record, because I had forgotten the number.

In my discussion with the previous panel, I suggested to one witness that regulation by the court ought to be adequate. Do you feel that that is adequate under the circumstances?

Professor Paterson: Not in the 21st century. In Scotland, whenever there has been a tricky regulatory problem in the past, we have had a slight tendency to say, “Oh, we’ll give it to the Lord President”. That leads to overload, or the potential for it, particularly if we do not give the Lord President the staffing, the office and the support that he or she needs to carry out that function.

There has been a tendency to leave everything to the Lord President and to assume that whoever holds that office can carry out more and more functions. That is not a good tendency to have with regard to regulation. I have no objection to the Lord President playing a role, but if he or she is to play a role in approval, along with ministers, some of the things that apply to ministers should apply to the Lord President. In other words, he or she should be asked, or expect, to receive comments from consumer and other bodies—whichever organisations are consulted under the regulations in the relevant sections of the bill—and move in the direction of a modern regulator.

11:30

Nigel Don: Does that mean that we necessarily have to go away from the Lord President being notionally the right person? Do we just have to ensure that he—possibly she, in time—has the appropriate staff to do that regulatory work? That might be cheaper than generating another body.

Professor Paterson: Indeed, but he must also be approachable and expect to receive representations from a wide range of interested stakeholders and individuals. That is the way in which regulation is moving.

Nigel Don: Might that be achieved simply by introducing a duty to consult a list of consultees, if necessary?

Professor Paterson: Yes. That would be a start.

Angela Constance (Livingston) (SNP): What evidence is there that opening up the legal services market to both banks and supermarkets will increase access to justice?

Professor Paterson: None of us knows the answer to that question, but all of us—including the consumer movement, the SLAB and the Law
Society—have views on it. We have relatively little research evidence on what will happen, but we have a lot of hypotheses about what might happen.

Retail analysts have done a fair amount of research into the impact of supermarkets and it is not all negative, which is why we all go and shop in supermarkets, but what would be the impact of supermarkets delivering legal services? According to the analysts, supermarkets have led to the closing down of many high street butchers, bakers and so on. Some niche markets have survived, but statistics and charts are available that show the decline of the high street provider. One could not really object to supermarkets providing exactly the same or a better legal service—to a higher quality and at a cheaper price, as they would say—but it is not clear that that would be the case. Although some people have argued that legal services are just like a can of beans, I am not sure that they are exactly the same.

One argument is that, being smart businesses, the supermarkets will enter the areas of legal practice and legal services from which they can make significant profits, whereas they might not be so attracted to the areas in which there is less money to be made. In rural areas, there is not a huge amount of money to be made from legal aid work even if a firm is efficient—and if a firm is not efficient, it cross-subsidises legal aid.

My concern on that front is that supermarkets will not choose to do legal aid work. They might do it—it has been suggested that there might be new providers in that area of legal practice because of the provisions in the bill that focus particularly on access to justice—but I do not believe that supermarkets will see enough financial incentives in doing legal aid work, especially in rural areas. That might lead either to high street firms going under or, more likely, to high street law firms not doing work that they regard as non-remunerative.

Angela Constance: Do you have similar concerns about banks?

Professor Paterson: I suppose that I do. We are all a little less trusting of banks now than we were two years ago. Two years ago, when we had these debates, there was talk of light-touch regulation down south. The Law Society hoped that we would have light-touch regulation, and Clementi adopted the financial services model. However, many people now think that that model has not worked particularly well and that—as the Government has said in relation to the bill—we need robust regulation.

Angela Constance: You have already touched on the regulation of multidisciplinary practices. In your view, does the bill provide a satisfactory framework for dealing with divergences from and differences between respective professional standards and codes of conduct?

Professor Paterson: As my written evidence suggests, that is not my view. To my mind, one of the clearest issues with alternative business structures is the fact that professional providers and, indeed, non-professional providers have different regulatory standards. In other words, how do we prevent standards being gradually watered down to the level of the grouping whose standards, one might say, are lower?

Although all professional groupings have—often quite high—standards, they do not all have the same standards. With regard to conflicts of interest, lawyers have the stronger standards and offer the greatest protection to the public, whereas other professional groupings tend to have slightly more relaxed approaches to such matters. In a multidisciplinary partnership, there will be pressure, intentional or otherwise, to move away from the stricter standards that apply to lawyers—or at least those in Scotland—towards a more relaxed approach to conflicts of interest. Personally, I think that that would be a bad thing.

Angela Constance: Instead of leading to a lowering of standards, could the overarching framework provide opportunities to raise the bar for other professionals?

Professor Paterson: If the bill spells out the professional principles a bit more than it does at the moment and includes what I regard as the more stringent standards, it is likely that the new entities will be required to achieve those standards. I also hope—and I note that the bill does not state this fully—that all legal services providers in alternative business structures or working as a licensed legal services provider will be required to comply with the higher standards.

Anomalies will arise if members of an LLSP do not comply with the standards and enter into a conflict of interest. I understand that, if someone or several people in an entity breach the conflict of interest standards, the issue will be policed and the entity disciplined through a regulatory complaint mechanism. However, the lawyers in the entity will be disciplined according to their standards, while any accountants involved will be disciplined according to their standards, which, as far as conflict of interest is concerned, are more relaxed and permit more information barriers. Other non-professionals might be judged against lesser—or the same—standards, but the point is that we will get into a regulatory mess and have what I call ethical Esperanto. What ethical code will apply to these beasts? I hope that it will be the lawyers’ ethical code, but when so many of the people involved will be non-lawyers it will be difficult to expect them to attain and be inculcated with those conflict of interest standards. I am not saying that it will be impossible, though.
Bill Butler: I suppose that my question is also about ethics. In relation to the regulation of third-party ownership, how satisfied are you that the fitness for involvement tests will be effective in excluding criminal elements from investing in or taking control of law firms?

Professor Paterson: That is a real problem; indeed, the Law Society itself is worried about it. I suppose that you could follow the Solicitors Regulation Authority in England and set out a series of tests to exclude people with recent criminal convictions from being able to invest in firms and so on, but it would be difficult to do and would certainly open up a risk area.

Bill Butler: Is that because a close relative or relatives of someone with a criminal background might be given the wherewithal to invest?

Professor Paterson: People will think up all kinds of ways of trying to avoid the regulations, so I am with you on that score and I hope that the committee will think hard about the issue. The problem is whether you can prove that the system will work.

Someone asked earlier what the Australian standards on third-party ownership are. I had a research assistant look at the issue a year ago, and we found that the Australian tests are not particularly clear. I e-mailed the two lead regulators in Australia a week ago, knowing that I was coming to the committee, so that they could give me an update. Unfortunately, I have not received a response from them, but I can supply the information in written evidence when I get it—I know both the regulators.

Bill Butler: That would be very useful, because we have not yet had anything on which to base our deliberations on this particularly difficult issue.

On international comparisons, other than Australia, does any other country have such a test?

Professor Paterson: Not many other countries have gone for multidisciplinary partnerships or external ownership of investment and law firms, so the answer to your question is no. The Americans, who we might think would have gone for it, have hitherto been fairly resistant, although there are one or two weakenings. The big drive in the States towards MDPs came from the accountants, and the Enron scandal put a stop to that for several years.

Bill Butler: Yes, I can understand why.

Robert Brown: What is the situation in European countries, which is one market that one might think we would be interested in? For example, are there multidisciplinary partnerships in France, Germany or Italy?

Professor Paterson: There are in one or two instances, as tax accountants and lawyers can form partnerships in certain European countries. However, the tax accountant is a very specialised professional, so such a system does not mean that management consultants or accountants can be in partnership with lawyers; it is self-contained and it has not proved to be a problem.

Stewart Maxwell: I take Professor Paterson back to Bill Butler's question on the risk of criminal elements investing in or taking control of law firms. We can all see how it could be done, and it has been done with other firms and businesses—the person who seems to own the business does not necessarily control it. However, in practice, is there a genuine risk of such elements taking control of law firms? Why would they? It would be just as easy for them to employ a lawyer as to take control of a firm—if not easier.

Professor Paterson: Yes, I take your point.

The Convener: I think that Professor Paterson has anticipated some of the questions that James Kelly intended to ask. Is there anything that you wish to follow up, Mr Kelly?

James Kelly: As has been said throughout the evidence sessions, the regulation that is proposed is complex. One concern that has been raised is that the budget that is allocated to overseeing it is perhaps minimal—the starting figure is around £13,000. Do you have any views on whether enough finance has been provided to support the new regulatory system?

Professor Paterson: Is that Government finance?

James Kelly: Yes.

Professor Paterson: The figure sounds a bit on the low side. Ministers will perform the role that the Legal Services Board performs down south, and I think that they may find that it costs rather more than £13,000. The Legal Services Board is a very lean outfit and was designed in that way; it has a relatively small staff of 35. The Government might find that it has to spend a little more than the figure that you mention.

11:45

Stewart Maxwell: I will follow on from the issue about ministers' involvement, although not so much their budgetary involvement. Arguments have been made in evidence that there is a problem with the bill creating a regulatory and overseeing role for ministers and the independence of the legal profession. Do you share that concern and, if so, why?

Professor Paterson: I see where the argument is coming from, but the fact that ministers are to be
subject to the better regulation principles and scrutiny means that I do not have a great concern. I understand the concern, but external ownership and multidisciplinary partnerships make me worry about a threat to the independence of the profession as well. Those are all threats that come with the bill. Presumably, the Government will be open to judicial review of anything that it does as a regulator, so that could be a further protection.

As I said in my written evidence, I would not necessarily be opposed to the Lord President playing a role in regulation, but it would have to be fairly confined to areas of legal competence.

Professor Paterson: On independence from the Government, I can see that there is an argument for bringing in the Lord President in the kind of role that we discussed earlier. However, the situation would be awkward. Who would decide on an application? Would it be the minister or the Lord President? Would the Lord President have a veto? Would they decide jointly? I am not sure that I quite see the answers.

I wonder whether, at the end of the day, we are going to be forced into having a legal services board. You might say that that is bureaucratic, but it would be a super-regulator, and the way in which the Legal Services Board is set up in England and Wales guarantees independence.

Stewart Maxwell: Are further safeguards required? Should other provisions be made to ensure that independence, or does the bill strike the balance as best it can?

Professor Paterson: That is the debate. The ministers think not.

Stewart Maxwell: What do you think?

Professor Paterson: Frankly, it depends on how it is done. I can see the argument, and it is finely balanced. I am not necessarily in favour of more bureaucracy for the sake of it, but I can see certain advantages in having an independent legal services board.

Cathie Craigie: We have written evidence from a host of interested individuals who represent different parts of the Scottish legal profession. One submission suggests that, if the bill is passed in its present form,

"the independent Scottish legal profession as we know it will ... be in danger of being lost forever."

The submission goes on to say that

"once this process begins there is a similar danger that the practice of Scots law will reduce".

The implication is that firms will move south and establish their practices there. Do you have any comment on that?

Professor Paterson: I saw that and I was intrigued because one argument that the large law firms might have used—if they used arguments—was that they might move south if changes were not made.

Much of what the large law firms in Scotland do is not within reserved areas—in other words, someone does not need to be a Scottish solicitor to do it. A firm could therefore move south and register as an alternative business structure in England and Wales and, if many firms did the same, it would have quite a serious impact on the provision of legal services, the separate legal system, and the legal culture of Scotland.

Fortunately, most large law firms value being Scottish solicitors—whether it is because of the brand or the independence that they enjoy—so it is less likely that they will move south as a result of the changes. Indeed, it is more likely that they will move south—or, at least, register there—if we do not have the changes.

Robert Brown: Earlier, with regard to execution-only legal services, I asked about will writing. Do you have any concerns about the explanations that we were given? We were told that no legal advice was necessary and that it can be an IT matter involving the answering of questions. Do you regard that sort of service provision as desirable?

Professor Paterson: All providers of legal services should deliver an adequate professional service whether or not they are doing it for free. With regard to whether they have to perform to the legal standard that is required of lawyers, I am sure that the consumer movement would say that that is unnecessary—one must bear in mind advice that is given by citizens advice bureaux in that regard.

I occasionally worry about execution-only legal services, especially when lawyers deliver them. There are circumstances in which they can do so, but I am not keen on that happening.

Robert Brown: Earlier, with regard to conflicts of interest, we heard about the possibility of surveying services being supplied by legal firms as part of a new entity. Do you have any observations on that?

Professor Paterson: I saw the conflict of interest in the situation that you were talking about.

One argument that is made in relation to alternative business structures is that there is an inherent conflict of interest. The one-stop shop sounds like a good idea—I have already said that
it is a good idea, in relation to multidisciplinary practices—but there is an inherent conflict of interest. If a lawyer finds that someone who has come through their door is also in need of an accountant, they will most likely send that person to their accounting partner rather than to a niche specialist down the road.

In most circumstances, however, the convenience of using the internal accountant—who will, we hope, deliver a good service—will outweigh the fact that that service might not be quite as good as the one that would have been provided by the niche specialist down the road.

The Convener: Thank you, Professor Paterson. You have given us exceptionally useful evidence.

11:53

Meeting suspended.

11:56

On resuming—

The Convener: I welcome the final witnesses of the morning: Richard Keen QC, dean of the Faculty of Advocates; Iain Armstrong QC, vice-dean of the faculty; Tom Marshall, vice-president, civil, of the Society of Solicitor Advocates; and Paul Motion, secretary of the society. Thank you for your attendance. I am sorry that your appearance has been slightly delayed—as you probably saw, we were dealing with some complex stuff.

We move straight to questions. Is the current model for advocates and solicitor advocates in Scotland fit for purpose in our times?

Richard Keen QC (Faculty of Advocates): I believe that it is. I noted that Professor Paterson referred to the proposed regulation of the faculty as “skeletal”. I would use the term “concise”. The structure of the bill is important. In that context, I draw the committee’s attention to section 86, which is fundamental to the regulatory regime that is proposed. The section provides that the regulatory authorities, which include the Lord President and the Court of Session, be subject to the regulatory objectives. That is the umbrella under which the scheme proceeds. The regulatory objectives are to be found in section 1 and have primacy not only in their numbering but in their impact on the bill as a whole. If one appreciates that the regulatory objectives are central—they are the pillar around which the bill is constructed—one can see that, although the provisions for some aspects of the regulation of the Law Society of Scotland and the Faculty of Advocates may be concise, they are effective.

I return to the question, as I ought to do.

The Convener: Indeed.

Richard Keen: I consider that the present system works effectively and that the proposal will be fit for purpose. I add one point, which Nigel Don raised. In the context of the regulation of the faculty, which is principally involved in advocacy before the supreme courts, an immediate form of regulation is an effective form of regulation, which is the court exercising its right to regulate the behaviour of those who appear before it.

12:00

Tom Marshall (Society of Solicitor Advocates): As the committee is aware, a review into rights of audience is going on, which was instigated by the Cabinet Secretary for Justice. The Society of Solicitor Advocates is actively participating in the review and we think that it would be discourteous to pre-empt its findings.

We set out the principles on which we believe that rights of audience must be exercised in the paper that we provided to the committee this morning. Those principles apply to all lawyers and are internationally accepted throughout the European Union. They are the principles of conduct, and they apply as much to solicitors as they do to advocates, because they are found in the Law Society of Scotland’s standards of conduct and in the Faculty of Advocates’ guide to the professional conduct of advocates. That is the fundamental basis on which we believe that rights of audience must be exercised. The bill’s main impact on solicitor advocates would therefore be in the context of solicitor advocates who were a part of or employed by a licensed legal services provider.

The Convener: Are you content to leave your evidence at that? I know that you might be inhibited about commenting until the interim report is produced in January.

Tom Marshall: Yes, if I may.

The Convener: I understand the sensitivities of the situation.

Stewart Maxwell: How effective is the court as the ultimate regulator of advocates? The witnesses considered that point in their submissions, but it would be useful to discuss it.

Richard Keen: In my view the court is an effective regulator, at two levels. First, ultimately the court approves all regulations of the faculty—and indeed may veto the regulations of the faculty—on admission and conduct. That is an overarching regulatory role. Secondly, there is a more fundamental and immediate form of regulation, which is connected to that. When an advocate appears in front of the court, he knows that the judge before whom he appears has the
right to regulate his conduct and to ensure that he behaves properly and professionally, in the interests of his client and in no other interest. The judge may intervene in the course of a hearing, although that would be exceptional, to point out that he is not happy with the conduct of an advocate or the manner in which representation is being carried on.

Those two levels of regulation have operated for about 300 years. That is not necessarily a point in their favour, but they have evolved and they have been effective. In my view, one has to look beyond the express provision of regulation—that is, the upper level—and bear in mind the secondary level of regulation, which is also highly effective.

**Stewart Maxwell:** In practice, the court involvement that you are talking about happens during a hearing. What about the wider regulation of advocates? As you say, the judge would intervene infrequently during a hearing to make the kind of statement that you have suggested. How are advocates regulated in their day-to-day work, rather than just in court?

**Richard Keen:** The regulations on the conduct of advocates are initially promulgated and then submitted to the Lord President of the Court of Session. What then follows is a series of meetings between the court and the faculty with regard to any proposed change in the regulations. It is necessary for the faculty to make a case as to why it is that change will it be made.

**Stewart Maxwell:** Do you accept that there is a perception among some members of the public that that is a bit of a cosy relationship?

**Richard Keen:** That is sometimes suggested. I point out that one must have regard not only to consumer interest but to the public interest in the administration of justice. If we want to maintain a strong, independent Scottish legal system, we require a strong, independent Scottish legal profession. We will not necessarily weaken that by introducing outside regulatory bodies and I am not suggesting that we would, but we have an effective system of regulation that has maintained a strong, independent Scottish legal profession and, in turn, a strong, independent Scottish legal system. I note that three things distinguished Scotland between 1707 and the introduction of this Parliament: the church, education and the law. We managed to maintain all three for 300 years.

**Stewart Maxwell:** Strangely enough, I have no argument with the maintenance of the independence of the Scottish legal system or of those who practise within it. However I think that, in passing, you accepted that to move the regulation of that system to an independent body would not necessarily change that. Do you accept that involving non-lawyers in the regulation of advocates would not alter the independence of the legal profession? If not, what is the problem with non-lawyers being involved in the regulation of advocates?

**Richard Keen:** It is a question of how and why as much as anything else. If we want to maintain the independence of the courts—which is fundamental—and of the legal profession, there must be a dividing line between the courts and the executive. That is already recognised by the Judiciary and Courts (Scotland) Act 2008, which provides for the position of the courts and the Lord President.

If you are looking to future regulation, you can address various models of regulation. Scotland has maintained the model of regulation by the court over a long period. That model is not unique to Scotland—it is employed in many of the states of the United States and elsewhere in the Commonwealth—but it is effective in ensuring direct regulation.

Regulation by the court does not exclude the interest of the public or the consumer because, under section 86 of the bill, the Lord President and the Court of Session in general are bound to proceed in accordance with the regulatory objectives when looking to the regulation of the legal profession. Those objectives are set out in section 1. Professor Paterson asked whether the Lord President would consult and receive the opinions of certain parties, but he is bound to because only by doing so can he adhere to the regulatory objectives. He must know what is in the public interest.

**Stewart Maxwell:** I fully acknowledge your point on section 86 and, indeed, on the basic regulatory objectives that are set out in section 1. That said, why would there be a problem if non-lawyers were to become involved in regulation? Would that, of itself, cause difficulties? I think that you accept the public perception that self-regulation is an issue. I am talking not only about lawyers: members of Parliament have come up against the problem in recent times. Do you accept the analogy?

**Richard Keen:** We are not self-regulating. I like to think that we might be, but I know as a matter of fact that we are not. Not everything that I suggest to the Lord President is adhered to or agreed to; I can assure you of that.

There is also the issue of proportionality. The 17,000 barristers in England and Wales make for a formidable regulatory issue. In Scotland, we have a bar of 460 people. We could think up a complex model for Scotland such as the bar standards board that is in place in England. However, if we were to impose that on the
relatively small bar in Scotland, we would be imposing an enormous overhead in relative terms on the delivery of legal services. At the end of the day, the customer—the consumer—pays the overheads.

Stewart Maxwell: Albeit that I accept your argument on proportionality, the question remains with regard to which side of the argument we come down on. Do the other panel members have anything to add?

The Convener: I am particularly interested in what Mr Marshall might have to say. Do you wish to adopt the dean’s argument, detract from it or add anything?

Tom Marshall: I do not want to impinge on the workings of the Faculty of Advocates. I return to the original question. The disciplining of solicitor advocates was at the forefront of discussions in 1990 when extended rights of audience were being debated in the House of Lords during the passage of the Law Reform (Miscellaneous Provisions) (Scotland) Bill. In the main, the debate in the House of Lords was conducted by Scottish judges who were also members of the House of Lords. They were very keen to ensure that the solicitors who were to appear in the supreme courts would be subject to the same kind of disciplinary procedures and practices as advocates. That was the main intention behind the wording of section 25A, as it became, of the Solicitors (Scotland) Act 1980.

Difficulties and differences remain. Clearly, there is a close relationship between judges and the Faculty of Advocates. All the judges in the supreme courts are former advocates who are used to having a degree of contact and exchange, in which problems can be dealt with in a relatively informal way without someone having to kick up a ruck or the matter having to be exposed or dealt with in the public gaze. Some may think that such an approach—in which not everything is done in the open—is no longer appropriate, but some little issues can be dealt with quietly by people just getting on with things instead of having a huge hoo-hah and a big public debate at vast expense.

Solicitor advocates feel that there may be scope for changes that would achieve the original objective of ensuring that solicitor advocates are treated exactly the same as advocates and that disciplinary procedures and issues of conduct can be dealt with in exactly the same way. At the moment, the system does not quite achieve that even though that was the intention. That is where the Ben Thomson review comes in and, as I have said, it would be better to wait and see what he says about the detail of that.

12:15

Nigel Don: How many solicitor advocates are there? I have no idea.

Tom Marshall: At the moment, there are about 250.

Bill Butler: Good afternoon, gentlemen. Issues of professional misconduct by an advocate will continue to be referred to the faculty for investigation. What safeguards are required to ensure that the system of self-regulation is patently fair and equitable?

Richard Keen: One has to take a step back from the point at which a matter is referred to the faculty. Any such complaint goes first to the Scottish Legal Complaints Commission—all complaints go to the commission, without exception. The commission then determines whether it is dealing with a service complaint or a conduct complaint. If it decides that it is a conduct complaint, it will refer the matter back to the faculty. If the faculty did not then deal with the matter, the commission would come back very quickly and ask what was going on. Inevitably, if a conduct complaint is referred back from the commission, it is dealt with through the faculty’s system, on which, as you know, there is lay representation. Thereafter, if a complainer is not satisfied, the case may be appealed or referred back to the commission. However, whether it be a service complaint or a conduct complaint, it always goes back to a lay commission. There was a time when judges might have dealt with complaints informally. However, that is what happened in the past; nowadays, if we receive complaints, they go to the commission.

Bill Butler: They are never dealt with informally.

Richard Keen: Not any more.

Bill Butler: When was the last time that a complaint was dealt with informally?

Richard Keen: I will explain my experience in that regard. When a judge is concerned about the conduct of an advocate, he may write me a letter. If that letter involves a complaint about the conduct of that advocate, I make the complaint to ensure that it goes to the commission.

James Kelly: What would be wrong with a system in which consumers had direct access to advocates?

Richard Keen: There is a system of direct access to advocates, but it is generally limited to professionals who are seeking opinion work. A firm of accountants or surveyors can instruct an advocate directly when it wants an opinion. For example, we are currently dealing with the Chartered Institute of Patent Attorneys. Other
bodies of that ilk have rights of direct access to advocates.

Why should the general public not have direct access to advocates? That simply could not happen under the existing model. Let us take, for example, a criminal case. If someone has been charged on indictment, they go to a solicitor. If, in due course, they need to be represented in court, that solicitor may instruct counsel. If, however, the person who is charged with an offence goes directly to counsel, counsel is not equipped to make the inquiries and undertake the preparation that is always essential in such a case. Counsel is not in a position to go out and take statements or liaise with police officers—that is not our business model. We simply cannot function in that way; we are a referral bar.

However, we do not prohibit direct access. In circumstances in which opinion work or similar work is sought, we will accept direct access. It goes further than that—for example, we have recently considered changes in our regulations to allow direct access for things such as employment tribunal work.

James Kelly: I realise that they will not want to compromise the on-going consultation, but how do our witnesses feel about the current system of solicitor advocates? Has it helped to increase competition and choice in legal services for consumers?

Tom Marshall: Undoubtedly, it has. The benefit of a solicitor advocate was always the closer relationship that he might have with the client, given that the client approaches a firm of solicitors in the first place. Initially, the solicitor that people approached might have been a solicitor advocate, although that perhaps happens less now, as the model is becoming more and more like that of the Faculty of Advocates, in that solicitor advocates operate purely as such within a legal practice. Initialy, clients had an opportunity to go directly to someone who would present his or her case in the supreme courts, whereas, before the system was introduced, there had to be the instruction of the solicitor and then the involvement of the specialist pleader to present the case. The solicitor advocate has a potential advantage in that they are a specialist pleader with those skills, but at the same time they might be in a closer relationship with the client and therefore more aware of the client’s requirements. They are not a purely separate professional with the particular role that the dean of the faculty has just described.

Richard Keen: I will add one point on that. In theory, the system should increase choice but, in practice, there are areas of law in which it has not been done so, particularly in criminal work. That is a regulatory problem, which is related to the point that Professor Paterson made on the issue. When people go to a firm of solicitors and explain that they have a particular problem, for example that they have just been charged with murder, too often, they are offered the solicitor advocate who is the partner of the person with whom they are having an interview, so they do not have the option of going to Queen’s counsel or a member of the faculty. That is not to decry the system of solicitor advocates; it is just to point out that there is a regulatory issue that must be addressed.

The Convener: That is of course part of the present inquiry, following on from the Woodside appeal.

Richard Keen: Indeed.

Nigel Don: I return to the point that Mr Keen made about direct access to counsel for opinions. Ignore the fact that I am an MSP and consider me an ordinary citizen who happens to live in a house on an estate where the factor is not doing a terribly good job. That is a current issue, as Mr Keen might be aware. Because I have some legal background, I can see what the issues might be and I do not need a solicitor to tell me that, but I really want counsel’s opinion. How would I get that, other than going through a solicitor? Is there an option?

Richard Keen: You would have to go through a solicitor in that case. From our perspective, one issue is that we do not know that you have a law degree, so we do not know the extent to which you can analyse the problem and determine what the issue is. I can say from personal experience that when counsel are asked to provide an opinion, we are often asked to answer a series of questions, but we often end up redrafting the questions before we give the answers. It is fundamental to such matters that people know which questions to ask. Of course there are people out there who are perfectly able to determine what question to ask and what question they want answered, but we have to decide where to draw the line. There will be some people who are above the line and who would be able to instruct counsel without going through a solicitor and some who would not. It is a question of determining where we place what I would call the safety net. We do that by reference to the background and qualifications of those who instruct the opinion. A simple example is perhaps accountants, but there is a long list of bodies that can now instruct counsel directly for opinion work.

That has not been opened up to the general public because we have to put the safety net somewhere.

Nigel Don: You say that the list is essentially made up of professional bodies. Is that list on your website?

Richard Keen: Absolutely.
Nigel Don: So although the public have perfect access to that list, they do not have perfect access to you—in fact, they have no access to you. Any individual has to go through a solicitor.

Richard Keen: That is correct.

Nigel Don: If that is the way it is, so be it. That has at least clarified the point.

Cathie Craigie: Underlying the bill’s approach to advocates is an assumption that advocates who wish to benefit from practising in a business entity involving other advocates, solicitors or third parties can do so by becoming solicitor advocates. What costs would be incurred by an advocate in doing so? Would they lose any status?

Richard Keen: The costs would be minimal. We have had instances in the past year in which people have left the faculty and become solicitors within a short period—I am talking about days. I do not know what the Law Society charges them to go on the roll of solicitors. However, it would not be a difficult thing to do.

This is one of the interesting aspects of the Scottish bar as distinct from the English bar. As you may know, in England and Wales, the training regimes for the bar and for solicitors are entirely separate. You might do a law degree or you might not, but the two regimes separate at birth and never meet again. It is fair to say that about 95 per cent of advocates in Scotland have all the qualifications required to be a solicitor. In fact, the only ones who do not have those qualifications tend to be people who have come from England and qualified for the bar up here. Almost everyone else has all the requisite qualifications to go on the roll of solicitors.

The issue that I raised in the context of the bill was whether people should have to requalify as solicitor advocates—should they become a member of the Law Society or should they be able to practise in the High Court with their previous right of audience? In England, if a barrister becomes a solicitor, he carries with him his right of audience in the Supreme Court. That does not happen in Scotland, and it is not covered in the bill. I do not think that it is a necessary prerequisite because in fact the transfer is fairly straightforward.

There is a difference going the other way. Many solicitor advocates become solicitor advocates only for the purposes of criminal work. Therefore, if they wanted to go the other way, they would have to address the issue of civil qualifications, too.

Cathie Craigie: So it is easy to transfer out and not quite so easy to transfer back in.

Richard Keen: I believe that that is the case.

As regards loss of status, that must be in the eye of beholder.

The Convener: Mr Marshall, I will not ask you to comment on any potential loss of status.

Tom Marshall: I am much obliged.

The Convener: Do you have anything else to add in general terms?

Tom Marshall: Transferability—the mutual recognition of qualifications, if you like—is another issue that is being considered by the review. Again, I anticipate that the committee may hear more about that in due course.

The Convener: Yes, indeed.

Paul Motion (Society of Solicitor Advocates): On a point of clarification, the Society of Solicitor Advocates is a voluntary organisation and does not have a formal role in the regulation of solicitor advocates. For the committee’s information, the current split of our membership is approximately 60 per cent civil practitioners and 40 per cent criminal practitioners.

Robert Brown: The faculty has set its face against non-lawyer ownership of legal firms. Will you give us an idea of your thinking about the risks associated with that model?

Richard Keen: There are potentially very real risks. You may be aware of the Bain report in Northern Ireland, which concluded that the risk there was very significant, largely because of the historical background. There was a great deal of concern that firms of solicitors would come to be controlled by factions within the shadows of Northern Ireland politics.

It is possible to put safeguards in place, but as soon as somebody puts up a fence, someone else finds a way round, over or under it. Professor Paterson candidly acknowledged that earlier. With shadow directors and shadow owners, the business can be difficult to regulate. There is a real issue there. The question, if I may put it back to the committee, is a political one: is the risk such that you should not take that step as far as outside ownership is concerned?

12:30

I have a concern for the Scottish legal profession. Although the arrangements would not impact on the bar, if we do not embrace the proposed model but the larger firms want it, they might be tempted effectively to reincorporate themselves in England. We do not want to see that happen.

Robert Brown: Does that work both ways? Risks have been voiced about the potential for English firms to take over Scottish firms. The
same end result would emerge if the whole idea of multidisciplinary partnerships was allowed to proceed.

Richard Keen: English firms take over Scottish firms already. As Mr Marshall will be able to confirm, Thompsons England and his firm, Thompsons Scotland, are two parallel partnerships. No doubt they are entirely separate legal entities but in reality they operate in close cooperation.

I do not think that there is a real risk of English firms storming in and taking us over. I believe that we can fight our own corner and that, as long as we deliver the service that the consumer and the public need and want and provide suitable means of access to justice, we can maintain our independence. My greater fear is that if a business model is available in England but not in Scotland there will be a temptation for some larger firms to go down and join the English Law Society and leave the Law Society of Scotland. That would not be a good thing.

Tom Marshall: I am less concerned about the involvement of lawyers from other jurisdictions. I hasten to say that Thompsons Scotland and Thompsons England and Wales, although they bear the same name, no longer have any relationship. Once upon a time, they had a closer relationship than they do now. We have mutual clients, but we operate entirely separately.

My particular concern relates to something that was said earlier about perception. If a new licensed legal services provider with outside ownership acted for a client in a court case that was lost, and if the client subsequently discovered that the owner of his law firm had a financial interest in the opponent in the case, the client’s perception—even if the lawyer who had been handling the case was entirely oblivious to the situation—would be that the service that he had received was somehow tainted by the relationship between the owner of the law firm and the opponent.

As I see it, and as we say in our submission, section 51 says that owners must behave properly, in that they must not actively take steps to impinge on the legal work of the organisation. In the example that I just cited, no active steps would be involved—it would be a passive situation. It seems that the bill does not deal with such situations; in my respectful view, it should.

The Convener: There being no other questions, I thank the witnesses very much for their attendance.

Richard Keen: I thank the committee for receiving us and listening to us.

The Convener: Always a pleasure, Mr Keen.
Scottish Parliament

Justice Committee

Tuesday 15 December 2009

[The Convener opened the meeting at 10:01]

Legal Services (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning ladies and gentlemen. I formally open the final meeting in 2009 of the Justice Committee, and remind everyone to switch off their mobile phones. There are no apologies as the committee has a full turnout.

The first item is continued consideration of and taking of oral evidence on the Legal Services (Scotland) Bill. I welcome the first panel of witnesses, who are all from the Law Society of Scotland. They are: Ian Smart, president; Lorna Jack, chief executive; Michael Clancy, director of law reform; and Katie Hay, law reform officer. Mr Smart, I take it that you will be lead witness, so if I and other members put the questions to you, you can allocate them to the appropriate officer.

Is the Law Society convinced that the bill is necessary and that the establishment of alternative business structures will benefit users of legal services in Scotland as well as practitioners?

Ian Smart (Law Society of Scotland): The short answer to your question is yes. The bill largely implements the policy that the Law Society adopted at our annual general meeting in May 2008.

We support the proposed legislation for a number of reasons. The first is simply that the legal profession’s structure is changing. The conventional view of a solicitor in Scotland is someone who is in a relatively small and modest partnership of three or four solicitors based in a county town, but the profession’s current demographic is far from that. Three quarters of all solicitors are now employed in one capacity or another. Some are employed by the state—locally or nationally—and others by the private sector directly, but a good number of them are actually employed. The old partnership model is in steady decline. The Law Society already allows limited liability partnerships and, since 1990, incorporated practices, and we see the bill as the next stage.

It is clear that in some areas—more in relation to commercial users of legal services—there is demand for a one-stop shop, where more than one professional service is provided under one roof. Recent research by KPMG south of the border—albeit it involved the Scottish market—indicated that a substantial 75 per cent of commercial users of legal services welcomed that model. We looked into that model and, frankly, had some concerns about the ethical issues, but they have been worked through in our policy and in how the Government has implemented that policy through the bill. We see no reason why the bill cannot be the next stage in modernising the provision of legal services to the public.

The Convener: For the record, can you remind us how many members the Law Society has?

Ian Smart: We have approximately 10,500 members.

The Convener: Do members’ views differ on the way forward?

Ian Smart: We would not kid the committee that there is no difference of opinion. We can say only that at the annual general meeting vote on the matter, it was agreed by a margin of more than four to one to endorse the principle of alternative business structures.

We have reservations about some of the technicalities of the bill, which we will be happy to go into as the questioning develops. Although there is a perfectly respectable opinion that is opposed to the bill’s principles, particularly that of external ownership of legal businesses, all the evidence suggests that that is a minority opinion.

The Convener: You will have heard the evidence of Professor Alan Paterson last week, who suggested that the proposals are driven by the larger partnerships. Do you have a comment on that?

Ian Smart: We cannot lose sight of the fact that the larger partnerships are an important part of the Scottish legal services market. It is fair to say that the larger firms see themselves as most immediately in a position to take advantage of the changes. However, smaller firms might do so in some circumstances. One change in the market in my time has been that while client-facing services were overwhelmingly—almost universally—provided by solicitors in the past, increasingly, in certain areas of the market, paralegals play an important role. At present, it is not possible for paralegals to be part-owners of a business. An employee share ownership scheme is not possible in the legal business, although it is in just about any other business. Small firms are likely to take up that opportunity.

Bill Butler (Glasgow Anniesland) (Lab): I have a question about fact, just because I am inquisitive. What percentage of votes at the Law Society’s annual general meetings are cast by the larger partnerships?
Ian Smart: To give a broad breakdown of the profession with very round figures, one third of members are in-house solicitors—people who work directly for central or local government, Standard Life, the Royal Bank of Scotland and other major corporate institutions—one third work in the traditional high street model as partners or employees, and one third belong to the big firms, which we define as those with more than 20 partners.

Bill Butler: That is handy, but it does not quite answer the question. You say that the types are divided into thirds, but what percentage of votes are exercised at AGMs by, let us say, the big firms? Is it one third, or do they have a larger percentage? That was the question.

Ian Smart: We operate with one solicitor, one vote. We have a system of proxy voting, so a member can appoint someone to cast a vote on their behalf. The president of the Law Society commonly has the largest number of proxy votes at general meetings. The voting is inclined to be affected by what is on the agenda. We had a special general meeting in the past year on criminal legal aid fees in which almost all the votes were cast by criminal legal aid lawyers, with in effect no participation by the bigger firms. The particular group in the profession that has an interest in what is on the agenda is inclined to be represented more. Mr Maxwell will know that home reports were controversial. On that issue, a huge number of votes were cast, mainly by proxy, but they came largely from solicitors who were involved in domestic conveyancing, as they had a direct interest.

Bill Butler: I am obliged for that answer. One solicitor, one vote is very democratic, and I agree with that. Do you have a breakdown of the votes that were cast by the more traditional, smaller partnerships to show what percentage of that third voted for the bill in principle and what percentage were against it?

Ian Smart: I do not and, to be honest, it is not really possible to give you that breakdown. I can tell you that approximately 1,000 votes were cast at the AGM and that the margin in favour was more than four to one. However, we did not analyse the composition of the minority, or indeed the majority.

Bill Butler: That is a pity, but thanks for that.

Robert Brown (Glasgow) (LD): I want to pursue that. Can you tell us how many proxy votes were cast at the AGM that considered the principles behind the bill?

Ian Smart: The voting at the meeting was 801 to 132. We have figures for the show of hands at the AGM. If you give me a moment, I will try to find the reference.

Lorna Jack (Law Society of Scotland): The other thing about the bill is that it is not mandatory; it is a permissive bill that will allow new structures but will not stop the traditional parts of the profession, particularly those in private practice, remaining structured as they are. We are in favour of that.

The Convener: Do you have the figures now, Mr Smart?

Ian Smart: Yes. On a show of hands, the vote was 49 to 18, which gives you an idea of the number of people who were present. On a proxy vote, the result was 801 to 132. Probably 10 times as many proxy votes were cast as there were people at the meeting. I have to say that that is quite often the situation at such meetings, because they take place during the working day and working lawyers cannot always take time out of the office to come to them. They are inclined to entrust their vote to somebody they know.

Robert Brown: You indicated that criminal lawyers were usually the ones who voted on criminal legal aid issues. Was that the case with the big firms at the meeting that we are talking about? That is what I was asking—I think that Bill Butler was asking that, too.

Ian Smart: Yes. The big firms were particularly animated about getting this policy through. You will hear later from the Scottish Law Agents Society, which is probably the single most representative group of the high street firms. As Mr Maxwell knows from his experience of the home reports, the SLAS has the ability to organise very well if its membership is animated enough about a matter. It chose not to organise in opposition to the policy.

Robert Brown: I take that point absolutely, but we would not be pursuing these angles were it not for the fact that there appears to be quite a bit of legal opposition to the policy. The Scottish Law Agents Society and others appear sceptical. Do you want to comment on that? Is the profession overwhelmingly in favour of the policy, which you rather implied at the beginning, or is that view overwhelmingly driven by the large firms, which is the impression that one gets from the evidence that we have seen so far? I am asking you to draw that out from the figures.

Ian Smart: I say with due modesty that a number of people around the table know me and the sort of law that I practise. I have never worked for a large commercial firm and I have no interest in ever doing so. I have always been a supporter of the policy. I know that a large number of others in the small-firm sector can see advantages to it.

I will give you a practical example. At present, you cannot provide legal services to the public if you are not in a business that is wholly solicitor
owned. Mrs Craigie and I know a local solicitor in Cumbernauld—he lives elsewhere now—who practises employment law. His business model involves him, a management consultant and a human resources professional—they have a business that gives advice. If their clients are taken to an employment tribunal, it is possible for him to represent them at that tribunal, because such tribunals are not in the reserved area. However, if his clients are sued in court, it is illegal—indeed, it is a criminal offence—for him to represent them, because his business structure does not allow it.

We heard the Office of Fair Trading’s evidence. We have to say that the idea of your routine high street surveyor and your routine high street solicitor getting into the same partnership is fanciful. However, there might be business vehicles that involve a solicitor as one of a number of people who bring together different skills to deliver a specific bespoke service. We do not have a difficulty with that in principle.

Robert Brown: I can see the argument based on the example that you gave, but I can also see potential limitations. I want to break this down, as there seem to be a number of different issues. I presume that the issue of the ability of Scottish law firms and English law firms to be in partnership together is relatively uncontroversial. There is also the issue of lawyers, accountants and surveyors going into partnership. In the tax field, for example, one can see that there is a certain match with lawyers and accountants. You talked about partnerships with surveyors and lawyers, as did the OFT. Not to beat about the bush, are there not problems with conflicts of interest there?

Ian Smart: I did not see the OFT giving evidence, but I had the opportunity to read the Official Report of it. The suggestion that, within one business, a surveyor might value a house for the seller and the solicitor might act for the purchaser is inconceivable to us, because there would be a patent conflict of interest in such a business model. You described that model as “extraordinary”. The OFT chose a bad example. However, somebody might create a bespoke model, such as a business that offered a land acquisition service that scouted out land for clients. The business would have a land agent, a surveyor and a solicitor to deliver a seamless service that involved identifying and valuing the ground, negotiating the price and acquiring the ground. That would all be done by one partnership of different professionals. We have no difficulty with that business model.

10:15

Robert Brown: Does that lead into the problem of the sort of non-lawyers with whom lawyers can go into partnership, in what circumstances and for what purposes? That arises in connection with the regulation of will writing, which was raised last week. On the face of it, the example in the Scottish Law Agents Society’s submission of will writing that does not involve legal advice makes my hair stand on end—I say that as a former solicitor. I am raising the brain surgeon issue. Should some areas of legal practice be only for lawyers? Are other areas, for which the professional training is less important, not as exclusive?

Ian Smart: I am conscious that I am doing all the talking, so I will pass that to Michael Clancy to answer.

Michael Clancy (Law Society of Scotland): The bill will not affect the scope of the reserved areas under the Solicitors (Scotland) Act 1980—

Robert Brown: What are the reserved areas?

Michael Clancy: They are the preparation of writs that relate to conveyancing, of documents in respect of confirmation of executors and of writs that relate to court process. Those reserved activities can be done only by solicitors and some other professionals; to do them for gain in any other circumstance is an offence. The clear answer to Robert Brown’s earlier question is that the reserved areas will be unaffected by the bill and such activities will still have to be done by a solicitor in a licensed provider situation.

It should be remembered that in a licensed provider firm—if such creatures come into being—the head of legal services will have to be a solicitor. One can envisage that the head of legal services will be responsible for ensuring compliance with the law and practice in relation to the preparation of the documents that I mentioned.

Robert Brown: Is the list of reserved issues long enough? Should additions be made?

Michael Clancy: We have spoken about our concerns about unregulated services. It is fair to say that we have concerns about unregulated will writing services. We would certainly sanction extending regulation to them.

Robert Brown: Does further work need to be done to dig down into the problem of the sort of people who can go into partnership with lawyers and how all that should work? One feels that we are bringing out evidence and that we have perhaps not thought about some matters—the Law Society has a particular view. Does more work need to be done to identify limits or restrictions on or to expand who lawyers can go into partnership with and for what purposes, and how that is regulated?

Ian Smart: First, we should say to avoid doubt that the bill is permissive. We expect our
regulatory rules to restrict with whom one can go into partnership. That will apply to any model that we are prepared to regulate. We have said that our policy inclination is to regulate only businesses that are clearly and primarily legal businesses, although their activities might cover other areas. The bill does not give us monopoly regulation powers, and other regulators could enter the market, but before other bodies are allowed to be regulators they will have to show that they have in place appropriate rules and codes to deal with regulation.

It is important to talk about external ownership. We have talked so far only about partnership; external ownership is almost a separate matter. As I said, in certain circumstances external ownership could also be internal ownership, as there could be employee participation, but the bill specifically provides for a fitness-to-own test to be passed. We are strongly of the view that that test is an essential part of the proposals and that sections 50 and 51 are therefore essential to the bill. We make no bones about the fact that if those provisions were not in the bill, it would not have our support.

James Kelly (Glasgow Rutherglen) (Lab): I come back to what I said, which is that, bluntly, it is regrettable—we make no bones about it—that we do not get a greater degree of participation, but it tends to be the case that people organise when they are strongly in favour of or strongly against something. The position on the bill was that a certain section of the profession was very strongly in favour of the proposals and the rest of the profession was essentially neutral.

We are not seeking to disguise the fact that, on our council and elsewhere, there has always been a minority opinion in the profession that opposed the proposals in principle. We can say only that we tested opinion over a period of time and all the evidence that came back to us was that the position that we have arrived at was the dominant opinion within the legal profession in Scotland.

James Kelly: How do you defend against criticisms that using proxies rather than having an individual postal ballot was an undemocratic way in which to conduct the vote?

Ian Smart: We do it that way because, under the standing orders of the Law Society, our AGM has a variable agenda. Motions are tabled, but amendments can be tabled on the day, so it is difficult to say in advance specifically what will be voted on and where we stand on matters. It has been in the Law Society’s constitution since it was created in 1949 that we deal with people’s inability to attend events by having proxies. It is difficult to see, particularly on such a complex issue, how we could find a single question that we could put out to a referendum—for want of a better phrase—that would give us a clear result. The consultation document that we produced is substantial; it is not a single paragraph proposition. The bill is a substantial piece of legislation and it was not possible to reduce it crudely to a yes or no question.

James Kelly: I have one final question on the process. You have indicated that you conducted a consultation process to inform the decision. What research and analysis did you carry out on the proposals in the bill?

Katie Hay (Law Society of Scotland): I can give a bit of background on the consultation. In September 2007, we held a conference on the future of the legal services in Scotland, at which the Cabinet Secretary for Justice was the keynote speaker. At that conference, the cabinet secretary foreshadowed his response to the OFT’s response to the Which? super-complaint by saying first that the status quo was not an option and that restrictions would need to be lifted but that, basically, he would offer the Law Society of Scotland—and, I think, the Faculty of Advocates—the opportunity to come up with proposals on how those could be lifted in the profession’s interest.
We drafted a consultation paper that was 24 questions long and focused on all the different models of business structure. The consultation ran for three months. We produced a report analysing the responses—we can make that report available—but a brief run-down is that we received 92 responses, of which 28 per cent were from firms of one to five partners and 24 per cent were from firms of 30-plus partners. It is fair to say, obviously, that some respondents were for the change, some were against it and some thought that it was probably an inevitability. The respondents did not really point to one definite course of action, but they said that, regardless of whether the legal profession was to be liberalised, its core values had to be upheld, its independence had to be protected and consumer safeguards had to be in place.

Bearing in mind that we were given a mandate to come up with proposals, we took from the consultation that we should propose a policy that liberalised the legal services market without compromising on robust regulation and that offered those solicitors who did not want to opt into such a regime the ability to continue to practise within a traditional model. We also aimed to do that while maintaining core values and protecting our independence. That was the intention behind our policy paper, which was very much informed by our consultation exercise.

I would be happy to forward the consultation report to the committee, if members are interested.

The Convener: Perhaps that could be done.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning. The Law Society of Scotland is a respected organisation, such that when it speaks people tend to listen. However, the level of response to the society’s consultation is disappointing. For a society that comprises 10,500 solicitors and 1,200 partnerships or companies, 92 responses is not a high response rate.

Prior to 2007, the Law Society was opposed to the proposed changes. At the conference in 2007, the Cabinet Secretary for Justice seems to have said, “This is the only game in town, so you must change or we will pass you by.” I would like to know a bit more about why the Law Society’s opinion changed so much, from being outright opposed to the ideas to agreeing to the general principles of the bill.

Like other colleagues, I am also concerned that—to any outsider who does not know how the society’s AGM works—it appears that a big company came in with a carrier bag full of proxy votes that changed the society’s opinion. I know that the panel has already tried to answer that point this morning, but that hardly seems a transparent and just way to go about representing 10,500 people.

Ian Smart: I can say only that our structure gives every solicitor the opportunity to entrust a proxy vote to someone else, who will cast the vote on that person’s behalf. That has been the society’s structure since time immemorial. There is no perfect way to represent our membership, given the geographical issues involved—solicitors from rural Scotland cannot realistically be expected to come to one place—and the fact that the AGM needs to be held during the week, which is when court practitioners in particular have other commitments. However, we did not entrust everything to that single big-bang approach. As Katie Hay emphasised, we also went through a consultation exercise.

Why did the society’s policy change? It did so for two reasons. The first reason was because that was what the membership wanted. You should not underestimate the significance of that. If our membership had continued to oppose ABS in principle, the democratic will would have been carried through. I probably would not have been here as the president if that had been the case, because I have always been on the other side of the policy argument, but in a democratic organisation people are entitled to change their view.

10:30

I have never believed that it is a valid argument to say that something must happen in Scotland because it has happened in England and Wales, but the second reason was the changed legal environment in England and Wales following the Clementi review and the Legal Services Act 2007. Many of our bigger commercial firms saw the danger that the liberalisation of the market in England would allow big firms in the City of London to encroach on Scotland. The view was therefore taken that we must be given the opportunity to compete with them on a level playing field. It is ironic that we can preserve the independence of the Scottish legal profession and avoid it being taken over by the behemoth legal 500 firms in London only by matching what has been done in England.

The Convener: I want to move on, but I have a couple of questions before we do. Can you encapsulate briefly the advantages for legal services users of the bill’s implementation?

Ian Smart: I have tried to give a number of examples of different structures that might emerge. I make no bones about emphasising that we feel that the bill will primarily be in the interests of commercial users of legal services, who are a huge part of the market. We cannot give you a
percentage, but the bigger legal firms overwhelmingly do commercial work. There is clearly a demand from their client group for what the bill proposes, otherwise it would not be happening.

**The Convener:** You anticipate that, if the bill were not passed, business would be lost to Scotland, because much of the business that our big firms carry out would move south.

**Ian Smart:** The danger is that we could see our big firms choosing to go to and be regulated in England and Wales, which is an option for them, given current cross-border provisions. If they have an office in London, as almost all our big firms do, the tail can wag the dog, because the firms can choose to be regulated in England and Wales if that allows them a more liberal business structure. The other danger is that if English firms are allowed external capital, they will be capitalised to the extent that they could start simply taking over even some of our biggest firms and treating them as subsidiaries.

**The Convener:** I will allow Mr Brown only a brief question, because we have a lot to get through.

**Robert Brown:** Is there any way of cutting off the top level of solicitors to allow all that you mention to happen in a way that does not interfere with the operations of the more traditional one third at the bottom?

**Ian Smart:** The key point, which is a very important aspect of the bill, is that none of what I have described will be compulsory; it will be entirely voluntary. The bill says specifically that the traditional form of legal practice, whether it is a partnership with other solicitors or a sole partnership, is not to be affected at all. The regulatory area is difficult, but we think that the Government has achieved a compromise that allows everybody to get what they want from the market but preserves the importance of a unified legal profession, which we might get a chance to say more about later.

**The Convener:** We have had a lengthy kick at that particular ball, so we will move on to other issues. Mr Smart and his colleagues have already answered a number of questions that we intended to ask, so members will no doubt dovetail their questions accordingly. We turn now to the independence of the legal profession.

**James Kelly:** Mr Smart, you referred in a previous answer to the importance of protecting the independence of the legal profession in Scotland. How will the proposal to ascribe regulatory powers to the Scottish ministers protect the legal profession's independence?

**Ian Smart:** If you do not mind, I will get Lorna Jack to answer that.

**Lorna Jack:** I think that we have already made known our view on this question. We see a need for the Lord President's role to be re-established beyond just simply being a consultee so that it involves an approval mechanism. We therefore think that the bill needs to be amended in that respect—we have made that point.

In their evidence, others have talked about the need for a super-regulator, as exists in England and Wales. However, we feel that that is inappropriate for the Scottish market, given its size. Given that the bill provides for ministers to decide after taking independent advice, we do not think that there is a requirement for a super-regulator. If you supplement that with a role for the Lord President in approving regulators, you will ensure that the independence of the legal profession is protected. We would have concerns about there being an additional layer—a quango—and about the cost of that to consumers of legal service in Scotland and, potentially, to taxpayers. The basis of our argument about ensuring the independence of the legal profession is that, alongside ministers, the Lord President takes a role in approving those who get to regulate people who deliver legal service.

**Michael Clancy:** I will supplement Lorna Jack’s comprehensive answer. There are provisions in the bill in respect of the regulatory objectives whereby approved regulators and indeed, by virtue of section 86, the existing regulators, such as the council of the Law Society, the Faculty of Advocates and—[Interruption.] I will just wait for the noises off to stop outside the committee room. [Interruption.]

**The Convener:** I will suspend the meeting until we find out what is going on.

10:36

*Meeting suspended.*

10:37

*On resuming—*

**The Convener:** The committee will reconvene.

**Michael Clancy:** One of the regulatory objectives of the bill is to promote the independence of the legal profession. That applies not only to approved regulators but to the existing regulators under section 86. Furthermore, the Scottish ministers, who have a particular role to play in relation to the approval of regulators, are also captured by the regulatory objectives in section 4, “Ministerial oversight”. The trouble is, of course, that ministers are to act in the way that is set out “only so far as practicable”.

That provision needs to be strengthened a bit.
Lorna Jack adverted to the role of the Lord President. We certainly think that the Lord President’s role should be enhanced from the position in the bill. In the original consultation, “Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland”, the Lord President was listed as being someone who had to agree to the authorisation or rescission of authorisation of an approved regulator, yet, in the bill, he turns out to be a “consultee” in that process. It would be appropriate for the Lord President to be reinstated to his position as someone who acts in concert with the Scottish ministers in that respect.

Where the bill deals with the specific role of the Scottish ministers regarding elements in the legal profession, there are concerns about how that will work. In my earlier discussion with Mr Brown, I referred to section 39, “Head of Legal Services”, in which it says that the head of legal services has to be a solicitor. However, under section 39(9), the Scottish ministers can make regulations about that person’s functions. It is inappropriate that the Scottish ministers should be able to tell a solicitor what to do.

Furthermore, section 35, which deals with ministers’ step-in powers, includes the proposition whereby ministers could create an approved body that would be involved in the licensing of those who deliver legal services. That is also a difficult issue, because as the Scottish ministers could create an approved body, they would then have to approve that body, so there would be a kind of infinity loop of ministerial control. That, too, should be struck from the bill.

I think that I have covered everything, but Katie Hay has a point to add.

Katie Hay: It is just a small point. In his response to the consultation, the Lord President thought that his office should have a role in the authorisation of regulators of alternative business structures. He made the point that “the risks posed to the due administration of justice by inadequate regulation are sufficient to merit that level of involvement on the part of the holder of that office.”

The Convener: That deals with those issues.

James Kelly: I have one final point. Are the funds that are outlined in the financial memorandum to the bill adequate to meet the costs of the regulation that will come into force if the bill is passed?

Lorna Jack: That is a difficult question to answer, given that we face an unknown picture as far as the number of licensed legal service providers and the number of regulators that might step forward are concerned. It is clear that the bill provides for the opening up of the regulation system to regulators beyond the Law Society of Scotland. We made that clear in our evidence on the financial memorandum.

An attempt is being made to ensure that the proposed system is more cost effective than what we have seen south of the border by avoiding the creation of superstructures or super-regulators. In England and Wales, the Legal Services Board and the Office of the Legal Services Complaints Commissioner cost around £39 million, which is split between the Law Society and the Ministry of Justice. Right now, they have only one regulator to regulate—the Solicitors Regulation Authority. In Scotland, we want to avoid a situation in which multiple regulators step forward and such a cost structure is required, certainly before we know how many regulators we might be dealing with. This year, solicitors in England and Wales have faced an initial leap in costs of 20 per cent on top of their practising certificate fee, which has gone on paying for those superstructures.

The Convener: We move on to questions on regulation which, to some extent, has already been dealt with.

Stewart Maxwell (West of Scotland) (SNP): Before I ask about regulation, I take the panel back to section 39(9), which Mr Clancy mentioned and which I have just had a look at. Given the need for flexibility to cope with unforeseen circumstances, if section 39(9) were removed from the bill, how could changes and adaptations be made other than through primary legislation?

Michael Clancy: Another mechanism could be employed, whereby the approved regulator could make changes to the role of head of legal services under the licensing or practice rules that have to be issued by the approved regulator. That would be one way in which the functions could be changed.

Stewart Maxwell: Would that not result in self-regulation by the regulator?

Michael Clancy: No, because the head of legal services is not part of the regulator. The head of legal services is someone who is employed by a licensed provider or who is a principal in the licensed provider firm.

Another route would be to have the approved regulator ask the Scottish ministers to make regulations, but that is a different track.

Stewart Maxwell: I can see the relevance of your second option, and I recognise your earlier points about the Lord President’s role.

I move on to ask about the kind of regulatory bodies that might be set up under the bill. Should a fully independent regulatory body separate representative and regulatory functions? Would such a model better meet the needs and interests of consumers?
Lorna Jack: There has been a lot of confusion about what the separation of regulation and representation means. How we interpret it is how it is set out statutorily, which is for the potential regulator such as the Law Society of Scotland to have an obligation to the profession and the public in relation to the profession. That does not challenge any voluntary representation that others might have in other ways. There are already bodies such as the WS Society, which provides terrific support services, and organisations such as the Glasgow Bar Association and the Family Law Association. There are a number of voluntary bodies that support the profession.

The Law Society’s current obligation to the profession and the public is no different from the responsibility that we see in other professional bodies. The Institute of Chartered Accountants of Scotland and the professional bodies for surveyors and architects all carry an obligation to uphold the integrity of their profession in the interests of the customers whom they serve. We see ourselves as a professional body in that respect. We therefore believe that we can be a competent regulator of licensed service providers in the legal market, as others might be.

10:45

Stewart Maxwell: You do not share the concerns of some of those who have supplied written evidence about the dual function that would occur if the Law Society became one of the regulatory bodies.

Ian Smart: We have that dual function at the moment.

Stewart Maxwell: I appreciate that.

Ian Smart: The matter is visited from time to time within the profession. I have been on the council of the Law Society for 11 years, and during that time it has been debated periodically. On each occasion, we came to the conclusion that the current situation was the best available, as did the Parliament during its early days when it looked into the matter in an inquiry into the regulation of the legal profession in Scotland. We can easily point to flaws in the system from the point of view of the consumer’s interest or that of the profession, but we have a compromise for a profession of 10,500 in a relatively small country, and there is a degree of clarity.

As Cathie Craigie said, people understand what the Law Society is and the role that it holds, and that understanding exists not just within the profession but among the general public. We have an identified role in Scottish public life. The danger in fragmenting that is that it will not be entirely clear who speaks for the legal profession, and if someone has a client complaint or a general complaint about the legal profession, it will not be clear to whom they will make the representations that they want to make.

Lorna Jack: We have suggested that the bill needs to be amended in this area, particularly when we think about other regulators that might step forward into the licensed service provider field. The bill does not require a level playing field in terms of compensation to customers. We have said that there needs to be commonality between regulators in serving both the professional need and the public interest need.

Stewart Maxwell: One of my colleagues might want to question you further on the level playing field aspect.

I return to the point that Robert Brown raised earlier about conflicts of interest. Is it your view—I think that I picked up that it is—that it is best for the regulatory bodies to deal with the regulation of conflicts of interest, rather than for the bill to deal with it?

Ian Smart: I think that that is our view. We anticipate that certain things will be in our regulatory rules. A fundamental rule that applies to the profession at present is that solicitors do not act where there is a conflict of interest. There are very limited exceptions where there are family members on opposite sides of a transaction and so on but, generally speaking, that is the rule. Another golden rule is that the solicitor’s money and the client’s money never mix. The firm’s financial affairs must be kept separate from the client’s financial affairs, and the client’s money must be guaranteed in all circumstances against business failure, dishonesty and negligence.

All those things are likely to be in any regulatory regime that we propose. In the end, the matter is one for the Scottish ministers, but we hope that they will insist that all those things are in the regulatory regime of any alternative regulator, because we believe that they are essential public protections.

Stewart Maxwell: I agree. In effect, the question is beginning to crystallise into how we ensure that that will be the case. If it is done in the way that you suggest, how will we ensure that other bodies that want to set up as regulators effectively follow a similar example? I am sure that the committee will discuss that in some detail.

Michael Clancy: The provisions in the bill for reconciling different regulatory conflicts between professional bodies might go a long way towards meeting your concern.

Katie Hay: I also point out that, in the regulatory scheme that will have to be approved by the Scottish ministers before an approved regulator can be authorised, it will have to be able to
demonstrate how it will deal with regulatory conflict.

**Nigel Don (North East Scotland) (SNP):** Good morning, ladies and gentlemen. I was going to ask you about your concerns about the level playing field with regard to the regulatory burden, but I suspect that you have said everything that you wanted to say about that. Is there anything else that you wanted to say on the matter?

**Lorna Jack:** We have focused on the compensation aspect, but another area where there should be a level playing field is complaints handling.

**Nigel Don:** As your written submission is pretty comprehensive on such matters, I will not pursue that line of questioning.

Given that firms can already get loan capital and protect it with a floating charge and can employ other professionals on bonus schemes and with other mechanisms that give them a significant commercial interest in the company, do we actually need ABSs at all?

**Ian Smart:** I tried to give one or two practical examples of what is not provided in the current market. We are lawyers, after all, and there is a great deal of ingenuity in the way things operate. I gave the example of employee shared ownership but employee bonuses that are tied in some way to performance or the quantity of business that a firm gets are common, even in the smallest of firms, and are in no sense illegal.

Perhaps I should turn the question back on you. We examined whether there was an ethical difficulty with further liberalisation and concluded that there was not. If there is no ethical difficulty, why not let it happen? I understand your point that, from an economic point of view that anyone who launches a new business venture is taking on risk and should therefore receive a proportionate—or, indeed, disproportionate—reward.

**Michael Clancy:** Legislation for ABSs is also necessary to deal with certain restrictions that are set out in the 1980 act, which regulates solicitors. Those restrictions, which include allowing licensed providers into reserved areas, are all detailed in section 90 of the bill.

**Nigel Don:** Playing devil’s advocate for a moment, I think that we will all acknowledge that, compared with models elsewhere that have been mentioned, Scotland is a relatively small place and that, even if these provisions are agreed to, there will probably never be more than two regulators: the Law Society of Scotland and ICAS. Could we not achieve all the benefits that we hope to accrue from the bill by making relatively small changes to the regulations that cover those two organisations and be done with it?

**Ian Smart:** As far as our interests are concerned, the honest answer to your question would be yes. If you are playing devil’s advocate, I suppose I should play devil’s advocate on behalf of the consumer lobby and say that what you describe would in effect be the Scottish Parliament delegating monopoly regulation powers to two randomly chosen organisations and creating an artificial restriction on other people entering the market. In terms of market intelligence, we agree that, to the best of our knowledge, the only other seriously interested player at the moment is ICAS. It is interesting that, in England, which allows for a multiplicity of regulators under a super-regulator, the Solicitors Regulation Authority is the only player two years after the Legal Services Act 2007 came into operation.

**Nigel Don:** That is consistent with my observation of the real world, and we occupy the real world. Although we have listened to people giving us, dare I say it, rehashed O level economics about why things should happen, I do not see any evidence that they will. If we are all in the same place, I wonder whether we need to go down that route, but perhaps that is for another day.

**The Convener:** Indeed. We now turn to the fairly vexed question of outside ownership. Cathie Craigie will pursue that matter.

**Cathie Craigie:** Is there a danger in the bill that outside ownership might lead to law firms offering only profitable legal services to the exclusion of less profitable work?

**Ian Smart:** There are two separate questions in that. There is provision for the transparency of external ownership in the bill that, in an odd sort of way, does not really exist in the traditional model. If a solicitor sets up in business under the traditional model and trades within the Law Society’s rules, there is no scope for an investigation of where the money came from to set up the business in the first place. It is regrettable but undoubtedly true that, from time to time, solicitors find themselves unduly indebted to an unsavoury client. Within the current model, there is
the example within the past 18 months or so of a solicitor who provided a false alibi for someone on a robbery charge to whom the solicitor had become unduly indebted. That is the current model. The bill provides for greater transparency and visibility of the external investor in a business. Sections 50 and 51 provide for a fitness-to-own test to be applied by a regulator. Therefore, we are not concerned about that.

Your wider question is about profitable legal services. Undoubtedly, high street firms have traditionally regarded themselves as having some kind of public service duty; they have provided services that are profitable overall—or they would not be in business at all—but they have felt under an obligation to provide assistance in unprofitable areas in the public interest. However, we are conscious that that element is going, even within the traditional model. People are cherry picking. In particular, when financial times are hard, people have to concentrate more on the work that is definitely making them a profit.

Behind all that lurk separate access-to-justice issues, which I hope we will get the opportunity to talk about. We do not think that ABSs are the issue here. The issue is a change in how the legal services market is operating, unfortunately.

Cathie Craigie: We are picking up a concern in the written evidence that we have had so far. A few years ago, the "Tesco" word was tripping off everyone’s tongues—large organisations might come in and mop up all the profitable work, which would affect the smaller high street firms. Such firms are more than just solicitors but they still want to make a profit. They do a lot of pro bono work for organisations in their community, but if they do not get a profit out of that local community, they will go somewhere else. If people look for cheaper legal services online or somewhere else, that threatens the smaller high street solicitor.

11:00

Ian Smart: I agree with that as a statement of principle, but people are being unrealistic about the extent to which that is already happening in the legal services market. High street firms are already under pressure from people who have commoditised certain elements of legal services. Domestic conveyancing is the most obvious example, but we could argue that summary criminal work, which is also fairly profitable, is increasingly being commoditised and concentrated in a few hands, too.

However, that is almost a separate issue from the one that we are dealing with in the bill. I make no bones about the fact that, when the process started, our big worry was not so much about the supermarkets entering the market, but about the banks doing so. We were worried that, when somebody got a mortgage from the Royal Bank of Scotland, HBOS, Lloyds TSB or whoever, the bank would package everything up and provide a lawyer from a central call centre. The one and only bright spot in the banking collapse is that there is now no prospect of the banking regulator allowing banks to move into what is in effect the one remaining independent bit of the market. That is not as much of a danger as it once was.

Michael Clancy: We should not forget that, under section 11, the licensing or regulatory scheme must take account of competition issues and whether there would be a material disadvantage to competition in a particular area as a result of an application for a licence. An approved regulator has to have those issues in mind to ensure that granting a licence does not produce an imbalance.

Cathie Craigie: The granting of one licence for the whole of Scotland might produce an imbalance. One licence might make it easy for people to deal with their legal needs over the telephone or by going to Edinburgh or Glasgow. I apologise if I am taking a wee step back, but why are we going in the direction in the bill when, from the written evidence that we have received, it seems that only two other countries in the world—England and Australia—have done the same?

Michael Clancy: People can get legal advice over the telephone or internet at the moment. Therefore, we are not persuaded that the granting of a licence will cause a rush of people to leave their traditional relationships with firms to seek advice from a firm that has obtained a licence and is doing all its business over the internet. The challenge of new technology and how the legal profession in its broadest sense relates to clients through it is a topic for another day.

On support for change in the way in which legal services are delivered, sure enough the Legal Services Act 2007 in England and Wales is the first exponent in these islands of changes in the way in which solicitors can relate to other professionals and deliver services. There have also been changes in Australia, and changes are afoot in Europe, too—we cannot forget what is happening in Europe. An earlier question related to the Clementi review in 2006-07 but, before that, Commissioner Monti had embarked on a European Commission-sponsored review of the legal profession in Europe in which he found a number of restrictions. That resulted in a relaxation of restrictions in countries such as France, Germany and Italy.

I take it to be understood that we cannot compare the legal profession in France to that in Scotland, as there are inherent differences, but it is possible in France for certain arrangements to
be made in terms of what is called la société pluridisciplinaire. In Germany, under the Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France the règlement intérieur national allows for similar changes. In Italy, all the restrictions have been removed on certain forms of relationship between lawyers. We tend to think of Europe as fortress Europe, with no change happening there. That is not entirely true. I understand that Spain and some of the Nordic countries now permit external ownership.

**Cathie Craigie:** One submission suggests that the bill is a “threat to Scots Law”, which will “lead to its marginalisation” and allow people from outside Scotland to work in Scotland—people “for whom Scots law is an alien system”.

The submission goes on to say that the legislation in England “does not threaten English law.”

**Ian Smart:** Obviously, our view is that having a separate system of Scots law is a matter of critical importance. There are already cross-border firms in operation and, ironically, if there were a liberalised legal services market in England and a restricted market in Scotland—albeit one in which the liberalised sector could operate in Scotland, which is the current legal position—the independence of the Scottish legal profession would be imperilled. The danger is that some of the big commercial legal firms in Scotland would continue to practise in Scotland but choose to be regulated in England and Wales. Some of the biggest English firms have already set up branch operations in Scotland. They have done that perfectly amicably; those operations are at the smaller end of the business. However, many of our big firms have a London base and they could choose to switch their regulation—to use an in-vogue phrase—to England and Wales. It is not change that is a danger to the independence of the Scottish legal profession, but no change.

**Cathie Craigie:** So you disagree totally with the view in the submission?

**Ian Smart:** I disagree fundamentally with it.

**Michael Clancy:** We talk about the preservation of Scots law, and we have to stand back and look realistically at the situation. The institution in which we are sitting is one of the foremost bulwarks against the denigration of Scots law or it becoming an item in the history books. Ten years ago, the Parliament came into being to rejuvenate Scots law, and it has done that. We have to be proud of that achievement and not toll the bells for the funeral of Scots law. In fact, legislation that is permissive may give Scots law an opportunity to shine across the world and to provide access to justice to many more people than we serve at present.

**Cathie Craigie:** That is exactly why we must take very seriously the submissions that we receive and put the views that are expressed to our expert panels.

My next question is for Mr Smart. Earlier, you spoke of money from sources that are not squeaky clean. The committee is concerned that the bill is not strong enough to ensure that third parties with a chequered past cannot invest in a law firm. You said that you could not support the bill if it did not include sections 50 and 51. Do those sections cover properly any practice that takes money from an outside source?

**Ian Smart:** Again, although the question is put to me, I will defer to the experts: Michael Clancy or Katie Hay.

**Michael Clancy:** I would defer to the experts too, but I will try my best to answer—you will just have to put up with me.

Section 50 sets the test for fitness to own. We have to read the section closely to work it through, but by and large it operates on the basis that an outside investor has to be a fit and proper person—their financial affairs have to be in order, they have to be of good character and probity, which include their associations, and they have to fulfil certain conditions. The conditions are examples of what might be thought to be things that would count someone out of being an outside investor, such as their being made bankrupt or sequestrated for example.

Your question concerned criminal activities—

**Cathie Craigie:** It was not just about criminal activities. We have all heard anecdotal evidence that money is channelled through tanning parlours or car washes, for example. The committee is concerned that, if we do not get the bill right, the next big thing will perhaps be to use a firm of solicitors to channel money.

**Michael Clancy:** That is why the bill makes provision that someone cannot be an outside investor if they have committed an offence of dishonesty, have been sentenced to a period of imprisonment of two years or more or have been given a fine for any offence. Under section 51, not behaving properly includes soliciting “unlawful or unethical conduct”. As far as it goes, the bill answers some of those points. We can talk around the margins of whether the reference to an offence of dishonesty could be emblazoned so that it covers an offence of serious violence, for example. We could talk about whether the reference to a fine on level 3 on the standard scale is appropriate or whether it should be level 2, and
whether the reference should be to two years’ imprisonment rather than one. Those provisions could be tightened in that way.

A key part of the issue is that the head of legal services has to be a solicitor. Under section 39(7), the head of legal services is given duties to ensure that the practice fulfils its duties under the bill and under any other enactment. If there is a failure to fulfil those duties, the head of practice gets involved and has to report it to the approved regulator.

The reference to any other enactment is important, because it will bring in all the legislation that we have in respect of anti-terrorism, proceeds of crime, anything involving serious organised crime and the Criminal Justice and Licensing (Scotland) Bill, which is awaiting stage 2. All of that will come under the words “another enactment.” A contravention of the serious organised crime provisions in the Criminal Justice and Licensing (Scotland) Bill—if it is enacted—would be a reportable issue.

Once the approved regulator receives such a report, what does it do with it? I do not know what a future approved regulator will do with it, but I can tell you what we do with such reports at the moment: we report to the Serious Organised Crime Agency and we have meetings with the Scottish Business Crime Centre. One would expect an approved regulator to develop a relationship with those law enforcement agencies to ensure that a money-laundering tanning salon, for example, does not rebadge as a licensed provider of legal services.

**Cathie Craigie:** Could association with a criminal—

**Michael Clancy:** What would happen if Mrs Corleone wanted to buy a law firm? I suppose that the approved regulator would turn to schedule 8 to the bill. They could ask Mrs Corleone for her name and address and it would be an offence for her not to give them. It would also be an offence for her not to answer any other reasonable question, such as, “Are you married to Don Corleone, the famous mafia boss, and do you really want to own this law firm?”

If an association were discovered, that would put an approved regulator on notice that something was up. If I remember rightly, the Criminal Justice and Licensing (Scotland) Bill contains provisions on association, which I know vexes the committee a bit. I am sure that, by dint of co-operation, we will be able to pin down the precise terms of what an association is and how it impacts on the capacity to own.

11:15

**Cathie Craigie:** Will regulators be able to regulate people who want just to invest money in a firm rather than to own it?

**Michael Clancy:** Yes—the bill uses the term “outside investors”.

**The Convener:** We will now deal briefly with difficulties that might arise with multidisciplinary practices.

**Angela Constance (Livingston) (SNP):** I will be brief. Mr Smart, many of your answers have touched on issues that relate to multidisciplinary practices. You have said a few times that some ethical issues have been worked through. On the regulation of multidisciplinary practices, are you satisfied that the bill provides a decent framework for dealing with different professionals who have different codes of conduct?

**Ian Smart:** We think so, because the bill is permissive, although more work will need to be done at the regulatory stage.

We looked for ages for a simple example of an ethical conflict that people would understand, and we came up with an example that concerns lobbyists. As members may know, registered lobbyists must declare all their clients so that they cannot act nominally for one person when in reality they are acting in another’s interests, whereas under our professional rules it is a breach to disclose the identity of clients without their permission—that is part of the veil of confidentiality in consulting a solicitor. We concluded that the conflict of those ethical codes could not be squared, so solicitors and lobbyists could never form an MDP. In other respects, their interests fit neatly together—if a lobbyist advised clients on changes that they wanted to make to a bill and a lawyer drafted the proposed amendments, that would be an advantage—but we cannot see how those professionals could be contained in one practice.

We will undoubtedly not be prepared to allow some associations for those reasons or simply to preserve the dignity of the legal profession—for example, we do not imagine that a multidisciplinary practice that involved a solicitor and a rag-and-bone man who could clear houses for executries would be appropriate.

**Angela Constance:** The other example that you gave was of a conflict between surveyors and solicitors. If I remember rightly, you described such a partnership as somewhat fanciful and an obvious conflict of interest, so it could not happen. Are you saying that, when professional codes of conduct obviously clash, the issue will be headed off because such professionals will not be able to go into business together in the first place? If that
is so, the issue of regulating conflicting professional standards is in some respects redundant.

Ian Smart: To be fair, I answered the earlier question in the context of the OFT’s bizarre proposition to the committee that, in one firm, the surveyor could act for the seller and the solicitor could act for the purchaser. I do not imagine that the surveyors’ code of conduct would allow that, never mind the solicitors’ code of conduct. It would be an obvious conflict of interest.

I gave the example of a legitimate partnership between a solicitor and a surveyor in a land-development business enterprise, but in it they would patently be acting for only one client—they would not act for the sellers of the land as well as its acquirers. That would be out of the question for us and I suspect—although the committee would need to ask—that it would be out of the question for surveyors, too.

Angela Constance: You are confident that conflicts of interest can be dealt with adequately.

Ian Smart: We are. We must deal with such matters as we go along. I agree with what Nigel Don said about regulators but, of the people who are in the market at the moment, the other obvious group with whom many solicitors have associations is independent financial advisers. It is now a common business model to have people in solicitors firms who give investment advice. They are professionals and are regulated by the FSA, but they cannot be partners or part owners in the business in which they work. Their regulatory code is similar to ours, and we think that any regulatory conflicts can be worked through.

Stewart Maxwell: I do not want to go into a long list of possible business models and various people who might or might not be involved. You just gave a couple of examples of models that might seem inappropriate. What is your opinion of an association between a solicitor and a medical professional in medical negligence cases? Would there be a conflict of interest in that or in cases in which private investigators are involved? Could such a conflict be worked out, or should it not be worked out?

Ian Smart: You have asked two different questions. I have a fair amount of medical negligence work and one absolutely critical factor is that the medical expert must be independent. A lawyer’s case would fail if their medical expert had a financial interest in its success. Ironically enough, one reason why the litigation in the McTear case failed—in the opinion of the judge —was that the medical experts were acting pro bono and therefore had an interest in having it found that smoking causes cancer. I cannot see how the business model that you describe could work, as that example demonstrates. Thinking off the top of my head, I suppose that in certain circumstances—in cases involving adults with incapacity, perhaps—there might be scope for a joint business model, but I am only flying that idea.

A model involving a private investigator is interesting. I talked about the concept of employee shared ownership. Some of the bigger firms will have employees who are charged with taking statements and doing investigatory work, and they might well be in a position to participate in an employee shared ownership arrangement. For us, we would need to be careful of the touting rules if people were in more formal partnerships with private investigators. There would be clear regulatory issues if people were improperly attracting business and getting around the solicitors’ code by employing somebody who is not a solicitor to go out and say, “Why don’t you transfer your business to Ian Smart? He’s a great lawyer.” I imagine that provision to prevent such touting would be in any regulatory regime that we put in place for a multidisciplinary practice.

Stewart Maxwell: It was not just the touting that I was thinking about; it was also that it would be in the interests of the private investigator to come up with evidence that is helpful.

Ian Smart: We see that, but such things are tested in court. Under the current system, it is not that dishonesty takes place, but it is a common fault among trainees who take statements that they put into the statement only the bits that help their case, such as, “I saw everything clearly”, and miss out other bits, for example that it was pitch black or foggy. That is a common fault under the present system. There is nothing malicious about it, but if people talk up their case in that way it all just falls apart in court.

The Convener: The McTear case highlighted the potential dangers of litigants adopting the practice that we envisage of medical people working with the lawyers. The same issue would arise under several other headings, as I see it.

Robert Brown: Listening to some of the examples from the Law Society consultation, it struck me that the society could probably give us written guidance on which of the business models might be appropriate and, more particularly, which would not, so that we are aware of some of the issues. If the witnesses could give some thought to that after today’s meeting, it would be useful to get a flavour of those issues.

My other question is about market failure. Social law is often regarded as a difficult area, but I suspect that it will not be greatly affected by the bill as citizen’s advice bureaux and law centres do such work. In areas such as immigration, housing law and social welfare, lawyers find it difficult to
make a profit and, even more particularly, they do not have expertise. Have you any comment to add on the implications of the bill in such areas?

Ian Smart: In some ways, I do not think that the bill really impacts on that. The issues that you raise are serious—we are in no doubt that there are significant issues to do with access to justice. The bill has a regulatory objective to promote "access to justice", but we do not think that that can be done by market forces—there are wider issues.

We propose to have a summit meeting in February, independently of the bill, to get everybody round the table. That means not just the Law Society but Citizens Advice Scotland; charities who give legal advice, such as Shelter; perhaps big public interest law firms, some of whom members will be aware of; the judiciary; and the Scottish Court Service. Many of the issues of access to justice are not just about access to lawyers but about processes that put people off accessing the system. It is no secret that we are huge partisans of the Gill review, which we think deals with a number of the issues. Basically, in February, we will try to get everybody into the one place to discuss them.

There is one fundamental issue, however. The traditional 1949 legal aid model assumed that, if someone walked in off the street to see them, high street firms would be prepared to undertake any kind of legal case. However, the reality is that, as the law has become more specialised, firms do not have the expertise, and lawyers now practise defensive law as there is an element of danger in taking on a case when they do not know what to do, because they are more likely to end up with a claim or a client complaint. The easy option is just to turn the business away, particularly when it is work that is not, or only marginally, profitable. That situation therefore needs to be worked through.

A strategic review was carried out just before the previous election, and we were broadly supportive of its conclusions on much of the social welfare law. The new Administration did not shelve it but simply said that it would take the matter under review. We understand that it is in the process of revisiting that, and we encourage it to do so. We know that the Cabinet Secretary for Justice is concerned about issues around access to justice, as indeed are we.

The Convener: Mr Smart, the committee is grateful to you and your colleagues for coming this morning. It has been an extremely useful evidence session. I suspend the meeting briefly while the witness panel changes.

Ian Smart: I am told by the chief executive that I should wish you all a merry Christmas.

The Convener: That is reciprocated.

11:27
Meeting suspended.

11:30
On resuming—

The Convener: I welcome to the meeting our second panel of witnesses: Michael Scanlan, president, and Kenneth Swinton, council member, of the Scottish Law Agents Society; Robert Pirrie, chief executive, and Caroline Docherty, deputy keeper of the Signet, of the WS Society; and Robert Sutherland, convener of the Scottish Legal Action Group.

We will go straight to questions—and I suggest to the witnesses that if they agree with what has already been said they should give a simple confirmation. I will begin with a question that I asked the Law Society: do you believe that the bill is necessary and that the establishment of alternative business structures will benefit users of legal services in Scotland as well as practitioners? I invite Michael Scanlan to respond.

Michael Scanlan (Scottish Law Agents Society): I am delighted to respond; however, I point out that I have only one expert with me, and I will probably have to defer to Mr Swinton on a considerable number of matters. I thank the committee for allowing me to appear as a late substitute.

The SLAS is the largest voluntary organisation of solicitors in Scotland, with a tremendous range across the country. We have in excess of 1,600 members, most of whom are high street practitioners. We feel that there is no necessity for the bill; there is certainly no necessity to introduce the concept of ABS in Scotland. Recently, we asked our membership a very simple question: "Are you in favour of ABS or against it?" Of the 400 responses we received, 85 per cent were against the introduction of ABSs in Scotland.

The elephant in the room is that ABS really means large legal firms getting together with chartered accountants and bankers. In Scotland, a tremendous number of small firms provide a range of services in the reserved areas, whereas a substantial proportion of the services that the small number of large firms provide to business and public bodies are not in those areas. As I am sure that you are aware, there have already been two fairly high-profile failures, not of ABSs as such, but of parallel partnerships involving accountants and firms of solicitors. That in itself is evidence that such an approach simply cannot work, no matter how you might try to legislate for it.

In our view, external capital simply equiparates with external ownership and can lead only to
conflict. It also makes it more likely that Scottish firms will register in England or will be taken over by English firms. Moreover, non-lawyer providers are unlikely to move into areas where there is demand but where the work is not so profitable, which at the end of the day comes down to consumer interest. ABSs are likely to cherry pick conveyancing and executry work, which generates reasonable profits, and that will have a substantial impact on the high street service, for which such work is its lifeblood. If the high street service has its lifeblood removed, it is unlikely to be able to sustain its existence with less profitable areas of work.

There is also a major possibility of conflict at all levels of ABSs. One has only to think of the relatively recent case involving the infamous Prince Bolkiah, a firm of chartered accountants in England and Wales and the concept of Chinese walls to see that such an approach simply does not work. For all those reasons—and, indeed, for many others that I am sure will be explored in questioning—we feel that the bill is a sledgehammer to crack a nut.

Robert Pirrie (WS Society): Good morning. Our view is that the merits of the bill are unproven. Our honest answer to your question is that we do not know whether the bill will have a beneficial effect. We think that there are dangers. While we do not want to stand in the way of the permissive aspects of the bill, our principal concern is what the consequences of the bill will be for the considerable virtues of the current system, and especially the independence of the profession.

The Convener: Did you consult your members about that?

Robert Pirrie: No. We have not carried out a formal consultation.

Robert Sutherland (Scottish Legal Action Group): In short, we agree with the views of the Scottish Law Agents Society. We find some of the Law Society’s comments in support of the bill unconvincing. In particular, the Law Society’s main justification, which is that Scottish firms may decide to go down to England and register there, resulting in harm to the provision of legal services in Scotland, does not fly. It is a bit like suggesting that Rangers and Celtic will go off and play in the English Premier League and that that will harm Scottish football. We think that it is unlikely that the big firms in Scotland would desert the Scottish legal market, although we expect that they would want to take part in the bigger English legal market.

We understand the justification for the bigger firms supporting the proposal: it will allow them to obtain capital such that they could match the greater potential capitalisation of large English firms. However, we anticipate that the consequence of that will be something like the consequence of the changes that were introduced in mutual societies, when building societies, insurance firms and others demutualised in order to get access to capital. There are now no large, independent mutual societies left. They all pursued a particular line and they have all gone bust. While that will not be exactly the consequence of the bill, we think that it will lead to Scottish firms being taken over by English firms, and that what were described as Scottish firms will simply be representatives of English firms.

Stewart Maxwell: I am not clear about a couple of points, including the idea that if ABSs were introduced firms would, in Michael Scanlan’s words, cherry pick. I am not sure that I understand what prevents a firm from deciding to specialise in a particularly profitable area of law at the moment—in other words, to cherry pick. What prevents that from happening now, and what would change if ABSs were introduced? What is the difference?

Michael Scanlan: You are absolutely correct that there is nothing to stop that from happening now. It would be fairly safe to say that, in the main, the larger firms generally do not operate in the area of domestic conveyancing. Once they get into bed with accountants, however, and the accountants see profitability in that area, views could change. That is our fear.

Stewart Maxwell: If you will excuse me, that is a rather odd interpretation. Are you saying that legal firms do not have a mind to being profitable but that suddenly, if an accountant comes on board, they would be interested—

Michael Scanlan: Different ideas will come about as to the direction in which particular firms might go.

Stewart Maxwell: That is interesting, but I am not sure that I am convinced by it.

You also talked about the resistance to ABS shown by your survey. I cannot remember the exact figures, but I think you talked about 400-odd responses. Were those responses about ABSs in general or were individual respondents saying that they did not wish to be ABSs? It is clearly not compulsory. It may well be that a lot of the traditional firms remain as they are. They will not be forced to become ABSs. What is the objection to other firms becoming ABSs if they wish to do so?

Michael Scanlan: We did not ask whether other firms should become ABSs. We presented the simple question, “Are you in favour of or against the introduction of ABSs in Scotland?” The response was that 85 per cent were against. I suppose you might follow that up by asking why, if
that was our members’ response, we did not do something at the much-talked-about AGM of the Law Society of Scotland, but we did not have the response at that time. We took the view that, as the bill is largely permissive and as it will affect the larger firms, we as a society would stand back from that. It was only when the bill was published and we were able to look at the nuts and bolts and see the detail of the bill that we came to the conclusion that our society had to speak out against the proposal.

Stewart Maxwell: But the publication of the bill was the end point of a long period of discussion, as we heard this morning. I am slightly confused about why you would say nothing all the way through and take a view only at the end point, when the bill was published. I understand that the issue crystallised when the bill was published, but there has been a long-standing discussion on the issue and it has particularly been discussed in the past couple of years. Why did you stand back, in your words, and say nothing until the bill was published?

Michael Scanlan: We are a society of solicitors and we represent all sorts of churches within the legal profession. We took what we thought to be a proper and right view when the Law Society was debating matters. It came up before the AGM that it would perhaps not be right for us to go along to an AGM and pretend to represent our members’ views at a time when we did not have those views. It was only when the bill was published and the detail came out that we reached the conclusion that the proposal would not necessarily be in the interests of the consumer and a good thing.

Stewart Maxwell: I have a final question for Mr Pirrie. You expressed the view that you do not see the need for change from the status quo. I suppose I can sum up your view by saying, “If it ain’t broke, why fix it?” However, we are not in the same situation that we were in a few years ago. The situation has changed in England, which obviously has an impact on what happens in legal services in Scotland. Why do you still hold that view?

Robert Pirrie: It would be wrong to say that we object to the permissive provisions in the bill that will enable ABSs. We are unconvinced about the change, but not to the extent of standing in its way. We recognise that there have been changes.

The process started effectively and with a strong message. Indeed, the Law Society said so earlier. We heard the phrase, “The status quo was not an option.” We were presented with a situation in which a considerable number of interests were saying that the changes had to be made. If one feels that something’s merits and hazards are unproven, it would be wrong entirely to stand in its way, but it is right to ensure that, if the experiment proceeds, the safeguards are maximised to ensure that it does not damage what is already in place.

Stewart Maxwell: That is entirely reasonable.

Robert Brown: I am not sure what you mean by the permissive provisions in the bill. If the bill goes ahead, a traditional model will be required to compete with somebody who decides to set up an ABS. Will you explain what you mean by the permissive provisions?

Robert Pirrie: That is a significant point. I started by saying that the need for the changes that the bill introduces is perhaps unproven. When I said that, I was mindful of the fact that, as Mr Scanlan said, there have already been significant moves in Scotland to form MDPs. One of the biggest experiments in the English-speaking jurisdictions involved Scotland’s largest law firm being part of an MDP, so it has been done. However, it was done within the regulatory framework at the time, which placed certain restraints on it.

The bill, on the other hand, contains a positive encouragement to go about it. That is the significance of the word “permissive”. The effect is utterly unproven, given a regulatory backdrop that is favourable to that type of body as opposed to one that is full of complications.

11:45

Robert Brown: Mr Scanlan, I am struck by the simplistic nature of the question that the Law Agents Society asked about whether firms were for or against the introduction of ABSs. We have heard from the Law Society that the situation is a bit more complicated than that. Can I divide it into bits, as I did before? There is the issue of lawyers in Scotland and England collaborating in various ways. Is there a particular objection to that?

Michael Scanlan: No. Freedom of movement permits that.

Robert Brown: There is then the question of lawyers collaborating with other professionals—accountants and so forth. We heard evidence from the chartered accountants that their rules already allow a solicitor to be a principal in a firm of accountants. They suggested that a method of handling the issue might be to allow the reverse under the Law Society’s rules. Would that cause you difficulties?

Michael Scanlan: I do not think that that would cause us difficulties. In fact, to some extent, we address that in our written submission. There is nothing to prevent LLPs from injecting capital into a law firm. They could remain employees or be designated directors of this, that or the other.
Participation and profits could easily be given in the form of bonuses on an annual basis.

Robert Brown: What sort of areas or propositions do you object to? The further development of non-professional non-lawyers is linked to the issue of outside ownership.

Michael Scanlan: I defer to Mr Swinton on that.

Kenneth Swinton (Scottish Law Agents Society): We think that there would be considerable risks in external ownership. There is a difference between a professional and someone who invests with a view to making a profit. The latter would not have the same ethical or educational background or the qualifications that professionals have.

Robert Brown: Okay, so external ownership would be an issue. What about the issue of paralegals, investigators and other people of that sort possibly being allowed to be principals in law firms?

Kenneth Swinton: Those are examples of external people.

Robert Brown: They are internal, really, are they not?

Kenneth Swinton: Well, they may be employees of the firm but there are difficulties in saying that a private investigator has the same professional background as a solicitor, an accountant or a surveyor. The ethical issue would cause us difficulty with that.

Robert Brown: Is the difficulty one of professional training, confidentiality and issues of that sort?

Kenneth Swinton: In studying for their diploma in legal practice, solicitors will receive training on professional ethics. There will be a compulsory element of professional ethics in every solicitor’s training, which will cover confidentiality and conflicts of interest. I cannot speak for the requirements of other professions, but I do not see that being the case for external shareholders who are not professionals.

Robert Brown: I was thinking of the brain surgeon argument that we come back to occasionally, that one would not get a non-qualified person to do brain surgery. Are you happy with the currently regulated areas of the law? Do you think that, under the bill, those might be extended in the public interest so that non-professional lawyers would be included in them?

Kenneth Swinton: The parameters of regulation are a different matter. The bill seems to offer an opportunity to regulate other providers of legal services outwith the currently regulated areas. In our written submission, we make specific reference to will writers, for example. That is a point that you explored with the witnesses on last week’s panels.

We also refer to claims companies. Although there is comparatively little evidence at this stage of detriment to consumers as the result of the operation of claims companies in Scotland, one need only look south of the border for that. The Ministry of Justice has removed 116 claims companies from authorisation because of undesirable commercial practices since the inception of that regime under the Compensation Act 2006. The bill offers the opportunity to provide a mechanism whereby, if consumer detriment were to be shown in Scotland, the Scottish ministers could extend the regulatory parameters to claims management companies.

Robert Brown: Your written submission provides some evidence on will writers. Can you elaborate a little on your concerns about non-professional people involving themselves in will writing? You referred to the lack of legal advice. Supposing that legal advice is given, is there an issue with that? Can you tell us about the difficulties or otherwise of that aspect of the law?

Kenneth Swinton: The bill does not change the regulated perimeter, so will writers will be able to continue, unless amendments are lodged at stage 2. I understand that the minister may be considering such amendments.

We gave examples in our written evidence of the potential for detriment. However, will writers might also find themselves in a position of trust where they are appointed as executors and have opportunities for misfeasance in the conduct of an executory, for example. I think that there are areas in which there could be consumer detriment. I have no examples of that from Scotland, but I have seen a press report about a will writer in England who absconded with £0.75 million of an estate.

Robert Brown: Wills are always said—at least, they were when I was in the profession—to be complicated things with lots of issues, particularly with the complicated family structures that there are now, I suppose. Is that a particularly difficult thing for a non-legally trained professional to get right? If a will just involves a wife and two children and is very straightforward, why should it not be done by a non-lawyer?

Kenneth Swinton: Drafting a will can be complex, depending on the family situation, as you suggest. Our principal concern is that the terms and conditions that may be imposed by will writers absolve them of any liability for any advice that is given. It is open to someone to use an execution-only service, provided that they have been given clear information as to the nature of the service that is being provided. There is currently no
obligation to do that. When people sign up for a mortgage, they get a warning notice that their home is at risk. Something as simple as that could be put into regulations to say that no advice has been given, people are on their own and should just fill in the blanks.

Robert Brown: I suppose that I am asking the question beyond that. Should that service be allowed? Or, because of the complexities that underlie it, should people not be allowed to do it unless they are legally qualified?

Kenneth Swinton: If people are not prepared to pay for legal services or are unable to pay for them when they are advised to have them, there is an access-to-justice issue. Our position is that we would not stand in the way of individuals making an informed choice to use a non-advised service.

Michael Scanlan: Do not underestimate the complexities that can arise in will drafting. You referred to a wife and two children, but regularly in such situations the issue is the second wife and the four stepchildren, so matters are not quite as simple as might be thought. I have regular evidence in my practice of the issue to which Kenneth Swinton referred. People phone me and say that they have been in touch with a will writer and have been told that they must structure a will that will put money into trust or set up a tenancy in common, which is a concept that simply does not exist in Scotland. They end up with a nil-rate band discretionary trust will, where they perhaps have only a fraction of what is required before they meet inheritance tax liabilities. On one occasion someone was charged in excess of £1,200 for such a will.

The Convener: Before we move on, are there any further comments on this area?

Robert Pirrie: Our concern is that there should be a solicitor left in the vicinity to get redress for the person who has been missold the will. That is what I meant about safeguarding the protections that are there already.

Robert Sutherland: In general, there is a distinction between alternative business structures and the ethical issues that arise from them. If we are to have ABS, we agree that things can be put into regulations to ensure that ethical difficulties are minimised as far as possible. It is not correct to say, as the Law Society did, that there is no ethical difficulty here at all. It is clear that, even on the basis of the Law Society’s evidence, there have been difficulties. The Law Society is looking to the regulations to sort out the ethical difficulties.

The other aspect of that, which is probably of prime concern to my group, is the consequences of alternative legal service providers coming into the marketplace and distorting the existing market and the existing provision of legal services.

Cathie Craigie: I have a small point specifically for Mr Scanlan. You have 1,600 members ranging from individual practitioners to small and larger firms. Twenty per cent of your members responded to the consultation that you carried out, which was just one question. I imagine that your members are also members of the Law Society, yet it received only a 1 per cent response to its consultation. Was that because your question was easier to answer?

Michael Scanlan: I would like to think so. We could have made it harder, but you must bear it in mind that we are a voluntary organisation that is dependent on member subscriptions, which must be pitched at a certain level. We do not have access to the sort of money that the Law Society does in determining what—if anything—we send out to our members. If we send something out to 1,600 members, we have to put stamps on 1,600 envelopes and everything that goes with that. Twenty per cent is quite a good response to what was a simple question and we are quite proud of that response. Frankly, I do not think that the 92 responses that the Law Society received to its consultation document add up to much at all.

The Convener: We need to move on.

James Kelly: Before we move on to the independence of the legal profession, I have a brief question on the survey. Can you clarify that it was a one member, one vote survey and that no proxies were involved?

Michael Scanlan: It was one member, one vote and no proxies were involved. It was a written response from our membership. However, our association is not against the use of proxies at Law Society AGMs and we have used them ourselves on occasion.

James Kelly: On the independence of the legal profession, what are your views on the powers in the bill that have been ascribed to Scottish ministers? How will they affect the independence of the legal profession in Scotland if the bill is passed?

Robert Pirrie: We say in our written submission that there are two clear issues: the regulation of the solicitors profession and its representation. We recognise that the proposed changes stem from a belief that there should be a more open market—we are not standing in the way of that—and that changes need to be made to the way in which the solicitors profession is regulated. However, we feel that some of the changes that are proposed in the bill will impact on the independence of the legal profession and tip the balance so that it will be even more difficult for the Law Society to regulate and represent a truly independent solicitors profession.
Robert Sutherland: We endorse those comments.

Kenneth Swinton: We are concerned about the threat to the independence of the legal profession, which is central to the rule of law. There is no point in having an independent judiciary if we do not have independently minded lawyers who are prepared to take cases in the first place. There is a closeness in the relationships in the bill whereby the Scottish ministers have to approve a regulatory scheme for a regulator. We are concerned that that regulatory scheme drills right down to the practice rules and so on, so that there is a possibility that direction could come from the Scottish ministers and prejudice the independence of the profession, although we do not suggest for a moment that that would happen under the current Administration.

We have heard about the Law Society’s proposal to extend the role of the Lord President. There might be an argument that that would be a proportionate approach in Scotland. However, our preference—albeit with a cost attached—would be to distance that involvement through a legal services commission, which would create a definite distance. It is a matter of perception—the perception, not only domestically but internationally, that the legal profession has independence from the Executive. That is the crucial issue.

James Kelly: What are the views of the other two sets of witnesses on the panel on the Law Society’s suggestion that there should be an enhanced role for the Lord President? Do they see any merit in going down the super-regulator route by having a legal services board?

The Convener: Ms Docherty has thus far been the silent partner. Would she like to lead on that?

Caroline Docherty (WS Society): We certainly endorse the view that there should be an enhanced role for the Lord President.

James Kelly: What is the witnesses’ view on the Legal Services Board that has been set up in England and Wales? Would the establishment of such a board in Scotland be an appropriate way to protect the independence of the legal profession?

Robert Pirrie: If regulation is taken closer to Government—to some extent one can see that that is inevitable in the 21st century—it becomes increasingly important to separate that from representation. There are various ways of doing that. Setting up a legal services board is one way of making it clear that regulation is separate from representation, but we do not think that that is the only way. We understand the argument that, in a jurisdiction as small as Scotland, setting up a board is perhaps unnecessary. Although it may be understandable that people want a greater role for the state in the regulation of legal services, we want to ensure that that approach does not prejudice the independence of the legal profession from everything else.

Robert Sutherland: We have not actively consulted our members on the subject. We have concerns about the independence of the legal profession and what can be done to maintain it. In the Scottish Legal Action Group there is a natural scepticism about the idea of a super-regulator, but that is probably as far as I can go at the moment.

Stewart Maxwell: We have probably covered my first question, but, for clarity’s sake, I will put it to Mr Pirrie. You talked a moment ago about separating the representative and regulatory functions, particularly with regard to the Law Society. The point is also covered in your written submission. Can you expand on that and explain why you believe that those two functions should be separated?

Robert Pirrie: The combination of regulation and representation has always been a very delicate balance. The position is reflected in section 1 of the 1980 act, which requires the Law Society to balance the interests of both the profession and the public. Everyone recognises that that is a very delicate mechanism, which I think has worked reasonably well. However, we feel that the proposed changes introduce the potential for greater prejudice, if I may put it that way, when the two roles are combined in one entity.

It is perhaps also worth saying—this is not a criticism; it is a statement of fact—that the representative role of the Law Society is quite problematic. Membership of the Law Society is effectively compulsory. It is a little unusual to have a representative body where those who are represented have no choice about whom they are represented by. Some of the issues have been reflected in this morning’s discussion of the democratic process. Questions have been raised about the extent to which the Law Society’s mechanisms properly represent a decision-making process for the Scottish solicitors profession. There are already problems. We feel that although certain changes that are being made through the bill are perhaps defensible in regulatory terms—particularly Scottish ministers’ powers to increase lay representation on the council of the Law Society and to make other interventions by regulation as to how the Law Society operates—they make it very difficult for that organisation also to represent the profession. The backdrop is that solicitors’ firms have only so much money to spend on representative functions—particularly as...
we emerge from the credit crunch, which has focused minds—and all those functions are monopolised by the Law Society. I say that not pejoratively but factually.

Stewart Maxwell: I presume that you heard the Law Society’s evidence that other professional bodies perform both functions. If other bodies can do that, why would the legal profession encounter difficulties in doing so?

Robert Pirrie: That is a question of degree. I do not believe that other bodies have the ability to intervene to the degree that the bill proposes. As I said, until now, the balance in the Law Society has worked reasonably well—perhaps as it does in other bodies. The principal question is whether the bill makes the crucial shift that tips the balance.

Stewart Maxwell: Do other panel members have a view?

Michael Scanlan: More than a balance is involved—the Law Society faces a dichotomy. I say that as a past president of the Law Society and as a member of its council for 12 years. I certainly feel that I have been well regulated by the Law Society. I do not say “well” in an encouraging way—I just mean that the Law Society has overregulated me in the past few years. I have certainly had little sense of representation, but that is not to say that I have not been represented—that is a question of what representation means, what I want the society to do for me and how successful what it has done for me has been.

One difficulty for the society is that, as the society advised the committee, it represents three elements of the profession—small firms, in-house lawyers and large firms. Such a gulf lies between what large and small firms do that it is difficult to see how the society can represent all its constituents evenly and effectively.

Stewart Maxwell: I understand and appreciate your argument, but what is the difference between the Law Society’s situation and that of professional bodies such as those for surveyors or accountants, which represent single operators, small firms and large firms? The situations seem fairly similar.

Michael Scanlan: The situations may or may not be similar—I do not know. We would have to ask surveyors whether they are happy with how they are represented. For effective regulation and representation, we should really look to the doctors.

Stewart Maxwell: It is probably best not to comment on the doctors.

Robert Sutherland: The Law Society has a problem in how it undertakes its representative role. The society has probably been effective in regulating its members over the years, but there is no doubt that the bill will change matters. We said initially that we were waiting to see what the society came up with. We wanted wider public involvement in its structures, and the society is following that route. Given that many changes are going on, one is tempted to be cautious and to say, “Let’s see how that works.” The society has achieved a balance so far—can that balance continue to work?

However, another problem is public perception, because the public are not happy with the mix of roles, either. The big difference between lawyers and the other professions that Stewart Maxwell mentioned concerns the wider public interest. Lawyers fulfil a wider role in society than do surveyors, and the public interest in regulating lawyers is greater. Nobody has a perfect answer at the moment.

Stewart Maxwell: The Law Agents Society’s submission expresses concern about the growth in execution-only services, which have been mentioned. Would the regulatory system in the bill—or, after amendment, some other regulatory regime in the bill—be the best way of dealing with the issues that have been raised in your written evidence? Does the bill adequately cover those problems?

Kenneth Swinton: The bill does not address the issue of execution-only services at all, and I think that the problem will become more widespread once we have external ownership. Things will be restricted immediately when the terms of business are agreed and, if those terms are quite lengthy, the consumer might well not be aware of what is going on.

Another problem with terms of business is that new providers might not have the same rules for conflicts of interest. Current rules bar solicitors from acting in any conflict of interest situation, although the Law Society can grant a waiver. In England, however, there is informed consent; the conflict of interest is disclosed to the client, who then waives their right to separate representation. I suspect that the terms and conditions of business will be manipulated to ensure that the waiver comes into effect automatically once a contract is entered into.

I certainly feel that there are dangers in not doing anything. We should take this opportunity to examine the regulated perimeter and state clearly where it applies and where it does not apply and to allow Scottish ministers to make regulations to provide for warnings about execution-only services.

Stewart Maxwell: You mentioned that earlier. Why do you think such waivers will almost automatically come into effect?
Kenneth Swinton: I suspect that the lawyers who draft the terms and conditions will put in that kind of thing.

The Convener: For self-preservation?

Kenneth Swinton: Yes.

Nigel Don: Returning to a subject on which I questioned the Law Society at some length, I note that, in its written submission, the SLAS clearly states that non-lawyers could well be part of these businesses, put money into them, be remunerated by them and so on. Do the SLAS witnesses have anything to add before I ask their colleagues on the panel for their opinion?

Michael Scanlan: I do not think so. The submission, which was particularly well drafted by Mr Swinton, clearly and cogently envisages a situation in which an ABS could be formulated without the need for all this legislation.

Nigel Don: I was impressed by the point. Has Mr Sutherland read the SLAS submission, and does he think that we actually need to change anything?

Robert Sutherland: I agree with the point; indeed, one of the points that I had intended to raise this morning was that there are plenty of ways in which existing law firms can take on people, reward them through pay or other mechanisms and provide the kind of services that it is suggested an ABS will be required to provide. We do not believe that the legislation is a necessity.

Robert Pirrie: I agree. I was once a partner in a multidisciplinary practice; back in 1997, Dundas and Wilson became part of Andersen Legal, which was a global professional services firm. Although the structure might have been complicated and although ways had to be found of adapting it to the regulatory scheme, we were able to do it and it worked. I believe that the same is true of the structuring of law firms and the way in which non-lawyers are incentivised or allowed to participate in the business.

Nigel Don: Of course things might change as we gather more evidence but, in the practical world as I see it, there seems little prospect of there being more than a couple of regulators in Scotland, even if the bill were to be passed with the amendments that you seek. Would it not be simpler to change the rules of the appropriate societies—which I presume would be ICAS and the Law Society of Scotland—to allow for the inclusion of other partners?

12:15

Michael Scanlan: Yes. I see the strength of that argument. As I said at the beginning, the whole debate is polarised around accountants and lawyers. Let us make no bones about it—that is what it is all about. The difficulty would be in persuading each to sign up to the other’s rules and regulations. It is fair to say that although there will be similarities in the core values of both those professions, there will also be material differences. Perhaps you could legislate for that—I do not know, but in principle, I do not see why not. If the Institute of Chartered Accountants of Scotland were to sign up to the Law Society’s rules and regulations and solicitors’ core values, I am not too sure whether there would be much left over for solicitors to have to sign up to in relation to accountants’ rules and regulations.

Kenneth Swinton: There is one area in which there would need to be legislation: accountants do not benefit from legal professional privilege or anything similar. If you had an interdisciplinary practice involving solicitors and accountants, any correspondence or communications with the accounting part would not be privileged, whereas communications with the legal part would be. That would have to be addressed by legislation.

Nigel Don: That is an issue that we will have to address in the bill anyway. I guess what I am asking is whether we really need an overarching system to be set up for anything and everything, when only two players are going to turn up. It might be rather easier if we just deal with those players and have done with it.

The Convener: Is that your view, Mr Swinton?

Kenneth Swinton: Yes.

Robert Sutherland: It is the anything and everything that causes us the biggest concern. The idea that solicitors could go into business with virtually anybody causes us considerable concern, because of the ethical conflicts involved. We are talking about identifying a group of people with whom you are likely to do business and with whom it would be acceptable to do business while maintaining the public interest. Given that this is going to be a financially driven process on the ground, accountants are the people with whom we would be most happy. However, the idea that any person who describes themselves as an independent financial adviser and who essentially does nothing more than sell financial products on commission could go into a business partnership of some sort with solicitors causes considerable ethical problems and is not in the public interest. If a very small group of people are considered acceptable, what do you need the legislation for? As the Law Society said, the professional practice rules could be worked at to see whether all the ethical conflicts are sorted out. It is clear from the Law Society’s evidence that, even after all this time, there are still ethical issues to resolve.
Robert Pirrie: When there has been market demand from within the profession, such as in the example that I gave, when Andersen Legal joined up with what was Andersen’s the accounting practice, the regulators of both professions demonstrated that they could adapt to allow such a thing to happen. However, much of the pressure that brought about the bill came from outside the profession. The profession has responded to that and seen opportunity, but the original push behind the bill came principally from Government and other interests—legitimate interests—in legal services.

James Kelly: On the point about professional privilege, the Scottish Law Agents Society’s submission states that the bill as drafted is not compliant with the European convention on human rights. Will you spell that out for the committee?

Kenneth Swinton: Section 60 deals with professional privilege in respect of legal proceedings. In fact, there are two aspects to legal professional privilege: one is the litigation privilege and the other is the advice privilege. Recent case law suggests that the advice privilege is as important as the litigation privilege and that the advice might be given at any stage—it could even be in a conveyancing transaction. I refer to the Balabel case in England in 1987, where the conveyancing aspects were said to be confidential in a subsequent court case. As drafted, the bill deals only with the litigation privilege.

The Convener: Sorry, Mr Swinton. What was your authority there?

Kenneth Swinton: Balabel v Air India. It is in our written submission.

The Convener: Thank you.

Robert Brown: I do not have a question; I simply repeat the invitation that I gave the Law Society of Scotland. The groups that are represented on the panel might want to think about whether they can elaborate, just in terms of flavour, on some situations in which there is no particular issue if lawyers act with outside people of various kinds and other situations in which there manifestly are issues whether because of a conflict of interest or for other reasons. Any such elaboration would be helpful to the committee. I leave that with you by way of an open invitation.

The Convener: If your thoughts on that are not available at the moment, you can write to us. That would be perfectly acceptable.

There are no further questions on that area, so we turn to the vexed question of outside ownership, which, again, Cathie Craigie will pursue.

Cathie Craigie: Good afternoon, panel. Is there a danger that outside ownership will mean that law firms offer only profitable legal services? Will you highlight some of the less profitable services that might suffer?

Michael Scanlan: That is one of the points that I was trying to make at the beginning, although not very effectively. That is a danger, because there are profitable areas of law and non-profitable areas of law, and the latter are regularly subsidised by the former. Off the top of my head, I would say that the non-profitable areas include legal aid work and any work that involves the social welfare of the citizen—that is never going to be profitable. My firm has a branch office in Govan where, believe you me, I regularly see the halt, the lame, the infirm and the totally unprotected. Frankly, if it were not for the other work that comes through the door at that office, I would not be able to look after those people, certainly not on the legal aid rates that I am paid.

It is highly unlikely that I will be headhunted by a major firm of chartered accountants so that they can acquire my business in Govan, but that is the sort of thing that could happen in high streets, and it could affect the whole range of services that are provided by high street practitioners, including family law and legal aid work.

Robert Sutherland: The point was made earlier that that already happens. It is not new that legal firms cherry pick the kinds of work that they do. We have regularly tried to raise the problem that, in large parts of the country, people do not have access to legal services and the kind of legal work that they need because there is nobody around who will do it for legal aid rates.

We are concerned that the problem will become even more extensive, because we anticipate that the profitable areas of high street work will be taken away and the work that will be left for firms, particularly in rural areas, will be the more unprofitable work that will be insufficient in quantity or price to justify keeping their offices open. There will therefore be a reduction in competition for the provision of legal services and fewer legal services will be provided around the country. The bill will just exacerbate an existing trend.

Cathie Craigie: In the case of smaller high street firms, is it legal aid and family law things that will suffer, as Mr Scanlan suggested?

Robert Sutherland: Yes. The research working group on the legal services market in Scotland said that, generally speaking, legal services in Scotland are competitive, but it identified areas that are not competitive: family law, housing and debt—essentially, the social welfare judicial review type of work—and local sheriff court work. It is not just rural firms that will be affected, as a number of big solicitors firms in Glasgow and Edinburgh also take on that kind of work, although there are fewer
and fewer of them. They, too, will be affected by the more remunerative financial work being taken away. They will not be able to keep on solicitors and provide services for those solicitors in expensive city centre practices when their most profitable work is taken away by a super-firm that opens a one-stop shop.

**Robert Pirrie:** We can only speculate, but it is not difficult to imagine that, in a provincial town where a large dominant supermarket firm already exists to monopolise residential conveyancing, four or five high street solicitors will disappear simply because the work that has been referred to is being subsidised out of residential conveyancing.

**Cathie Craigie:** Moving on to regulation of third-party ownership, are you satisfied that the fitness-for-involvement test, which it is hoped will prevent criminal elements from investing in or taking control of law firms, will do just that?

**Michael Scanlan:** Notwithstanding our position on the bill, it is fair to say that we are generally satisfied with that test.

**The Convener:** Is anyone dissatisfied?

**Robert Sutherland:** The test looks good on paper, but our one concern is that, as we have seen in the past few years, the people who carry out underground criminal operations are not yet necessarily at the forefront of police attention. How do we stop those people investing their money before they are identified as Don Corleone or Don Corleone’s wife? It is easy to say that that is an extreme circumstance in which the test will not work, but the concern is at the much lower level — how do we ensure in practice that we stop the wrong people from putting their money into such organisations?

**Robert Pirrie:** By its very nature, the bill is trying to increase the diversity of people involved in legal services businesses and there is no question but that increases the risk. We will find out whether the regulation is up to the job.

**Kenneth Swinton:** The only concern might be in relation to money laundering regulations under the Proceeds of Crime (Scotland) Act 1995, which operate on the regulated perimeter on named professions. The identification of a client would come only when they did legal work with the legal professionals within that entity and not when they did any other work that did not fall within that regulated perimeter. There might be an issue there.

**The Convener:** We have one final question. I ask for succinct answers, please.

**Angela Constance:** My question is about the regulation of multidisciplinary practices. Mr Sutherland, you said earlier that ethical issues are still to be resolved. Will you say a bit more about what those ethical issues are?

**Robert Sutherland:** I was just picking up on the Law Society’s comment in evidence earlier that it is still working on particular ethical problems, without having identified what they are — I am afraid that I do not know the details of what it has and has not resolved. I was just making an observation, really.

12:30

**Angela Constance:** Okay. Does the panel have anything to say about whether the bill provides the right framework for regulating different professionals who work to different codes of practice, particularly in relation to conflicts of interest?

**Kenneth Swinton:** As I think I have already said, the position on conflicts of interest is not clear. Different professions may have different standards, with the Law Society being the gatekeeper for solicitors and others allowing the client to make the decision, so there is still a difficulty as regards conflicts of interest.

I have already given an answer on confidentiality and our concerns about legal professional privilege.

**Robert Pirrie:** The devil is in the detail. As has been said, if the bill needs bolstering, the principle should be to ensure that there is a level playing field so that all MDPs, and all the professionals in them, are required to meet the same standards as single-discipline practices, but it is all down to the detail.

**Angela Constance:** Do you have anything to add, Mr Sutherland?

**Robert Sutherland:** No. I endorse that entirely.

**The Convener:** Thank you very much indeed for your evidence, which was most welcome, and for your attendance.

12:31

**Meeting suspended.**

12:32

**On resuming—**

**The Convener:** I welcome our final witnesses of the day, who are from the Scottish Legal Aid Board. Tom Murray is director of legal services and applications, and Colin Lancaster is director of policy and development. You are probably fortunate in that the evidence that you are required to give is factual, so we should be able to get fairly succinct answers from you, which would be welcome.
Bill Butler: Good afternoon, gentlemen. For the record and for the committee’s benefit, what are the advantages for consumers of ABSs?

Colin Lancaster (Scottish Legal Aid Board): Good afternoon. It is worth saying that the board’s main interest is access to justice, and it would probably be fair to say this is not the driving reason for the introduction of the bill. That said, whatever the other reasons may be for introducing ABSs, they offer some potential advantages for consumers in relation to access to justice. The point has already been made that increasing specialisation in the legal services market in recent years has resulted in concerns about supply of such services as have just been discussed in areas such as social welfare, housing, employment, mental health, immigration and family law.

We observe that those concerns have arisen under the current model, which has seen a great degree of specialisation, a reduction in the number of firms that do a bit of everything and, consequently, a reduction in the number of firms that provide legal aid services.

We do not think that large areas of the country suffer from shortages in service provision, but in some parts of the country, reductions in supply have been more significant and access to justice issues may have arisen or may still arise. Over the past two or three years, there have been several developments to try to address some of those issues. The committee may be aware of the board’s employment of solicitors in a number of locations and the recent grant-funding programme—for example, in relation to the economic downturn—in which it has tried to fill gaps.

Alternative business structures will give opportunities for other types of provider to enter the market. Traditional law firms have served us well and will continue to be the predominant providers of legal services to people who cannot afford to pay. Other business models such as social enterprises, citizens advice bureaux and other advice agencies may want to enter the market—at the moment, they cannot employ solicitors and so are limited in the range of services that they can provide—and it would be an advantage if they were able to do so. I say that notwithstanding concerns about the drafting of provisions on “fee, gain or reward”. There are opportunities for other providers to deliver services where firms that operate under the traditional model choose no longer to do so.

Bill Butler: Do you concur with that view, Mr Murray?

Tom Murray (Scottish Legal Aid Board): Yes, I do.

Bill Butler: Are there any disbenefits to the ABS?

Colin Lancaster: It would be disingenuous of me to pretend that the risks that other witnesses identified are not real risks. It is important to ensure that the bill has the flexibility to support the alternative models to which I have just referred in order to counteract some of those risks.

Bill Butler: In other words, you think the risks are manageable.

Colin Lancaster: On balance, yes.

Bill Butler: In your submission, you suggest that SLAB should be able to require bodies other than those that are listed in section 97 to provide it with specific information. Will you elaborate on that?

Tom Murray: The drafting of the bill makes it clear that there will be provision from people other than lawyers and counsel. I refer to citizens advice bureaux, Consumer Focus Scotland and so forth.

Our view is that, if we are effectively to provide our function under the bill, we will need as much information as possible on the running of the system. We suggested that, instead of adding bodies to the list, we should have a general power to ask for information. Clearly, we hope to get the information. If we are effectively to provide advice to ministers, we will need to form a good picture of what is happening, so organisations will have to provide us with information in order for us to do that.

We welcome the sections where provision is made for the regulators to give us information. However, the split in provision between the legally and non-legally qualified means that we will need to have as much information as possible as quickly as possible.

Bill Butler: That is very clear.

Nigel Don: My question is for Mr Lancaster. You talked of CABx wanting to employ solicitors. You will have to forgive me, but what is the benefit to a CAB of employing a solicitor rather than simply engaging the services of one? The answer escapes me. Why do they not just take the advice of Mr X?

Colin Lancaster: Evidence from research that has been conducted not just in Scotland but around the world suggests that the risk in referring people from one source of advice to another is that they do not get to the other source of advice. Citizens advice bureaux tell us repeatedly that they have difficulty in finding solicitors who will take cases on referral. For a number of years, CABx have wanted some form of in-house provision.

About eight years ago, we started a pilot project in the north of Scotland with Citizens Advice
Scotland in which we employed a solicitor to provide advice to advisers—not to clients—in CABx in the Highlands and Islands. The current rules that govern the employment of solicitors do not allow Citizens Advice Scotland to provide such advice, but we can do that under our legislation, albeit that the provisions are a bit cumbersome. The board employed the solicitors and posted them in the community. We have done that for a number of projects. The advantage to CABx of having lawyers in-house is that the lawyers are on hand to see clients who require representation. The solicitor can also provide advice, training and general support to advisers.

Many solicitors across the country participate in clinics and rotas at CABx and take cases on referral. However, there are still difficulties in the relationship in some parts of the country and for some clients. In-house solicitors will be an advantage.

Nigel Don: I will take you at your word. However, given what you have just said, it is not obvious why a solicitor must be part of the organisation. They can choose to be available to the court or to a citizens advice bureau.

Colin Lancaster: Such solicitors are members of private practices, so are subject to other business pressures and have other clients with whom they must deal. They are not at the beck and call of citizens advice bureaux that wish to pass clients through immediately. As I said, there is a risk that clients who are passed from one place to another may fall through the net.

Tom Murray: The issue for me is the ambiguous wording of section 36, which refers to “fee, gain or reward”. That could prevent a citizens advice bureau that wanted to become an entity in an ABS from doing so.

The Convener: You have anticipated a few of the questions that we intended to ask, but I am sure that there are other points that will need to be picked up.

Robert Brown: I recall that in the past there was a close relationship between the law centre and the citizens advice bureau in Castlemilk. That model would seem to be preferable. Is the rather more elaborate structure that the bill proposes required? The provisions relate to a different end of the market from the provisions relating to cross-border arrangements and partnerships with accountants. Is much more than a relatively minor alteration to the Law Society’s powers required?

Colin Lancaster: History shows that it has been difficult for such relationships to be established. In the current funding round, we awarded grants to organisations to provide advice on repossession and so on. Of the 16 grants that we made, eight were for projects that employ solicitors. Most of the bids that we received were partnership bids. For example, a CAB may have found a law centre with which it can work in partnership. That arrangement is fine and can work in some places, but it carries with it some complexities, as multiple agencies will be involved in the provision of one project.

Robert Brown: I understand that. Regardless of the wider issues, is a legal services bill, rather than more minor adaptation of the Law Society’s regulations, needed to allow such arrangements to happen? Could they be regulated by the Law Society in something like the normal way?

Colin Lancaster: I suspect that if there were not other drivers for the bill we would not be discussing its advantages in relation to access to justice.

Robert Brown: You have identified the areas of the law in which there are difficulties. Currently, we are going through a recession, not least in certain parts of the legal profession. From previous conversations with officers of the Scottish Legal Aid Board, I understand that that has led to a resurrection of interest in some areas of work that were under threat, not least family law. Can you give us a flavour of that?

Colin Lancaster: Members may be aware that, over the past 15 years or so, the number of applications for civil legal aid and the number of firms providing that service have declined. In the past 18 months, there has been a significant downturn. In the year to date, there has been an increase of something like 35 per cent in the number of applications for civil legal aid, and we have seen the first increase in the number of firms on our register that provide civil legal assistance. The increase has occurred across the board.

The make-up of the civil legal aid business fluctuates from year to year, but in the year to date there has been a substantial increase in many areas, especially family law. As a result of the downturn, in one way or another, more firms are offering supply and more clients are expressing demand for the service.

Robert Brown: In relation to family law, in particular, how representative are the figures of the number of firms that are registered? I have heard from you or others that, rather than being regular suppliers, some firms keep their name on the list to do the odd case. Do you agree that the figures are slightly misleading in that connection?

12:45

Colin Lancaster: That is right. A large number of firms are registered just in case a client comes in, such as a previous client who has fallen on hard times. There is a split in the market. Over the
past few years, even with the decline in applications and in the number of firms, there has been growth at the top end of the market—the firms that provided most civil legal assistance were providing more—and that has continued through the downturn. A relatively small number of firms do a large amount of civil legal assistance, but a large number of firms do rather less.

Robert Brown: Am I right in saying that the answer to the areas of difficulty is not so much multidisciplinary practices as the use of citizens advice bureaux, social enterprises and so on? Differences in legal aid rates might be relevant as well.

Colin Lancaster: The board’s view is that a mixed model is the best way of ensuring that we meet the needs of the 21st century. The legal aid model is more or less unchanged since the immediate post-war period. Needs have changed, and the profession has changed. A more pluralistic model, in which different types of provider can work alongside each other, is the way forward. That is certainly the way in which we have approached the direct employment of our solicitors. It is not in competition with private practice solicitors; instead it works alongside them, in recognition of the fact that they will wish to continue to provide some types of work but not others. Our offices will pick up the work that they are less inclined to do. The more different types of providers we can add to the mix, the more likely we are to meet the varied circumstances throughout the country.

Robert Brown: Does Mr Murray have something to add?

Tom Murray: For information, there are currently 619 registered civil firms. As well as a 35 per cent increase in civil legal aid, we have seen a corresponding lower increase in advice and assistance—about 6 per cent recently.

The Convener: Do the figures that you produced in respect of the legal aid applications not suggest that the solicitors in fact go where the money is?

Colin Lancaster: We would contrast the position in the past 18 months with the position in the past 15 years.

The Convener: We have dealt to some extent with the geographic availability. Does Cathie Craigie wish to pursue that?

Cathie Craigie: I am looking through the research working group’s findings, and there seem to have been gaps in provision for a while. Is it a problem that you think will grow, Mr Lancaster?

Colin Lancaster: We continually monitor the provision of civil legal aid services in particular because the most concern has been about them. We look at different types of work within that, such as family law and housing. We have developed that work more over the past 18 months to two years so that we can identify not only where the firms are but where the clients are and whether there are parts of the country where clients have to travel to get help. We identified that there have been bigger reductions in some parts of the country than in others. We have been concerned about the Highlands and Islands for some time, and we are concerned about Aberdeen and Aberdeenshire. We have been concerned about parts of Argyll, and there are one or two areas of Strathclyde where we think that there are potential difficulties as the number of applications coming from those areas has reduced.

In a number of those areas, we have been able to intervene by employing solicitors or providing grant funding. There are still one or two pockets where there may be shortages, notwithstanding the growth in the past 18 months. Inverclyde is one such area, so we will discuss with providers in Inverclyde what it is about that area that has resulted in a bigger reduction than elsewhere.

James Kelly: Section 9(6) provides for the Scottish Legal Aid Board to monitor the accessibility and availability of legal services throughout Scotland. How will that be done?

Colin Lancaster: As I was saying a moment ago, we already monitor the availability of legal aid services, and the provision in the bill will allow us to extend that work. At present we map patterns of applications by client and by firm. As Tom Murray said earlier, we also engage with other agencies to see whether they have picked up changes over time. We did a survey of the advice sector, and we have worked with Women’s Aid and advocacy groups to see whether their clients face difficulties in getting access to services. Although the bill broadens that monitoring role into other areas of legal service, and therefore necessitates others to provide us with information, we see it as an extension of the work that we already do.

The Convener: There are no further questions so I thank you, Mr Lancaster and Mr Murray, for your attendance this morning.

12:50

Meeting suspended.
Scottish Parliament

Justice Committee

Tuesday 5 January 2010

[THE CONVENER opened the meeting at 10:07]

Legal Services (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I open the first parliamentary committee meeting of the new year by giving the compliments of the season to everyone who serves the Justice Committee and everyone who will give evidence today. I hope that the new year will be successful for them.

I remind everyone to switch off their mobile phones.

Under agenda item 1, the committee will continue to take oral evidence on the Legal Services (Scotland) Bill. The first panel consists of Vivienne Muir, executive director, regulation and compliance, and Charlotte Barbour, project director, regulation and compliance, from the Institute of Chartered Accountants of Scotland. I thank them very much for coming to the meeting and for their forbearance. As they know, they were to be the second panel, but they have filled the breach caused by the late arrival of a witness who was scheduled to give evidence before them. I am grateful for that.

I will open the questions. I thank you for your written submission, which suggests that an adapted version of the existing regulatory regime for accountants—you refer to ICAS’s regulated non-member model—could be applied to the legal profession at a cost that would be lower than that of the current proposals. Will you explain how such a scheme would be established and how it would operate in practice?

Vivienne Muir (Institute of Chartered Accountants of Scotland): Good morning, and thank you very much for inviting ICAS to the meeting.

ICAS operates a fairly comprehensive regulatory approach for its members. Our chartered accountant firms comprise non-members as well as chartered accountants. In order to bring those non-members into the regulatory structure, they can become regulated non-members—there are contractual arrangements under which non-members come to the regulatory fore.

The advantage is that when we go out to a firm we can monitor the whole firm, as opposed to looking just at our members. We are therefore bringing non-members into the regulatory framework. It is a simple way of doing things and means that we can go out and assess the firm for quality and competence. The method has worked well for the accountancy profession.

The Convener: Have you anything to add, Ms Barbour?

Charlotte Barbour (Institute of Chartered Accountants of Scotland): Not really. The criteria for being a regulated non-member are that the person is a fit and proper person and agrees to be bound by all the ICAS rules and regulations. Of course, although such a person is not a chartered accountant, the system allows them to become a principal in a firm of chartered accountants. At least 50 per cent of the principals in such firms must be chartered accountants, but our rules would allow a lawyer to come in. I appreciate that, as yet, the Law Society of Scotland rules do not permit that. Ex-inspectors, members of the Chartered Institute of Taxation and so on are often regulated non-members.

The Convener: We will continue on the theme of regulation. Do you feel that further safeguards, such as an enhanced role for the Lord President of the Court of Session, or a consumer panel established by statute, would provide reassurance in relation to preserving the independence of the legal profession?

Vivienne Muir: I have no strong views on that. Obviously, in relation to the bill, ICAS’s role is fairly limited, in terms of an interest in alternative business structures or confirmation services. However, I certainly would not be opposed to that type of arrangement.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): My question follows on from the convener’s questions. Charlotte Barbour just told us that 50 per cent of partners in a regulated firm must be CAs. Can you expand a bit on the types of people who apply to be regulated non-members?

Charlotte Barbour: Yes. Chartered accountant firms consist mainly of chartered accountants, who might be from ICAS or from other institutes of chartered accountants. In the tax world, members of the Chartered Institute of Taxation or ex-tax inspectors might apply to be regulated non-members. Regulated non-members tend to be people who work in other professional fields that perhaps do not have the same regulatory structure and who want to be able to be a full partner in a firm of chartered accountants.

Cathie Craigie: Do regulated non-members tend to be people who work in accountancy in some way?
Charlotte Barbour: That is an interesting question. Accountancy firms are already almost multidisciplinary practices, because a chartered accountant might do accountancy, insolvency, tax or corporate finance. Audit is slightly different because it is in a regulated sector for which extra qualifications and licences are needed. A range of services is therefore provided already. In fact, one reason why the bill interests us is that our members already provide quite a lot of legal services—tax advice and that kind of thing.

Cathie Craigie: Why was it felt necessary to say that 50 per cent of partners in a firm must be CAs?

Charlotte Barbour: I think it is because we would want control.

Nigel Don (North East Scotland) (SNP): Can you elaborate on the kind of problems involved in lawyers doing law rather than doing tax, if I may use such simple terms? Surely that would cause regulatory problems, which I suggest your scheme simply does not cover.

Vivienne Muir: It would depend on how the whole regulatory approach works. Certainly, we are in favour of the bill. However, its success will depend on the regulatory approach. If we could build our existing processes into a regulatory approach for different types of licensed providers, that would be beneficial and cost effective.

We will have to enter some form of memorandum of understanding with the other professions so that we understand where we have to work together and share information, for example. However, all will depend on our obligations as an approved regulator and what regulation we have to carry out. If it is at a fairly high level—in some ways, we already carry out such regulation with our firms—it will not create difficulties to have lawyers within a regulated structure in one entity.

10:15

Nigel Don: There seem to be two approaches to your being regulators in the context of the bill. One is for you to modify your existing scheme to accommodate the requirements. The alternative is that you say, “Look, our existing scheme, with a few tweaks, will be good enough. We don’t need the bill.” What you have just said implies that you regard the former as the better route. You recognise that your scheme would not be compliant with the bill, particularly as it does not deal with the confidentiality issues or the conflict of interest issues that lawyers are going to meet. If I heard you aright, you are not suggesting that your scheme would be fine and that we do not need the bill. What you are suggesting is that your scheme would be a good one on which to build, given whatever framework the bill provides.

Vivienne Muir: Yes—that is absolutely what we are suggesting.

Nigel Don: Thank you.

The Convener: Just so that we can put the matter to bed, what test does ICAS apply with regard to non-accountant members in so far as the definition of a fit and proper person is concerned?

Vivienne Muir: We have a fairly rigorous application process. We can certainly leave the details with you. It covers financial integrity and reliability, previous convictions or civil liabilities, and reputation and character. There is also a requirement to obtain references.

The Convener: What are you reading from?

Vivienne Muir: It is the application for regulated non-members.

The Convener: It might be helpful if we had a copy of that.

Vivienne Muir: No problem.

The Convener: Thank you.

Cathie Craigie: I am sorry to keep coming back to you, Charlotte, but when I asked you why you believe it is important for partnerships to contain at least 50 per cent CAs, you said that it is because you want to keep control. The bill does not set any such level for solicitors firms. Is that appropriate?

Charlotte Barbour: I suppose that, when I look at what drives that bit of the rules, the important thing is whether the firm will be able to promote or designate itself as a firm of chartered accountants. We would not want a firm to do that if only one of its four principals was a CA. If a firm is to brand itself as a firm of chartered accountants, we would want to know that chartered accountants were in the majority or formed at least 50 per cent. That relates to the point in our submission about whether such a firm should be called a legal services provider. The bill is structured in such a way that a firm that comprised three chartered accountants and one lawyer would need to be called a legal services provider. I am not sure that that is necessarily what our members would want.

That is why we propose interaction with our regulated non-member model. If we tweak the two approaches, we might get closer to a situation in which a firm was either a legal services provider—such firms would have a majority of lawyers and an accountant or surveyor or whatever—or a firm of accountants. A change to the Law Society rules would arguably allow one or two solicitors to join our firms.

Cathie Craigie: Thank you.

Charlotte Barbour: Is that sensible?
Cathie Craigie: It is a point that we will bear in mind as we compile our report on the bill.

Your written submission states:

“We have traditionally favoured ... moves to facilitate the creation of multi-disciplinary practices”,

which

“could lead to operational efficiencies which might be passed on to consumers”.

What evidence is there of demand for multidisciplinary practices, or one-stop shops, as some might call them?

Vivienne Muir: That is quite a difficult question to answer at the moment. We issued a survey to our members but unfortunately the response rate was only 8 per cent. The majority of those responses were in favour, but at this stage, members are not fully familiar with the likely regulatory impact or cost. They are seeking to keep their options open and waiting to see how the bill will proceed and what the regulatory impact will be.

Cathie Craigie: I appreciate that you are speaking on behalf of your members today and that you have not consulted widely with clients, for example, who might or might not think that it would be a good idea to go to a one-stop shop.

Charlotte Barbour: We have not taken it further than surveying member firms.

Cathie Craigie: You got an 8 per cent response rate. How many members do you have?

Charlotte Barbour: We surveyed almost 1,000 member firms.

Cathie Craigie: So it was member firms as opposed to members.

Charlotte Barbour: Yes.

Cathie Craigie: Professionals seem to have difficulty in getting their members to respond. There was a similarly low response rate to a consultation by the Law Society.

On the regulation of a multidisciplinary practice, does the bill provide a satisfactory framework for dealing with divergences and differences between respective professional standards and codes of conduct?

Vivienne Muir: The bill is very much an enabling bill, and we will have to wait and see how the detail works out. As I said, the bill meets those requirements. The obligations on the approved regulator will be critical and they will have to be at a fairly high level to allow individual professions to continue to regulate themselves. That will mean that conflicts will be dealt with quite easily because there will only be difficulties when there is a conflict between the approved regulator and what the licensed provider has to do to satisfy the approved regulator. I am comfortable with the way in which the bill is structured at the moment, provided that the approved regulator’s obligations are structured correctly.

Cathie Craigie: Do you believe that the application process for regulated non-members—you are going to supply a copy of the documentation to the committee—can deal with the conflicts that might arise between the different professionals, and that it can protect the integrity of the service that is being provided?

Vivienne Muir: It must be remembered that regulated non-members are still affiliated to and therefore overseen by their home institute. We are talking about a way of bringing in firms so that we can monitor them and look at different aspects of their work.

Cathie Craigie: How will the multidisciplinary practice reconcile the differences between solicitors and accountants?

Vivienne Muir: Conflict has to be dealt with by each of the institutes. We all have codes of practice and ethical guides that deal with our own conflicts of interest. The regulation of individual professions will continue. We have to sit down and see whether, from an entity and licensed provider perspective, there are any potential conflicts that we have to address, but that could be done by way of a memorandum of understanding. We have already had some discussions with the Law Society on that quite sensible approach.

James Kelly (Glasgow Rutherglen) (Lab): In previous evidence sessions, concerns have been raised about the potential for undesirable third parties to get involved in law firms as a result of the bill. In an answer to the convener, you cited elements of the application process that would provide some safeguards. Are you confident that, if ICAS were to become an approved regulator, its processes would be robust enough to prevent the involvement of undesirable third parties?

Vivienne Muir: Yes. Our current processes for assessing whether people are fit and proper to become regulated in whatever area—for example, if they are seeking to be audit registered—are already robust, and a similar approach could quite easily be taken to the proposed business set-up to ensure that all the necessary checks were in place. Indeed, we would be obliged to ensure that the provider had gone through a fit and proper process.

James Kelly: How would your checks flag up whether, for example, someone had been involved in criminal activity?
Vivienne Muir: That information would have to be declared on the application form.

James Kelly: If the applicant did not declare such information, would you be able to track it down? Are you essentially relying on people's honesty?

Vivienne Muir: We do rely on the applicant's honesty. However, it all very much depends on the nature of the applicant, and if we felt that we needed to carry out further checks we would certainly do so.

James Kelly: But is there not a potential problem in that respect? After all, undesirable elements who apply without honest intention might well not declare previous criminal convictions.

Vivienne Muir: That is a consideration, and we would have to think about how we might safeguard against such things.

James Kelly: In paragraphs 7 to 10 of your submission, you express concern about the branding of licensed legal services providers. Will you elaborate on that concern?

Charlotte Barbour: As I said earlier, I doubt that it serves the consumer interest well to call a firm primarily comprising chartered accountants with only one or two solicitors a legal services provider because one would assume that such a provider would be a firm of solicitors rather than a firm that primarily provided accountancy-related services as well as some legal services. As the bill is currently structured, it is a moot point whether under the separate regulatory vehicle the firm will be a "legal services provider" or whether that will just be a subtitle and we will still be able to refer to such a firm as a firm of chartered accountants and solicitors regulated as a legal services provider. However, I cannot imagine that a firm of chartered accountants that took in one solicitor would be interested in adopting such an approach at the moment, because it simply does not lend itself to allowing such firms to make it clear exactly what they do.

Nigel Don: I noted your earlier comments on that matter. With regard to the head of legal services's overriding control of, in particular, money, it makes great sense for someone in a legal business to be responsible for clients' money; of course, accountants routinely carry out such work, so I see where you are coming from. Can you give me some clues about how we might resolve the issue? Should the person responsible for the accounting mechanism for clients’ money be a CA or a qualified lawyer?

Charlotte Barbour: I do not think that it matters whether they are a lawyer or a CA, just as long as a professional designated person is responsible.
to justice should depend on affordability, or on the depth of people’s pockets.

Sarah O’Neill (Consumer Focus Scotland): Consumer Focus Scotland and our predecessor body, the Scottish Consumer Council, have long argued that there is a need to open up competition in the market for legal services in Scotland, and that we should consider new ways to deliver those services—subject to adequate consumer protections being put in place. We believe that lifting the existing restrictions through implementing the bill will bring consumers a number of advantages, including an increased choice of services, reduced prices, greater convenience and more consumer-focused services. Most important, we see potential in the bill to increase access to justice for consumers.

We have been concerned that much of the debate on the bill so far has focused on the benefits to big legal firms, external ownership by businesses and issues to do with legal markets where there is already healthy competition, such as conveyancing. We view the bill, together with other proposed reforms such as those in Lord Gill’s recent civil courts review, as important for achieving modern, consumer-focused legal services in Scotland.

The bill has the potential to lead to the development of entirely new structures in the voluntary, charity and advice sectors, not just in private practice and in services provided by solicitors and accountants, which we have been hearing about. Charitable and advice organisations should have flexibility in how they address unmet legal need, both in geographical areas and in areas of legal work where there is insufficient provision of legal services. In 2006, the legal markets research working group found that there are clear gaps in provision in areas of social welfare law such as debt, housing, employment and immigration. We would like to see the market opened up so that citizens advice bureaux, which we know want to have these powers, and other charities, can employ solicitors to work directly in those areas.

The Convener: You have slightly anticipated a question that I was going to ask but, to come back to the question that I did ask, what is your evidence that the bill is needed?

Sarah O’Neill: Our evidence is, first, the research working group report to which I have referred, which showed clearly that some legal markets are not competitive. As I have said, advice agencies and others expressed concern about a lack of supply in some markets. We also know from other research, such as “Paths to Justice Scotland”, that people cannot always access the legal advice and assistance that they need.

Cathie Craigie: When did the research working group to which you refer carry out its research?

Sarah O’Neill: It reported in 2006.

Cathie Craigie: Was that not the working group that concluded that much more research work needed to be done on the issue?

Sarah O’Neill: Yes.

Cathie Craigie: I find it strange that you are using that group’s report to back up your submission. What drive is there from consumers who believe that the bill will benefit them?

Sarah O’Neill: As others have said, it is very difficult to say what demand is out there from consumers. We know that consumers cannot always access the legal services that they need, so, although they may not know that they demand other ways of delivering services, we think that the bill brings the potential to consider other ways of delivering services that meet people’s needs, particularly by enabling advice agencies to employ solicitors. You may recall that Ian Smart from the Law Society of Scotland gave an example of a partnership involving an employment solicitor, a human resources consultant and a management consultant. That solicitor cannot currently practise as a solicitor and so cannot represent clients in court, although they can do so in a tribunal. In employment law, the working group found that there is a dearth of provision for employees, so it makes sense to allow such structures to grow up. We will not know what other innovative structures might grow up until the bill is in place.

Cathie Craigie: That is exactly my point. The research working group was made up of highly experienced academics and practitioners from across Scotland. Would it not have been reasonable to follow up its main recommendation that more work and more research are required on whether this huge change to the way in which we deliver law services and solicitor services in Scotland should be made?

Sarah O’Neill: The Scottish Consumer Council was a member of the research working group and we were of the view that the current restrictions should be lifted. Most of the research that the working group recommended was on taxation and various other issues. Whether there are markets in which there is insufficient provision was not at issue; that was more or less agreed in the report and that is the evidence that I am using.

Cathie Craigie: I am sorry that I do not have the working group’s recommendations to hand—I think that I have them somewhere on my desk, but I do not want to be rude and fumble through my papers as we hear your evidence. I do not think that you can pick and choose from the group’s recommendations; it recommended that we should
conduct more research. It concerns me that the consumers of legal services have not been consulted in any great detail since that research working group, which involved your organisation, reported.

Sarah O'Neill: We know that there is unmet legal need. We have not explicitly asked people whether they would like to have these services, but we think that they would. We certainly know from the KPMG report that corporate clients are interested in having these services, because they can see the advantages for themselves. We think that individual consumers would also see the advantages if the services were available to them but, of course, they are not repeat players in the same way that businesses are. They do not necessarily use legal services very often, so they would not necessarily think about the issue until they knew what was available to them.

The Convener: In her first response, Ms Farmer expressed concerns, which were also contained in the Unite submission, about how the new system might operate, although the concerns seem to be about legal aid rather than the application of the bill. Would it be fair to suggest that Unite believes that the operation of the bill could result in a reduction in pro bono services, for example?

Fiona Farmer: I believe that it could. It is quite difficult to see how many aspects of the bill could be implemented. In general, we are not opposed to solicitors securing investment and expertise from outside sources; our major concern is mass privatisation and how external providers such as multinationals, banks and supermarkets would be regulated if they began to control the Scottish legal system in that way.

The Convener: We will now deal with the independence of the legal profession.

Stewart Maxwell (West of Scotland) (SNP): I have a small follow-up question before I move on to that issue. It is about Ms Farmer’s analogy with the NHS. I am not sure that I understand the analogy between the provision of legal services that is envisaged in the bill and the privatisation of the NHS that has taken place in England. It seems to me that, in Scotland, it is possible to have multidisciplinary practices in the NHS but not to have multidisciplinary practices that involve legal services, accountants and so. Will you explain how your analogy works?

Fiona Farmer: My analogy was really just with the situation in England. We are a United Kingdom union and we have vast experience of the opening up of the NHS to privatisation, which has resulted in the attractive and money-spinning parts of the sector being creamed off and being taken up by private enterprise, social enterprise and outsourcing.

Stewart Maxwell: My point is that we seem to be creating a change in structures rather than a mirror image of the opening up of the NHS in England to privatisation. All firms of accountants and lawyers are in the private sector—they are not public sector firms. I am trying to understand how a bill that aims to break down the barriers between different professionals is analogous to the privatisation of the health service in England.

Fiona Farmer: It is about the fact that, as a trade union, we do not want to see legal services being wholly controlled by the private sector.

Stewart Maxwell: I am sorry to interrupt, but could you name a legal firm or a firm of accountants that is in the public sector?

Fiona Farmer: I am not saying that the legal system is run by the public sector, but there is Government input into it. At the moment, monitoring and accountability are part of Government activity. We do not want to see that being wholly controlled by the private sector.

Stewart Maxwell: I am interested in your use of the phrase “wholly controlled by the private sector”.

I fail to understand what that means. I think that you have accepted that the firms in question are private sector firms. I accept your point about the Government’s role in the legal system, but it is clear from the bill and from evidence that we have received that monitoring by ministers—I would not use the phrase “Government control”—will continue if the bill is passed. Could you explain what you mean by “wholly controlled by the private sector”?

Fiona Farmer: One of our concerns is that it is not clear from the bill what control, monitoring and accountability there will be in the future.

Stewart Maxwell: I will leave the issue just now, although other members may want to come in on it.

The Convener: Cathie Craigie has a follow-up.

Cathie Craigie: I have had a look at Unite’s submission. Is it your concern that the passing of the bill would create an open door for people to provide legal services purely for profit rather than for other motives? Are you worried that they would be motivated by profit?

Fiona Farmer: Yes, our concern is that profit would be the motivation and that we would end up with a very unequal justice system that could be accessed only by those who could afford it, rather than by those who had the most demanding or pertinent cases.
10:45

Stewart Maxwell: I must come back on that point—I was going to leave it, but again I fail to understand your line of argument. The question was about whether legal firms would be out for profit. Under the current set-up, are legal firms—which are, as we have established, private enterprises—not already out for profit?

Fiona Farmer: I am not saying that legal firms are not out for profit; they are in the private sector. I am concerned that, by allowing in the multinationals—the banks and the supermarkets—we are opening the system up to something completely different. Issues of accountability and control are a concern for us, because, as I outlined earlier, we have seen the fallout from the opening up of the NHS to social enterprise and multinationals.

Stewart Maxwell: I fail to understand your argument, to be honest. I do not want to be rude, but I will be frank. At present, legal firms and accountancy firms—all the organisations that are involved in the bill, which range from small, one-person firms to very large organisations that are single service rather than multidisciplinary—are profit seeking. They are businesses that seek to survive and generate profit for their members. I do not understand the difference that you are trying to establish between what happens now and what may happen under the bill. The firms—either the same firms, or firms owned by different people—would still be out to make a profit. I cannot see the difference.

Fiona Farmer: We have outlined our position quite clearly in our submission, and I have outlined it a number of times today. I am not sure what else I can say to explain it further.

The Convener: We have the evidence, and it is up to us to assess it. I ask Stewart Maxwell to move on to the independence aspect.

Stewart Maxwell: Certainly, convener. We have briefly touched on the regulatory role for the Scottish ministers. Does either of you believe that that role is consistent with the independence of the legal profession?

Sarah O’Neill: We are keen on the idea of an advisory panel to advise ministers on the regulatory framework. Such a panel would deal with many of the concerns that have been raised.

Stewart Maxwell: In what way would it do that? How would the panel be selected, and who would be on it?

Sarah O’Neill: We do not yet know that. There is nothing in the bill about putting a requirement for a panel in legislation, which disappoints us, as the majority of respondents to the consultation wanted that to be the case. We know from the policy memorandum that the Scottish Government intends to establish such a panel, but it will not be on a statutory footing as we believe it should be. The composition of such a panel would need to be considered, but we would like it to feature strong consumer representation.

Fiona Farmer: We would be more supportive of a legal commission. We do not have any figures for that, nor have we put any meat on the bones in relation to how it would be structured, but we would like such a body to be set up.

Stewart Maxwell: For the sake of clarity, what would be the difference between a legal commission and the panel that we have just been discussing?

Fiona Farmer: The difference relates to accountability.

Stewart Maxwell: We have received evidence that suggests that an enhanced role for the Lord President could deal with the question of the perception of independence. Would that be sufficient?

Sarah O’Neill: It is entirely proper that the Lord President should be consulted on the issues, but we are concerned, for a number of reasons, about the suggestion that approval by the Lord President should be required. It is not clear how such a role would sit with the Lord President’s other roles as a member of the Faculty of Advocates and as head of the Scottish Court Service.

We also have concerns about what happens when a body that is not a legal professional body applies to be an approved regulator. There may be an issue of public perception; people might ask why the Lord President is involved, as it is not only legal professional organisations that may apply to be a regulator.

Stewart Maxwell: Are you suggesting that there is a potential conflict of interest for the Lord President?

Sarah O’Neill: We are suggesting that public perception of a conflict of interest may be an issue.

Fiona Farmer: That is exactly the point that I would make. We would be concerned about a conflict of interest if the Lord President were to be the only individual involved.

Stewart Maxwell: You both agree that the Lord President should have a role but that he should not have an approval role. Are you talking about a halfway house whereby he would have an advisory role as opposed to the role that is being suggested?

Sarah O’Neill: We are happy with what is in the bill. The Lord President’s role is clearly important, particularly in relation to legal issues.
Fiona Farmer: Yes, it should be a participatory but not a governing role.

The Convener: James Kelly will now pursue the area of regulation.

James Kelly: As we have just been discussing, the bill seeks to open up the legal profession, which would mean that we would have both traditional firms and licensed legal services providers. There would also be approved regulators and existing regulators. Does the bill do enough to provide a level playing field as regards regulatory burden between traditional firms and the proposed licensed legal services providers?

Sarah O'Neill: We are happy in principle with the regulatory scheme that is set out in the bill, but we have expressed concern that it will not apply to traditional firms. We think that it should because, from the consumer perspective, it should not matter how the business the consumer deals with is set up; they should be entitled to the same form of protection. For example, traditional firms are not necessarily required to comply with the regulatory objectives and adhere to the professional principles, but we think that the same principles should apply to both types of providers.

James Kelly: Do you therefore believe that the regulation of traditional firms will be less robust than that of licensed legal services providers?

Sarah O'Neill: We are not necessarily saying that it will be less robust. One of the clear issues for us is the changes that are to be made to the governance of the Law Society, which we very much support—we have said for a long time that that should happen, although we have an issue about the percentage of lay members on the Law Society's council. We are happy with the regulation, but if we are moving towards having a more modern legal system, all providers should be subject to the same requirements. As it stands, the regulatory objectives do not necessarily apply to traditional providers.

James Kelly: Does Ms Farmer have a comment about that?

Fiona Farmer: I do not have terribly much more to add, except to say that we would like exactly the same regulation to apply across the board, but we have no great criticism of the existing regulation.

James Kelly: When a user of legal services pursues a complaint, we want to ensure that the process is as simple as possible so that they can address their issues. Does the bill serve that purpose or is the regulation too complex?

Fiona Farmer: As it stands, the regulatory process is not terribly clear. The complaints process has to be simplified and made clearer.

Sarah O'Neill: It is essential that the process is as clear and simple as possible for those who use it. That is one of the reasons why it is important that we have the same regulation regardless of who provides the service. That is key for us.

We raised an issue about the addition of a new form of complaint—a regulatory complaint. There will now be an additional category of complaint for people to find their way through and we are concerned that that will make it more complicated. It is essential that information about what consumers should do is as clear as possible. It should not matter who provides the service that the consumer receives, but they need to know which road they should go down if they have a problem.

Nigel Don: Good morning, ladies. What benefits would there be in opening up legal services in such a way that allows advocates to participate in alternative business structures? The benefits of that are not at all clear to me.

Sarah O'Neill: It is difficult to see what the benefits would be without knowing what kind of structures will grow up. We know that there are advocates out there who would like to be able to form alternative ways of doing business. There is a strong argument for those restrictions to be lifted. The issue of advocates is less pressing for us than that of solicitors, because few members of the public deal with advocates. However, we think that the restrictions should be lifted, because we do not know what kind of structures could be formed.

Fiona Farmer: My answer is very much the same. It is unclear what is being proposed for advocates, apart from a lifting of the restrictions, and how that would be taken forward, so it is difficult for us to comment on the matter in detail.

Nigel Don: In paragraph 24 of her submission, Ms O'Neill states:

“We believe that all restrictions on competition should be removed unless there are clear and justifiable reasons for retaining them. We are not convinced that there is sufficient justification for retaining the current restrictions on advocates participating in ABS.”

Given that there are something like 440 advocates in Scotland and given that, in principle, they deal with every case that comes before them, it is completely unclear to me how we can improve the competitiveness of the market by changing the structure. I am looking for some help. I appreciate that advocates might want to work in partnerships, for business reasons, but even that would restrict competition.

Sarah O'Neill: We are not convinced that it would. It is important to make the point, as others have done, that the proposal is permissive—we are not saying that advocates must participate in
ABSs but that they should be allowed to do so, if they wish. We are not entirely convinced that that would lead to competition issues; if it did, the Office of Fair Trading would have a role to play. There seems to be an assumption, which I cannot quite understand, that advocates who are in the same area of work would band together. I am not sure why that would be the case, as it is not what generally happens with solicitors firms. The argument is often made that, if all advocates working in an area banded together, it would be difficult for the other side in a case to get representation. However, some advocates working in different areas might want to form practices with one another or with solicitors.

Nigel Don: I accept that, but how would such an approach work in the consumer’s interests, given that it would reduce the number of parties who might be able to represent people? Surely that would reduce competition, by definition.

Sarah O’Neill: I am not sure that it would reduce the number of parties that could represent people. It might make it easier for consumers to get access to the advocate whom they need or lead to reduced prices for them. If advocates could have the structures that are proposed, it would lead to a more consumer-focused service.

Nigel Don: I will press you, because the issue is important and advocates want to know the reason for the proposal. I do not disagree with what you have said—many witnesses have made the same point to us. I have described it—perhaps slightly unfairly—as elementary economics. All of us understand the basic principle that competition may reduce prices. However, in the particular case of advocates—I am not talking about solicitors or accountants—I still struggle to see how any mechanism other than requiring practitioners to operate independently would increase competition.

Sarah O’Neill: I can only repeat what I have said. We do not know what the structures would be, because at the moment such arrangements are not allowed. We would like to see what might develop. If competition issues arise from that, the Office of Fair Trading will have a clear role to play.

The Convener: We move to issues of outside ownership and governance.

Cathie Craigie: My question is directed primarily at Consumer Focus Scotland. In its written submission, it reminds us that it “works to secure a fair deal for consumers in both private markets and public services” and states that “while producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not.”

I agree with that point and with the organisation’s aims. What risks and benefits are associated with opening up the legal services market in Scotland to banks, supermarkets and others that may want to invest in it?

11:00  
Sarah O’Neill: I have outlined what we see as the benefits. I have focused on advice agencies, the voluntary sector and so on, but we see potential advantages in other providers coming into the market. I have talked about reducing prices and so on, but there are other considerations, such as greater convenience if services can be provided at times that suit people better and the fact that new providers may be consumer focused and concerned about consumers trusting their brands. As we have said, lots of things could happen.

There are risks but, whatever we have heard about the increasing marketisation of legal services, it is already happening. Indeed, one of the main reasons for introducing the bill is the fact that the legal services market is already changing, and we need to modernise the system so that we can keep up with that change. Alternative providers are coming into the market and that will continue to happen, particularly with the reforms that are taking place in England, Wales and elsewhere in Europe.

We know that consumers like supermarkets because they offer a much greater choice than existed in the past, including a much greater selection of goods and more convenient opening hours. However, whether supermarkets will want to offer legal services is another question. Tesco law is the phrase that is being bandied about, but we are not sure that lots of supermarkets will want to provide such services. The point has been made that supermarkets will do work that is profitable, but I question what that is. The research working group found conveyancing to be one of the most competitive markets. I am not convinced that there is a lot of potential profit in there for supermarkets, banks and others.

Cathie Craigie: Your written submission talks about the benefits of alternative business structures, such as increased choice, reduced prices, better access to justice, a more consumer-focused service, greater convenience and increased consumer confidence. That all sounds very upbeat, but people tell us that there would be risks to the consumer in smaller towns such as those in my constituency, for example, if supermarkets took over legal services. We have been told that many of the small legal firms that operate in the main streets would be at risk because their more profitable business would go if work such as conveyancing could be done online.
or more cheaply at the stores. You have said that there will be some risks to the consumer—what are those risks?

Sarah O'Neill: Yes, there is a risk that access to justice could be decreased, but we do not believe that that will happen. As I have said, we believe that access to justice could be increased by the changes.

It is important to make it clear that we are still talking about solicitors providing legal services. In any licensed legal services provider, the head of legal services will have to be a solicitor, and they will be responsible for all the designated persons within that provider. People will have the same protections that they have at the moment regarding the legal services that are provided, the level to which those services should be provided, the quality of the services and what happens if things go wrong. In this debate, sight is sometimes lost of the fact that we are talking about solicitors providing the services. The only difference is that they will be employed by different entities from those that employ them at the moment.

Cathie Craigie: What is going wrong with legal services just now? Why is there a need for the legislation?

Sarah O'Neill: As I have said, there is insufficient supply in some markets. Some of that is in specific geographical areas, but we also know that there is a dearth of provision in particular areas of law. Access to social welfare law and family law is increasingly an issue in a lot of areas.

Cathie Craigie: Let us move on to governance, which you have touched on. Consumer Focus Scotland’s written submission mentions the benefits of increased non-solicitor membership of the council of the Law Society. It wants to see that membership at 50 per cent, but the Government wants it to be around 20 per cent. Do you want to say any more than you have already said on that?

Sarah O'Neill: For us, that is absolutely key. The Scottish Consumer Council argued for that representation for many years, and we think that, if we are going down the road that it is proposed we go down, it is even more important that there is public confidence in the professional body and the regulatory body. We are pleased that the Law Society is moving towards 50 per cent lay representation on its regulatory committee, but we believe that 20 per cent lay representation on its council is insufficient. Given its dual role of promoting the profession’s interest and the public interest, we think that there should be 50 per cent lay representation on the council as well.

The Convener: Do you have anything to add, Ms Farmer?

Fiona Farmer: No, I think that I have covered most of those points already.

The Convener: You have indeed. One thing occurred to me, though. Unite is a sizeable trade union and many of your members will ask for advice and assistance. What do you do about legal services for them?

Fiona Farmer: We deploy various firms of solicitors—depending on the region of the country and the nature of the legal query—to give legal advice and to represent our members in court and at tribunals. We also have our own legal department in the union. Normally, the solicitors whom we deploy are specialists in employment law, but that is not necessarily the case.

The Convener: You use them according to specialisation.

Fiona Farmer: Yes.

Nigel Don: Paragraph 27 of Consumer Focus Scotland’s submission suggests that the body supports the self-regulation of advocates by the Faculty of Advocates but notes that “the current governing arrangements could create confusion in the public’s mind”.

I am sure that that is true, because I am sure that the general public have not the slightest idea how advocates work or even, indeed, what they do.

Paragraph 27 ends by saying:

“However, we do not believe the current provisions within the Bill offer sufficient clarity to allay our fears about the lack of independent oversight of the Faculty.”

What you would like to be done to change that?

Sarah O'Neill: Our position is clear. We think that the same arrangements should apply to the Faculty of Advocates as we think should apply to the Law Society. In other words, we think that there should be 50 per cent lay representation on the Faculty of Advocates’s council and that there should be a lay chair. We feel that the faculty could be more transparent with regard to how it regulates advocates. Although we welcome the fact that the regulatory arrangements are being put in statute, it is still not entirely clear how they will operate and in what circumstances the Court of Session may delegate the powers to the Lord President and/or the Faculty of Advocates.

Nigel Don: Accepting your point that there is a lack of clarity, I should say that I suspect that there will be a lack of clarity around all of this until we have signed off the finished act.

Are we not in a position to accept that, fundamentally, advocates work for the courts and that, therefore, regulation by the Lord President—no doubt delegated on occasion—provides a pretty good way in which to operate in practice?
Sarah O'Neill: No, because advocates work on behalf of consumers, and it is important that that is recognised in their regulation. Yes, they work for the courts but, ultimately, their clients are consumers, who should be represented in the regulation.

Nigel Don: Do you not feel that, given that advocates respond only to solicitors—with a few exceptions, which we discussed a couple of weeks ago—the solicitors, in a sense, regulate the advocates on behalf of the client? After all, if solicitors are not happy with the service that they get, they know exactly where to complain.

Sarah O'Neill: Solicitors know where to complain, but we are contacted from time to time by consumers who are unhappy with advocates whom they have used and who are not entirely clear about how they make a complaint, what the process is or how any of the issues are governed or regulated. We see this bill as providing an opportunity to open up that process and clarify its operation.

Nigel Don: So is the issue more to do with having a transparent complaints system than it is to do with a regulation system?

Sarah O'Neill: We think that it is about regulation more broadly. We have done a lot of work in the past on complaints, particularly with regard to the solicitor branch of the profession, and we obviously now have the Scottish Legal Complaints Commission, which deals with complaints in both branches of the profession. However, other issues of regulation are also of interest to consumers, such as how advocates and solicitors are educated and trained, what their professional standards are and so on, and it is important that consumers’ views should be represented in the governing body.

Robert Brown (Glasgow) (LD): I apologise for being late, convener. I had transport problems this morning.

The Convener: That has been a fairly consistent problem.

Robert Brown: My question relates to professional qualification. To what extent should will-writing services be regulated in Scotland? I am particularly interested in whether Sarah O'Neill has a view on that on behalf of Consumer Focus Scotland.

Sarah O'Neill: We do have a view. We are not aware of a particular issue with will-writing services in Scotland—although we understand that more such services are appearing—as traditionally there has been more of an issue in England. However, we certainly think that, if will writers provide services in Scotland, they should be regulated adequately. It might be okay for people to do it themselves or to use will writers in straightforward circumstances but, unfortunately, people often think that their circumstances are straightforward when in actuality they are not. Our view is that people should take legal advice before they prepare a will but that, as other providers are in the market, adequate protection should be in place for consumers who use them.

Robert Brown: Does that not raise the broader question that I think Fiona Farmer touched on about the balance between the cost of a product and the quality of the service that people get? As I understand from the explanation that we have had about will-writing services, they are do-it-yourself things with no guarantees, no professional indemnity and no legal advice on the implications. As you said, it is a complex area of the law. Are there not significant issues that have implications beyond will writing for other services in which strong professional quality is required?

Sarah O'Neill: We always say that a professional who provides a service should be appropriately qualified to do so, but they do not necessarily have to be a solicitor. For example, with money and housing advice, many non-solicitor advisers are much better informed and more experienced than some solicitors are. The issue depends on what is appropriate for the service that is provided. The legal profession has an opportunity to brand itself and say that people should come to solicitors rather than will writers because solicitors have legal expertise and, actually, do not charge that much for wills.

It is important that people have the information that they need to make an informed choice. They should be clear that solicitors often offer wills as a loss leader, as they hope to get executry business later. People should be aware of that when they consider such services.

Robert Brown: Is it appropriate for a do-it-yourself service for will writing to be available at all? I am thinking about what the exact extent of the regulation should be.

Sarah O'Neill: In general, a do-it-yourself will is probably better than nothing. Our predecessor organisation, the Scottish Consumer Council, carried out research in, I think, 2006, which found that only roughly a third of people have a will. That is a concern, because people have much more complicated family arrangements than in the past. We also asked people about their understanding of succession rights on intestacy. It was clear that many people did not understand what would happen if they died without a will. We urge people to have a will, and preferably to have legal advice, but in general having a will is better than not having one at all.

Robert Brown: Even if it is a bad will?
Sarah O’Neill: Well—a balance is needed.

Robert Brown: Does Unite have a view?

Fiona Farmer: We believe that will writing should be in the domain of the legal profession. It is a service that we offer our members—that is done through direct access to a lawyer and legal services. We do not want such services to be dumbed down, so to speak.

Robert Brown: Can either of the witnesses give examples of similar services that we should have concerns about because of either the complexity or the implications if advice is being given at too low a level?

Fiona Farmer: I do not have any specific examples but, if the bill goes ahead and the market drives the way forward for legal services, specific services will be dumbed down. If the market is opened up, the profitable services will be snapped up, which will be to the detriment of the less trendy legal services.

Cathie Craigie: I have a question for Sarah O’Neill. In evidence to the research working group on the legal services market, Consumer Focus’s predecessor organisation—the Scottish Consumer Council—highlighted the areas of wills, trusts and executies and employment law, particularly as it affects employees, as ones that should be prioritised for future work. Do you have any suggestions about how your organisation’s policy could be taken forward by improving the bill?

Sarah O’Neill: The will writer issue came up at a later stage. I understand that the Scottish Government issued a consultation on it just before Christmas, and we have not had time to consider it in any detail. There are other issues about claims management companies and others, but we do not have any evidence that they are a particular issue in Scotland. If there is such evidence, this is an opportunity to look at and include those issues in the bill.

Cathie Craigie: You said that you do not have any evidence to allow you to comment in detail on the issue. Was there any evidence from consumers in particular that the changes that are proposed in the bill are needed? I have asked that question before. Did your organisation consult, or have any involvement with, consumers of legal services?

Sarah O’Neill: No.

The Convener: Ms Farmer and Ms O’Neill, thank you for attending and for giving your evidence so clearly. We are much obliged to you.

Bill Butler: Yes, it is never too late. I accept that you are personally disappointed at the level of response. Did solicitors have sufficient opportunities to contribute to the development of the bill or were they simply too busy to respond? If the legal profession understood the unintended consequences and dangers of the bill, would its support for the bill be less overwhelming than it appears? When the Law Society of Scotland gave evidence, we heard that large firms were “very strongly in favour of the proposals and the rest of the profession was essentially neutral.”—[Official Report, Justice Committee, 15 December 2009; c 2482.]

Is the position of the majority of the profession dangerously misguided?

Gilbert Anderson: Absolutely, particularly given that we have now had greater publicity about the bill. I accept entirely your point about the number of responses to the consultation. When the Law...
Society of Scotland first issued its consultation paper—I think it was in October or November 2007—it sought responses by the end of January 2008. As dean of the Royal Faculty of Procurators in Glasgow, I was keen to be seen not to be taking a view on the bill but to be trying to stimulate informed and responsible debate on the hugely important issues that are involved.

In January 2008, we managed to organise a seminar on the bill about a week to 10 days prior to the deadline for responses. Before the seminar, I understand that the number of responses could be counted on the fingers of both hands. The seminar was very well attended by participants from across the spectrum of practitioners, including the Faculty of Advocates, large commercial firms and Govan Law Centre. We had an excellent debate. Although I have never seen the breakdown of the responses, in the short period of time after the debate, I am pretty certain that 92 or 94 responses were generated.

I return to the question. As the committee heard in evidence from the Scottish Law Agents Society, there is now a much wider appreciation of the issues that are involved.

As I think I say in my submission, the real push for ABSs in Scotland came from the large firms. That is acknowledged by the Law Society. The policy paper was approved at the Law Society annual general meeting in May 2008—on which I note that evidence has already been given—but, as I see it, that approval was, essentially, obtained via the large firms.

11:30

**Bill Butler:** Are you saying that the large firms exerted a disproportionate influence and that the real matters of concern were put to one side? Although attendance at the AGM was low, the proxy votes were there in the hands of the large firms. Is it fair to say that that is your view?

**Gilbert Anderson:** That is a fair comment. I read the evidence to the committee prior to Christmas and noted what Ian Smart said about the turnout. There was an attempt to get a breakdown of the proxy votes, but that evidence did not materialise. I seconded an amendment to the Law Society’s motion at the meeting. Unfortunately, I have been unable to get the official figures from the Law Society—I inquired about that earlier this morning. To put matters into perspective, the vote in the hall was 49 to 18, which reflects the number of people who attended. The proxy vote was 801 to 132, but by my reckoning around 600 votes may have come from four firms. Although that does not excuse apathy on the part of the silent majority, it clearly illustrates that the vote was pushed through by the large firms.

**Bill Butler:** You are saying that the vote was organised in such a way that the volte face by the Law Society was not due to the argument becoming clearer and changing people’s minds; the reason was simply organisation. In other words, the votes were gathered, the proxies were used and—

**Gilbert Anderson:** I have no evidence to substantiate that.

**Bill Butler:** Do you suspect, though, that that might have been the case?

**Gilbert Anderson:** I do not. I would not put it that way at all. As someone once said, one vote is enough.

**Bill Butler:** It was Churchill.

**Gilbert Anderson:** Indeed. I am not suggesting that there was any underhand collusion or anything like that.

**Bill Butler:** Neither am I; I am suggesting only organisation. That is never underhand—it is just organisation. However, I take your point, Mr Anderson. I do not want to press you further on that.

**The Convener:** You said that of those present at the AGM there was a majority of 49 to 18. Is that the case?

**Gilbert Anderson:** That is certainly what I noted.

**The Convener:** So even allowing for the organisational abilities of some concerned, there was still a majority.

**Gilbert Anderson:** What I do not know, because I have never been able to check, is the breakdown of those who attended: how many were from large firms and how many represented firms from right across Scotland. However, that information should be available to the committee; I cannot believe that it would not be.

**The Convener:** We turn to the issue of independence.

**James Kelly:** Mr Anderson, your submission says that there will be “dire consequences” if legal services are opened up to unqualified persons who would provide a “low cost substitute”. It is obvious that you have serious reservations about the bill, but the view has been put to us in a number of our evidence-taking sessions that the bill provides an opportunity to open up legal services to provide a greater range of services and therefore to drive down costs. Might not the bill result in better and lower-cost services for the consumer?
Gilbert Anderson: My whole approach in my submission is about the consumer and the public interest. My whole approach as a professional is to serve the public and constantly to seek ways to improve the quality of services for those consumers—if you like—who use them. The key issue or challenge for all of us in Scotland is to improve the quality of the legal services that are provided and the access to justice through high-quality legal services. I am not in favour of diluting the quality of services, and I have serious misgivings that that will happen if we open up or liberalise—whatever word one might use—the market. We can have a market for anything, I suppose.

At the heart of my concern—it is a very grave concern—is the fact that the legal profession is unlike any other profession. Just as it is essential for a free democratic society that subscribes to the rule of law to have, in the public interest, a clear divide between the judiciary and Government, it is equally important, I believe, that we have a genuinely and truly independent legal profession. My reason for saying that is that judges do not come from just anywhere; we are all part of the same profession. The legal profession consists of judges and practitioners: judges obviously include senators of the College of Justice, sheriffs and lay magistrates; practitioners include members of the bar—members of the Faculty of Advocates—solicitors and solicitor-advocates. We are all part of the same family. We are all officers of the court. When we speak about the need for an independent judiciary, it seems to me to follow—as night follows day—that equally we need a strong, robust, independent legal profession.

The relationship between a lawyer and his client is a unique relationship that does not exist in other professions. Only that relationship confers on the client the right to legal professional privilege, which one should remember is a right that belongs to the client rather than to the lawyer. That is a fundamental right of the client. I have severe concerns about where it might lead us if we start to dilute that right. We might not see the signs or know where that might take us—the outcome may be unforeseen at the moment—but that would be the start of a slippery slide.

My other major concern about the lack of independence is about the need for a strong, highly qualified, disciplined and educated legal profession. There is a danger in allowing what the bill terms “designated persons” to come into the market to provide legal services without any requirement for training. As I read the bill, I cannot see any provision that would require designated legal services providers to undergo strict training, or indeed any training. All that seems to be required is a head of legal services or a head of legal practice, and everything will be all right. That head could be responsible for 100 providers, but nothing in the bill requires those designated providers to undergo strict training, or indeed any training. That is a massive and obvious concern.

James Kelly: You are saying that opening up the market in such a way and allowing in people who do not, in your view, have the appropriate training will lead to a decline in the service that is given to the public. Can you give more details about what led you to that conclusion? Obviously, you think that people who are currently qualified to practise law provide particular services and that opening up the market in such a way will let in people who might not have the same expertise and might not be able to give the same advice. Will you elaborate on that?

Gilbert Anderson: I will do my best.

Let us take a simple element of a transaction—a conveyancing transaction is the obvious example. If providers of legal services do a particular bit of the transaction—it may be the title aspect—and they are not qualified, they will not be in a position to give the client additional protection in respect of the consequences of entering into the transaction. There are grave dangers in simply doing the mechanical bit of a transaction in isolation. If the person who does the mechanical bit—I am using a basic expression—does not understand the law of insolvency, the law of contract and all the other qualifications, the consumer or the public may be completely ignorant about the dangers and the tightropes that may be being walked in blissful ignorance. Someone who has a full professional qualification can give an all-embracing service and be attentive to the comprehensive needs of the client. Does that answer your question?

James Kelly: Yes, it does. Thanks.

You have elaborated on the importance of the independence of the legal profession. Some have suggested that one way of addressing concerns about the bill is to give the Lord President an enhanced role. Would that address your concerns in any way?

Gilbert Anderson: I have recently thought further about regulation, and what I am about to say is germane to your question. The short answer to the question is yes. I believe that the legal profession and other professions exist to serve the public, and that, in the main, the legal profession ought to be self-regulating, pretty well along the lines of the Faculty of Advocates. However, because the law embraces every aspect of life, I fully accept that there should be lay participation in regulation from across the spectrum of society, although such participation should not be in the majority. For example, all the rules of conduct that are passed or recommended by the council of the Law Society of Scotland require the Lord
President’s approval, for obvious reasons. The short answer to your question is undoubtedly in the affirmative.

**James Kelly:** Okay.

Finally, in your written submission and in the evidence that you have given today, you have outlined your serious concerns about the bill. Can those concerns be addressed at stage 2 or are your disagreements with the proposals more fundamental? Do you think that the bill is not fit for purpose?

11:45

**Gilbert Anderson:** I made the point in my submission that it is always easy to be negative, whatever the subject. I would like to think that I am not that type of person, by nature, I recall from the policy memorandum that a stated objective of the bill is to allow for external investment so that there can be innovation and growth. I would have no difficulty with anything that improved the legal profession in Scotland to make it compete more effectively internationally, as long as it did not detract from practices being fundamentally law firms, be they partnerships, sole traders, limited liability partnerships or incorporated practices.

I could be persuaded to support minority investment that would help to improve the management of practices, for example through more effective utilisation of technology—we live in a technological world—or perhaps through something that was incidental to a practice’s main work. I would have no difficulty with such minority investment, provided that the nature of the beast did not change—in other words, that the entity was and always would be a law firm. Such an approach would avoid the pitfalls of and enormous problems to do with conflictary regulatory matters and, much more fundamental, would overcome the serious problem in relation to the client’s right to legal privilege. In other words, the firm would be a firm of lawyers, even though someone who was not a lawyer had a stake in the business and was doing work that was incidental to the law firm’s work, so all the rules that concern legal professional privilege would stick to the firm.

**Robert Brown:** You made a considerable plea about the importance of professional qualifications and standards. To what extent will conflict of interest be an issue in situations in which there is greater facility for involvement with accountants, surveyors, mediation experts and so on?

**Gilbert Anderson:** Common sense suggests that there must be increased potential for conflict of interest if more professionals are involved in a situation and are providing a variety of services to clients. That is a concern, because the avoidance of conflict of interest is a core value of our profession.

**Robert Brown:** Conflict of interest is already an issue for the legal profession, for example when a solicitor acts for a buyer and for a seller, providing conveyancing services for one and estate agency services for the other. I suppose that there are also issues to do with the single surveys that we now have. Such matters are dealt with under existing rules of practice; can they be dealt with in the wider context that is proposed, through regulatory rules that will be easy to understand and to enforce?

**Gilbert Anderson:** The short answer is that I do not know. I will not know until there has been informed debate among the various professions, who have different professional codes. The issue is another example of a difficulty that would not arise if we did not go down the route of having MDPs.

**Robert Brown:** I have a question about language. We normally talk about solicitors and clients, but the bill talks much more about consumers. What distinction do you, as a legal professional, perceive there to be between “client” and “consumer”?

**Gilbert Anderson:** I think that the two terms are synonymous in the context of the relationship between the lawyer and his client. The word “client” pops up everywhere, and I have noticed that insurance companies seem to talk about customers nowadays—I always thought they were policyholders. It is semantics. I do not think that there is a difference between the terms; if a consumer is receiving legal advice from a lawyer, he or she is a client.

**The Convener:** You expressed the view, which I know is held unanimously around the table, that there must be a certain level of professionalism and expertise in Scots law. You highlighted the fact—that the obvious way in which most people will have contact with solicitors is through conveyancing transactions. You went on to say that the technicalities that attach to a search on a title require it to be carried out by someone with the appropriate legal qualification. In my limited experience in that respect, a great many jobs of that type are carried out by a paralegal, or by someone who is not legally qualified—subject to the transaction being signed off by a partner, of course. Is that not the case?

**Gilbert Anderson:** I was trying to say that the title aspect of the transaction is an awful lot less complex now than it used to be. However, there is an issue around just leaving that to a paralegal, to use your word, without adequate supervision, which would be provided in the case of a firm of
solicitors whose future livelihood depends on their reputation and on their not making mistakes. A wider knowledge is required of the ramifications of not registering the title, for example, or of not concluding the contract leading to the title. I am old enough to remember when all the work on conveyancing transactions was done on the title, and missives were concluded in a day or two. Now, the real work—often difficult work—tends to lie in concluding the contract. To divorce one bit of the process from the other would lead to danger.

I have no difficulty with firms where solicitors properly supervise a paralegal, who has undertaken a proper course, and who is subject to day-to-day supervision. I do have a difficulty, however, with the fact that, according to the bill as I read it, it would be possible for anyone—there could be many similar people in the one licensed legal services provider—to do that bit of the transaction, perhaps with just one lawyer involved, and they might not even be in the same building. There are obvious, grave concerns about that—it is of concern to me and, I am sure, to everyone around the table.

**The Convener:** But the client would have a remedy.

**Gilbert Anderson:** That is another question. The client would certainly have a remedy against a firm of solicitors, as the standard of care would be that of the ordinary, competent solicitor acting with reasonable care. One of the questions that I raise in my written submission is: what standard of care is incumbent on a licensed provider? I do not know.

**The Convener:** That is a matter that we might pursue to our potential advantage with the minister.

We will now pass on to the matter of outside ownership, with a question from Cathie Craigie.

**Cathie Craigie:** With your permission, convener, before we move on to that, I wish to raise an issue arising from Mr Anderson’s submission.

**The Convener:** Yes, please do.

**Cathie Craigie:** Good morning, Mr Anderson. I take your submission very seriously, given your 34 years’ experience as a practising solicitor. In paragraph 16, you make a point about Lord Gill’s proposals. You cite the “urgent need” to enact his recommendations, in particular on conducting

“a thorough review of the funding of dispute resolution.”

You suggest that, until we move forward with some of the Gill recommendations, the bill should be put on hold. Could you say a wee bit more about why you make that suggestion?

**Gilbert Anderson:** Thank you for the opportunity to say more; this is a very important point. As I might have mentioned in my earlier comments, the big issue in this debate is access to justice. I believe that we can improve the efficiency and effectiveness of the civil courts structure without massive expense but, as Lord Gill acknowledged, there is little point in doing that if it is only those at the margins of society who can use the system effectively—those who quite properly qualify for legal aid and those at the other extreme who do not require such aid. I refer to the super-rich, if I may use that phrase. In such a situation, the 98 per cent of us in the middle will struggle.

Lord Gill focused on the area of the law that deals with dispute resolution. There is a fundamental need to create something that was mentioned this morning in another context—a level playing field. Equality of arms is a phrase that I have often used. When people who are in dispute require advice, each side should be able to access a lawyer of their choice to get the meaningful, professional advice that solicitors and advocates provide.

Because of the lack of time and resource, and given the fundamental importance of the issue, Lord Gill strongly recommended that the Government set up as a matter of urgency a working group or perhaps a civil justice council to address the issue quickly. As I am sure that many of you around the table know, in the past year or so there has been a massive, root-and-branch review of litigation costs in England and Wales, which is a different environment to the one in Scotland. It would be interesting to see what comes out of that before we start—forgive me—dabbling and seeking to make fundamental changes to the very fabric or framework within which legal services are provided. It seems to me that we are putting the cart before the horse.

The past two years have probably seen the biggest amounts of work ever in relation to the civil courts structure in Scotland, and we must consider the way in which legal services will be delivered under the bill. To my mind, those two areas alone have the potential to make the biggest change in our legal system and legal profession for 100 years. We must consider the huge amount of work that was done by the Gill review, which had 23 people involved in it, and the detail in the report, which is 500 or 600 pages long.

Incidentally, I understand that the Parliament debated the report within a week or so of its publication. Given that it took Lord Gill and his colleagues a couple of years to compile it—I have not got to all the issues in the report—I cannot believe that there could have been a meaningful debate.
The Convener: You seriously underestimate our capacity to absorb evidence. [Laughter]

Gilbert Anderson: I am sure that I do, so please forgive me, but it seems to me that a reasonable amount of time should be taken to study the report, have a balanced view of it and see what can be implemented now, before we rush off and make changes that I believe, as I state in my submission, could have a deleterious impact on our legal system. I have grave concerns about what will happen if we rush into making changes. I think that I used the word “sleepwalking” during the Law Society debate, and I believe that there has already been an element of sleepwalking. Maybe we need a good dose of insomnia to wake us all up. Perhaps the current debate will do that. As I think Mr Butler said, it would be better late than never.

The Gill review touches on welfare law. I heard questions this morning about those areas of the law that places such as Govan Law Centre can deal with. Those are hugely important areas. How can we resolve disputes proportionately? How can we have specialist advice available to help needy people? Lord Gill has some suggestions, including the concept of a district judge for cases involving sums up to £5,000. I urge the Justice Committee and the Parliament to digest Gill before rushing off and making other fundamental changes, because I have grave concerns about where that might take us.

12:00

Cathie Craigie: Thank you for that response. Contrary to what the convener might have implied, many of us who took part in the debate on Lord Gill’s report in the chamber admitted to not having got much further—if even that far—than the executive summary of the report. Members from all parties admitted that, including—I think—the minister. I sympathise with your point.

I do not know whether you were a member of the research working group on competition. It made a number of recommendations, with which I assume you are familiar. Again, should we have taken note of the experience of the professionals in the working group before rushing to legislate?

Gilbert Anderson: I was not involved in the working group, so it would be wrong of me to read too much into what it said. I reiterate the point that I hope I made clear in my introductory comments, which is that the legal profession is different. I think that the public interest in that regard outweighs what might be seen as the competition interest. However, I would need to know more about the particular point that you have highlighted.

Cathie Craigie: As I understand it, the research working group made a number of recommendations for small changes. One of its main recommendations was that there should be further research before introducing legislation, but we have moved more quickly.

Gilbert Anderson: It would be sensible to do further research. Ultimately we must make decisions—we cannot go on researching forever— but when dealing with the kind of issues that we are dealing with today, any meaningful research is worth while. I believe that the only way in which we can test issues is to take an extreme example. One of my concerns is about the extreme example in the Law Society’s policy paper, which was an excellent paper in many ways, with a wonderful analysis of various models. However, the extreme example was that of a law firm that was owned and therefore controlled by non-lawyers. What was passed at the Law Society’s AGM was that there was no objection to any of the models, including the extreme one, provided the core values of the legal profession were preserved. That just did not add up for me, because at the top of the list of core values is independence. If a law firm is owned and controlled by someone else, it cannot be independent, even on a commonsense basis.

The Convener: We need to move on now.

Cathie Craigie: We discussed this issue briefly earlier. Your submission suggests that a fallback, compromise position would be that there could be minority investment by non-lawyers in a law firm, up to a maximum of 25 per cent. How would that work in practice? Would it protect the public by preventing big companies and organisations from swallowing up smaller firms that provide legal services in our small towns and communities?

Gilbert Anderson: That is an important point. I think that the protection would be that there would be only minority investment, which would mean that there could not be a special resolution to wind up a business, for example. There would be legal protections, but they would not prevent one of the objectives of the policy memorandum, which is to try to get further investment in law firms in Scotland to enable them to compete better in the international marketplace. I would say amen to that—I am very happy with that.

The point that I was trying to make earlier is that all the difficulties that we have with conflicting regulatory codes would fly off with my model. We would not have that difficulty, because, in effect, the practice would still be a law firm. We could achieve the further investment to innovate and be more competitive—we are seeking in particular to attract international dispute resolution to Scotland—but we would still be a law firm.
Therefore, the problems that I have highlighted with legal professional privilege would not arise.

**Cathie Craigie:** You might have heard the evidence that we took earlier from the Institute of Chartered Accountants of Scotland. Its regulatory framework allows non-members up to a 50 per cent stake. Do you have any comments on that?

**Gilbert Anderson:** Without going into all the legal reasons for it, I believe that the right figure is 25 per cent, to avoid the winding up of the business.

**Cathie Craigie:** The convener touched on this issue earlier. Should paralegals be permitted to be part-owners of law firms?

**Gilbert Anderson:** That is not something that I had in mind. In our firm we have a chartered accountant who is involved in management—it is almost a chief executive role. I will have to be careful what I say here, but I could envisage that kind of model, which would involve someone with a professional ability who might be able to take a stake in and help the development of the business. However the nature of the business would not change from being a law firm. I do not think that a paralegal would fall into that category. However, I have not given that great thought. My firm does a lot of work on repairation, invariably through insurers. A service that is incidental to insurance and which would be incidental to the work that our firm does, such as loss adjusting, could be another example. I am sure that other practices could come up with many other examples.

**Cathie Craigie:** I will move on swiftly, because I am conscious that the clock is ticking. I do not want to get on the wrong side of the convener on our first day back in 2010.

The Law Society gave evidence to the committee on 15 December. It suggested that if the bill is not enacted, big Scottish legal firms could choose to be regulated in England and Wales under the Legal Services Act 2007 and that English firms could take over Scottish firms using external capital. You talk about that in your submission. How would you respond to the concerns that the Law Society has raised?

**Gilbert Anderson:** I read that evidence and I saw Ian Smart’s comments—I think that Professor Alan Paterson made the same comments—and I must say that they puzzled me. Let us take the example of a large Scottish firm, such as one of the big four firms—let us not mention names—whose roots and fundamental client base are in Scotland but which has opened elsewhere and has sought to compete in the English market with so-called magic circle firms. There is nothing to stop those Scottish firms setting up down south or electing to be regulated under the 2007 Act, which governs England and Wales but, to be blunt—and as I believe I say in my submission—I cannot see such firms upping sticks and moving south. What would be the point? If they wanted to compete in that area, that would be wonderful—after all, we have some wonderful Scottish firms—and no one would stop them from doing so. They can choose to be regulated down south for that bit of their business. I have to say that, for the reasons that I have given in my submission, I disagree with the suggestion that that will happen.

I am concerned, however, that a much greater danger of introducing ABSs in Scotland is that some of the very large organisations down south might come and, as I have heard people say, just hoover up. Indeed, as someone said earlier, they might well focus on profitable areas; commoditise—another word that I have heard regularly—the way in which work is carried out; reduce costs; and start to use English terms and conditions. Before we know it, Scots law will be on a slippery slide.

**Cathie Craigie:** In your submission and in your evidence this morning, you have highlighted the importance of the public interest, public access to justice and the independence of legal services providers. Will the public interest be well served if the bill is enacted in its current form?

**Gilbert Anderson:** Unequivocally no, and I hope that I have made that clear in my submission. Independence will be lost; quality of service will be diluted; and there is a risk that Scots law might be diminished. Moreover, the opportunity of attracting work to these shores, which is a laudable aim, will be lessened if we damage our system’s integrity and independence. I feel very strongly about that.

**Angela Constance (Livingston) (SNP):** You have touched on a number of issues and concerns about multidisciplinary practices. In light of your comment that in the context of regulating such practices the bill “creates considerable uncertainty” with regard to the principle of legal professional privilege, do you feel that the bill provides a satisfactory framework for dealing with different codes of practice and professional codes of conduct?

**Gilbert Anderson:** I believe that many, many difficulties will arise; I have heard it said that they can be resolved, but I cannot really say until I see precise examples of the specific conflicts in question. The conflicting regulatory codes are a bit of a jungle and, indeed, another reason why going down this route is not in the public interest.

A lot of time is spent on coming up with these codes, but the fact is that the Scottish legal system is based on principle. To my simple mind, solutions should arise from applying the principle
to the circumstances; we should not try to find solutions for every set of different circumstances that might arise. This is simply an unnecessary attempt to resolve things that we might well not be able to resolve unless we allow for the compromise model that I have suggested. I am not saying that the model itself is a panacea, but I believe that it is a genuine attempt to find a way forward and encourage further investment without compromising independence or getting involved with conflictory disciplinary codes.

12:15

**Angela Constance:** Is there anything that could be learned from other professionals? Members of many other professional groups have to work with one another to do their job. I speak as a former social worker who had to work with medical practitioners on a daily basis. There was a conflict in the code of conduct, particularly when it came to child protection versus patient confidentiality, but that could be addressed and overcome. It might be unfair to ask you, but is it the case that the issue is insurmountable? Are there not things that could be learned from elsewhere?

**Gilbert Anderson:** At the risk of repeating myself, all kinds of professionals have duties of confidentiality. Only lawyers have legal professional privilege—that is what makes them different.

How do we resolve the existence of different codes? Lawyers work with different professions day and daily, but we do so on an arm’s-length basis because, ultimately, even a solicitor who does conveyancing work—that sounds terrible—is still an officer of the court. That is what makes us different from other professionals. It would be a massive task to resolve the conflicts that exist in the various codes of conduct for different professions. In my humble opinion, if getting into relationships with other professional bodies would cloud or weaken the client’s right to legal professional privilege, that is a no-go area.

**Robert Brown:** I revert to the issue of will writing, which I raised with the first panel. You have emphasised the importance of professional services. What are the dangers of allowing execution-only legal services to be provided by non-lawyers in areas such as will writing?

**Gilbert Anderson:** I am very conscious of time; the short answer is that the Scottish Law Agents Society’s submission covered that extremely well, in graphic detail. Will writing is another illustration of an area in which, to take an oversimplified view of matters, if a mistake is made, a mess is created; when someone is dead, they do not have a second bite at the cherry, to the best of my knowledge and belief—

**The Convener:** Not without overturning a degree of precedent.

**Gilbert Anderson:** Indeed. Will writing is an excellent example of an area in which a simple mistake can have huge consequences. Earlier, someone—I am sorry, but I cannot remember who—raised the issue of whether it was better to have a duff will than no will at all. I thought, “I am not so sure that it is.” It might be better to have the law of intestate succession.

Will writing is a highly specialised area of work. Wills that are mass produced and available on the internet contain disclaimers, either in bold or in print that cannot be read. The submission from the Scottish Law Agents Society made the point that some of the documents that are available refer to the law of England. That is a nightmare, and the public deserve better. People should not be allowed to do that. I do not mean to suggest that anyone who drafts a will and who is not a lawyer is no good, but I return to the point about there being a duty of care. If a lawyer writes a will and makes a mistake, the public have protection.

**Robert Brown:** I was surprised to find that a relatively small number of areas of work are reserved specifically to solicitors or to lawyers in general. Does that need closer examination?

**Gilbert Anderson:** You are referring to the drafting of wills in court. There has been discussion of advocacy and McKenzie friends. Only a solicitor is allowed to do work such as registration for property writs, writs in court, petitions for confirmation and inventories. It is an offence to do something that only a solicitor is allowed to do, and perhaps wills should be added to that list, for the obvious reasons that we have discussed.

**Robert Brown:** My point is that that is a relatively small section of the total corpus of legal work.

**Gilbert Anderson:** Yes, but it covers a huge amount of legal work. If court writs and property transactions are covered, I would be in favour of adding will writing to the list. I do not see a problem with that at all; I think that it would be in the public interest so to do. Therein was the problem with the Which? super-complaint—why should lawyers have a monopoly on that work? Why do brain surgeons have a monopoly on brain surgery? I rest my case.

**The Convener:** We will have a final question from Nigel Don.

**Nigel Don:** Paragraph 12 of your submission is about the rule of law—an issue of statute that has concerned me for a while. As drafted, section 1(a) states the objective of “supporting the constitutional principle of the rule of law”.

"supporting the constitutional principle of the rule of law".
As we are well aware, that is an extended principle that could run to several chapters. In paragraph 12 of your submission, you give us a formulation that I do not want to discuss here. Would you like to see some such formulation in the bill, or do you feel that the rule of law is sufficiently well understood that section 1(a) is okay as it stands?

Gilbert Anderson: Is it well understood by the public at large? Education about our constitution and the law generally is a massive issue, and I would encourage such education even at primary school. I think that lawyers know what we mean, but, for all that I know, people could be at cross-purposes when they talk about the rule of law. I do not think that it would be a bad thing to have a formulation, but the key to that would be an independent legal profession.

Nigel Don: I guess that the only people who interpret statutes are lawyers at the sharp end.

Gilbert Anderson: Yes.

Nigel Don: As long as lawyers know what it means, that is fine. What bothers me is that it means several different things, as you have suggested. I wonder whether it would be worth enshrining the principle at some point. Should we be thinking about what we should enshrine?

Gilbert Anderson: The wording in my submission was my attempt at a formulation—on a Sunday night, I think—in my response to the committee. I repeat that I am grateful for the opportunity to give evidence. However, as I have said, many erudite scholars have written many volumes on the doctrine. Enshrining it may not be a bad thing. My view is that it is more an issue about the wider education that is required to enable citizens to understand why we need an independent legal profession.

Cathie Craigie: Convener, may I ask one further question?

The Convener: Briefly.

Cathie Craigie: Paragraph 25 of Mr Anderson’s submission is about professional privilege. It raises the concern that the bill would create “considerable uncertainty”, pointing out that such uncertainty does not exist in an independent law firm that is owned solely or in major part by lawyers. That is an important point, which has alerted me to that area. Can you say a wee bit more on it?

Gilbert Anderson: If I speak to a lawyer about something very important, the lawyer must take that to the grave unless he or she is ordered by a court to do otherwise. In my view, anything that dilutes the fundamental right to that legal professional privilege is not in the public interest. I have tried to illustrate the point with an example rather than simply talk about the theory.

Let us suppose that, in a multidisciplinary practice, two out of 20 professionals—or two out of 12, or whatever—are lawyers. If a client goes to see someone who is a partner in the business, but not a lawyer, about a legal issue and says something that is of immense importance and which might be prejudicial to them if it came out in subsequent litigation, can they insist on the right to legal professional privilege? I have asked that question a number of times, and there is severe doubt. Why create doubt about such a fundamental right? That is another argument against MDPs.

The Convener: The issue can be raised with the minister. We are grateful to you for giving up your morning to come here. Your attendance is greatly appreciated and we have thoroughly enjoyed your contribution.

12:25

Meeting continued in private until 13:44.
Legal Services (Scotland) Bill: Stage 1

10:01 The Convener: Item 2 also relates to the Legal Services (Scotland) Bill and is the main item of business this morning. I welcome Fergus Ewing, the Minister for Community Safety; Colin McKay, the deputy director of the legal system division of the Scottish Government; Andrew Mackenzie, the bill team leader; and Leigh-Anne Clarke, a principal legal officer with the Scottish Government. Good morning, Mr Ewing. I invite you to make an opening statement.

The Minister for Community Safety (Fergus Ewing): Good morning, convener and committee members. I begin by declaring that I am a Scottish solicitor, but I am not in practice.

At the heart of the bill is the removal of the current restrictions on how solicitors can organise their businesses. The bill will allow solicitors to form partnerships with non-solicitors, to create businesses offering a range of legal and non-legal services and to seek investment from outside the profession. However, the bill is enabling rather than prescriptive; therefore, traditional business models will remain an option.

As the committee has heard over the past month or so, there have been demands from within the legal profession for the flexibility that the new business structures will allow. After extensive consultation and debate, the profession voted overwhelmingly in favour of alternative business structures at the Law Society of Scotland’s annual general meeting in 2008. The view that was taken by the majority of the profession who voted was that those structures would make it possible for law firms to develop new ways to deliver more effective and efficient services in the interests of their clients and the continued success of the Scottish legal system. Furthermore, our public consultation found a majority in favour of the reforms.

Solicitors in England and Wales will soon be able to operate in alternative business structures and access external investment under the Legal Services Act 2007. That will put Scottish firms at a competitive disadvantage and will threaten the long-term sustainability of the Scottish legal profession unless Scottish firms are able to operate on a level playing field.

The bill will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators that, in turn, will regulate licensed legal services providers. The bill also includes measures to
reflect changes in the governance of the Law Society of Scotland; statutory codification of the framework for the regulation of the Faculty of Advocates; provisions to enable the Scottish Legal Aid Board to monitor the availability and accessibility of legal services; and provisions to allow non-lawyers to apply for rights to obtain confirmation to the estates of deceased persons.

I am aware, however, that not everyone shares the view that the bill will have a positive impact. Over the past month, I have met some of those who have expressed reservations about the proposed reforms and have listened to the evidence that has been given to the committee, and I have found those meetings very helpful. Although I believe that some of the concerns that have been expressed are unfounded, I fully understand why the proposed changes have provoked apprehension and why there is concern about preserving access to justice as well as the effectiveness and independence of the Scottish legal profession. Indeed, the very first section of the bill emphasises the importance that we attach to those matters. However, if there are suggestions as to how we can strengthen that commitment still further without undermining the aims of the bill, we will consider them extremely carefully.

Third-party ownership is understandably viewed with some trepidation. Some believe that allowing non-solicitors to own a stake in legal firms is a threat to the independence of the legal profession and the core principles that have been at the heart of the practice of law in Scotland for centuries. We have spent considerable time developing safeguards against those potential threats, such as the introduction of regulatory objectives in section 1, as I mentioned, and professional principles in section 2, and robust provision has been made to ensure that only fit and proper persons are allowed to own firms that provide legal services. It has also been suggested that outside ownership could threaten Scots law by allowing those with little knowledge or understanding of our legal system to become involved in it. I repeat that the continuation of a strong, independent Scottish legal system is something that the Scottish Government supports strongly, and the bill does not jeopardise that.

In most areas of legal work, including conveyancing, litigation, succession and family law, anyone who wishes to offer a legal service in Scotland will need to do so using Scots law. There are, of course, areas such as commercial work in which there is a choice of jurisdiction to a degree. However, in those areas, Scottish solicitors already face competition from English firms and, potentially, from new entrants licensed under the legislation in England and Wales. Widening the options for Scottish law firms is the best way to ensure that they remain independent and able to compete effectively.

Some have questioned the level of support for the reforms from the legal profession and have suggested that changes are simply being imposed from above. With respect, that is not the case. Despite some points that have been raised in previous evidence-taking sessions, support for the proposals was expressed by the Law Society’s membership in a vote that took place in accordance with its established democratic processes. In addition, we remain keen to have constructive discussions with those who might have concerns about the bill, as I have done recently.

A few questions have been raised about the training and qualifications that are required by those who provide legal services, with suggestions that the bill will allow unqualified individuals to practise law. I stress that the bill makes no changes to the areas of work that are reserved to solicitors under the Solicitors (Scotland) Act 1980. As regards non-solicitor employees of legal practices, such as paralegals, the present position is that they are able to work in those reserved areas under section 32 of the 1980 act. The bill simply provides that such individuals will be able to do so in the new entities as designated persons. A further safeguard in the bill is the requirement for a head of legal services. He or she must be a solicitor and is to manage designated persons with a view to ensuring that they comply with the regulatory objectives and professional principles.

A final point that has been put to me is that increased competition from large firms entering the legal services market will put small and rural firms out of business. As a former self-employed solicitor and partner in a small business, I can definitely understand that fear, particularly in the current economic climate. However, I can also see the opportunities that the bill presents for such firms. Where small practices might struggle to survive in towns and rural areas, a one-stop shop offering a variety of professional services might present a solution that allows lower overheads and the combination of business experience and expertise. That could give small professional practices, whether legal or not, an opportunity to flourish and continue to provide key services in communities throughout Scotland.

As the committee might be aware, we are considering introducing to the bill a number of areas at stage 2. In brief, those are McKenzie friends, which have been the subject of much discussion and debate in recent months; possible amendments to rights of audience in the supreme courts; subject to the recommendations of the ongoing Thomson review; various technical amendments to the 1980 act; and the regulation of
will writers. We are consulting on that last point, but we are extremely sympathetic to the view that non-solicitors who are involved in preparing wills should be regulated.

I am more than happy to expand on any point that I have mentioned. To the best of my ability, together with my officials, I will answer the committee’s questions on the bill in general.

The Convener: Thank you for your useful introduction. I certainly do not think that we want to do anything about rights of audience until the Thomson report, which follows the outcome of the Woodside appeal, is received.

I will open the questioning. You referred to the evidence that the committee has taken in the past few weeks, which suggests that the legal profession is—shall we say—lukewarm towards, although generally in favour of, the proposed reforms. There is little evidence that consumers of legal services demand alternative business structures. What has driven the case for reform?

Fergus Ewing: Several factors have driven the case for reform. The committee is aware of the history, which is fully canvassed in the policy memorandum to the bill. In England, the Clementi review was undertaken, the Office of Fair Trading was involved through the super-complaint and the Legal Services Bill was introduced. In Scotland, a debate has taken place in the profession—in the Law Society of Scotland. Accompanied by other witnesses on 15 December, Ian Smart—the Law Society’s president—described that debate and the process in which the Law Society is engaged. No one has suggested that that process has been other than inclusive and extensive; it has involved consultation at just about every stage.

You are right to say that there is no groundswell of overwhelming acclamation and support for the bill among all 10,000 or so solicitors in Scotland, but one would not expect that, because the bill will not in all likelihood affect every solicitor. In his evidence, Ian Smart suggested that solicitors are divided into three broad groups: employees of local authorities, companies and other organisations; those who are in large firms; and those who are in small and medium-sized firms. It is plain that the main opportunities that the bill will provide—certainly financially—will probably rest with large firms, so one sees immediately that one third of the profession is most obviously in a position to benefit from the reforms.

The circumstances of the Law Society’s mandate to support the reforms—the overwhelming majority of members who voted supported them—were canvassed at length by Ian Smart, Michael Clancy, Lorna Jack and Katie Hay, who were the Law Society’s witnesses. I read their evidence, which was convincing. One might argue that the proxy votes that were cast when the vote was carried by 801 to 132 were largely from large firms but, even if the large firms’ votes were discounted, one would still be left with a substantial majority, which, as a proportion, I might be so bold as to suggest many MSPs might be happy to possess.

Criticisms can be made and I am fully aware of the points from the Scottish Law Agents Society, whose representatives I have met at length. Nonetheless, there is no doubt that the procedures have resulted in a mandate. I am convinced that the bill will create invaluable opportunities, which I have no doubt that I will discuss with you and your colleagues and which mean that it is essential to support the bill and to see it become law.

The Convener: Given that the Westminster Government introduced the financial services act south of the border some years ago, what would be the impact of our not passing analogous legislation?

Fergus Ewing: I presume that you are referring to the Legal Services Act 2007, not the financial services act.

The Convener: Sorry—yes.

10:15

Fergus Ewing: One facet that has emerged from almost all the evidence is that not passing the bill presents some very real risks for the Scottish legal profession. If we do not pass the bill, solicitors in England and Wales will, through the Legal Services Act 2007, be entitled to enter into alternative business structures. Solicitors in Scotland will not, which I think will tie one hand behind the back of many Scottish legal firms. Let me tell the committee why.

We have had evidence from the president of the Law Society of Scotland and the dean of the Faculty of Advocates, who are extremely concerned that that will be the case. In their view, the bill is essential because without it, the Scottish legal profession will be disadvantaged. The reason that they gave for holding that view—by Ian Smart, in particular—is that if Scottish firms do not have the opportunity to avail themselves of the business opportunities created by the bill, some of them will, in order to get those opportunities, register as solicitors in England and Wales. They will remove themselves from regulation in Scotland and move to England and Wales. That clear suggestion has been made in evidence by those at the top of our legal profession in Scotland. I am sure that the committee agrees with me that that is a serious warning indeed. Furthermore, even among those who oppose the bill, there is general recognition that that is a real risk.
However, let me be positive—I want to put a positive case for the bill to receive the support of the committee and the Parliament. There are many aspects, which concern not just large but small firms. As is stated in paragraph 39 of the policy memorandum, much of the work that the largest firms in Scotland do is in areas that are not reserved to Scots law. Many of those top firms compete not simply in Edinburgh and Glasgow, but in London and internationally. They will probably be competing not in domestic conveyancing or family law, important though those topics are—we will come on to them—but in commercial law, aviation law, mercantile law, the law of shipping, the law of telecommunications, the law of telegraphy, the law of patents and copyrights, arbitration or construction law. All those areas of law and many others that I could mention are areas in which law firms that seek business from the largest commercial concerns by offering a specialist service may well wish to enter into business relationships with experts. They might wish to enter into such relationships with experts in aviation or shipping law, for example. They would certainly wish to do so with experts in construction, if one thinks of the scope in arbitration work for complicated commercial construction disputes. They might also wish to have experts in taxation or pension law.

All those areas are highly lucrative and each has massive markets and huge potential. Unless we pass the bill, our Scottish solicitors will not be able to avail themselves of the opportunities that exist in areas of law that, unlike the framing of writs, litigation and conveyancing, are not reserved to Scottish solicitors but in which activities can be carried out by all solicitors in the United Kingdom. Unless we avoid a situation in which our firms have one hand tied behind their backs, they may well be disadvantaged.

As the policy memorandum states, the value to the Scottish economy of the turnover of the Scottish legal profession is estimated to be more than £1 billion. That shows the scale of the opportunities that exist, even if the recession has predated that sum. There are massive opportunities for Scottish lawyers and the Scottish legal system. Over the past decades, we have perhaps been held back, with even our largest public limited companies choosing to use law firms in London for various reasons, which we are seeking to address in the bill and in other ways, such as through the extremely important work of Lord Gill.

The opportunities are there. I am not sure that the committee has heard the case that is being expounded by the large firms. I am not offering to step into the breach, because I am not qualified to speak for any of them, but it is fairly obvious that there are immense opportunities, which I have tried to expound in brief. If we stick with the restrictions in the 1980 act, none of the opportunities that I have described will exist.

The Convener: You may think that it is strange that I am raising this issue at this stage in the proceedings, bearing it in mind that the bill has been certified by both the Government and the Presiding Officer, but I do so against the background of recent representations. Are you totally satisfied that the bill is compliant with European Union law?

Fergus Ewing: I am pleased that you have raised that issue with me. The answer is that I am satisfied. A number of issues have been raised relating to possible problems with EU law, which supports member states’ ability to put restrictions on regulated professions where necessary to ensure independence, impartiality and compliance with relevant principles. I am aware that specific arguments have been put by those who have taken the trouble to make submissions to the committee—submissions that we also value. I understand that Walter Semple, for example, who is a solicitor who has taken a profound and deep interest in all these matters, has made particular arguments. We considered such arguments most carefully prior to submitting the bill to the Presiding Officer. As you know, various in-house checks are carried out by our legal team, with the law officers, at a meeting on the bill. The bill is then submitted first to the First Minister and secondly to the Presiding Officer. At each and every stage, we have to be satisfied that the bill is compliant with EU law, and we are so satisfied. However, if it would be helpful to the committee—it might save committee members time today—we would be more than happy to assist members by setting out in a letter responses to some of the specific and fairly detailed, not to say arcane, arguments that have been made. Alternatively, I could invite Leigh-Anne Clarke to provide more information, should the committee so wish.

The Convener: It would be useful if you could give us a written representation on that heading.

Fergus Ewing: Thank you.

The Convener: We now turn to questions surrounding access to justice, which will be led by Stewart Maxwell.

Stewart Maxwell (West of Scotland) (SNP): Good morning, minister. You said in your opening remarks that a number of witnesses have submitted evidence to the committee in which they express concern about the opening up of legal services to non-lawyers, such as banks, supermarkets and others. Do you believe that some of those concerns are justified, in that such businesses may well cherry pick—if I may use that phrase—some of the work, so we will end up with
reduced access to legal services for many people who do not seek legal services in the profitable areas of the law and that, therefore, non-profitable services will effectively be forced out? One of the areas on which we have received evidence relates to family law practitioners. Access to those practitioners would be, at the very least, restricted. What is your response to the concerns that have been expressed to the committee?

**Fergus Ewing:** My response is on a number of levels. First, to ensure that access is available to those who are perhaps most vulnerable and those whose problems may involve areas of law that are least likely to be regarded as profitable—such as welfare law, debt law and family law—we have obviously taken steps to make legal aid available, as appropriate and as far as we can reasonably afford in Scotland today. I note that Tom Murray’s evidence on 15 December was that 619 firms are registered to do legal aid work, which is a fair number, that civil legal aid has increased by 35 per cent and that legal advice and assistance has increased by 6 per cent. In addition, as the member and the committee will know, we have provided reasonable increases to legal aid rates, and around half the people in Scotland are now financially eligible for civil legal aid. That general backdrop covers part of the question, but not all of it.

Secondly, the bill provides a specific legal duty on the Scottish Legal Aid Board to assess and monitor the extent to which legal aid is available. That is an important duty. Such monitoring already happens. In Inverness in my constituency, in addition to the public defender, a civil legal aid service was set up after advice was received from Lindsay Montgomery and others at SLAB that there was a gap in legal aid services. I have visited that service and seen for myself how effectively it appears to operate. Therefore, the bill caters for ensuring the availability of legal aid throughout Scotland, particularly in rural areas where availability can be a concern.

There are already pressures on local solicitors from increasing specialisation. Those pressures would exist irrespective of the bill and have been on-going for a long time. With that increasing specialisation—as Robert Brown will well know—many solicitors take the view that it is too risky to practise, for example, employment law before employment tribunals or debt law and family law, where statutory overlay has made the law fairly complex. The risk is that one cannot offer the standard of knowledge and expertise that makes one properly able to assist clients. Those trends will continue, and the legislation in itself cannot offer a solution to them.

Finally, the member mentioned the scenario in which large concerns—I believe that he mentioned supermarkets—might seek to cherry pick business. Precisely because we share some of the general concerns that have been expressed by those such as the Scottish Law Agents Society, to which I alluded earlier, we have set out the most robust regulatory framework. If I may say so, the bill provides a Scottish solution to a Scottish problem, without involving a hugely expensive new quango, by providing a pretty smart and, I believe, effective way of regulating the new system. I am happy to go on, if I have the opportunity to do so, to explain why I believe that the solution that we offer is a good one.

**The Convener:** You will have that opportunity shortly.

**Stewart Maxwell:** We will come on to the issue of regulation in more detail shortly.

The minister mentioned that the amount of legal aid work has increased. It has been expressed to us that that increase is not so much because legal aid is an attractive or profitable area of work but because of the current economic circumstances. When times are tough, lawyers will look for work that is available. Legal aid work has become more attractive at the moment for that reason rather than because of any particular desire on the part of lawyers and legal firms to be involved in it.

The minister also mentioned that 619 firms are involved in legal aid work. Am I wrong in thinking that, given that there are more than 10,000 solicitors, that figure represents about 6 per cent of the solicitors in Scotland? Although 619 might seem a sizeable number, it is actually a small proportion of the solicitors who are currently working in Scotland. Therefore, do not Scottish Women’s Aid and others have a point in saying that that small pool could be further reduced by the effects of the bill?

**Fergus Ewing:** Arithmetically, the argument is correct, because 600 divided by 10,000 is 6 per cent—I am no mathematician, but I think that that is correct. I said earlier that about one third of the profession is engaged in small to medium-sized firms so, if that is the correct proportion, it would be fairer to say that 600 of the perhaps 3,000 solicitors who provide legal services in small and medium-sized firms—around 20 per cent—provide legal aid. However, the point is well made that that is not a majority of firms and, although a fairly substantial number of firms provide legal aid, I do not discount the concerns that have been expressed.
the bill will lead to a sort of predation of that number. If it is the case, as the member argues, that in the recession, solicitors are now doing legal aid work in order to maintain their income, they will carry on doing that work in order to continue deriving income from it. Although modest, that income is not unreasonable and should allow a reasonable living to be had if one is operating a legal aid practice efficiently with a busy court schedule and client list. In my view, the bill is not likely to exacerbate the problem. On the contrary, it is likely to lead to improved possibilities.

Many witnesses, including those from the consumer lobby, but also those from the Law Society of Scotland, have argued that to cater for those who need access to justice and who have difficult family law, debt law, labour law or employment law problems, the bill might open up the possibility of new opportunities, whether through private concerns, citizens advice bureaux, law centres or legal aid solicitors. The restriction that the bill is removing will allow those opportunities to be explored.

A point was made by Citizens Advice Scotland that the provision that the services have to be provided for a “fee, gain or reward” might cause restrictions and limitations. Without giving any undertaking today, I can say that we will look at that. Having seen that evidence, we have decided to go away and consider whether we need to amend that provision.

Stewart Maxwell: I hear what the minister is saying, but I have a final question. Although the legal services market is not directly comparable to many other areas of life in which there has been an opening up of markets and “privatisation”, to use the word that the Unite witness used last week—I do not accept their argument—in effect, firms move into the profitable bits of those markets. For example, bus operators do not want to operate non-profitable bus routes, such as the community service routes, unless they have to. Other organisations in other areas of life want to operate in the profitable bits of their market and, if possible, ignore the non-profitable bits, for obvious reasons. Is such an outcome to opening up the legal services market not inevitable?

Fergus Ewing: I do not think so. I really do not think that the areas of law that we are talking about are likely to be of great interest to supermarkets. As the member envisages, they are likely to be interested in areas of work that they perceive to be more profitable. The bill could help to sustain local services. In the example that I gave, which others have also given, a solicitor in a small town in Scotland will be free to enter into business arrangements with other professionals, to share overheads and to take advantage of business opportunities. It seems to me a very Scottish, very sensible step to remove a barrier in order to allow people in business to engage most effectively with others in the best interests of their clients and to allow them to operate more efficiently. If such arrangements were not allowed under the bill, that would be a barrier to success and would be more likely to lead to the problems of the sort that the member is right to ask about.

Colin McKay has further information to offer.

Colin McKay (Scottish Government Constitution, Courts and Law Directorate): I was not sure whether the 600 to which Mr Maxwell referred were 600 individuals or 600 firms.

Stewart Maxwell: I think that the minister used the figure 619.

Colin McKay: If it was 600 firms, that would not be comparable with 10,000 individual solicitors, because firms would have more than one—

Fergus Ewing: I was quoting Tom Murray, who referred to 619 registered civil firms.

Colin McKay: So it is not quite such a fragile—

The Convener: It could be much higher.

Colin McKay: Absolutely.

More generally, a lot of access to justice issues were looked at in a fairly major review that was undertaken a few years ago. One of the review’s conclusions, and one of the things that informs the Scottish Legal Aid Board’s evidence, is that it would be a very limited strategy if the only egg in the basket for seeking to secure access to justice for poorer people is simply to hope that high street solicitors will deliver a service to them through cross-subsidy from their other work. The work that was done concluded that, while it is obviously great that solicitors are sometimes prepared to do certain work for a lower level of profit—I put it no higher than that—that does not necessarily deliver access to justice in all the areas in which it might be required. For example, a family solicitor might do some family law work for less than they would normally charge, but they would not necessarily do immigration, mental health or children’s hearings work, or be advised to do so, because such work is not their area of expertise. If we are looking to secure access to justice, we must therefore take a broader approach than just hoping that the existing model of the high street firm will deliver that.

Robert Brown (Glasgow) (LD): I am intrigued by the suggestion that the bill will have advantages in social welfare law. To be frank, it seems to me that if, for example, one were to consider lack of access to debt advice or whatever as the specific problem, that would not be addressed by the bill. Do you agree that, although there may or may not be advantages in tackling
social welfare problems in that way, the bill is not the most obvious way of doing that and the problem is more to do with, for example, funding of CABx and other bodies? Rather than the bill’s mechanisms, perhaps there could be a technical amendment that would allow solicitors to be employed by CABx.

Fergus Ewing: The bill’s primary purpose is not to tackle that problem, as I have already said. I hope that members agree that the provisions in the bill that directly apply to the Scottish Legal Aid Board to create a duty to monitor gaps in service provision are—as I previously mentioned—a very useful step. The Scottish Legal Aid Board is very keen to ensure that the public has access to legal services. I know that because of the approach that SLAB takes. I am sure that Robert Brown is also aware of that.

The bill’s principal purpose, and the reason why we are here, are not in the section that will create a duty to monitor gaps. However, because of our concern to ensure access to justice, which is shared by Mr Brown and other members, we felt that SLAB, which sees who does and does not get legal aid, is best placed to take on that duty. That is why we asked SLAB to do that. It has a good track record, and it is likely that the bill will lead us to more proactive consideration of where gaps in access to justice may be. However, I agree with Robert Brown and with the thrust of Stewart Maxwell’s question that the problems of access to justice are dealt with in a number of ways that are largely outwith the bill. That will continue to be the case.

Robert Brown: I would like to avoid doubt about the motivation for the bill and its general purpose and direction. You have given a clear view of the position that would apply to legal firms that deal with matters at international or corporate levels, but it is not terribly obvious that there will be advantages to consumers or, indeed, to solicitors who operate in the general market. I will use the analogy of a corner shop. The corner shop has a number of streams of business, including the sale of food, newspapers, cigarettes, alcohol and so on, each of which contributes to the shop’s profits. However, none by itself enables the shop to be profitable; that is achieved when they are added together. It is in that context that the market issue that Stewart Maxwell touched on seems to me to have relevance. Do you agree that it is a bit of a risk to allow certain parts of the overall profitable mix to be taken away by outside providers, leaving only the bits and pieces that do not provide for a viable presence in, for example, a rural town?

Fergus Ewing: There are many components to that scenario, and I am not sure that I share Mr Brown’s view. I will state what the bill seeks to do: it seeks to offer opportunities that are not compulsory or mandatory. It may well be that the majority of traditional small or medium-sized firms will choose to remain as they are. First, we do not envisage that all solicitors will take up the bill’s opportunities. Secondly, by removing the restrictions against ownership by, and partnership with, non-solicitors, the bill will open up opportunities.

I well remember that, as a legal adviser in a small firm, I provided an advantage to two clients from a particular business. I had better not name the big firm from which they previously received legal advice. They had gone to that firm one morning in their yard boots—they were both pretty wealthy, if not millionaires—and were kept waiting for 45 minutes. They did not fancy that much, so they came to me and I gave them legal advice and I went out to their business. I mentioned that because that is the sort of service that small and medium-sized legal firms routinely offer their clients—an attractive client-based and client-focused service.

The bill will allow such firms to go further and to say, for example, “Look, when you come and see me every six months, you can also see this excellent accountant, who is my new partner. You can do your books at the same time so that you don’t need to spend more time away from the yard.” Many businesspeople loathe having to go to professional people and to be away from their businesses for longer than they want. As a direct result of the bill, small and medium-sized companies will be able to access new business opportunities.

In conclusion, I remind members that the model in the bill is alternative business structures. We did not go down the route of specifying what those business models must be. Because of the Law Society of Scotland’s approach, which we endorse, it is for businesses to determine how they will form structures with individuals who are not solicitors. They will have freedom and flexibility to do that—subject to their complying with an extremely robust regulatory regime.

The Convener: I call Cathie Craigie.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you, convener. I nearly promoted you to Presiding Officer there.

Good morning, minister. You have partly answered some of my questions on multidisciplinary practices. However, will you advise the committee what evidence exists that there is a demand for multidisciplinary practices or one-stop shops, as some people call them?

Fergus Ewing: The evidence comes in many forms. First, we have the evidence of the vote within the profession, which showed that an overwhelming majority is in favour of the proposal.
We have clear evidence that a number of the largest firms in Scotland believe that the business opportunities are necessary for them to expand and provide opportunities for young Scots who seek work in the interesting fields in which those firms operate. We also have evidence from the Office of Fair Trading and from consumer lobbyists.

We do not have a queue of members of the public standing outside Parliament in the morning saying, “Please, minister, stop tackling crime. I want you to create this new opportunity so that I have a better chance of being charged lower fees.” However, consumers do not focus much on the sorts of models that are operated. They look at the end product, which has to be competitive, fair and which must charge reasonable fees. To be fair to the Scottish legal profession, it has over the years taken many measures to address that. In conveyancing, for example, that has been done by scrapping the scale fees that used to exist and by allowing advertising: fees in that area have come down considerably. Some people argue that they have come down too far, but that is another story. Consumer interest is important.

I accept that, in assessing consumer demand, we have not had the voluminous evidence that we might like. I think that we are unlikely to obtain any further evidence. Mr McKay has more information.

Colin McKay: I do. If it is not too cheeky, I will refer to comments that Professor Stephen made at the time of the research working group. He said that

“the benefits and costs of MDPs remained hypothetical”,

and added that

“Where they were permitted, however, they seemed to emerge with a significant market share, particularly in markets serving major business clients”.

Basically, the argument at paragraph 8.76 of the research working group’s report is that, if people do not want MDPs, they will not make any money, therefore they will not exist. Essentially, the purpose of the bill is to allow them to happen. If consumers want them, they will thrive. If consumers do not want them, they will not thrive. That will have to be tested once they are available.

10:45

Cathie Craigie: My concern is that, if people move elsewhere, the test might throw out of business some smaller firms that serve communities. You mentioned the public consultation. I agree that the issue is not keeping our constituents awake at night and that they are not rushing to members’ surgeries about it, but it is important that we have accessible legal service provision. Stewart Maxwell compared the issue with the deregulation of buses. Politicians told us that that would be great for the public, but now we find that it is a great only on lucrative routes whereas, in other areas, it is impossible for people to get a bus out of their community.

In written and oral evidence, the Scottish Law Agents Society tells us that it “is the largest voluntary national organisation of solicitors in Scotland”,

with some 1,600 members in high street practices. It consulted on the bill and received 400 responses, 85 per cent of which were against the proposals in the bill. In its written evidence, the society tells us that the bill “pays no attention to the interests of consumers which is the only reason which justifies regulation in the first place.”

How do you respond to that evidence?

Fergus Ewing: I have met representatives of the Scottish Law Agents Society and I respect its views and the work that it has done on this topic. It has a smaller membership—by a considerable margin—than the Law Society of Scotland. According to the figures from which you have quoted, it appears that a fairly large majority of its members did not participate in the survey, although I am not sure that the figures are final. Be that as it may, we take and have taken seriously the concerns that the society has expressed; I addressed some of them in my opening statement.

Cathie Craigie’s question gives me the opportunity to make the point that the regulatory regime that we have set out states that the objectives that must be pursued, and to which regard must be had in respect of the application to be a regulator and a licensed provider, are

“protecting and promoting—

(i) the interests of consumers,

(ii) the public interest generally,”

as well as

“promoting an independent, strong, varied and effective legal profession”

and

“promoting and maintaining adherence to the professional principles.”

Section 2 of the bill describes the professional principles, which include a requirement that solicitors

“act in the best interests of their clients”

and

“maintain good standards of work”.

Those principles apply to all solicitors, regardless of whether they enter alternative business structures. They are a codified version of what
every Scottish solicitor holds dear and of what is to be expected of them in their work: the highest standards, probity, honesty and integrity. Duty to the client is absolute. We believe that the duty to “act in the best interests of … clients” includes and implies a duty of confidentiality, which is why such a duty is not spelled out specifically in the bill.

I will finish by addressing another matter that has not been mentioned in evidence from witnesses, and which will be a significant safeguard for any supermarket or bank that wants to enter the market. I refer members to section 51, which is entitled—intriguingly—“Behaving properly”. It states that an outside investor, such as a bank or supermarket,

“in a licensed provider must not … interfere in the provision of legal or other professional services by the licensed provider”.

If a supermarket tells the legal providers in a firm that it owns that it wants them to stop the complicated stuff of sending out letters, to do things far more quickly and cheaply and to cut costs, it will be in clear breach of the law. Moreover, the head of legal services and the practice committee that the company must have under the bill will have to report the matter to the regulator. Those safeguards illustrate that we have thought through the points that Cathie Craigie and Stewart Maxwell rightly made about the risk of outside ownership, by ensuring that a series of protections with which everyone must comply is clearly written into the bill.

There is also procedure for complaints about actions, which will be dealt with by the appropriate authorities and which will provide further protection for the consumer.

The Convener: We have strayed slightly off the path. Perhaps Cathie Craigie can get us back on to the route that we want to take.

Cathie Craigie: What will happen if the licensed provider tells people to stop writing so many letters, to do things far more quickly and cheaply? How long will it take for that to surface? If an individual is motivated more by profit than by the desire to deliver legal services, what will happen if the people who are employed by that person do not speak up because they might lose their jobs as a result of their doing so?

Fergus Ewing: Such a scenario is not at all likely. Let me explain why. It is absolutely clear that an outside investor will have to comply with the regulatory objectives and professional principles, which will impose the same standards on licensed providers—the new business entities—as exist for solicitors. That is no accident; it is deliberate. It is plain that the provisions to which I have referred will apply to outside investors. The head of legal practice will have a duty to warn. Under section 40, which sets out the head of practice regulations,

“If it appears to a Head of Practice that—

(a) the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment … the Head is to report that fact to the licensed provider’s approved regulator.”

Failure to comply with that duty would be a serious matter. There are provisions in the bill for rescission of the licence, as Cathie Craigie would expect.

The regulator will not only consider applications, but will have a duty to monitor the operation of licensed providers. Activities will be monitored regularly, as solicitors are monitored by the Law Society of Scotland, which comes in and inspects lawyers’ books and files—rightly so—in order to protect the public. The regime of inspection, monitoring, reporting and checks and balances that currently exists in the legal profession will, in effect, be transposed by the provisions in the bill.

I cannot say that there will be no bad apples in the barrel—no one can ever say that, including, sadly, about the legal profession, as we note from the newspapers from time to time. However, I am confident that the system that we will have in place will be robust and is likely to prove to be effective in the vast majority of cases. I would be surprised if there were any instances of the type that Cathie Craigie described.

Cathie Craigie: Does the bill allow for swift action to be taken, for example to suspend a licence, if it is brought to the regulator’s attention that all is not well in an organisation?

Fergus Ewing: I am pretty sure that it does. I will ask the officials to give you the copperplate answer.

Colin McKay: The schedules to the bill set out a range of sanctions. Some measures might be pre-emptive, such as performance targets, but schedules also make provision on censure, financial penalties, directions and so on. The regulatory regime would have to set out the ways in which firms could intervene. If there was evidence of serious misconduct, I envisage that action could be taken very quickly.

Fergus Ewing: The fourth tier of protection in the bill is that any solicitor who carries out work for a licensed provider will also be subject to regulation by the Law Society of Scotland. Therefore, any impropriety will be dealt with as it is currently, with the provision for complaints to be made to the Scottish Legal Complaints Commission and for instances of fraud to be dealt with as currently happens.
In parallel with the bill, solicitors will be subject to the existing fairly robust regime. As Mr McKay has said, the bill, which contains 102 sections and nine schedules, sets out provisions for censure and for financial penalties or breaches of the duties that are contained in the bill. I hope that that answers the question generally. However, if there are more specific points that we have not answered, I would be happy to write to the committee before it finalises its report.

The Convener: The committee will discuss all aspects of that later, and if there are matters upon which we require further information, we will write to you.

Cathie Craigie: Clearly, the minister believes that benefits will flow to consumers if the bill becomes an act. What categories of users of legal services are likely to benefit most from the MDPs?

Fergus Ewing: That will depend on the extent to which the alternative business structures are taken up. In the short term, it is likely that clients of legal firms will carry on as they do at the moment in respect of how they seek advice from legal firms. In the longer term, we hope that by removing barriers to how solicitors can carry out business, there will be reductions in fees. I concede that the greatest scope for that happening is at the top end—in other words, the larger firms. However, I have alluded to opportunities that exist for smaller firms operating in towns. I am conscious that the committee has previously heard examples, from Ian Smart and others, of how small-town based solicitors could avail themselves of the opportunities in the bill.

The Convener: You mentioned that earlier.

Fergus Ewing: Indeed. Perhaps I should not repeat myself.

Cathie Craigie: I was thinking about the benefits to users that would flow from the bill rather than the benefits to firms.

Fergus Ewing: The benefit to users would be that the bill will allow lower fees to emerge from more effective and efficient business structures.

The Convener: We strayed slightly from the intended path, so when members are asking questions I ask them to reflect on whether the minister has already answered their question. We will go to the question on outside ownership.

Bill Butler (Glasgow Anniesland) (Lab): What consideration has the Scottish Government given to alternative means of allowing non-lawyer participation in the ownership of firms that provide legal services, such as, for example, the Institute of Chartered Accountants of Scotland’s regulated non-member model of regulation?

Fergus Ewing: We have considered ICAS’s model and I met two representatives of ICAS and discussed that with them. The model that we espouse, and which is in the bill, has emerged from lengthy discussion and consultation, principally with the legal profession. The legal profession sought the model and we have provided it with it. We believe that it offers slightly more flexibility than the ICAS model. I say that because my understanding of the ICAS model is that under it accountants can enter into arrangements with non-accountants, but there must be 50 per cent ownership by accountants. We do not think that that restriction makes sense, so we do not support the ICAS model. However, we very much support ICAS’s general view that the regulatory approach should be robust but not overly expensive, that it should be in due proportion to the size of the market in Scotland and the number of solicitors, and that it should be commensurate.

Bill Butler: You see the model that is espoused in the bill as being more flexible, and therefore superior.

11:00

Fergus Ewing: I think so. The bill does not prescribe the form of business structure, which can be determined by the people who wish to enter into business. That is sensible—provided that they comply with the regulatory framework.

Bill Butler: Thank you, minister. That was clear. In your initial comments, you said that the bill includes robust provision to allow only fit and proper persons to own law firms—the fit and proper person test. Are you confident that that provision will prevent undesirable third parties from taking over law firms?

Fergus Ewing: Yes. We are confident that the provisions and protections that we have put in place should secure that objective. A “fitness for involvement”, or fitness to own, test is set out in section 49. Section 50—“Factors as to fitness”—defines what fitness to own or “Fitness for involvement” means. It gives examples of relevant things to take into account in respect of “an outside investor’s fitness”, including his “financial position and business record ... probity and character (including associations)”. The inclusion of that last word encompasses associations with people who have a criminal record, for example.

There will be a requirement on the head of legal services or head of practice to report any actions, as appropriate. There are further provisions whereby people who have been convicted of
crimes of dishonesty, people who have been fined at level 3 of the standard scale and people who have served a sentence of up to two years will be disqualified from involvement. Mr Clancy gave evidence on that. He said that it might be possible to tighten up that provision by reducing the disqualification point to level 2 fines. He pointed out that it is open to any MSP to argue for that.

The series of tests, including fitness for involvement, the requirement to behave in a proper way—as set out in section 51—and the requirement to have a head of legal services and a head of practice will provide that protection. Those come on top of the professional obligations to which all solicitors in an ABS will still be subject, as regulated by the Law Society of Scotland. When an outside investor makes an application, I expect it to be open to the regulator, in assessing that application, to check whether the person has a criminal record.

Subject to Parliament’s approval in due course—and to the necessary Scottish statutory instruments, I expect—the provisions will form a sensible measure for the regulator to work out who it is that is seeking to become an investor in a law practice, and they should prevent the risk of Mr Bigs—inadvertently or otherwise—becoming the owners of law firms in this country.

Bill Butler: That was very clear. You mentioned level 2. What would the Government’s view be if a member lodged an amendment at stage 2 to tighten up the requirements? Does the Government have a view on that?

Fergus Ewing: We are open to arguments. We want the most effective and stringent test that is consistent with the bill’s overall approach. We have not formed a view on that point. I have read through the evidence, and I noticed Mr Clancy’s suggestion, which is worthy of consideration.

Section 52 provides the Scottish ministers with a power to make regulations on the matter, if required, so there is a backstop.

Finally, there has been widespread agreement, I think, that the provisions are robust. Even the Scottish Law Agents Society, which objects to many other measures in the bill, has accepted that the measures are adequate and said so in its oral evidence on 15 December.

Bill Butler: I have a final question. How would the Government respond to the suggestion that the extent of outside ownership of a law firm should be limited? You will be aware that Mr Gilbert Anderson suggested that outside ownership of law firms should not exceed 25 per cent. What is the Government’s view on that?

Fergus Ewing: I noted that suggestion, which Mr Anderson put forward in some very interesting evidence. We believe that we should not specify what the business model should be—we should set the regulatory framework but not limits that might be regarded as arbitrary in relation to the extent of outside ownership. For that reason, we would not support such a measure.

Bill Butler: That is clear. Thank you.

The Convener: Minister, in following that up I refer you to section 36, which states that a licensed legal services provider must have one solicitor with the appropriate practising certificate. If an organisation is required to have only one solicitor, will it really be entitled to brand itself as a provider of legal services? That contrasts starkly with the requirements for accountants. Under the ICAS system of regulation, at least 50 per cent of the principals of an accountancy firm must be chartered accountants if it is to be called a chartered accountancy firm.

Fergus Ewing: I am sorry, but I do not quite understand the question relating to chartered accountants. I have section 36 before me, which I will come on to talk about.

The Convener: I am drawing a contrast. Under the ICAS system of regulation, in any organisation that is defined as a chartered accountancy firm, 50 per cent of the principals must be chartered accountants. Under the proposals for legal services, there need be only one fully qualified legal practitioner in a firm. There could be four partners—one lawyer, one accountant, one surveyor and one financial services specialist. There is therefore an inconsistency.

Fergus Ewing: With respect, I am not sure that I understand what that inconsistency is. Perhaps that is a failing on my part. The provision that an entity must have at least one solicitor who holds a practising certificate if it is to be eligible to be a licensed provider, as set out in section 36, is plainly a minimum requirement. That provision would operate for a sole practitioner, for example, who wanted to enter into a partnership with an accountant under the scenario that I mentioned earlier. We would not want—indeed, it would be wrong of us—to prevent that from happening.

Perhaps you are suggesting that there should be a more sophisticated system that would ensure that large concerns faced some greater hurdle and were required to contain a greater proportion of partners or owners who were solicitors. Our general view is that the regulatory regime is so robust that it can ensure compliance with the public interest, protection of the clients and all the other regulatory objectives that I have mentioned. We believe that it is better not to fetter the ability of businesses to develop and devise new formats that they adjudge to be necessary and to avail themselves of opportunities to succeed in
business and to represent their clients effectively, perhaps charging lower fees as well. We do not want to impose new restrictions that would replace the ones that we seek to remove.

Cathie Craigie: How would you respond if the legal professionals themselves wanted a system similar to that of the accountancy professionals, whereby 50 per cent or 25 per cent—we will not argue about what the percentage should be at the moment—of the principals in a firm should be solicitors.

Fergus Ewing: With respect, that is a hypothesis. We would address that situation were it to arise, but it has not arisen thus far. The Law Society has had an opportunity to formulate its policy, and it has done so. I noted Mr Anderson’s interesting suggestion, which is worthy of discussion, but as far as I can see it has not found favour with the profession as a whole. If there is evidence that that is incorrect and events paint a different picture, of course we will consider the situation as and when it arises, but we do not believe that it is likely to arise for the reasons that I canvassed in my earlier answers. Mr McKay might have some more information, if he may provide it.

Colin McKay: To clarify the point, the bill sets out the regulatory framework. Within it, anyone who seeks to be an approved regulator will have to come up with a regulatory scheme that contains rules and procedures. It is entirely possible that a body such as ICAS could come up with a scheme similar to the ICAS scheme, or indeed that the Law Society could—if it seeks to be an approved regulator, as it indicated it would—restrict how licensed legal services providers that seek to be regulated by the Law Society operate. There is room for further refinement of the regulatory scheme, but in the bill we have left it up to the bodies that seek to be regulators to work out exactly what the best model is for the kind of businesses that they seek to regulate.

Cathie Craigie: A major change is proposed to the way in which lawyers and legal firms operate. Are you saying that if we had more than one regulator, we could have different sets of regulations? For example, one regulator might have the power to say, “There must be 50 per cent solicitors,” whereas another regulator might apply no such cap, other than the one in the bill.

Colin McKay: It would depend on the kind of businesses that they were seeking to regulate. The bill makes it possible for solicitors to be involved in several different kinds of businesses. As has been said before, we do not anticipate that a flood of people will seek to be approved regulators; there might be a small number of them. However, they might propose a particular business model and say, “Our members can deliver a particular kind of service involving solicitors and other people. We will regulate in this way. That is the only kind of business that we seek to regulate, because that is where our area of expertise lies.” Several safeguards in the bill will ensure that even if there is more than one regulator, those regulators must be competent to do the job properly and effectively.

Ultimately, ministers will have to sign off on that—they will have to sanction that such people know what they are about, have devised a regulatory scheme that is fit for purpose and will regulate the businesses properly. That will happen after consultation with the Lord President. As was said, some people have suggested that the Lord President’s role could be beefed up. There is a fairly robust framework in the bill for ensuring that whoever comes forward to be a regulator has thought through the issues and identified how to regulate the businesses properly.

Cathie Craigie: Just so that I am clear, it is unlikely that there will be a flood of people wanting to take on the role of regulator, but there could be more than one regulator applying different regulations.

Fergus Ewing: That is quite possible and the bill envisages it. In the financial memorandum, we look at there being between one and six approved regulators, although I think that the number will be nearer one than six. However, time will tell. Cathie Craigie is right to raise that point. It is unlikely that the consumer would benefit from there being more than one regulator, but it might be of advantage to businesses to be able to choose which regulator is most applicable to them. All regulators will be subject to providing the same level of protection to the public and the same standards before they are authorised as regulators.

The Convener: We now move on to questions about the independence of the legal profession.

Angela Constance (Livingston) (SNP): Minister, you stated in your opening remarks your support for the independence of the legal profession. How do you respond to concerns that the enhanced regulatory role that the bill creates for the Scottish ministers is not consistent with the independence of the legal profession?
It is of paramount importance that the profession remains independent. We do not believe that the bill will undermine the profession's independence. Section 1 states that the regulatory objective is, inter alia, “promoting an independent ... legal profession”.

I have referred to section 51, “Behaving properly”, which provides that outside investors must not interfere in how legal services are provided. That, too, is a bulwark.

Angela Constance refers to the provisions that concern the Law Society. Section 92 and subsequent sections set out a system that changes the regulation of the Law Society. As the committee knows, the Law Society is subject to regulation as a statutory body. The bill amends the 1980 act to establish a regulatory committee, 50 per cent of the members of which will be laypersons. That committee, which will assume all the regulatory functions, will therefore involve an outside element.

It is envisaged that the Lord President will be consulted on the approval of regulators. We are considering further whether the Lord President’s role should be beefed up in the way that some witnesses have suggested.

The Convener: That is the nub of Miss Constance’s question.

Angela Constance: Will the minister respond in more detail to the calls for further safeguards to protect the legal profession’s independence, such as a greater role for the Lord President, and for a statutory consumer panel, which Consumer Focus Scotland suggested?

Fergus Ewing: We are considering whether the Lord President should have a greater role. We do not believe that establishing a statutory panel is necessary, but perhaps a non-statutory panel could be established, and might be preferable. Of course, we have provided for lay membership of the regulatory committee, which will provide a safeguard.

Angela Constance: Would the non-statutory panel that is being considered advise ministers on applications for authorisation and on how best to review the regulatory framework?

Fergus Ewing: The body would help with and play a part in discharging all the Law Society’s regulatory functions—[Interuption.] I am sorry—were you asking about a consumer panel?

Angela Constance: Yes. How would such a panel interact with and advise the Scottish ministers, as opposed to the Law Society?

Fergus Ewing: Mr McKay will tell you how we envisage such a committee performing its role.

Colin McKay: We are slightly at cross-purposes in talking about the regulatory committee that relates to the Law Society. Angela Constance refers to the suggested advisory panel for ministers, which some organisations have said should be statutory. The short answer to her question is yes—we are considering the possibility of a non-statutory advisory panel, whose function would be as she described. It would advise ministers on applications to be an approved regulator and on any other functions that they must discharge under the bill, to ensure that they have access to the widest possible range of expert advice.

Although it would be possible to make that panel statutory, that would inevitably constrain flexibility in relation to who is on the panel and how it should operate. The preference at the moment, in line with Government policy around the simplification of the public sector, is not to create yet another public body, as it were, although I am not sure whether such a panel would count as a public body. We think that we can secure the benefits through non-statutory means.

Angela Constance: Thank you. Can you say anything more about your consideration of giving the Lord President a greater role and what that might entail?

Fergus Ewing: At the moment, we envisage that the Lord President will be consulted. Certain evidence has suggested that he should have a greater role than that. We are therefore considering whether that should be the case, and we are meeting the Lord President.

It might be helpful to point out, as I have been reminded, that, under section 6, “Approval of regulators”, approved regulators must exercise their regulatory functions “independently of any other person or interest”.

That safeguard is set out in the bill. We will come back to the committee at stage 2, if not before, on the role of the Lord President, which is under active consideration.

Colin McKay: The subject was discussed at the bill reference group, which involves the Law Society of Scotland, Consumer Focus Scotland and a number of the bodies that have given evidence. Those deliberations will be made available to the committee—if they are not already on the internet—so that you can see some of the discussions that we have had.

Angela Constance: Thank you for that.

Does the Government envisage that the role of the Lord President will be more of a consultative role than an approval role?
Fergus Ewing: It is consultative at the moment. The bill states:

"Before deciding whether or not to approve the applicant ... the Scottish Ministers must consult ... the OFT, and ... such other person or body as they consider appropriate."

At the moment, the bill envisages that we would consult the Lord President. The question is whether he should have a sort of dispositive role, a co-decision-making role or a consultative role, and whether that would be necessary further to protect the independence of the legal profession. We are considering that issue further.

The Convener: Of course, we are all signed up to the independence of the legal profession, but there is perhaps an inconsistency in that, under the bill, there is an enhanced role for the Government. Some members might not be terribly relaxed about the legal profession being truly independent when the Government has that enhanced regulatory role. Cathie Craigie has a brief point to make on that.

Cathie Craigie: The committee received written evidence from Douglas Mill, a former chief executive of the Law Society and the director of professional legal practice at the University of Glasgow's law school, in which he raised concerns about the independence of the legal profession and said that there is a worrying trend in that regard and that the bill is flawed. He stated:

"The potential for direct Governmental control of the legal profession contained in for instance section 35 could reduce Scotland to the type of legal profession seldom seen outside South America and Equatorial Africa."

How do you respond to that?

Fergus Ewing: There are many respectable, reputable and successful countries in those parts of the globe, on which I would certainly not wish to cast any aspersions—I am sure that that was not the intention.

On the independence of the Scottish legal profession, which is more within my area of potential responsibility and interest, we are satisfied that the bill sets out a regime whereby the role that the Scottish ministers play does not interfere with that independence. Indeed, that is made clear in section 4, "Ministerial oversight", which delimits the role that the Scottish ministers will play. The Scottish ministers will not pick businesses and say, "Right, you have permission to be a licensed provider," although they will have a role in dealing with regulator applications. Under the proposed tiered protection, the first tier is that the regulators will be appointed by the Scottish ministers, but that will happen only after consultation, as we have described. The regulators, who must be independent, will make the decisions about who does or does not meet the stringent tests to become licensed providers. In addition, all of us will be subject to the regulatory principles that enshrine the independence of the legal profession in statute.

Cathie Craigie: On section 35, "Step-in by Ministers", for the benefit of the committee and anyone who might be listening in, can you give examples of when ministers might step in?

Fergus Ewing: I ask Andrew Mackenzie to clarify the technical aspects of that point before I respond.

Andrew Mackenzie (Scottish Government Constitution, Law and Courts Directorate): The section makes provision for a worst-case scenario in which there is no other approved regulator. The provision is a last resort or safeguard to ensure that there will always be somebody to deal with the role of an approved regulator.

Fergus Ewing: Yes. I think that the provision envisages the case where an approved regulator, for whatever reason, either ceases to act as the regulator or is struck off from being the regulator, for which provisions exist. Section 35 is a fall-back or last-resort provision and is intended as such.

The Convener: We have a fair amount still to go through so, in the circumstances, I suspend the meeting briefly for about five minutes.

11:26

Meeting suspended.

11:35

On resuming—

The Convener: We have a fair amount to get through, so I ask members to be as brief as possible in questioning and not to go over old ground. Questions on regulation will be led by James Kelly.

James Kelly (Glasgow Rutherglen) (Lab): Minister, earlier you were enthusiastic about the way in which regulation is outlined in the bill, but in some evidence sessions it has been criticised as too complex. Why, for example, are we adopting the approach of having multiple regulators, rather than a single regulator?

Fergus Ewing: Overall, the regime is designed to be robust, not light touch—to use a phrase that was fashionable some years ago, before the collapse of certain banking institutions. However, it is designed not to set up new, expensive quangos but to set out a framework that will apply to anyone who wishes to establish new business structures. You asked why there is provision for more than one regulator. As I said in response to questions from Cathie Craigie, although having
more than one regulator is unlikely to benefit consumers, it may be of benefit to licensed providers.

I will give the member a hypothetical example, although my hypothesis may be no more valid than anyone else’s. If a business entity is orientated primarily towards accountancy and taxation and is regulated by ICAS, it may, as an alternative business structure, want to continue to be regulated by ICAS, rather than by ICAS and, perhaps, the Law Society of Scotland. On the other hand, if an ABS is largely a solicitors practice with some accountants, it may prefer to deal with the Law Society of Scotland, with which it deals anyway. That is one scenario that I can paint to assist the member.

In her evidence, Lorna Jack said that, south of the border, where a Legal Services Board has been established, there is a fairly sizeable staff and cost element. The board and the Legal Services Commission down south cost £39 million. Lorna Jack mentioned that solicitors in England and Wales have faced an initial hike in their fees of 20 per cent, in addition to the fees for their practising certificates. I do not think that many solicitors in Scotland would welcome a 20 per cent hike in their fees. One must take account of the smaller jurisdiction and market in Scotland and the proportionality of the regulatory vehicle that we have provided. I think that we have got it right.

James Kelly: If you take a multiregulator approach, how will you ensure that there is a level playing field between licensed legal services providers and traditional firms, and between existing and new regulators? In its evidence, Shepherd and Wedderburn pointed out that, in its view, it will be at a competitive disadvantage to licensed legal services providers, which will be able to choose between regulators.

Fergus Ewing: First, it is a matter of choice. Any firm can choose to enter or not to enter into an alternative business structure.

Secondly, the regulatory objectives and professional principles that are set out in the bill will apply to all solicitors, so there will be a level playing field in that regard.

Finally, I am aware of the point that Shepherd and Wedderburn made in its submission about the possibility of traditional firms being placed at a disadvantage if there were licensed legal services providers. At the most obvious level, a legal services provider’s first requirement would be to pay a fee, estimates of which we have set out in our financial memorandum. It is not possible to be absolutely certain about how much that fee will be, but it is plain that it will not be payable by traditional legal practices that decide not to become ABSs. Under the proposed new system, there will be an extra cost—albeit that it might be a modest one—attached to being an ABS.

James Kelly: There are those who feel that the current system of complaints handling is already complex for users of legal services and that by introducing a system of multiple regulators, the Government will make it more difficult for people to make complaints when they have issues with the legal services that they have been provided with.

Fergus Ewing: The bill introduces a new type of complaint—a regulatory complaint—which would be a complaint that provisions of the bill had been breached. However, the existing complaints structure for solicitors and accountants will remain in place. As far as solicitors are concerned, there is a clear, established procedure for matters of professional negligence and fraud. I do not think that any client who has a complaint to make about a solicitor will find it difficult to find out to whom that complaint should be addressed.

Colin McKay: It is important to remember that the bill retains the provisions of the Legal Profession and Legal Aid (Scotland) Act 2007, whereby the Scottish Legal Complaints Commission will be the initial gateway for all complaints. Regardless of whether the firm concerned was an ABS or a traditional practice, the first place that someone who had a complaint would go would be the Scottish Legal Complaints Commission, which would help them work out where to go next and how to proceed with the complaint.

James Kelly: There is some discussion in the submissions of the gap in the regulation of claims companies, which have been the subject of discussion in recent weeks because of the weather difficulties that we have had. Is that not an area that should have been taken forward in the bill?

Fergus Ewing: We gave some consideration to that, alongside the proposal on the regulation of will writers. As far as claims management companies are concerned, little evidence has been presented to us of malpractice. In Scotland, legal aid is still available—rightly, in my view—to those who wish to pursue a claim for compensation for personal injury, which, as members will know, are often among the most serious cases in Scotland. Legal aid is still available for such matters, especially in the most serious cases.

We also considered the introduction of contingency fees. After various deliberations, including with the committee, we decided that it would be premature to do that. It seems to me that it might be appropriate to consider the regulation of claims management companies in tandem with the issue of contingency fees—no-win, no-fee—
because consideration of such a scheme would, by definition, involve an analysis of how claims are managed and pursued in Scotland at the moment. We decided that, on balance, the bill is not the correct vehicle for addressing that issue, but we will be happy to give it further consideration in future.

The Convener: That might be appropriate, given that, historically—as you know—there have been certain concerns in that direction.

Bill Butler: The committee has had evidence from Mr Gilbert Anderson that section 60 of the bill creates considerable uncertainty in regard to a client’s right to legal professional privilege. How do you respond to that concern?

Fergus Ewing: The issue of the appropriate way in which legal business is carried out is essentially covered by the professional principles that are described in section 2. I think that I may have remarked earlier—

Bill Butler: Perhaps I misled the minister. I should have said “section 60”—I thought that I had done so—rather than “section 6”.

11:45

Fergus Ewing: I was going on to say that there is an argument that the bill should say that licensed legal services providers will be subject to the same provisions about confidentiality to which solicitors are subject. That is not in the bill because we took the view—it was the view of our expert parliamentary draftsmen—that the matter is covered in section 2, on the professional principles to which all licensed providers will be subject, which says:

“persons providing legal services should ... act in the best interests of their clients”.

The advice that I have is that that includes and encompasses the duty of confidentiality. However, given that the matter has been raised in the committee and in evidence, I will seek further advice. I am a great believer in the principle, “if there’s doubt, spell it out”. Therefore we should consider whether there is a way in which we can make it absolutely clear, as is consistent with our overall policy objective, that we want to ensure that licensed providers are under at least an equal standard of care and duty to their clients as ordinary solicitors are under. I thank Bill Butler for raising the issue; we will consider specifically whether we are covered on that point.

Bill Butler: I am grateful for that assurance. I noted that you said that section 2 includes and implies a duty of confidentiality, in this instance it might be better if the bill were explicit.

The Convener: The minister’s offer is helpful.

Robert Brown: Before the meeting was suspended we were talking about section 35, “Step-in by Ministers”. I think that the minister said that the provision in section 35 is a long stop, but—with the greatest respect—it does not look like that. The wording seems to allow the Scottish Government to be proactive, for example, in setting up an approved regulator if no potential regulators come along, to push forward the competitive agenda. Was that the intention?

Fergus Ewing: Section 35 is not intended to be anything other than a long-stop provision—that is manifestly the case. I am not sure what part of section 35 gives rise to your fears, but it is pretty clear from the policy memorandum that the provision should be used only if necessary and as a matter of last resort. We are confident that applications to be regulators will be made. The Law Society of Scotland and ICAS have regulated their members for a long time, and if those organisations were to come forward and be approved as regulators I would expect them to continue to carry out such work in a professional, thorough and competent way.

Robert Brown: Are you saying in effect that if nobody came forward—although you do not expect that to happen—you would not propose to use section 35 to fill any deficiency?

Fergus Ewing: I do not envisage that the hypothesis that nobody will come forward will arise. You are entitled to put the hypothesis and to challenge our evidence—it is a member’s right and perhaps the committee’s duty to do so. However, that is simply not a scenario that we envisage will arise.

Robert Brown: I will move on to section 47, “Designated persons”. I think that you have seen Gilbert Anderson’s written evidence, in which he expressed concern that the bill does not require a designated person—that is, someone who is designated by a licensed provider to carry out legal work—to undergo training or have relevant qualifications. I think that Mr Anderson’s concern was echoed in the evidence from the committee of heads of Scottish law schools. The question of training and education for legal providers seems to me to be important. Can you comment on that aspect? It does not seem to be covered by the bill at present.

Fergus Ewing: The bill does not amend those provisions of the Solicitors (Scotland) Act 1980 that changed the nature of the work that solicitors do in Scotland. The bill makes no change to the areas of work that are reserved to solicitors in the 1980 act. The position on training for all solicitors is as it is now, no more and no less. The existing provisions that apply to the standard of training, education and qualification required by Scottish solicitors will apply, as they say, mutatis mutandis...
to solicitors operating in licensed legal services providers.

Robert Brown: With great respect, section 47, if I understand it right, does not apply specifically to solicitors but to people who are, according to section 47(3)(b), “eligible for designation”. They are defined in sections 47(3)(b)(i) and (ii) as “an employer or manager of the licensed provider ... or ... an investor in it”.

The inclusion of an investor seems a slightly odd arrangement. However, they seem to be different categories of people from solicitors, do they not?

Fergus Ewing: Yes—that is a fair point. Plainly, in licensed legal services providers, a range of people will operate as principals in the business, but the bill makes no change to the law on the way in which work is carried out. Those areas of law that require specific training are reserved to Scottish solicitors; no one who is not a Scottish solicitor can carry out, for fee or gain, work such as litigation, conveyancing or the preparation of writs, excepting wills. If a non-solicitor does such work, they commit an offence. At present, as Robert Brown knows, there are certain provisions for paralegals, who are subject to a specific training regime. Paralegals, of course, will continue to require to do the training that they currently have to do in order to operate. The bill therefore makes no changes to the reserved areas. I take Robert Brown’s point that that is not explicitly stated in the bill, but that is because it is explicitly stated, in effect, in the 1980 act. I am sure that all members would want to ensure that education and training are at least to the same standard as currently required. I have set out the correct response, but I undertake to look specifically at this issue again.

My attention has been drawn to section 47(4), which somehow momentarily escaped my notice. It states:

“Nothing in this Part affects the operation of any other enactment, or any rule of professional practice, conduct or discipline, which properly requires that a particular sort of legal work be carried out by an individual of a particular description.”

That aims to deal with the situation that we have been discussing, but Mr Brown has raised an important point—his colleagues have raised important points in other areas—so we will look again at the position to see whether further provision needs to be made.

Robert Brown: I am grateful for that. I think that the point remains, so I want to be clear that the minister is with me on it. I understand the position as regards solicitors in legal firms, but what we are talking about is people who are not solicitors and are perhaps not in legal firms in the way that they have traditionally been talked about. That includes, among others, investors. It seems to me that there are issues there about the nature of the work that people will do. Frankly, I am not quite sure why an investor is designated as a person to carry out legal work. I may have misunderstood the reasoning on that. Can the minister come back to us specifically on that aspect and give us some understanding of why an investor in a legal practice is required to be eligible for designation?

Fergus Ewing: First, I direct the committee’s attention to section 51, which provides protection in relation to outside investors, to which I alluded earlier. Section 51(2)(a) states that outside investors may not “interfere in the provision of legal or other professional services by the licensed provider”.

I did not refer earlier to section 51(2)(b), which states that the outside investor must not

“(i) exert undue influence,
(ii) solicit unlawful or unethical conduct, or
(iii) otherwise behave improperly.”

There are therefore those further protections that are designed to apply to outside investors. I think that Robert Brown is perhaps looking at an earlier section of the bill, so I ask Mr Mackenzie to give more information on this question.

Andrew Mackenzie: The purpose of section 47 is to enable people such as paralegals to work in the new entities. At the moment, unqualified persons can work in reserved areas when they are working for solicitors. For the new entities, there are further safeguards in the bill to allow the head of legal practice to be responsible for those persons. It mirrors what we have at present in firms of solicitors, and in incorporated practices, which are also exempt from prosecution when they work in reserved areas.

Colin McKay: It may be an issue of definition. Section 47(3)(b)(ii) talks about an investor, and section 52(4) defines an investor as a “person who has ... ownership or control”.

A partner in the firm could fit that definition. It is not intended to refer to an outside investor; those are defined differently. The idea is that a person who is effectively a partner in the business might be carrying out some form of legal work in the business.

Robert Brown: That should perhaps be subject to an amendment. It is confusing at the moment—it appears to be contradictory.

A more general issue that arises out of that is conflict of interest. You may have noticed that the committee has asked questions about the position of solicitors in partnership with surveyors, and the issue of single surveys and so on. Minister, you
talked earlier about arbitration in building contracts. It is difficult to see how that could be offered as an internal service because, by definition, an arbitrator would be an independent person in that connection. Will you give us an overview of the conflict of interest, which will clearly be greater under these arrangements than it is at the moment under the well-understood arrangements for solicitors? How is that to be tackled and to what extent is there a risk of undermining the professional standard?

**Fergus Ewing**: I am not clear how the conflict of interest could prevent solicitors from availing themselves of the opportunities for arbitration work, which is a growing area of involvement for many Scottish solicitors; we have the Arbitration (Scotland) Bill.

**Robert Brown**: My point was that if you had a firm that was partly a legal entity and partly something that offers arbitration services, how could it offer independent arbitration services to the client, who, by definition, is one side of an arbitration process? Perhaps I am missing something.

**Fergus Ewing**: Perhaps we are talking at cross-purposes. I am envisaging solicitors who are already involved in arbitration and mediation work planning out that work using their expertise and skills, and doing it throughout the world, rather than necessarily carrying it out for clients of the firm.

I move to the major point, about conflict of interest. As Robert Brown will know, the rules that apply to solicitors with regard to conflict of interest are fairly detailed and the result of a long history, not all of it unchequered, of serious problems arising from conflict of interest. We envisage that the new regime of licensed legal services providers should be subject to at least the same standard in relation to conflict of interest. In other words, there would be no loss of the standards that we see in place in that regard. In principle, that is the approach that we think should be taken in that matter.

**Robert Brown**: Would that come down through the regulator, for example the Law Society, or would it occur in some other way?

**Fergus Ewing**: To use a phrase used by the dean of the Faculty of Advocates, the regulatory objectives are the pillar of the bill. Those objectives, in part 1, include the professional principles set out in section 2 that require licensed legal services providers to display the high standards that are expected of solicitors. We seek to ensure parity of standards. That is the principled approach. However, I draw the committee’s attention to section 9, which is one of those—I was about to say “the few”, but that would not be right, because there are many more to choose from—that we have not yet considered. The section is on reconciling different rules and deals with regulatory conflict in more detail. We have considered the issue. I hope that I have set out in response to Mr Brown’s question the general principle that we will pursue.

12:00

**Robert Brown**: Thank you, Minister. Convener, may I ask the question about wills now?

**The Convener**: I ask you to keep that until later.

Have Nigel Don’s concerns about regulatory conflict been resolved?

**Nigel Don (North East Scotland) (SNP)**: My questions have been answered.

**The Convener**: I ask you to pursue questions about advocates.

**Nigel Don**: Good afternoon, minister and colleagues. Advocates appear in the bill fairly extensively, but in concentrated form. The bill proposes that non-solicitors should be substantially involved in regulating solicitors, but no comparable conditions are set out for the Faculty of Advocates. Why does the minister feel that that is appropriate?

**Fergus Ewing**: Whether the Faculty of Advocates should be included in the bill’s overall purpose of allowing alternative business structures was of course considered. The conclusion was that the faculty did not demand that at this stage, so it was decided on balance that we should not impose the arrangement on the faculty. However, the faculty has expressed its willingness to embrace change. Richard Keen—he was accompanied by Iain Armstrong, who I do not think said anything—gave evidence about the faculty’s position, which we understand and support. Scotland has a smaller bar—of more than 400 advocates—than that in England, which has more than 10,000 barristers. It is plain that the situation here is entirely different from that south of the border.

It was decided not to impose on the faculty the opportunity to participate in alternative business structures, but we nonetheless decided that it would help and be advantageous to set out the framework in which the members of the Faculty of Advocates operate. The regulatory framework is therefore set out in sections 87 to 89—chapter 2 of part 4. I understand that those sections codify the existing position on such matters as the discipline of faculty members. The Court of Session is responsible for admitting people to the office of advocate and for regulating the professional practice, conduct and discipline of advocates.
The bill does not require the faculty to allow advocates to participate in alternative business structures, but it is so drafted that advocates will be able to participate in licensed providers, should the faculty rescind in the future its rule that prevents them from so doing.

Colin McKay: In giving evidence, the faculty made the point—it relates to the earlier question about the independence of the legal profession—that, historically, advocates have been members of the College of Justice and regulated by the Lord President. It would not be impossible for Parliament to impose on the Lord President rules on how the faculty should be regulated, but that would be a significant change to the faculty’s historical regulatory relationship with the Court of Session and the Lord President.

Nigel Don: I understand that point and I entirely see the difference, but the consumer in me advocates that the world has moved on and that no matter how many centuries for which the Lord President and the courts have directly influenced and regulated advocates, perhaps a case exists for independent oversight in the 21st century. If that is appropriate for solicitors, why, at this point, is it deemed to be inappropriate for advocates?

Fergus Ewing: That is because the approach that we took was not to impose anything on solicitors; we waited for solicitors to debate and decide themselves what approach they wished to take, albeit with the caveat that the status quo did not appear to us to be an option. They came back and said that they wanted to go forward with ABS, but the faculty decided that it did not. That governed our approach.

To be fair to the faculty, Richard Keen canvassed in some detail the procedures for how complaints are dealt with in his evidence on 8 December. As far as I recall, Tom Marshall said that it perhaps does not feel right that there should be self-regulation in this day when most regulators are independent of the body whose members are subject to the complaint. That is undoubtedly correct, but we are dealing with a bar of 400 or so advocates—a small bar—so we have to be mindful of their views and perhaps not impose a particular option on them. We decided to take that approach for those reasons, with the caveat that should advocates rescind the rule in future, the framework exists—or will exist, if the bill becomes law—for them to follow the example of solicitors and be involved with licensed providers.

Nigel Don: There is a case, some of which has been made to us in writing, that, currently, it is difficult in some areas to find the services of an advocate, even by going through a solicitor. Given that evidence, there is an argument from the consumer lobby that direct access to advocates would aid them, in principle. How do you respond to that argument?

Fergus Ewing: That is a perfectly fair question. I am not quite aware of what evidence there is about that. It is always dangerous to rely on one’s own experience, because, by definition, it is anecdotal. However, I must admit that I always managed to find an advocate who could provide advice, albeit that one did not always receive the advice the next day. Nonetheless, obtaining the advice did not seem to be a problem. However, if there is evidence that that is becoming a serious problem, we will look at it. I expect that the faculty would look at that and discuss it with us if it perceived there to be a problem.

The second strand to my answer is the evidence that Richard Keen gave, which is that we are talking about a referral bar. He was absolutely correct to point out that advocates are not equipped to, and cannot, get involved in the investigatory work that a solicitor would do. Solicitors prepare the case for the advocates. They do the precognitions, visit the scene of the crime to inspect the locus if they are dealing with a criminal matter and present their brief to the advocate, who uses his time to apply his skill and expertise to the facts that have been prepared and amassed by the solicitor—hopefully doing his job properly. There is limited scope for other non-solicitors to refer matters to advocates, which Richard Keen covered. That is an area that might well merit further discussion—I think that accountants were a group of potential referrers, as were patent and copyright agents, which is being considered. That is an area for further consideration. However, I think that a lay person might find it difficult to provide a clear, sufficient, comprehensive and adequate set of instructions to an advocate. I know that many advocates say that solicitors find it hard to do that as it is. That is a serious practical aspect of the answer to Mr Don’s question.

Colin McKay: It is important to remember that advocates no longer have any monopoly over any particular service, in that solicitor advocates can offer the same services as advocates in relation to pleading in the higher courts. If a consumer wished to avail themselves of direct access to a pleader in the higher courts, they could use a solicitor advocate. Presumably, if that took away too much business from the faculty, the faculty would consider changing its rules.

Fergus Ewing: I should of course have mentioned the cab rank rule, in case someone out with this place criticises me for not doing so. Plainly, advocates are subject to the cab rank rule principle, which prevents them from refusing cases that come within their field.
Nigel Don: I will pursue this point to the end and then drop it. Are you confident that no substantial economies are to be gained by allowing advocates to join solicitors or solicitor advocates in alternative business structures—on the basis that those economies would be passed on to the consumer?

Fergus Ewing: I have not formed a view on that; I have not looked at the question. In theory, it could be argued that if advantages are to be gained in other types of business, there might well be advantages to be gained by advocates joining up with other businesses. Some large commercial concerns will retain in-house lawyers qualified at the top level, who might otherwise have been Queen’s counsels practising as advocates or barristers. The view that has guided our policy formation and approach to the bill is that we did not wish to impose measures on branches of the profession. In responding to the profession, we decided that our approach to the bill would be to set out a framework to pave the way for advocates to follow the example of solicitors should they so choose in the fullness of time.

Nigel Don: Thank you.

Looking at the wider legislative landscape, you mentioned Lord Gill’s review. The question arises, at least in principle, of why you are introducing this legislation now when we have two substantial volumes from Lord Gill on how we might revise the civil justice system.

Fergus Ewing: As the member knows, we debated Lord Gill’s report. The Government values that report and recognises that it contains a large number of recommendations for improving our civil justice system, particularly to get the best deal from the client’s point of view. I think that I used the phrase “delay, worry and expense” in the course of my remarks in that debate.

A lot of work is to be done in considering how we take forward Lord Gill’s report. That work is being done by officials and Parliament will be fully involved in it; it indicated its willingness so to do in that debate. However, we estimate that it will take some time to introduce reforms of the scale and radical nature that Lord Gill contemplates—a lot of debate will be needed about that. It is clear that it will not be possible to do that in 2010 and perhaps not in 2011, but that remains to be seen.

Were we to say, as I think that Gilbert Anderson or one of the other witnesses suggested, that we should wait until Lord Gill’s report has been implemented, we would be waiting for a gey long time. Meanwhile, most of the witnesses have argued that if we do not act now, we might find that some solicitors will simply go down to England and regulate there.

The answer is that we want to take forward Lord Gill’s report and Parliament wishes so to do. A lot is to be discussed; many of the details will involve the most controversial issues and will be hotly debated without doubt. However, we should not wait until that work, which might take some years, is done before we tackle the current problem that requires to be dealt with now rather than some years hence.

Cathie Craigie: I have a question about section 92 in chapter 3—that is the most appropriate point at which to raise it. Paragraph 202 of the explanatory notes states that section 92, on membership of the council, gives

“the Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors (or a proportion of them) in order to be eligible for appointment to the Council. This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council.”

I am concerned that that would mean too much Government control in the council. I would be interested to hear your comments.

Fergus Ewing: Scottish ministers will not seek to obtain powers to control what happens in the council. Section 92 simply gives Scottish ministers the power to specify criteria that must be met by non-solicitors, or a proportion of them, in order to be eligible for appointment to the council. The section does not therefore exist simply for us to interfere with or take decisions that are rightly in the domain and province of the Law Society of Scotland; far from it—the section deals with provisions for the appointment of non-solicitor members. I think that that provision is welcomed across the board.

12:15

Cathie Craigie: This is quite an important point, so I will pursue it further. As I said, paragraph 202 of the explanatory notes states that section 92 amends the 1980 act to give

“Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors”.

It goes on to say:

“This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council.”

That seems a wide-ranging power to give to any Government minister; if ministers did not particularly like the way in which an organisation was going, they could find a reason to change its personnel. Am I reading that paragraph wrongly?

Fergus Ewing: It is a hypothesis, I suppose, although I could not imagine Jim Wallace, Cathy
Jamieson or Kenny MacAskill, for example, wishing to take control of the Law Society.

From the point of view of the bill, we do not consider it necessary for the Law Society to become a purely regulatory body. Much of the debate in the evidence that was submitted to the Justice Committee was about the Law Society’s role, which is primarily a question for the Law Society and its members to discuss. For as long as I can remember, there has been a debate within the Law Society and its membership on that matter. However, the bill provides for the separation of regulatory and representative functions for all approved regulators, and it makes specific provision for the Law Society to have a regulatory committee with 50 per cent non-lawyer membership to regulate licensed providers, independently of any representative function of the Law Society. Our provisions in the bill are therefore designed entirely to ensure that the regulatory framework and functions are set out appropriately and properly; they are not intended in any way to interfere with the non-regulatory, representative functions of the Law Society, which are entirely its domain.

**The Convener:** We now revert to Robert Brown, on regulation of will writers.

**Robert Brown:** There is, perhaps, in some aspects of the bill an element of tension between cost and quality, and between competition and professional standards. We have read written evidence from SLAS and heard its oral evidence about the scary situation with regard to wills in the context of complex changes to what was once regarded as the standard family unit. I know that, depending on the outcome of the consultation on wills, the Scottish Government is considering lodging stage 2 amendments. Is further discussion or regulation needed? Have you any preliminary views on the issue?

**Fergus Ewing:** Yes. I have discussed the matter with SLAS representatives. I also noted the wide-ranging evidence from Kyla Brand, Ian Smart, SLAS representatives and others, who expressed various concerns about wills. As Robert Brown will know, the starting point is that the Solicitors (Scotland) Act 1980 sets out the reserved functions for Scottish solicitors, which include the framing of wills, but exclude wills, which are therefore currently not reserved or regulated. That has led to an awful lot of concerns, which the committee has heard about. Michael Scanlan gave a pretty scary example of a fee of £1,200 being applied for what he said was a clearly inappropriate will. My recollection of charging for wills is that the fee was nearer to £30, £40 or £50 than to £1,200; that is perhaps where I went wrong.

Many witnesses have said that making a will can have serious consequences. When a non-nuclear family is involved, such as Robert Brown mentioned, or when someone who makes a will has children by different partners, there is immense scope for difficulties and problems. Instinctively, I feel as a solicitor that it is important that wills be written by people who are properly qualified, and that there should be an element of regulation.

We will lodge amendments at stage 2 in the spring, one of which could concern the introduction of a regulatory framework for non-lawyer will writers. That idea is being considered following representations to us during consultation on the bill and, subsequently, by various bodies. I note that many members of the committee have pursued this line of questioning with various witnesses. It is not our intention to regulate individuals who prepare their own wills: the aim is not to place restrictions on informal or death-bed wills. I do not think that it would be right—although this is a matter for consultation and debate—to outlaw people making their own wills, perhaps in their last moments on this earth. That might run contrary to the European convention on human rights. The aim is to produce regulations on non-lawyer will writers, which might, in practice, include entities such as supermarkets that provide pro forma wills.

A particular point of concern about which evidence has been led is the prevalence or development of execution-only wills, whereby a will is offered by a non-lawyer business—say, a supermarket—on the proviso that it takes no responsibility for the consequences of it. Many of us have deep misgivings about the probity of that practice and question whether it should be permissible and legal in Scotland. I just wanted to outline that matter.

If committee members want more information, Andrew Mackenzie can talk about the consultation paper that we have issued. For the benefit of committee members and people who might read the *Official Report* of the meeting, I remind members that the consultation will conclude on 19 February. That is, as a result of the timetabling of the bill, less than the usual 12-week minimum period for consultation responses. Responses to the consultation that are submitted by that deadline will be very much appreciated.

**The Convener:** I take it that the terms of the consultation are on the website, Mr Mackenzie.

**Andrew Mackenzie:** Yes, that is correct.

**The Convener:** Therefore, it might be redundant for us to go into that matter this morning.

**Andrew Mackenzie:** Correct.
Robert Brown: I have one more general question on wills. The minister talked earlier about the problems that arose from light regulation of banking. I do not think that anybody would dispute that there were issues with that, but some people might allege that part of the difficulty was that people who did not have backgrounds in banking came into banking with different traditions and a different ethos. In the context of the bill and the possibility of having outside investors and people who are not qualified solicitors entering the profession, does the minister feel that the long-standing tradition and ethos of the Scottish legal profession could be changed and taken in an undesirable direction, irrespective of regulation, by bringing in the new forms of organisation that we are discussing? That is a more general question, which is illustrated by the difficulties that have been experienced in relation to wills and the quality-against-cost argument.

Fergus Ewing: I would agree with Mr Brown, were it not for the fact that the bill specifically requires non-lawyers who will be involved with licensed service providers to uphold the high standards that solicitors must meet, whereas execution-only wills are provided by people who are subject to no such standards. In that respect, although Mr Brown makes an interesting point, it is not one with which I entirely agree.

On regulation of will writers, I very much hope that we can work with the committee to introduce legislation that tackles the problems that have been identified by many of the witnesses who have given evidence—subject, of course, to our conducting a thorough and careful analysis of the responses that we receive to the consultation paper.

Robert Brown: My point was about whether the issues to do with provision of inadequate service, as were thrown into stark relief in relation to wills, are risked by the general ethos of the bill because—as we know from banking—imposing obligations on people in statute is not quite the same as building in with the bricks the ethos and other things that go with traditional legal practice.

Fergus Ewing: I do not agree. The bill imposes an extremely high regulatory standard, to which those who will be involved must subscribe. If they fail to do so, they may be committing an offence. That is not the case with wills.

I take the general point that to allow non-solicitors to carry out work that has traditionally been carried out by solicitors will bring about a new situation, but that is precisely why we have devised a regulatory framework that I believe is preferable to the one that has been introduced south of the border. It will not involve such huge costs and will protect the public, the consumer and—as far as possible—access to justice. For those reasons, I respectfully disagree with Mr Brown’s contention.

The Convener: At the same time, there are specific issues that must be dealt with, which we hope can be dealt with prior to stage 2, if necessary.

Fergus Ewing: As time permits.

The Convener: Finally, we turn to questions on the financial memorandum, which will be asked by James Kelly.

James Kelly: Do you accept that if the bill is passed as it stands, the solicitors guarantee fund will not be able to continue in its present form, which will undermine the protection that it provides to users of legal services in Scotland?

Fergus Ewing: The bill has the policy aim of requiring people who will operate in alternative business structures to provide to clients the same standards of protection that would be provided if the status quo were maintained. That applies to the arrangements under the indemnity insurance scheme against professional negligence. There are provisions in the bill explicitly to cater for that.

In addition—to respond to Mr Kelly’s question—we believe that there should also be protection against fraud. My understanding is that the current regime operates through the solicitors guarantee fund, which protects the public against fraud by solicitors. It is our intention that the bill will include provisions on compensation in cases of fraud, so we are currently looking at various options. It is a question of precisely which options are appropriate. For the benefit of members, I can reveal that the options that we are considering include a compensation fund and fidelity insurance. We anticipate the bill being amended in that regard at stage 2.

I think that James Kelly asked whether what we are doing will impact on current arrangements. Plainly, the paramount interest is protection of the public, so nothing will be done that would adversely impact on the protection that rightly exists for people who deal with solicitors.

The Convener: We find that encouraging, although I am surprised and slightly concerned that the issue was not identified a little further back down the road.

12:30

Fergus Ewing: I may say that my involvement with the bill has been fairly recent, but the matter did form part of our early discussions. That said, it is self-evidently the case that there must be proper protection against fraud. There is slightly more to it than that, in that it might be argued that the matter...
is implicit in the bill. I think that Mr McKay is going to give us some more information about that.

Colin McKay: The question is one that we recognise. One of the difficulties has been that concerns have been expressed within the solicitor profession about the sustainability of the current guarantee fund, regardless of the bill, so there might have been a difficulty in simply importing the same requirements for other providers. We have been working with the Law Society on the detail of how that might work best. We are certainly well aware that the issue needs to be addressed.

James Kelly: Douglas Mill states in his written submission to the committee that the financial resources for the bill are totally inadequate. Will you respond to that comment? For example, paragraph 227 of the financial memorandum states that only £13,000 will be allocated to monitoring, which seems to be on the low side, to say the least. Perhaps that backs up Mr Mill’s concerns.

Fergus Ewing: I am aware of Mr Mill’s criticism, which we take seriously. We considered the matter carefully on the basis of our consideration of applications by bodies that wish to regulate under the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Although the figures that we produced have come in for criticism, I am not aware that any other individual or group has sat down to work out what the costs would be and presented their findings. We are in discussions with the Law Society on the figures.

I think that Mr Mill goes on to state that we should fund a legal services board, as is done in England and Wales. For the reasons that I mentioned earlier, we do not consider that it would be appropriate or wise to spend several million pounds on that, particularly in the current economic recession. Our doing so would impose on Scottish solicitors a substantial financial burden that we could not justify.

I reread the financial memorandum earlier this morning. Plainly, the way in which it goes about its business is to envisage that the work that will be done on considering the approval of the regulator mechanism and then monitoring the regulator will be done in-house. It estimates the number of civil servants who will be required to carry out the work. The estimates are set out explicitly in the financial memorandum. The figures vary. Paragraph 219 contains different figures depending upon the number of applications. I think that I alluded earlier to the fact that we expect between one and six applications. Different figures are set out for three scenarios, depending upon the number of applicants who come forward to be approved as regulators.

The costs are fairly modest, but the estimates are based on the rationale that we will do the work in-house. We will not, during an economic recession, create a quango with more costs to the public and more burdens that we cannot begin to justify. That means that officials will work even more effectively than they do at the moment and, perhaps, that they will carry out more work than they do at the moment, which might not be such a bad thing. I have every confidence that my officials will discharge that job properly and efficiently, as they do the rest of their duties. Although I am aware of the criticism from Mr Mill, which we take seriously, we do not accept it.

We do not know how many people will apply to be a regulator, so it would be difficult to take any approach to the financial memorandum other than the one that we have chosen. I am pleased to be presenting a bill that has relatively modest implications for the public purse at a time when it is so important that we devote taxpayers’ money to front-line public services in our hospitals, schools and so on.

James Kelly: It is one thing to comment on the costs of the bill’s provisions being modest, but it is important that the costs are accurate.

In the earlier discussion about the ease of complaint handling, Mr McKay mentioned the Scottish Legal Complaints Commission. The Law Society of Scotland said in written evidence that the bill will mean additional work for the commission that is not properly taken into account in the financial memorandum.

Fergus Ewing: It is correct to say that the bill makes provision for the making of a new type of complaint called a regulatory complaint, for which we have not included an estimate of the cost. We do not really think that the cost will be hugely significant, which is why it is currently not included. However, as Mr Kelly has raised the issue in the committee, I will go back and check whether any provision needs to be made.

Given the likelihood that a relatively small number of firms will apply to be licensed providers—the financial memorandum estimates no more than 200 and then goes on to consider what the licence fee might be for those individual firms—and given that the number of complaints made per solicitor in Scotland is not huge, I personally would be surprised if there were a significant number of regulatory complaints. I might, as ministers do, live to regret those words—I have not yet, I guess, reached that stage of being a minister—but I personally would be surprised if that were a significant issue. However, as Mr Kelly has raised the matter, I will double-check in case we have failed to make some, albeit modest, provision.
Colin McKay: It is important to remember that the Scottish Legal Complaints Commission is funded by a levy on the profession rather than from the public purse. If the existence of ABSs led to more complaints to, and costs on, the Scottish Legal Complaints Commission, the ABSs would bear that in their subscriptions to the commission.

The Convener: One point that we missed earlier, which was probably my fault, is that we have had some contradictory evidence about the impact that the bill might have on the ability of charitable organisations and advice organisations to deliver legal services. Does Mr Ewing have any comments on that aspect?

Fergus Ewing: The bill was drafted so as to ensure that organisations in the voluntary sector are not burdened by unnecessary regulation and cost. As I may have indicated earlier, we will discuss with Citizens Advice Scotland its concern that the requirement on licensed providers to operate for gain would be restrictive for the purposes of citizens advice bureaux. We will consider with CAS whether the voluntary sector might be disadvantaged by the proposals, which is certainly not what we seek to happen. If that results in our being persuaded of the need to make provision for that matter, I hope that we can look at that at stage 2.

Robert Brown: A general point about the enforcement of duties occurred to me when the minister was talking about some aspects of the regulatory system. Does the bill provide for, for example, the ability to suspend licensed legal service providers, either temporarily or long term? Does it provide for any criminal sanctions for things such as failure to keep a client’s account, which is dealt with in a general way under section 18? Does the bill provide adequate sanctions, or do those perhaps require to be spelled out to a greater degree? Do they include criminal sanctions? I cannot honestly say whether criminal sanctions can currently be applied to solicitors, but it seems to me that some matters might not adequately be dealt with by financial sanctions. For example, if someone makes off with a client’s money, I am not sure that that should be dealt with in the context of failure to deal with the rules properly.

Fergus Ewing: Section 14 provides for practice rules. Mr Brown and I are familiar with practice rules, because we were subject to them as solicitors in practice. Such rules deal with breach of regulations. Section 14(1)(f) states that practice rules are about

"the measures that may be taken by the approved regulator, in relation to a licensed provider, if—

(i) there is a breach of the regulatory scheme, or

(ii) a complaint referred to in paragraph (e) is upheld."

Paragraph (e) concerns

"the making and handling of any complaint about ... a licensed provider”.

Section 16(1) deals with sanctions and enforcement of duties. It states:

“Practice rules must include provision that it is a breach of the regulatory scheme for a licensed provider to—

(a) fail to comply with section 38, or

(b) fail to comply with its—

(i) other duties under this Part, or

(ii) duties under any other enactment.”

My recollection is that there are other provisions later in the bill relating to offences. I do not have those references to hand—I feel as if I have come to the end of a long multiple-choice examination. I am advised that the general criminal law, rather than statutory offences, applies in this regard. The general criminal law has served us pretty well.

Robert Brown: Is that adequate? Does it match what is available in the instance of a breach of professional conduct by a solicitor? You are right to say that section 16 refers to breaches of the regulatory scheme, but it is not immediately obvious to me that it deals with sanctions for those. I was raising the general issue—I do not have a particular agenda—of whether the financial sanctions that are mentioned in section 15 are enough to give proper public control of bodies operating in this area. I am not necessarily looking for an answer today, as the matter would bear a bit of consideration. I invite you to come back to us on the point later.

Fergus Ewing: The answer will be that the sanctions are contained in the general law that applies to solicitors, which is imported into the bill. Mr McKay will provide more detail.

Colin McKay: You alluded to the fact that section 18, on accounts rules, imports into the bill sections 35 to 37 of the 1980 act, which contain provisions on maintaining proper accounts, keeping clients’ funds separate, having proper accountants’ certificates and so on. The sanctions in such cases are that failure to comply with the provisions will be professional misconduct. As you said, section 15 of the bill allows the regulator to impose financial penalties. That is comparable with, and possibly even stricter than, some of the penalties that would be imposed on solicitors. We can set out the matter in detail in writing.

Robert Brown: That would be helpful.

Cathie Craigie: At the moment, a solicitor can be struck off if they have done something that merits that. Will there be a penalty as strong as that for non-solicitors?
Fergus Ewing: Non-solicitors cannot be struck off the roll of solicitors, as they are not on it.

Cathie Craigie: No, but could they be debarred from acting as a non-lawyer proprietor of a legal services firm?

Fergus Ewing: Plainly, solicitors are subject to the existing regime. Mr McKay will now regale us with the contents of section 68.

Colin McKay: Apologies for darting about, but I refer members to sections 44 and 68. Section 44 allows the approved regulator to disqualify people from certain conditions, including from being a designated person—basically, the approved regulator can tell someone that they can no longer provide legal services in an LLSP. Regulators must keep lists of people who have been disqualified, so that such people do not try to join another practice. In effect, that is equivalent to being struck off.

The Convener: Members have no further questions. I thank the minister for his performance at a fairly lengthy evidence session this morning and the officials for their helpful contributions.

12:45

Meeting continued in private until 13:04.
ANNEXE E: Written evidence, including supplementary evidence and Scottish Government correspondence

Written submissions received in alphabetical order

Gilbert M. Anderson, Solicitor
Chartered Institute of Patent Attorneys
Peter Cherbi
Citizens Advice Scotland
Committee of Heads of Scottish Law Schools
Consumer Focus Scotland
Faculty of Advocates
Alan Holmes
Institute of Chartered Accountants of Scotland
Law Society of Scotland
Lord President
Maclay Murray and Spens
Douglas Mill
Office of Fair Trading
Professor Alan Paterson
Scottish Association of Law Centres
Scottish Law Agents Society
Scottish Legal Aid Board
Scottish Legal Complaints Commission (a)
Scottish Legal Complaints Commission (b)
Scottish Police Federation
Scottish Women's Aid
Walter Semple and Catriona Walker, Solicitors
Shepherd and Wedderburn
Society of Legal Scholars
Society of Solicitor Advocates
Thompsons Solicitors
Unite Trade Union Scottish Region
Which?
WS Society

Supplementary evidence received in alphabetical order

Consumer Focus Scotland
Law Society of Scotland, 17 December 2009
Law Society of Scotland, 11 January 2010
Law Society of Scotland, 22 January 2010
Scottish Government 21 January 2010
Scottish Government 26 February 2010
Scottish Law Agents Society
Walter Semple and Catriona Walker, solicitors, 9 January 2010
Walter Semple and Catriona Walker, solicitors, 20 January 2010
WS Society
Government correspondence

Minister for Community Safety to the Convener of the Justice Committee on potential Stage 2 amendments, November 2009
Convener of the Justice Committee to the Minister for Community Safety on potential Stage 2 amendments, 24 November 2009
Minister for Community Safety to Convener of the Justice Committee on potential Stage 2 amendments, 4 December 2009
Justice Committee

Legal Services (Scotland) Bill

Written submission from Gilbert M Anderson, Solicitor

Introduction

1. I am grateful for the opportunity to make submissions on the general principles of the Bill and to highlight certain other matters. I would welcome the opportunity of being invited to give oral evidence to the Committee.

Background information

2. I am a member of the Law Society of Scotland having been admitted as a solicitor in 1975. I have practised as a solicitor for over 34 years. I became a partner in a law firm in 1979. I have wide ranging experience of all aspects of the law during my career. During the last 20 years or so my focus has been on civil litigation and dispute resolution, particularly in the field of reparation. I am an Immediate Past Dean of the Royal Faculty of Procurators in Glasgow having demitted office in June of this year. I am also the immediate past Regional Representative for Scotland of the Forum of Insurance Lawyers, my term of office having ended earlier this month. I am also a member of the Civil Justice Committee of the Law Society of Scotland and I am also a member of the Scottish Law Agents Society. I am presently the Senior Partner of Andersons Solicitors LLP which has offices in Glasgow and Edinburgh.

3. I would stress that my comments and views in this submission are provided purely by me as an individual. I do not purport in any way to represent the views of any of my colleagues in Andersons, or of the various professional bodies/groups to which I have referred.

General

4. I have read the full and helpful Policy Memorandum accompanying the Bill. I have had some opportunity of reviewing the history following on from the Clementi Report. As has I think been acknowledged by the Scottish Government in the Policy Statement published in December 2007 there are immense dangers in equiperating the English legal system and profession with that which exists in Scotland. The roots of Scotland’s mixed legal system have far more in common with continental Europe than with England and Wales. I am not aware of any demand in Europe for the creation of business models which would allow law practices which provide professional legal advice and services to the general public to be owned and controlled by non-lawyers.

5. As far as I am aware no investigations have been carried out by the Scottish Government into the position of European states, and in particular why they have not pushed for ABS. Could it be that these states appreciate and value the need for a truly independent legal profession?
6. Prior to the Annual General Meeting held by the Law Society of Scotland ("the Law Society") in May 2008 I had heard it said by the Scottish Government that in relation to business structures for the practice of law in Scotland "the status quo is not an option". I have never been at all clear as to why that stance has been taken. It may have reflected the position of the OFT in agreeing with the so called "super complaint" by "Which" to the effect that the present regulatory regime restricts choice and favouring the opening up of the "market" for legal services in Scotland. I have never understood the Which/OFT position.

Caution

7. Surely the critical issue is the public interest. The professions primarily exist to serve and protect the public and not vice versa. I wonder why "Which" have not recommended that the "market" for say brain surgery should be liberalised so as to enable unqualified "designated persons" to provide an alternative to neuro-surgeons! Clearly such an idea is absurd and it would certainly not be in the public interest. I do feel that this extreme analogy does highlight very serious risks, and indeed dangers, for the rule of law. In my view a truly independent legal profession is the bulwark which protects individual freedom in a free democratic society. If an independent legal profession is dismantled, or even partially dismantled, allowing vulnerable "consumers" to be nurtured by a low cost substitute provided by unqualified persons this could have serious consequences for the rule of law. Tinkering with the independence of law firms could in my view be the first step towards a very slippery slide from the free democratic society we currently enjoy. There could well be unforeseen dire consequences arising from treating the practice of law as a commodity as is the case with a tin of beans on a supermarket shelf. I greatly fear that once the safety structure of our independent legal profession begins to be dismantled the process will continue to such an extent that it will be very difficult if not impossible to put it back together again. Should the genuine independence of our legal profession in Scotland be diminished I wonder whether the next step would be to interfere with the independence of our judges?! For the judiciary are appointed only from qualified lawyers. Judges, members of the Faculty of Advocates and solicitors are all part of the one profession. One is the extension of the other. That is why law firms are unlike other professions. That is why rules exist on confidentiality and privilege. Great care must be taken to avoid obscuring or indeed removing the protection of the public through an independent legal profession. We need to be very careful when tinkering with the machinery of justice in Scotland.

8. I am concerned that the Scottish Government has been persuaded to blindly follow England and Wales in going down the heavily congested regulatory route of the Legal Services Act 2007. For example, I note that Part 4 of that Act is entitled “Regulation of approved regulators”. I had understood that the Bill dealing with business structures in Scotland was to be entitled The Legal Profession and Legal Aid (Scotland) Bill. I am curious to
understand the change of name. The new title suggests to me that there is a focus on "legal services" rather than on "the legal profession".

**Apathy**

9. In considering its response to the OFT recommendation that the Scottish Government should publish a statement on how it intended to reform the current system the Scottish Government very properly sought the views of the legal profession in Scotland having previously charged the profession to give a lead. The Law Society embarked on a consultation process which culminated (in May 2008) in the approval at the Law Society AGM of the Council’s Policy Paper “The Public Interest: Delivering Scottish Legal Services”. This paper included *inter alia* a helpful analysis of various ABS’s, including that of a law firm totally owned and controlled by non-lawyers. The Council concluded in its paper that it had no objection of principle to any of the business models highlighted provided that the core values of the legal profession were preserved. In listing these values the Law Society paper very firmly put independence at the top of the list of these core values. *In my view the Council paper in this respect was fundamentally flawed.* Clearly a law firm totally owned and controlled by non-lawyers cannot be independent no matter what a “Head of Practice” or “Practice Committee” may say about acting with independence. The fact is that such an entity is not and never can be independent. I regret to say that throughout the consultation process there was very little evidence of active engagement by the solicitors branch of the profession. *I understand that of over 10,400 solicitors in Scotland less than 100 submitted written responses to the Law Society’s Consultation Paper on ABS. At the AGM in May 2008 which debated the Law Society’s Policy Paper only around 80 solicitors attended. Approval of the paper was eventually carried by a large number of proxies from certain large commercial firms. The lawyer owners of these firms would of course stand to gain the most in the event they are allowed to sell out to non-lawyer commercial investors.*

10. If this Bill is passed in its present form the independent Scottish legal profession as we know it will in my view be in danger of being lost forever. *Once some law firms begin to lose their independence there is a real danger that non-lawyer owned organisations will dominate the market for legal services in Scotland.* Indeed, once this process begins there is a similar danger that the practice of Scots law will reduce and start an irreversible trend culminating in its eventual demise. In my view this would be a tragedy of unimaginable proportions for Scotland, and indeed the civilised world.

**The Rule of Law, Access to Justice and the Impact of the Gill Review**

11. As previously touched on preservation and protection of the rule of law is essential for the enjoyment of the benefits of a free democratic society. *These benefits may be taken for granted, or perhaps they have become obscured in what seems to be the never ending consumer quest for*
price rather than value. In Scotland we are of course proud of our distinctive system of law and we are privileged to live in a free democratic society which subscribes to the rule of law.

12. Although many erudite scholars have written many more volumes on the doctrine of the rule of law for the purpose of this submission I take it to mean that:

(a) in enjoying our hard earned freedoms (and many have paid a price which cannot be measured in money) we as citizens are entitled to be governed by law and not by the embodiment of government, namely, people;
(b) no-one is above the law;
(c) everyone is equal before the law;
(d) we are guaranteed an independent judiciary applying rules of natural justice in determining the issues and disputes which come before it, including the application and interpretation of statutes passed by the legislator.

13. The rule of law as outlined above can only have real meaning if the law is accessible to all citizens and legal persons. This is another way of describing “access to justice” which essentially means access to the practical application of the law. Such practical application may be on a transactional (some might say “commoditised”) basis such as in the purchase/sale of property, the creation of securities, will making, drawing up and advising upon contractual agreements, advising on statutory duties/obligations, or the consequences of insolvency. In addition to these examples of transactional aspects of the law in action the law also provides for remedies and dispute resolution in the civil courts or through some other form of dispute resolution. Proper practical access to justice can only be provided through the provision of legal services by persons suitably trained and qualified in the law.

14. In my submission the focus should be on ensuring that those who provide legal services are fully trained and qualified and that the users of our legal system can access such expertise at reasonable cost. The focus should not in my view be to “dumb down” or dilute the quality of the legal services on offer on the basis that poorer quality can be provided at cheaper cost. The quality and knowledge of the provider of legal services to the public must be of a high and consistent standard throughout. This is what the public are entitled to and what in my submission they deserve.

15. I note from the Policy Memorandum accompanying the Bill (see para. 43) that the introduction of ABS is intended to lead to improved access to justice. All lawyers will of course applaud any move to do so but I fail to see how this Bill will achieve this worthy aim. It seems to me that the issue of access to justice is the most important aspect in the debate. The debate also comes at a time when a very detailed report from the Scottish Civil Courts Review under the chairmanship of Lord Gill has recently been delivered to the Cabinet Secretary for Justice, Kenny MacAskill. This followed a most detailed
root and branch review of the Scottish civil justice system. Indeed, it has probably been the most comprehensive review into civil justice in Scotland in generations straddling as it did court structures, jurisdictions, locations, procedures and most importantly funding. **Implementation of the key recommendations of Gill will undoubtedly improve the effectiveness and efficiency of our civil courts, and indeed the quality of justice dispensed in these courts.** Of course at the heart of the Gill Review has been the issue of funding access to justice. It was with regret that Lord Gill and his colleagues concluded that they did not have resources available to fully and properly investigate this subject in that to have devoted appropriate time to it would have skewed the focus of the Report. Lord Gill has of course urged the Scottish Government to investigate this area. He has also suggested that part of the remit to his recommended Civil Justice Council for Scotland should be to focus on this issue and in doing so appropriate account could be taken of the exhaustive report into litigation costs in England and Wales due to be published by Lord Justice Jackson in mid December 2009.

16. **I would strongly commend early implementation of the Gill recommendations to the Scottish Government and Parliament.** I am aware that the Scottish Government has a laudable and ambitious vision for our legal system in Scotland being seen as the jurisdiction of choice for the effective resolution of disputes from other jurisdictions. Implementation of the Gill recommendations will undoubtedly assist the achievement of this aim by creating capacity in the Court of Session which does not presently exist. **But of course the achievement of an efficient and effective civil court structure is somewhat pointless if it is not affordable to all the people of Scotland.** Lord Gill has suggested that there is an urgent need for a thorough review of the funding of dispute resolution. I believe that at the very least the present Bill should be put on hold pending implementation of the Gill recommendations. Furthermore, I would urge the Scottish Government to commission thorough and robust research into the most appropriate and cost effective way of funding litigation so as to ensure access to the courts for all with genuine equality of arms. A compulsory legal expenses insurance scheme may well be the answer.

17. **I have no doubt that to remove transparent independence from our legal profession in Scotland would have a serious adverse effect in achieving the aim of attracting international dispute resolution to Scotland.** The transparent integrity of a genuinely independent legal profession will in my view inspire confidence in our system in other jurisdictions. The converse does of course apply. If we dilute the independence of our profession this in my view will detract from the integrity of our system.

18. In the context of funding I have noted the terms of the recent letter from the Minister for Community Safety, Fergus Ewing, to the Justice Committee and in particular his comments on contingency fees. I have also read Annexe A to the Minister’s letter. This is of course part of the whole debate on litigation funding which Lord Gill and his colleagues were unable to resolve within the time and resources available to them. I would again urge full and
speedy investigation into the feasibility of introducing compulsory legal expenses insurance. Such a scheme would in my view achieve genuine equality of arms and undoubtedly improve access to real justice. I am not in favour of contingency fees. Lawyers in Scotland should not have a vested interest in the subject matter of the cause. A contingency fee is in Scotland a pactum de quota litis. It is illegal and void in Scotland. I note that Annexe A touches on the system of CFA funding in England and Wales. In my view the introduction of CFA’s in that jurisdiction around 10 years ago following the abolition of Legal Aid has been nothing short of disastrous. It has not in my opinion had very much to do with any civilised notion of justice. Indeed, CFA’s have caused a vast amount of precious judicial time to be taken up with disputes on success fees. The requirement that success fees are added to compensation on top of “normal” costs, (in Scotland our no win, no fee system provides that any additional fee charged by the solicitor to his successful client is payable by the client and is in effect deducted from the compensation), has created an additional layer of cost and has attracted unscrupulous parties into the claims process. I would refer the Committee to my detailed comments on this issue at pages 7, 8 and 9 of my response (April 2009) to the Scottish Government’s Consultation Paper on the Regulation of Legal Services in Scotland. I should also highlight that unlike the position in England and Wales referral fees (ie whereby solicitors effectively buy work) are not permitted in Scotland.

19. I would reiterate my view that the present Bill should be delayed and reviewed pending implementation of the Gill recommendations and a solution being found to the funding problems to which I have referred.

The Competition Argument

20. As I understand it the suggestion in para. 40 of the Policy Memorandum is that if ABS are not introduced in Scotland large commercial law firms in Scotland will be at a competitive disadvantage against their English counterparts when competing for major international commercial work mainly carried out in the City of London. It is suggested that such firms will leave Scotland or be bought out by large English firms. As I see it the argument tends to be advanced by Scotland’s “big four” commercial firms. In relation to the first alternative I cannot see why a major firm in Scotland with an established client base would want to “up sticks” and move south simply to try to compete in the “magic circle” market in London. The second alternative seems to me to be equally unlikely. If an English firm under an ABS structure wished to move into ABS free Scotland it would require to be regulated by the Law Society of Scotland. It would require to retain its genuine independent status. Accordingly an ABS free Scotland would have an entirely neutral effect on competition. Indeed, it seems to me that the introduction of ABS in Scotland is a far greater threat to the survival of the Scottish legal profession, and indeed legal system, since this would allow large commercial organisations from England to buy up Scottish law firms.
The Faculty of Advocates

21. The position of the Faculty of Advocates is interesting. The Faculty does not support participation of its members in ABS and has not been prepared to alter its rule preventing an advocate entering into partnership with another advocate or any person in connection with his practice as an advocate. The main work of members of the Faculty of Advocates is of course pleading in the courts. The bulk of court pleading in Scotland is conducted throughout our 49 sheriff courts by solicitors. It does appear somewhat anomalous that the Bill allows solicitors to participate in ABS but not advocates. I can only assume that the fundamental rationale behind the Faculty's position is their concern about the loss of transparent independence.

Some specific concerns

Knowledge, skill and discipline of the law and legal system

22. The law is complex. It is one of the three traditional learned professions (the others being medicine and divinity). For persons to qualify as solicitors or advocates and thereby become proficient in the law and fully understand the consequences of its practical application it is necessary that they (i) undertake a strict and strenuous period of study, (ii) pass many written examinations, (iii) successfully complete a period of practical training.

23. Thereafter solicitors require to continue to study and attend courses on an ongoing basis through compulsory professional development. As society and commerce has developed and become more and more complex so also has the law. This in turn has extended the need for strict and relevant training for solicitors. In the same way that members of the medical profession require to demonstrate competence in their crucially important work, so also do those tasked with providing legal advice. The foregoing qualification and training programme and the ongoing compulsory education is absolutely essential for the protection of the public. Against that background I am troubled by the somewhat weak language of section 2(c) of the Bill which requires that persons providing legal services should “maintain good standards of work”. I am not at all clear as to what that means. It does not seem to me to automatically equate to anything like the knowledge, skill and discipline of the law and of our legal system which is required of a Scottish solicitor.

24. Furthermore, I am troubled by the provisions of section 47 dealing with “designated persons”. Such persons are designated by a licensed provider to carry out legal services. I cannot see anywhere in the Bill any requirement for designated persons to have legal training. It may be that I have missed the provision but it seems to be conspicuous by its absence. It is such a basic point. Indeed, I find it hard to believe that the intention is that providers of legal services in an organisation which is owned and controlled by non-lawyers are not required to undergo any training. This is quite alarming. Firms of solicitors under present structures are of course independent and have an interest to ensure that any unqualified staff are
adequately trained to the standard of the ordinary competent solicitor acting with reasonable care since that is the standard which the firm will be measured by in the event of a claim against it. I am not at all clear as to what standard a licensed legal service provider will be measured by. Will that be a lesser standard than that of the ordinary competent solicitor acting with reasonable care?

Legal professional privilege

25. This is a matter of immense importance. The client’s right to legal professional privilege is a fundamental right and one which makes the lawyer/client relationship unique. The client’s right to legal professional privilege is a fundamental right which is at the core of a democratic society subscribing to the rule of law. In my view it must be sacrosanct. As I read section 60 of the Bill in order to secure professional privilege the client will need to be aware of the precise status of the person in the licensed legal service provider with whom he/she was communicating at the material time. Take, for example, a situation where the licensed legal service provider is essentially a multi-disciplinary practice with the principals straddling a number of professional disciplines. If there are ten principals in the practice but only two are lawyers and the client’s communication in question is with one of the non-lawyers (say a surveyor in connection with a property transaction) can the client in that situation insist on privilege? I am not aware of any satisfactory answer. If the answer is that no privilege is conferred then this would represent a curtailment of one of the fundamental, and indeed unique, aspects of the lawyer/client relationship. It is there to protect the client. Section 60 to my mind creates considerable uncertainty. Such uncertainty does not exist in a situation involving an independent law firm solely owned, or at least with appropriate majority ownership and control, by lawyers.

Guarantee Fund

26. As I read the Bill I cannot see any reference to the existing Guarantee Fund and I can only assume that it is not intended that licensed legal service providers should contribute to such a fund. Nor am I clear as to whether the requirement that the Head of Legal Services must be qualified to practice as a solicitor has the consequence that the licensed provider must contribute to the Guarantee Fund administered by the Law Society. The lack of access to the Guarantee Fund or equivalent by clients of a licensed provider will on the face of it put such a client at a considerable disadvantage when compared to the benefits enjoyed by clients of a traditional firm of solicitors. Clarification on this point is required.

Possible compromise

27. Para. 36 of the Policy Memorandum accompanying the Bill states that the Scottish Government’s belief is that current restrictions of business structures for law firms inhibit options for Scottish solicitors to grow and innovate. I am all in favour of opportunities for law firms in Scotland to grow and
innovate but on the clear and strict understanding that the sacrosanct independence of the law firm is transparently preserved through ownership and ultimate control by the lawyers themselves. I can be persuaded that minority investment in a law firm by non-lawyers would not detract from the independence of the firm provided that the following principles would apply to the entity in question, viz.

i. The nature of the entity providing the legal services must essentially be a law practice.

ii. Necessary majority ownership and control must be by solicitors.

iii. The ultimate governing and applicable rules/codes of conduct are those incumbent upon solicitors.

iv. The equity state of the participating non-solicitors cannot in the aggregate exceed 25%.

v. The involvement of non-solicitor equity participants in the law firm must consist of either internal management or services to clients which are ancillary or incidental to legal services.

28. I might possibly be persuaded to agree to pure external ownership but as a minimum in my view such ownership in the aggregate should not, along with any non-lawyer participant investment, exceed 25%.

29. I would have no objection to a multi-disciplinary practice model subject to compliance with the foregoing principles. It would therefore follow that in the event of any inconsistency between or among professional codes those applicable to solicitors should apply. The reason I would be prepared to agree to such a model is that the fundamental nature of the entity is a law firm, control of which is in the hands of lawyers.

30. Minority investment and participation in a law firm by non-lawyers on the foregoing basis would undoubtedly help towards growth and innovation in the law firm.

31. In my submission minority investment in a law firm along the foregoing lines would not require the introduction of a whole new raft of regulatory provisions. Scotland is a relatively small jurisdiction. Our distinctive legal system enjoys an excellent reputation. The legal profession is subject to more than enough regulation at present via the Scottish Government, the Lord President of the Court of Session, the Scottish Legal Complaints Commission, the Faculty of Advocates and the Law Society of Scotland. Indeed, I note that in the foreword dated 7 January, 2009 to the Scottish Government’s Consultation Paper the Cabinet Secretary for Justice, Kenny MacAskill, said “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 commitment to service, probity and excellence.” I entirely agree! In my view the non-solicitor investment proposal which I have suggested need only require changes to the solicitors legislation without the need for the regulatory maze required by the introduction of licensed legal services.
Conclusion

32. For the reasons detailed in this submission I have grave concerns for the public interest, our Scottish legal system and our legal profession in the event that this Bill is passed in its present form. In my view the public interest demands that legal services should only be provided by a strong and genuinely independent legal profession which is thoroughly trained and disciplined in the practice of law. I would urge members of the Justice Committee, and indeed all MSP’s, to vote against the provisions of this Bill which would allow law practices to be owned and controlled by non-lawyer licensed providers.

Gilbert M. Anderson, Solicitor
30 November 2009
We write in reply to the Assistant Clerk's email to us of 7 October 2009 regarding the call for written evidence on the Legal Services (Scotland) Bill. We take this opportunity to make the following observations.

Background

The Chartered Institute of Patent Attorneys (CIPA) is the professional and examining body for patent attorneys (also known as patent agents) in the UK.

CIPA was founded in 1882 and incorporated by Royal Charter in 1891. It represents virtually all the 1,820 registered patent attorneys in the UK, whether they practice in industry or private practice. The total membership is over 3,000, and includes trainee patent attorneys and other professionals with an interest in Intellectual Property (patents, trade marks, designs, and copyright). Further information on CIPA can be found at our website, www.cipa.org.uk.

The Intellectual Property Regulation Board (IPReg) was set up by the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) to undertake the regulation of the patent and trade mark professions. CIPA and ITMA will be approved regulators under the Legal Services Act 2007, and in order to separate the regulatory functions from the representation functions, as the Act requires them to do, they have each set up a Regulation Board (a Patent Attorney Regulation Board and a Trade Mark Attorney Regulation Board), which as far as is possible, will act and take decisions together as the Intellectual Property Regulation Board. Until the formal designation of CIPA and ITMA as approved regulators, the IPReg is preparing for the formal handover of regulatory responsibilities and has a "shadow board" and a skeleton administrative organisation. Further details can be found at www.ipreg.org.uk.

(1) Definition of "legal services"

Section 3 of the Bill defines legal services:

(1) For the purposes of this Act, legal services are services which consist of (at least one of) -

(a) the provision of legal advice or assistance in connection with—

(i) any contract, deed, writ, will or other legal document,
(ii) the application of the law, or
(iii) any form of resolution of legal disputes.
Clearly some of the day-to-day activities of a patent or trade mark attorney fall within this definition.

(2) Eligibility of licensed providers

Section 36 states at sub-section (2):

(2) An entity is eligible to be a licensed provider only if it has within it, for the provision of legal services, at least one solicitor who holds a practising certificate that is free of conditions (as construed by reference to section 15(1) of the 1980 Act)."

If a patent or trade mark attorney firm, of whatever structure, does not employ a solicitor licensed to practise in Scotland, the firm will not be eligible to be a licensed provider, and will not be subject to the proposed regulatory regime.

(3) Rights to conduct litigation and rights of audience

According to the Policy Memorandum at paragraphs 15 and 16:

"Bodies with rights to conduct litigation and rights of audience

15. Sections 25 to 29 of the 1990 Act provide that the Lord President of the Court of Session (“the Lord President”) and the Scottish Ministers may grant professional and other bodies rights to conduct litigation and rights of audience in the Scottish courts.

16. To date, the Association of Commercial Attorneys is the only body to have successfully applied for and been granted rights to conduct litigation and rights of audience."

It therefore appears that there remains a way forward for patent attorneys, through CIPA, to be granted rights to conduct litigation in the Scottish courts.

(4) Complaints about Patent and Trade Mark Attorneys

The Bill does not affect the way complaints are presently dealt with. According to the Policy Memorandum at paragraphs 174 and 175.

"The Scottish Legal Complaints Commission will retain its function as a gateway for all legal complaints, including complaints about licensed providers and those working for them .... Likewise complaints about the conduct of other professionals in the licensed provider will be investigated by the relevant professional body, an example being ICAS in respect of a chartered accountant."

Therefore if a patent or trade mark attorney is employed in a licensed provider, any complaints about the attorney would be directed to CIPA/ITMA, and thence to the IPReg.
(5) Conclusion

It is our understanding that the Bill is not directed to patent and trade mark attorney firms of any structure (including partnerships and ABS's) operating in Scotland. However, we would note that:

(1) If a patent or trade mark attorney firm, of whatever structure, employs a solicitor licensed to practise in Scotland, the firm would be subject to the proposed regulatory regime. However, the current proposal (as we understand it) for patent or trade mark attorney firms, employing a solicitor in England is as follows. The Solicitors’ Regulation Authority (SRA) in England and Wales has indicated that if a solicitor is employed within a patent/trade mark attorney firm the solicitor can be regulated by CIPA/ITMA - and therefore subject to the arrangements put in place by IPReg rather than the SRA. This would contrast with the present proposal in Scotland as we understand it that that firm would be subject to the Scottish legal regulatory arrangements.

It would seem advantageous in mirroring the SRA's proposals so that patent/trade mark attorney firms would be subject to one regulator whether or not they practice North or South of the Border, and whether or not they employ solicitors.

(2) In England and Wales patent and trade mark attorneys are classed as lawyers, but not in Scotland, so that in England and Wales CIPA can regulate firms and individuals offering IP services, whereas in Scotland a patent & trade mark firm employing a Scottish lawyer would be an ABS. We thus have the situation that a firm based in Scotland employing an English solicitor will be regulated by CIPA and the solicitor can provide legal services to clients of the firm, but under the Bill the firm would not be able to employ a Scottish solicitor without becoming an ABS.

(3) The Lord President of the Court of Session and the Scottish Ministers will continue to be able to grant professional bodies including CIPA rights to conduct litigation and rights of audience in the Scottish courts.

(4) If an individual patent or trade mark attorney works within a business entity which is a licensed provider within the meaning of the Bill, any complaints about the attorney in relation to the provision of patent or trade mark attorney services would be directed to CIPA/ITMA and thence to the IPReg.

If the Justice Committee wishes representatives of CIPA to attend before them to provide oral evidence, then we would be pleased to make ourselves available to do so.

Dr David Moreland
Scottish Sub-Committee, Chartered Institute of Patent Attorneys
1 December 2009
Justice Committee

Legal Services (Scotland) Bill

Written submission from Peter Cherbi

Adding to what has already been said by Which? and Consumer Focus Scotland, I would urge the Justice Committee to recommend that independent regulation of legal services in Scotland is implemented along with the Legal Services Bill, to ensure that consumer protection remains at the heart of any access to justice reforms brought about by the new legislation and the post alternative business structure legal services market.

As the Justice Committee will be fully aware, England and Wales have their own Legal Services Bill, which has brought about independent regulation of solicitors and legal services practitioners in the rest of the UK, while Scotland lacks behind with the legal profession still maintaining self regulation and consumers still failing to find any fair hearing from any of the regulatory bodies which currently operate in Scotland (Law Society of Scotland, Faculty of Advocates, Scottish Legal Complaints Commission and the Scottish Solicitors Discipline Tribunal).

There are any number of examples of cases of consumer complaints before these respective organizations which have failed to be processed in an acceptable manner, some of those cases going on for several years, and ultimately consumers failing to receive any solution to their predicament. Such a state of affairs is surely not acceptable to be continued in this bill, which is aimed at reforming access to justice and the way in which legal professionals provide services to the public.

I would also urge the Justice Committee to consider the issues of transparency and accountability when it comes to considering the testimony from the current regulators of the legal profession in Scotland who have already appeared before the Committee. In England and Wales, for instance, the Law Society of England and Wales, while not accountable under Freedom of Information legislation, has a policy of replying to Freedom of Information requests as if they are compliant with FOI legislation. I would recommend the Justice Committee consider recommend that either this policy be adopted by all the current regulators of the legal profession in Scotland (excluding the Scottish Legal Complaints Commission, which is already FOI compliant), to give Scottish consumers and the general public a greater level of transparency when dealing with aspects of regulation that seems to work fairly well in the rest of the UK.

In the written submission from Which? it is stated: “We believe that legal services should be independently regulated, and that it is difficult for an organisation to both represent its members effectively, and to regulate itself. There is a fundamental conflict of interest which would be best addressed by legal services
being regulated by a Scottish Legal Services Board, independent of the legal profession and government. This could be done by vesting regulatory control of the Scottish legal profession and of third party entrants directly in a newly established Scottish Legal Services Board. Such a Board could also be responsible for consumer protection. Alternatively, a Scottish Legal Services Board could oversee the Law Society and the Faculty of Advocates, which would then regulate the third parties who wished to enter the market. This would put Scottish consumers on an equal footing with those in England and Wales.”

I fully support the idea from Which?, and would point out that while such an aim was partially attempted with the creation of the Scottish Legal Complaints Commission from the passing of the Legal Profession and Legal Aid (Scotland) Act 2007, this has not been achieved, and the SLCC has yet to show any “successes” for consumers in terms of complaints handling and resolution of very serious issues brought to its attention. I therefore believe it would be in the best interests of Scottish consumers if as in the rest of the UK, and independent Legal Services Board were formed from outside the legal profession, to address these issues.

I also believe that leaving Advocates out of the Legal Services Bill is a mistake, and will create an imbalance in consumer protection in terms of regulation, and allow the Faculty of Advocates to continue what is currently viewed (and experienced by many clients) as a closed shop mentality of business and complaints handling, where despite what some may think, it is not an automatic right for clients to gain the services of an advocate, even working through a solicitor. Indeed there are many cases in Scotland where solicitors are failing to secure the services of an advocate to represent their clients in court, where particular patterns have emerged of certain types of litigation failing to attract any representation from the Faculty of Advocates. Such a system that allows such an impediment to consumers access to justice must be reformed.

I did note the Justice Committee had spent time asking questions over complaints against solicitors and how the current regulatory framework has operated.

To enhance members understanding of the issues, I attach links to two reports, one authored by the Scottish Consumer Council entitled “Complaints Against Solicitors”, which documents many as yet unresolved problems in regulation of legal services in Scotland, and also a report co-authored by the Justice Committee’s adviser – Professor Frank Stephen, which focused on consumers attempts to make financial claims against the Law Society of Scotland’s Master Policy and Guarantee Fund.

I would ask the Committee to note that in the report, there is a particular revelation that at least one suicide has been attributed to the claims process against solicitors. Several others have come to light since the report was
published by the Scottish Legal Complaints Commission earlier in 2009, but as yet no action has been taken by the SLCC on this matter. Surely such a system of regulation and claims, which Professor Stephen’s report contends is in place “to allow solicitors to sleep at night” must be reformed to ensure that consumers are put first, rather than the financial interests of the profession at large.

Peter Cherbi
18 December 2009

*Scottish Consumer Council: Complaints about Solicitors January 1999*
http://scotcons.demonweb.co.uk/publications/reports/reports99/rp01comp.pdf

*Report to Scottish Legal Complaints Commission on the Master Policy and Guarantee Fund Research - Frank H Stephen and Angela Melville 30 June 2009*
Justice Committee

Legal Services (Scotland) Bill

Written submission from Citizens Advice Scotland

Citizens Advice Scotland and its 83 CAB offices form Scotland’s largest independent advice network. CAB advice services are delivered through 222 service points throughout Scotland, from the islands to city centres.

The CAB service aims:

- to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively

and equally

- to exercise a responsible influence on the development of social policies and services, both locally and nationally.

The CAB service is independent and provides free, confidential and impartial advice to everybody regardless of race, sex, disability or sexuality.

1. Summary of key points

We support:

- The establishment of a regulatory framework for LLSP

We have concerns regarding:

- The number of approved regulators and the potential for inconsistency of approach and license fee tariffs. We believe there is a need for more prescriptive requirements.
- The failure to impose any time limits regarding regulator authorisation.
- The lack of an advisory panel to advise Ministers on applications for authorisation and to review the new regulatory framework.
- The focus on the commercial sector, with the requirement that LLSPs must charge fees for their services. This requirement precludes the charitable advice sector. We would call for this part of the Bill to be amended, and for a specific set of governance requirements for charitable organisations be developed.
- The discrepancy between the regulatory requirements for existing legal service providers and those to be applied to the new LLSPs. We consider that the Council of the Law Society of Scotland should consist of 50% non-solicitor representation to mirror that of the new regulatory committee
2. Introduction
Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland’s network of 83 Citizens Advice Bureau (CAB) offices. These bureaux deliver frontline advice services throughout nearly 200 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.

Last year, the Scottish CAB service dealt with just under a million different client issues – almost one hundred and twenty issues every hour. These issues cover a wide range of topics including welfare benefits, housing, debt, consumer and employment. The Scottish CAB service continues to experience a significant demand for services requiring varying degrees of legal advice and guidance, and in certain circumstances representation in Employment and United Appeal Tribunals.

In 2008/09 the Scottish CAB service provided advice on 21,232 legal issues and out of those completed court or tribunal documentation for 8,845 clients. Bureaux advisers undertook casework for 3,189 cases, representing 2,113 clients at Employment and United Appeal Tribunals and achieved a financial gain for those individuals of nearly £10.2m.

The CAB service in Scotland acknowledges that there is a need to create greater competition in the market for legal services in Scotland. It is our view that new ways of delivering those services are required that should result in greater consumer choice and increased accessibility to high quality legal services. We therefore generally support the liberalisation of the legal services market in Scotland, and see it as an opportunity to improve access to justice and to make greater provision of legal services to disadvantaged client groups. However, it is our view that the Bill has been drafted focusing toward commercial enterprise and has not fully considered not-for-profit or charitable organisations who may wish to utilise new business structures.

The Scottish CAB service is broadly supportive of the provisions contained in the Bill, although we have some concerns which will be outlined in the body of this response.

3. Approved regulators (Part 2, Chapter 1)
We support the Bill’s commitment to ensure that consumers who chose to use alternative legal service providers receive the same level of consumer protection as those using traditional forms of legal practice. We also support the requirement that licensed legal services providers (LLSPs) have to have sufficient professional indemnity cover in place and that should the occasion arise, consumers using LLSPs will have access to a Guarantee Fund or equivalent to ensure they have the same level of protection as provided to consumers using traditional legal service providers.

While the Scottish CAB service is supportive in the requirement for regulation, we do have concerns surrounding elements of the proposed structure of regulation. Under the terms of the Bill, any organisations fulfilling the eligibility criteria will be able to apply to be a regulator. Although this will enable
organisations other than current professional bodies to apply, there is a real danger that if the regulatory function is undertaken by too many bodies, there will be a lack of consistency in terms of approach, regulatory framework and license fee tariffs which may act as a deterrent to some organisations considering LLSP status. We believe that the Bill should be more prescriptive in terms of stating a maximum number of Regulators, and that all organisations fulfilling this role should adopt a standard regulatory framework and fee structure as determined by Ministers in consultation with legal profession representatives and consumer protection agencies.

The Bill aims to allow authorisation to act as a regulator to be awarded without any time limit. The Scottish CAB service is of the view that an open-ended arrangement should be removed leaving a time limited period as the only option. It is important that a regular and robust procedure to review the authorisation of a regulator is in place to ensure that the regulator and their regulatory scheme adheres to and applies the regulatory objectives and obligations.

It is a concern that the Bill does not contain provision for establishment of an advisory panel made up of non-legal, consumer and voluntary advice sector representatives to advise Ministers on applications for authorisation and to keep the regulatory framework under review. An independent advisory panel could safeguard against any of the new regulatory bodies having a conflict of interest if it has responsibility for regulating a LLSP, regulating legal professionals while trying to promote the interests of the public. Such a panel could also play an important role in monitoring the regulatory body’s performance against the regulatory objectives.

4. Licensed Legal Services Providers (Part 2, Chapter 2)

The Scottish CAB service is of the view that the eligibility criteria designated to qualify as a LLSP has been drafted purely with the commercial sector in mind and has not considered that voluntary advice organisations may benefit from adopting the alternative business structure model. In a significant number of locations throughout the country the ability to engage a legal professional would greatly broaden and deepen the range and complexity of legal advice services a citizens advice bureaux (CAB) could offer to its clients. It is disappointing to note that the current provisions in the Bill would preclude organisations such as CAB from registering as LLSPs as bureaux offer FREE advice to clients, whereas the Bill states that LLSPs must charge fees for their services. The effect of this is that bureaux will remain unable to employ solicitors directly, as is currently the case. We would like to see the criteria for LLSP status contained within the Bill to be modified to enable bureaux to be able to directly employ solicitors for advice giving purposes.

It is recognised that this could have a potential downside particularly in respect of the regulative burden that would be placed on any bureau that may wish to become a LLSP. However, the Scottish CAB service is of the view that bureaux should be eligible to apply for LLSP status, and should have the choice whether to do so or not depending upon their ability to satisfy requirements. The removal of the requirement that LLSPs must charge fees
will improve access to justice for consumers by increasing the types of services offered by free advice giving agencies.

The Bill states that LLSPs must have a Head of Service and Head of Practice/Practice Committee as part of its governance structure to ensure that the new business models adhere to the principles of the legal profession, and additionally states that these roles can be performed by one and the same individual. There is a lack of clarity in these requirements in cases of LLSP’s that may contain only one legal professional, as to whether these roles can be performed by the practising legal professional. The Scottish CAB service would be supportive of this interpretation for LLSP operating models involving charitable advice agencies, where funding constraints may mean that the engagement of more than one legal professional would not be possible.

5. Applying the Regulatory Objectives (Part 4, Chapter 1)
We are concerned that the Bill is not looking to apply the requirements of the new regulatory framework onto existing legal service business models. The resultant effect of this is that existing legal service providers will not have similar statutory duties as those imposed on LLSPs with regard to the regulatory objectives. We think that consumers obtaining legal services from traditional models may feel that they will not have the same level of protection as those using LLSPs.

In addition to consumer protection we feel that the regulatory duties being placed on LLSPs, in terms of Head of Service and Head of Practice, are over and above those applied to traditional forms of practice may deter the emergence of some potential LLSPs, particularly within the charitable sector where such additional governance requirements may be seen as onerous and financially unachievable. Although we agree that the Bill needs to create flexibility to encourage new innovative legal service delivery models while ensuring high levels of consumer protection, we feel that greater latitude or discretion needs to be granted to regulators in terms of governance structure when granting LLSP licences to charitable advice agencies such as citizens advice bureau.

6. Solicitors and Other Practitioners (Part 4, Chapter 3)
The Scottish CAB service accepts the continuation of self-regulation by the Law Society of Scotland for solicitors who continue to operate under traditional forms of practice provided that there is an adequate and appropriate level of non-lawyer representation on the Society’s Council. While the Bill proposes changes to the governance of the Society, in that Ministers can within the regulations, prescribe a number of non-solicitor members, the current proposal of twenty per cent non-lawyer membership does not feel sufficient. We suggest that the Society’s Council should comprise of 50 per cent non-solicitor membership similar to that proposed for the Society’s regulatory committee. Given that the Society’s statutory representative function is in promoting the interests of the public, we feel that our suggested composition of the Council and regulatory committee should lead to increased public confidence and increased perception of transparency.
7. Other Bodies (Part 4, Chapter 4)
The Scottish CAB service supports the proposal within the Bill concerning provisions giving the Scottish Legal Aid Board the general function of monitoring the availability and accessibility of legal services in Scotland. We see this as an important requirement to enable an early identification of unmet legal need or access to justice resulting through either an increase in consumer demand, or a restriction of legal services supply in the event that commercial LLSPs modify their operating models to concentrate on only the most profitable areas of legal services.

8. Conclusion
The Scottish CAB service broadly supports the Legal Services (Scotland) Bill and its goal of facilitating the development of new business models to create greater access, choice and value for money to the consumer for the provision of legal services from the commercial market. However our major concern is that the Bill has failed to adequately consider voluntary sector organisations, who can gain significant benefit to clients from disadvantaged groups, by participating in an alternative business structure with access to a qualified legal professional. We have outlined our responses to the provisions in the Bill and believe that all our concerns can be addressed in the near future through the Bill or the Statutory Instruments supporting the legislation.

Keith Jones
Advisory Officer (Legal Projects), Citizens Advice Scotland
1 December 2009
The Committee of Heads of Scottish Law Schools [CHSLS] represents all ten Scottish Law Schools whose programmes are accredited by the professional bodies in Scotland. It meets approximately four times per annum to discuss matters of common interest in relation to legal education in Scotland. It appoints three of its number to sit on the Joint Standing Committee on Legal Education on Scotland [JSCLES] which offers a forum for the interchange of ideas and opinions among the Professional Bodies and academic institutions. JSCLES has also introduced a lay representation to ensure the public interest in legal education is represented.

CHSLS notes the terms of the Legal Services (Scotland) Bill.

In relation to the new proposed profession of Confirmation Agents we note that S75(2)(a) makes reference to the training requirements to be met by a proposed confirmation agent however there is no reference to either the educational requirements nor the need for continuing professional development of such practitioners. We note that the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 permitted the creation of two new types of legal practitioner, licensed conveyancing and executry practitioners and executry practitioners. The former Scottish Conveyancing and Executry Services Board made provision in its rules for the educational requirements for such practitioners. The absence of any reference to educational requirements in the present Bill leaves open the danger that any regulator of such practitioners may be acting ultra vires in imposing any educational requirements as opposed to periods of training. Such practitioners formerly regulated by SCESB are now regulated by the Law Society of Scotland following the winding up of SCESB and no new such practitioners can be admitted. We have concerns that in light of past experience there may be no demand for this new type of legal practitioner but if it is intended to proceed then we suggest the Bill requires to be amended.

We therefore recommend that the Bill be amended to reflect our concerns. Further in determining an appropriate scheme dealing with those educational requirements we suggest that any regulator and/or the Scottish Ministers who have overarching responsibility in terms of the Bill for supervising regulators consult with JSCLES as to appropriate content and standards for any educational provision.

In relation to the provision of legal services by Alternative Business entities again we note the provisions of the Bill, in particular the provisions in the Bill relating to the Head of Practice contained in s40. The Bill provides “A person is eligible for appointment (and to act) as its Head of Practice only if the person (a) has such qualifications, expertise and experience as are
reasonably required, and (b) in other respects, is fit and proper for the position.” The person who fulfils this role has important functions to fulfil in terms of the Bill. It is important therefore that adequate consideration is given to the qualifications which are required of such a person.

We therefore recommend that any regulator charged with regulating such entities and/or the Scottish Ministers consult with JSCLES as to the appropriate content and standards of the qualifications of those who will be called upon to act as Head of Practice.

18 December 2009
Justice Committee

Legal Services (Scotland) Bill

Written submission from Consumer Focus Scotland

About Consumer Focus Scotland

Consumer Focus Scotland started work on 1 October 2008. Consumer Focus Scotland was formed through the merger of three organisations – the Scottish Consumer Council, energywatch Scotland, and Postwatch Scotland.

Consumer Focus Scotland works to secure a fair deal for consumers in both private markets and public services, by promoting fairer markets, greater value for money, and improved customer service. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors’ clients, public transport users, or shoppers in a supermarket.

We have a commitment to work on behalf of vulnerable consumers, particularly in the energy and post sectors, and a duty to work on issues of sustainable development.

Summary

- Consumer Focus Scotland welcomes the Legal Services (Scotland) Bill. Consumer Focus Scotland believes there is a need to open up competition in the market for legal services in Scotland and look for new ways of delivering those services. We believe this will result in more consumer-friendly, high quality legal services in Scotland.

- We believe that fundamental to the proposals is the need to ensure that consumers will receive the same level of protection whatever legal services provider they access. We are concerned, however, that the legislation as drafted may result in disparities in regulatory approaches. We believe it is in the interests of consumers to apply a consistent approach to the duties placed on regulators, legal services providers and legal professionals.

- We are disappointed that the Bill does not contain provision for establishing an advisory panel to advise Ministers on applications for authorisation and to keep the regulatory framework under review. We believe that establishing such a panel is a necessary safeguard, given the potential for a regulatory body to have dual or multiple responsibilities for regulating a licensed legal services provider, regulating individual professionals and promoting the interests of the public and the profession.
We are disappointed the restrictions on advocates participating in alternative business structures have not been removed. We do not believe there is sufficient justification for retaining such restrictions. It is also our view that the current provisions do not offer sufficient clarity about the Faculty’s governance arrangements.

We welcome the establishment of a regulatory committee of the Law Society of Scotland with at least 50 per cent non-solicitor representation and a non-solicitor chair. We believe this should lead to increased public confidence, transparency and effectiveness. We are disappointed, however, that 20 per cent non-solicitor composition of the Society’s governing Council is considered by the Scottish Government to be acceptable. We believe 50 per cent non-solicitor representation and a non-solicitor chair is required to instil public confidence in the Society and its functions.

Introduction

1. Consumer Focus Scotland welcomes the opportunity to give evidence on the Legal Services (Scotland) Bill.

2. The Scottish Consumer Council (SCC), one of our predecessor bodies, maintained for a long time that there is a need to open up competition in the market for legal services in Scotland, and to look for new ways of delivering those services. The SCC was a member of the Research Working Group on the Legal Services Market in Scotland, which published its final report in May 2006, identifying a number of restrictions on competition in the Scottish legal services market, which both the SCC and the Office of Fair Trading (OFT) agreed should be removed.

3. Consumer Focus Scotland believes there is a need to open up competition in the market for legal services in Scotland, and to look for new ways of delivering those services. We believe that this will result in more consumer-friendly, high quality legal services in Scotland. Consumer Focus Scotland therefore supports the liberalisation of the legal services market in Scotland, subject to the necessary consumer protections being put in place. We believe that alternative business structures could bring a number of advantages for consumers, including:

- **Increased choice** in deciding where to go for legal and some non-legal services
- **Reduced prices** through economies of scale and reduced transaction costs
- **Better access to justice** for some consumers in rural areas and some communities
- **More consumer-focused service** through external finance, specialist non-legal expertise and approachability
- **Greater convenience** through ‘one-stop shopping’ and increased opening hours
Increased consumer confidence through improved reputation and branding of legal services

4. We support the overall principles behind the Bill, which will have the effect of reforming the regulatory framework for legal services and removing restrictions on the types of business models under which solicitors can offer such services, whilst allowing the traditional model to remain an option for those who choose to carry on practising within that structure. We are also pleased that the Scottish Government is taking this opportunity to modernise the governance of the Law Society of Scotland and codify the regulatory arrangements of the Faculty of Advocates. The SCC long argued that such changes were necessary and Consumer Focus Scotland continues to view such changes as central to any future regulatory reforms.

Part 1: The Regulatory Objectives etc

5. We are pleased that the regulatory framework proposed by the Bill has been informed by the Better Regulation principles as set out by the Better Regulation Task Force.\(^1\) These principles have been endorsed by the Scottish Government’s Regulatory Review Group, of which Consumer Focus Scotland is a member.

6. We welcome the introduction of regulatory objectives. We believe setting out in detail the objectives for the regulatory body should improve the transparency and accountability of the regulatory process and provides a clear structure upon which all decisions must be justified. In particular we welcome the commitment to put access to justice and protecting and promoting the consumer interest at the heart of these reforms. As discussed in more detail at paragraph 20, we are pleased that the regulatory objectives will also require to be applied by the regulatory authorities set out in section 86, including the Court of Session, Lord President, Faculty of Advocates and Law Society of Scotland.

7. Although the Bill does not include the regulatory objective of “increasing public understanding of the citizen’s legal rights and duties,”\(^2\) we welcome the statement within the Policy Memorandum that the Scottish Government believes this is an important policy aim.\(^3\) Consumer Focus Scotland, and previously the Scottish Consumer Council, has for a long time campaigned for greater Public Legal Education (PLE). We believe that doing more to inform consumers about their rights, responsibilities and means of redress is an important tool to ensuring they have access to justice. In March 2009, Consumer Focus Scotland, together with the Scottish Government Justice Analytical Services, organised a seminar for relevant stakeholders to discuss the possibilities for a public legal education strategy in Scotland. Overwhelmingly, participants thought that the Scottish Government had a role to play in taking PLE forward on a strategic level.\(^4\) Therefore, while we agree the Legal Services (Scotland) Bill is not necessarily the correct vehicle for

---

\(^1\) Legal Services (Scotland) Bill Policy Memorandum, paragraph 84
\(^2\) Legal Services (Scotland) Bill Policy Memorandum, paragraph 74
\(^3\) Consumer Focus Scotland (May 2009) Public Legal Education Seminar Report
developing this area, we hope the Scottish Government will look for other ways to promote this policy aim, particularly given the recent report of the civil court review’s recommendation that PLE should be an element of any strategy to improve access to justice in Scotland.4

8. We note the Bill does not currently propose to regulate claims management companies. Consumer Focus Scotland currently has no evidence to suggest that similar problems in relation to claims management companies to those experienced in England and Wales prior to the Compensation Act 2006 are commonplace in Scotland. If evidence of problems in the operation of claims management companies were to be found, however, we would support the introduction of regulation of such companies in Scotland as a means offering greater protection to consumers.

Part 2: Approved Regulators

Chapter 1: Approved regulators

9. It is crucial that consumers receive the same level of protection, whatever legal services provider they use. We therefore welcome the commitment that the Bill should provide similar consumer protections to consumers using traditional forms of legal practice. We are pleased section 19 requires licensed legal services providers (LLSPs) to have in place sufficient arrangements for professional indemnity. We believe it is also important that consumers using LLSPs have access to a Guarantee Fund or equivalent provision to ensure they are afforded the same level of protection as afforded to consumers using traditional business models.

10. We are also pleased that it is intended that a policy of proactive regulation be adopted.5 It is in the interests of consumers that regular checks are undertaken to ensure licensed providers are acting in a way which is compatible with the regulatory objectives, rather than waiting until a consumer has been adversely affected before taking action. We believe the principle of proactive regulation should also be applied to regulation of traditional forms of practice to ensure consumers can be confident of the consistency of approach to the regulation of legal services, whatever type of provider they access.

11. We welcome the change from the proposal in ‘Wider Choice and Better Protection’ so that section 6(3)(a) requires Scottish Ministers to consult the Lord President prior to making their decision whether or not to approve a regulator of licensed legal services providers, rather than requiring his agreement to that authorisation. As discussed below, we have concerns about how the Lord President’s multi-faceted role fits with his role of oversight regulator of the Faculty of Advocates and we believe the picture would be further confused if the Lord President also had an approval function for regulators of LLSPs. We would also be concerned that an approval role for the Lord President may deter potential applicants from outwith the legal sector.

---

4 Report of the Scottish Civil Courts Review, Volume 2, Chapter 11 at paragraph 8
5 Legal Services (Scotland) Bill Policy Memorandum, paragraph 115
from applying to be an approved regulator. While we fully agree that the Lord President has a key role to play in advising the Scottish Ministers on applications, we believe the current provisions offer a balanced approach to the approval of regulators; they enable the Scottish Ministers to seek the views of the Lord President on matters within his competence whilst avoiding the situation where the Lord President in effect has a veto over the approval of regulators.

12. We do not support the inclusion of section 7(4)(a)(i), which allows authorisation to act as a regulator of licensed legal services providers to be awarded without limit of time. We believe it is necessary to have in place a robust procedure to review the authorisation of a regulator of licensed legal services, including reviewing how their regulatory scheme adheres to and applies the regulatory objectives and obligations. We therefore would wish to see s7(4)(a)(i) removed to ensure that authorisation to act as an approved regulator be given *only* on a time-limited basis.

13. We are disappointed that the Bill does not contain provision for establishing an advisory panel to advise Ministers on applications for authorisation and to keep the regulatory framework under review. As stated within the Policy memorandum, the Scottish Government does agree that such a panel would be helpful, but does not believe it requires to be put on a statutory footing. We do not agree with this position. We stated in our response to the ‘Wider Choice and Better Protection’ consultation that establishing an advisory panel was a necessary safeguard, given the potential for a regulatory body to have the dual or multiple responsibilities for regulating a licensed legal services provider, regulating individual professionals and promoting the interests of the public and the profession. Such a panel could also play an important role in monitoring the regulator body’s performance against the regulatory objectives. We suggested that as with the Consumer Panel in England and Wales, this panel should be made up entirely of non-lawyers and should include representation of the consumer interest. Given that the proposals for establishing an advisory panel were supported by more than three quarters of the consultation respondents, we believe there is sufficient justification for establishing the advisory panel within the statutory framework. This would allow its remit to be clearly established and would secure the long-term sustainability of the Panel.

Chapter 2: Licensed Legal Services Providers

14. We are disappointed that the current provisions in the Bill preclude certain organisations from registering as licensed legal services providers. The requirement that LLSPs charge fees for their services, for example, will prevent citizens advice bureaux from registering. The effect of this shall be

---

6 Legal Services (Scotland) Bill Policy Memorandum, paragraph 133
7 Consumer Focus Scotland (April 2009) Response to “Wider Choice and Better Protection: a consultation paper on the regulation of legal services in Scotland” at page 10
8 Analysis of the Responses to the Consultation on the Regulation of Legal Services in Scotland, Scottish Government Social Research, 2009, at page 41
9 Legal Services (Scotland) Bill section 36(1)(a)(ii)
that CABx will remain unable to employ solicitors directly, as is currently the case; any solicitors based in a CAB must be employed by a structure permitted by the current rules such as a solicitors’ firm, or law centre or they must be directly employed by the Scottish Legal Aid Board under Part V of the Legal Aid (Scotland) Act 1986. The SCC for a long time argued that CABx should be able to directly employ solicitors. While we recognise there are potential downsides to this position, particularly the regulative burden on any CABx which wish to become LLSPs, we believe that removing such restrictions may improve access to justice for consumers by increasing the types of services that can be provided by certain agencies and giving increased flexibility to respond to the need of local consumers.

15. During the consultation process, we supported the introduction of the ‘Fit to Own’ test for ownership of a licensed legal service provider. However, we would note that the current presumption that an outside investor will be fit to own if qualified to practise as a solicitor, deviates from the current proposals in England and Wales; the Legal Services Board has proposed that there should be one test for owners and managers that is consistent across all licensed authorities and there will be an obligation to notify the appropriate regulator of a change of circumstances that is relevant to the test. We would assume that rules surrounding such an obligation in Scotland would be a requirement of an approved regulator’s regulatory scheme, to ensure that if an outside investor, including a qualified solicitor, was no longer deemed fit to own, the regulator must be informed of that.

Chapter 3: Further Provision.

16. We note that the Office of Fair Trading’s input in relation to competition issues is intended to be targeted at the application stage for regulators, LLSPs or approving bodies. This is a weaker power than it has in England and Wales, where the OFT has powers to investigate the behaviour of a regulator if it perceives it to be anti-competitive. We would be disappointed if the practical effect of this difference was that consumers in Scotland have less protection than those in England and Wales. We would welcome inclusion within the Bill of an obligation for Scottish Ministers, in their oversight role, to refer concerns about competition issues to the OFT for investigation.

17. We are concerned that the introduction of another type of complaint under section 65, a regulatory complaint, may cause additional confusion for consumers. When submitting a complaint to the Scottish Legal Complaints Commission, consumers are already asked to choose between two different forms, depending on whether their complaint is 1) a handling complaint, or 2) a service or conduct complaint. We hope that the introduction of regulatory complaints will not result in an unduly complex or confusing process for consumers wishing to make a complaint about a licensed legal services provider or a professional working within such structures.

---

10 Legal Services (Scotland) Bill Policy Memorandum, paragraph 172
18. We are disappointed that complaints about approved regulators are to be made to the Scottish Ministers rather than the Scottish Legal Complaints Commission.\(^{11}\) This has the effect of removing the single gateway for legal services complaints, which may cause confusion for consumers. Moreover, while we note the Scottish ministers have the authority to delegate the investigation of such a complaint to the Commission, the decision of whether the complaint is frivolous, vexatious or totally without merit will always rest with Ministers. We believe that consumer confidence in the complaints-handling function is crucial and we are not convinced that there shall be such confidence in a complaints process if a decision as to the merit of a complaint is perceived as a political one.

**Part 3: Confirmation Services**

19. We welcome the provisions within the Bill creating a process for other professionals to apply for approval to undertake confirmation services. At present, professionals such as accountants can provide most executry services but they cannot make an application for confirmation of an estate and must instead refer this to a solicitor. The SCC supported inclusion of such provisions in its evidence to the Justice 2 committee during the passage of the Legal Profession and Legal Aid (Scotland) Act 2007, in the interests of greater competition and consumer choice,\(^{12}\) and we therefore welcome these provisions in the Legal Services (Scotland) Bill.

**Part 4: The Legal Profession**

*Chapter 1: Applying the Regulatory Objectives*

20. We made clear in our response to the ‘Wider Choice and Better Protection’ consultation that we would have concerns if different regulatory standards were to be applied to legal professionals depending on the structure within which they were working;\(^{13}\) it is our view that consumers should have the same level of protection whatever service they use. We therefore welcome section 86, which provides that a number of existing regulatory authorities, including the Law Society of Scotland, the Faculty of Advocates, the Lord President and the Court of Session must, so far as practicable when exercising their regulatory functions, act in a way which is compatible with the regulatory objectives and which it considers most appropriate with a view to meeting those objectives. This echoes the situation in England and Wales where the principles set out in the Legal Services Act 2007 apply to regulators of both alternative business structures and traditional legal services. We agree the regulatory objectives should be adopted by all regulators to ensure the same principles of regulation are applied by all such bodies and there is clarity of the aims of legal services regulation. We believe such consistency to be in the interests of consumers.

\(^{11}\) Legal Services (Scotland) Bill section 64.

\(^{12}\) Scottish Consumer Council (March 2006) Evidence to the Justice 2 Committee on the Legal Profession and Legal Aid (Scotland) Bill at page 6

\(^{13}\) Consumer Focus Scotland (April 2009) Response to “Wider Choice and Better Protection: a consultation paper on the regulation of legal services in Scotland” at page 7
21. We are concerned, however, that there do not appear to be equivalent provisions to those contained in section 64 for regulators of licensed legal services providers, for making complaints about how the regulators outlined in section 86 exercise their regulatory functions. We believe this requires to be set out in the legislation. As discussed above at paragraph 18, we believe an appropriate body to deal with such complaints would be the Scottish Legal Complaints Commission.

22. We are disappointed that the Bill does not seek to impose a new regulatory framework on current business models.\textsuperscript{14} The result of this is that traditional forms of practice will not have similar statutory duties to those to be imposed on Licensed Legal Services Providers by section 38, including having regard to the regulatory objectives and adhering to the professional principles. We are concerned that if no statutory duty to comply with the regulatory objectives and professional principles exists for traditional forms of practice, consumers accessing legal services from these models will not have the same level of protection as those accessing LLSPs.

23. We are also concerned that placing regulatory duties on licensed legal services providers that do not exist for traditional forms of practice may deter the emergence of some potential LLSPs. While we wholeheartedly agree there needs to be a balance in the Bill of providing sufficient flexibility to encourage innovation in service delivery with high levels of consumer protection, we would be concerned if the regulatory requirements were seen to be so restrictive to potential providers that they have the practical effect of limiting the feasibility of some models of LLSP, particularly some of the innovative models which may emerge in rural areas.

Chapter 2: Faculty of Advocates

24. We are disappointed that the decision has been made to retain the current restrictions on advocates’ participation in alternative business structures.\textsuperscript{15} Whilst we have welcomed the Faculty’s commitment to make it easier for advocates and solicitor advocates to switch from one branch of the profession to another, Consumer Focus Scotland’s view remains that preventing advocates from participating in ABS restricts competition. We believe that all restrictions on competition should be removed unless there are clear and justifiable reasons for retaining them. We are not convinced that there is sufficient justification for retaining the current restrictions on advocates participating in ABS. We believe that lifting the restrictions would open up the possibility of new and innovative ways of providing legal services, which in our view would be in the interests of consumers.

25. We do recognise that lifting these restrictions would require other issues to be addressed. For example, there would be a need to ensure that consumers are referred to the most appropriate advocate for their needs,

\textsuperscript{14} Legal Services (Scotland) Bill Policy Memorandum, paragraph 192
\textsuperscript{15} Legal Services (Scotland) Bill Policy Memorandum, paragraph 194
rather than simply the ‘in-house’ advocate, as a means of protecting consumer choice.

26. There are also concerns, as expressed by the Faculty of Advocates, that such arrangements could also adversely affect access to justice, particularly because of the challenge partnerships present to the operation of the ‘cab-rank rule’, the rule under which an advocate cannot in theory refuse an instruction. We note the Faculty asserts that the cab-rank rule could not be maintained if advocates were allowed to participate in ABS. However, we have for a long time sought greater clarity about how the rule operates and is enforced in practice. In the absence of transparency about the operation of this rule, it is difficult to measure its actual benefits to consumers. We therefore do not believe that this argument offers sufficient justification on its own for prohibiting advocates from participating in alternative business structures.

27. We are also disappointed by the provisions relating to the governance of the Faculty of Advocates.\textsuperscript{16} We support self-regulation of advocates by the Faculty (other than for the investigation of service complaints) in principle, but we have concerns that the current governing arrangements could create confusion in the public’s mind, particularly because advocates are based in Parliament House, which also houses the Court of Session. In our response to ‘Wider Choice and Better Protection’ we supported the proposals to codify the Faculty’s regulatory and governance framework, believing this would clarify the regulatory function of the Faculty and its relationships between its members and the courts.\textsuperscript{17} However, we do not believe the current provisions within the Bill offer sufficient clarity to allay our fears about the lack of independent oversight of the Faculty.

28. Consumer Focus Scotland believes that in order to instil public confidence in its regulatory functions and protect against conflicts of interest, appropriate regulatory oversight of the Faculty would include a Faculty Council with equal representation of advocate and non-advocate members with a non-advocate chair. At the very least, however, we believe that the current situation could be improved by a clear statement of how the Lord President’s role as an ‘oversight regulator’ of the Faculty fits with his roles as a member of the Faculty and as head of the Scottish Court Service. The current provisions within section 87, however, allow for the Court of Session to delegate regulatory responsibility to the Faculty of Advocates or Lord President but no further clarification is offered as to how this relationship would function in practice. We are also concerned by the lack of any codified statement about how consumers or other individuals/organisations may refer regulatory concerns to the Lord President acting in his capacity as oversight regulator of advocates. We therefore remain concerned by the continued lack of clarity of the Faculty’s regulatory and governance framework and believe the Bill would be strengthened if such further provisions clarifying these frameworks were to be added.

\textsuperscript{16} Legal Services (Scotland) Bill section 87.
\textsuperscript{17} Consumer Focus Scotland (April 2009) Response to “Wider Choice and Better Protection: a consultation paper on the regulation of legal services in Scotland” at page 16
Chapter 3: Solicitors and Other Practitioners

29. Consumer Focus Scotland supports self-regulation (other than for the investigation of service complaints) and believes that solicitors who remain in traditional forms of practice should continue to be regulated by the Law Society of Scotland, provided there is an adequate level of non-lawyer representation on the Society’s Council. We therefore welcome the proposals in the Bill on changes to the governance of the Society. In particular we are pleased that there are provisions for Scottish Ministers to make regulations prescribing a number or proportion of non-solicitor membership of the Council of the Society. Consumer Focus Scotland, and prior to that the SCC, has for a long time maintained that it is a considerable drawback for a professional organisation which has a statutory responsibility to promote the public interest that its decision making body has no non-solicitors among its membership, leaving it open to criticism that its view of what is in the public interest is not sufficiently informed by opinions from outwith the profession. We are disappointed, however, by the Scottish Government’s statement within the policy memorandum that it regards the Society’s current proposal of twenty per cent non-lawyer membership to be acceptable. It is Consumer Focus Scotland’s position that in order to demonstrate clearly that it is acting in the public interest, the Society’s Council should comprise 50 per cent non-solicitor membership with a non-solicitor chair. We welcome the proposals that such a composition for the Society’s regulatory committee will be set out in legislation and believe this should lead to increased public confidence, transparency and effectiveness. Given the Society’s statutory representative function in promoting the interests of the public, we would like to see this principle extended to membership of the Council.

Chapter 4: Other Bodies

30. The SCC supported proposals in the Advice for All consultation for a national coordinating body with responsibility for proactive planning, coordinating and developing publicly funded legal assistance. Although these proposals have not been taken forward, we are delighted that the Bill contains provisions giving the Scottish Legal Aid Board the general function of monitoring the availability and accessibility of legal services in Scotland. We believe this is an important step to identify the experience of unmet legal need and promote access to justice.

2 December 2009

---

18 Legal Services (Scotland) Bill Policy Memorandum, paragraph 210.
19 Legal Services (Scotland) Bill section 93.
20 Solicitors (Scotland) Act 1980 section 1(2)(b).
22 Legal Services (Scotland) Bill section 96.
1. The Faculty of Advocates welcomes the opportunity to respond to the invitation by the Justice Committee to submit written evidence on the provisions of the Legal Services (Scotland) Bill.

2. The Faculty is in agreement with the general approach and principles of the Bill insofar as they affect the regulation of the bar and the way in which advocates practise.

3. In *Access to Justice a Scottish Perspective a Scottish Solution* the Faculty set out its detailed response to the Government’s Policy Statement on Regulation and Business Structures in The Scottish Legal Profession. The Faculty’s position has remained consistent throughout the consultation process.

4. It recognised the need to analyse in a rigorous fashion the relevance of what it does, to optimise the services it delivers to the public and Scottish institutions and the need to be outward looking, accessible and economically effective.

5. The Faculty argued that the maintenance of an independent referral bar subject to the cab rank rule was an essential ingredient of providing meaningful access to justice for the people of Scotland.

6. The Faculty’s business model is one in which advocates operate as one-person businesses and are prohibited from entering into partnership with other advocates.

7. The prohibition on partnerships at the bar benefits the consumer because it provides the maximum range of availability of counsel to meet the needs of clients wherever they live and whatever their circumstances.

8. As the Faculty response explained, in Scotland there are about 460 practising advocates – compared with 17,000 barristers in England and Wales. While it might be commercially beneficial for some advocates to form into partnership the practical result in a jurisdiction the size of Scotland would be a significant reduction in consumer choice.

9. Where one advocate member of a firm acted for one side in a dispute any of his colleagues would be barred by reason of conflict of interest from acting for any party to the dispute.

10. There have also been suggestions by consumer groups and the Office of Fair Trading that the current business model operated by members of Faculty does not bring the benefits of economies of scale to clients.
11. However, a study by Professor Frank Stephen and Dr Angela Melville from the University of Manchester concluded: “The analysis of cost sharing across members of Faculty suggests that the OFT’s contention that permitting partnerships between advocates would enable economies of scale which are not available to independent practitioners to be captured is mistaken. Members of Faculty already benefit from economies of scale through participation in Faculty Services Ltd (FSL) and access to shared facilities at the Faculty.”

12. In its consultation paper, “Wider Choice and Better Protection,” the Government said that on balance it had not been currently persuaded that it was necessary to require the Faculty to permit its members to form partnerships or participate in other alternative business structures (ABS) provided that transfer between the advocate and solicitor branches of the profession was a straightforward procedure.

13. The Faculty agrees that advocates who wish to form partnerships or take part in ABS should be able to do so without difficulty by becoming solicitor advocates – solicitors with extended rights of audience.

14. It has suggested a number of ways in which simplicity of transfer between the two branches of the profession can be achieved.

**Regulatory Framework**

15. It has been stated that the Faculty of Advocates is a self-regulating body but that is a misconception.

16. An advocate is entitled to practise because he or she has been admitted to the public office of advocate by the Court of Session. That has been the case since at least the 17th century. The Faculty of Advocates does not have the right to admit anyone to the public office of advocate.

17. The Faculty regards it as of the utmost importance for the independence of advocates from the executive that they continue to be regulated by an independent judiciary. Oversight by the court is a common practice across the world and as far as Scotland is concerned is proportionate and cost effective.

18. Throughout the admission process for advocates the Faculty must operate within the terms of Regulations as to Intrants which set the standards and training requirements. These requirements must be approved by the Court of Session.

19. In recent times significant changes to practice rules have been introduced, but this can be done only with the approval of the Lord President.

20. When the Faculty wished to exclude a candidate on the basis of poor examination results, both the Faculty and the candidate appeared before a judge who heard arguments from both sides as to whether the candidate should be excluded.
21. So it can be seen that although in practice day to day responsibilities are delegated to the Dean of Faculty, the court exercises a real and continuing oversight over the Faculty.

22. Given that there seems to be some misunderstanding about the role of the court, the Faculty agrees with the proposal in the Bill to set out on a statutory basis in a clear and transparent way the current regulatory framework, including the role of the Lord President.

23. Oversight of the Faculty is also exercised by the Scottish Legal Complaints Commission (SLCC) which in October 2008, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007, became the gateway for all complaints against advocates, replacing the Scottish Legal Services Ombudsman.

24. Complaints about the service provided by an advocate are handled by the SLCC while complaints about conduct are referred to the Faculty to deal with. The SLCC can also investigate the way in which the Faculty has dealt with a conduct complaint.

25. The Faculty has no difficulties with the regulatory objectives set out by the Government:

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

26. In summary, the Faculty regards the current regulatory regime as proportionate and cost-effective and in the public interest.

1 December 2009

My personal experiences of legal services relate to the activities of Scottish solicitors and the failures in effective regulation by the Law Society of Scotland, the former Scottish Legal Services Ombudsman and the Scottish Legal Complaints Commission. The inadequate legal services include professional misconduct, avoidance, deceit, manipulation, collusion, dishonesty and lying. In short, corrupt practices that are the consequences of all previous and current oversight legislation, where members of the public are abused by dysfunctional regulation and underhand techniques used by members of the legal fraternity to avoid accountability.

I have read the text of the draft Legal Services Bill. This is a pretentious document that claims to have the purpose of improving public access to legal services. If you work out the final outcomes you will realise that the original aims have been highjacked by the legal fraternity to capture further control of legal services and to further diminish the longstanding inadequate regulation of legal services. This is a Bill prepared by solicitors on behalf of solicitors, under the direction and protection of solicitors. The proposed legislation has nothing but the continuation of abuse and injustice to offer the people of Scotland. It is further proof of the need to end self regulation and the Justice Committee and Scottish Government should now act to bring about this change, without fear of retribution, or threats, from the legal fraternity. Scotland has an uncertain future while the elected representatives in Government remain unwilling to demonstrate their commitment to the founding principles of the Scottish Parliament and an independent Scotland will not flourish under the undemocratic domination of 10,000 members of the population.

In assessment of my representations I invite the members of the Justice Committee to consider whether the proposed Legal Services Bill will prevent repetition of any of the following personal experiences, which are directly attributable to the misconduct of solicitors and the sham regulation systems they rely upon for exclusive indemnity.

Some of the Consequences of the Inadequate Regulation of Solicitors in Scotland

1.0 Solicitors (permitted activities)

01) Preparing legal documents with defective clauses that subsequently require additional legal advice and fees.
02) Passing client to another solicitor within the instructed firm to duplicate work and time charge fees.

03) Avoiding acting on client’s instructions, to create future additional work and fees.

04) Avoiding advising client of the right to complain to Law Society, for the purpose of delaying investigation and retaining control of potential complaints, until they are time barred.

05) Misleading client by giving written advice on the actions proposed by legal firm on behalf of the client. Charging fees, then withdrawing the initial advice and providing new advice which is contrary to the original advice.

06) Using confidential client information to create work and generate additional fees.

07) Withholding key information from client and charging fees for failing to advise client of key information.

08) Preparing illegal property purchase documents and charging fees for defective services.

09) Failing to conclude a contract between the property seller and purchaser and concealing illegal documents.

10) Colluding with property purchaser to avoid compliance with financial services regulations and Code of Conduct.

11) Avoiding obtaining client files before charging fees for inappropriate advice based on inadequate information.

12) Delaying providing client with files until it is too late for client to comply with complaints procedures timescale.

13) Refusing to reply to client’s complaint letters to avoid accountability.

14) Using a complaints partner to divert attention from the individual partners and staff members who are the subject of the complaints. As individuals they have representation, the complainant does not !.

15) Providing false and misleading financial and investment advice.

16) Destroying evidential documents to avoid providing copies requested by third parties.

17) To avoid accountability, failing to obtain appropriate compliance expert witnesses.
18) Carrying out work without obtaining instructions and charging time charge fees.

19) Removing documents from client file to conceal inadequate services and misconduct.

20) Making false and misleading statements and claiming key information had been destroyed.

21) Failing to apply for specific legal aid and ignoring urgency arising from accumulated costs and previous delays.

22) To conceal the discovery of critical evidence, advising client to complain to the Investment Ombudsman but not the Pensions Ombudsman. An example of negligent advice for the purpose of causing additional financial loss.

23) After three years of fee accumulation, giving new written advice that should have been provided at the outset. The new advice negated the original advice and fees were charged for these inadequate professional services.

24) Demanding payment of fees for work not carried out.

**Some of the Consequences of the Inadequate Regulation of the Law Society of Scotland**

2.0 Law Society (permitted activities)

01) **Reply within 14 days or we will close your file.** (no prior notice and no consideration of personal circumstances)

02) Complaints against solicitors are dealt with by solicitors, employed by solicitors and funded by solicitors.

03) Where no action is proposed on behalf of the complainant, decisions by the Law Society claim to be reviewed by a Committee comprising solicitors and lay persons. **How would anyone know?** This unaccountable faceless regime is not transparent, nor is there any procedure for accountability. A system that relies upon nameless persons for fairness and impartiality does not provide access to justice. **These procedures obstruct access to justice.**

04) **There is no access to any appeal of the decisions imposed by the Law Society secret Committees and you would have to live in Zimbabwe, Iran, or North Korea, to encounter similar injustice and avoidance techniques!**

05) It is not possible to find out what information, if any, is presented to any Law Society Committee by the Case Manager (a solicitor) who is also a member of the Law Society. All Scottish Government Ministers and MSP’s should be concerned about the consequences of the inadequacies of previous and current legislation relating to the provision of legal services and the
devious and dishonest claims that these services are adequately regulated. If there is any case for the independence of legal services, then there is an equally strong case for independent, transparent, regulation. With rights come responsibilities, not some cosy arrangement that defies justice!

06) The Law Society is exempt from complying with the provisions of the Freedom of Information Act 2002, which permits solicitors and the Law Society to act in ways which impose inhuman and degrading treatment on complainants, contrary to Article 3 of the Human Rights Act 1998. The Legal Services Bill does nothing to address the issues arising from conflicts of interest which deny justice to members of the public who have the misfortune of having to use legal services.

07) Applying time barring when the complainant has submitted medical evidence to confirm that it was not possible to prepare complaints submissions within the required timescales. Repeating time barring techniques when additional or new evidence is discovered by applying the original grounds for refusal to investigate any complaints.

08) Refusing to obtain, or receive, additional medical evidence and passing incomplete private and confidential information to an anonymous Committee, (none of whom were qualified to interpret any medical evidence), who then imposed decisions to avoid any investigation of the complaints, contrary to the principles of natural justice.

09) The Law Society of Scotland has not complied with the terms of the Memorandum of Understanding with the Financial Services Authority which was signed on behalf of the Law Society by a Douglas Mill, who subsequently resigned from his position as Chief Executive and Secretary of the Law Society. Members of the Justice Committee should be aware of those circumstances and other historical malpractices, because they are representative of the adverse consequences of self regulation.

10) The Law Society did not provide complainants with the right to complain to the former Legal Services Ombudsman against any finding of the Law Society of Scotland. The Ombudsman was restricted to giving consideration to the way the Law Society handled complaints. There was no means of obtaining a review of the Law Society’s decisions on complaints raised against solicitors. In short there was no provision for appealing any decision by a Case Manager or Committee acting on behalf of the Law Society of Scotland. In those circumstances there is no justifiable case for solicitors to remain free from independent regulation.

11) The Law Society did not provide the Financial Services Authority with relevant information that would be a material concern to the FSA regarding the nature of complaints submitted to the Law Society, where the Law Society advised in writing that some complaints should be referred to prosecuting authorities. Refer MOU Part 4 section 8.3 (vi), “circumstances which give rise to a reasonable suspicion that a financial crime has taken place in connection with the carrying on of regulated activities by an authorised professional firm”.
ie. the giving of false and misleading financial and investment advice and information, contrary to the requirements of the Financial Services Act 1986.

12) The Law Society does not promote the interests of the public in relation to the solicitors’ profession. As a self regulating body the Law Society has a license to kill members of the public by all the means at their disposal, by promoting and protecting only the members of the legal fraternity.

Some of the Consequences of the Inadequate Regulation of the Previous Legal Services Ombudsman

3.0 Legal Services Ombudsman (permitted activities)

01) When the Ombudsman agreed to obtain case file information from the Law Society the complainant is not provided with any schedule or proof of the information obtained from the Law Society. It is hard to imagine circumstance more open to exploitation and the avoidance of duty of care. Who decides what information is handed over, a Case Manager, a Committee, or some other individual within the Law Society?

02) Why pretend to be obtaining file contents when the only permitted purpose is checking that the Law Society has complied with its own Rules. What Rules exist?. Does anyone in Scotland know what those Rules say and have they been checked and approved by anyone other than the Law Society?

03) Were any of the arrangements between the Law Society and the Legal Services Ombudsman regarding the handling of complaints against firms of solicitors agreed with, or issued, to the Financial Services Authority ?.

04) The Ombudsman had legal powers to decide to transfer complaints to the Legal Services Ombudsman for England and Wales. These powers were invoked when the Ombudsman decided that there had been some previous contact between the Ombudsman and the legal firm which was the subject of complaints. An alleged unexplained conflict of interest – how convenient! More delay, obfuscation, cost and effort for the complainant.

Some of the Consequences of the Inadequate Regulation of the Legal Services Complaints Commission

4.0 Legal Services Complaints Commission (permitted activities)

01) The chair of the LSCC refused to obtain complaint files from the Law Society and arranged for the complaints to be sent to the Legal Ombudsman for England and Wales. More delay, obfuscation, cost and effort for the complainant. As evidence I have attached a copy of part of the text from page 5 of a report issued by the Legal Services Ombudsman for England and Wales, dated June 24 2009. Why did the Ombudsman consider it appropriate to provide these opinions when there are no legal powers to review or
question the opinions of a Case Manager, the secret Committees of the Law Society of Scotland or the Legal Services Complaints Commission?

02) If there was a conflict of interest within the SLCC, those circumstances do not prohibit another person within the office of the Legal Services Complaints Commission dealing with the matters raised as complaints with the Law Society. Why was it necessary to divert information out of Scotland when the Legal Services Ombudsman for England and Wales only had powers to review the way the Law Society handled the complaints procedure but was not empowered to review the substance of the actual detailed complaints lodged with the Law Society.

03) Who decides what information is handed over to the Legal Services Complaints Commission, a Case Manager, a Committee, or some unidentified individual within the Law Society of Scotland?

04) Were any of the arrangements between the Legal Services Complaints Commission and the Legal Services Ombudsman for England and Wales, regarding the handling of complaints against Scottish solicitor agreed with, or submitted to, the Financial Services Authority?

Some of the consequences of allowing the current Legal Services (Scotland) Bill to proceed to Enactment

5.0 Draft Legal Services (Scotland) Bill

1.0 Only legal firms who are members of the Law Society will be approved as “licensed providers”.

2.0 The proposed legislation excludes oversight by the Financial Services Authority.

3.0 The draft legislation implies that the Scottish Government will be responsible for investigating complaints against approved regulators but can delegate this function to the Scottish Legal Complaints Commission.

4.0 The Government, SLCC and the Law Society will be responsible for investigating complaints. These proposals offer no effective protection for members of the public. It is more of the dysfunctional past but with additional layers of obstruction, which protect solicitors and licensed providers, not members of the public.

5.0 To provide access to justice the only means of protecting and promoting the interests of consumers and the public interest generally, is through the establishment of an effective independent regulator of all legal services. The Legal Services (Scotland) Bill should only be progressed if legislation is added to provide for independent regulation.

Alan Holmes
7 December 2009
Justice Committee
Legal Services (Scotland) Bill

Written submission from the Institute of Chartered Accountants of Scotland

1. The Legal Services (Scotland) Bill has been considered by The Institute of Chartered Accountants of Scotland and our views are set out below.

2. As the Institute’s Charter requires, we act in the public interest, and our proactive projects, responses to consultation documents etc. are therefore intended to place the general public interest first, notwithstanding our charter requirements to represent and protect our members’ interests.

3. We consider the public interest in this instance to be the availability of legal, and other professional, services of a high quality that provide value for money. High quality in this instance reflects expertise, independence, competence, and client confidentiality.

4. Given that this Bill has been driven by a desire to promote competition and choice in the consumer interest, we believe that the attendant cost of regulation which flows from this legislation needs to be proportionate in order to encourage participants and new entrants. We have recommended in an earlier submission that consideration be given to using an adapted version of the existing regulatory regimes in place, to keep costs to a minimum. For example, ICAS has a regulated non-member model whereby a solicitor could be a principal in a firm of chartered accountants (currently the ICAS rules would permit this; changes would be required to the Law Society of Scotland rules). In such a scenario, the entity regulation would be provided by the existing ICAS regime and individual regulation of the solicitor would be by the LSS – both extant regulatory functions. Further tailoring of the scheme is required but this would broaden choice in the professional services market and could be undertaken at a minimal cost. It is a model that serves the accountancy profession well and we believe it could be adapted to the legal profession at far less cost that the current proposals which would require a new regulatory scheme.

Licensed Legal Services Providers

5. We have traditionally favoured, and continue to favour, moves to facilitate the creation of multi-disciplinary practices (MDPs) so that a multi-disciplinary service can be obtained by consumers from a single firm. We believe that MDPs could be attractive to consumers as a ‘one-stop-shop’ for professional advice. It is also conceivable that combined practice management could lead to operational efficiencies which might be passed on to consumers in lower costs. However, we have a number of reservations as to whether the Bill meets its stated regulatory objectives or introduces a level playing field for all potential participants in an MDP.

6. In summary, our concerns centre on the branding of a licensed legal services provider, the definition of legal services and whether this includes the work of non-solicitors, and ministerial oversight. We also have some reservations about the
regulatory principle of promoting access to justice. These points are discussed below.

**The branding of a licensed legal services provider**

7. For the consumer to gain maximum benefit from the objectives of this bill, they must be able to identify clearly a multi-disciplinary practice. A multi-disciplinary practice is unlikely to wish to promote itself as ‘a provider of legal services’ – most consumers would probably readily assume that this describes a firm of solicitors. In informing customers of the range of services available we suggest that there is flexibility in how a firm can describe itself. For example, ‘ABC and Co; Chartered Accountants and Solicitors, regulated by ICAS as a licensed legal services provider’ is a meaningful proposition to a consumer. This point requires clarification and we suggest it should be addressed in the Bill.

8. We raise this issue because it is our understanding that the Bill would enable a solicitor to practice in one of two regulatory regimes: either (i) in the existing traditional model of a firm that is 100% owned by solicitors and regulated by the Law Society of Scotland; or (ii) in a licensed legal services provider subject to two tier regulation, with entity regulation by an Approved Regulator whilst the individual professionals would remain subject to the regulatory requirements of their own professional bodies. So, for example, three solicitors and a chartered accountant could be in partnership and regulated as a licensed legal services provider.

9. An alternative example might be, say, a firm of four CAs and one solicitor but as the Bill is currently drafted, the business would be a licensed legal services provider and if the firm is to be referred to by its regulatory status we question whether our members, chartered accountants, would want to brand themselves as such.

10. We are disappointed to note that no provision has been made in the Bill, or in proposed alterations to the practice rules of the LSS, to allow a solicitor to practice under another suitable regulatory scheme. As we outlined in an earlier submission, the ICAS regulated non-member model is an appropriate model for entity level regulation and would broaden choice in the provision of legal services. The ability to have regulated non-members as partners serves the accountancy profession well and we believe this offers a cost effective and practical means of opening the legal services market while preserving regulatory safeguards.

**The definition of legal services: does this include the work of non-solicitors?**

11. In section 3 the definition of ‘legal services’ is widely drawn and we are concerned about how this might affect chartered accountants in a licensed legal services provider who advise, for example, on tax, corporate finance, company law etc. Section 39 states that there will be a Head of Legal Services, who must be a solicitor and has the function of securing the licensed provider’s—

(a) compliance with section 38(1)(a) and (b),
(b) fulfilment of its other duties under this Part so far as relevant in connection with its provision of legal services.
12. The Head of Legal Services is also expected to manage the designated persons within the licensed provider with a view to ensuring that they have regard to the Head’s function noted above. section 47 states who is a ‘designated person’ but, arguably, this could encompass anyone who provides ‘legal services’ which returns one to the definition in section 3. If this is the case, not only would principals who are chartered accountants be subject to the Head of Legal Services in relation to much of their work, but a profession that is already subject to regulation would be drawn within a further regulatory net and complaints process.

13. We do not believe that a comprehensive definition of legal services is desirable or practical. To prevent confusion and regulatory disputes it is essential that there is a definition of ‘legal services’ that is narrow and it should be restricted to the two existing areas reserved to solicitors of rights of audience in court and conveyancing.

Ministerial powers and oversight of Approved Regulators

14. We welcome the decision not to mirror the policy decision taken in the English Legal Services Act 2007 to establish a separate legal services board to oversee the regulation of the legal profession. We do not think that there is a need for a separate oversight body. However, we believe further thought needs to be given to the oversight function.

15. As the Bill is currently drafted, extensive powers have been given to Scottish Ministers in relation to the approval process, the ability to make further regulations, and in the appeals function. We question whether this is appropriate – the legal profession and the administration of justice should be independent from political influence. There remains a role for independent regulation and we believe that trust should be placed in those who are approved as Approved Regulators.

16. At the same time, other features that should rightly sit at a policy and oversight level are being inappropriately delegated by the Bill to the Approved Regulators. We do not believe that the regulatory principles to promote access to justice and competition should be the responsibility of the professional bodies. The accountancy profession has debated this in relation to the audit market. Bodies such as ICAS and ICAEW issue practising certificates to their members and, as a generalisation, practising certificates may be applied for by any member with relevant experience, appropriate Professional Indemnity Insurance, and up to date CPD compliance. ICAS does not have the authority to restrict the granting of practising certificates based on other factors such as access to services, whether this is based on a geographic test or on seeking to promote choice in the market. Nor do we believe that ICAS should have such an authority. It is not the role of a professional body in exercising its regulatory functions to apply the government’s competition policies or promote access to justice. Such considerations would lead to new regulatory procedures, the potential for expensive appeals, and would be further complicated where there is more than one regulator.
Confirmation

17. We welcome the measures in the Bill that mean our members may be able to offer confirmation services.

18. We should welcome the opportunity to give oral evidence to the Committee in order to discuss the above points further.

Vivienne Muir
Executive Director, Regulation and Compliance
1 December 2009
Justice Committee

Legal Services (Scotland) Bill

Written submission from the Law Society of Scotland

Please find enclosed a memorandum of comments, which has been prepared on behalf of the Council of the Law Society of Scotland to assist the Scottish Parliament’s Justice Committee in their consideration of the above Bill. I also enclose for your information the comments that have been prepared on the Council’s behalf in respect of the Bill’s Financial Memorandum, which I have today submitted to the Finance Committee (please see the annexe).

Katie Hay
Law Reform Officer

The Law Society of Scotland’s Memorandum of Comments

INTRODUCTION

The Legal Services (Scotland) Bill aims to assist in the development of improved access for all to high quality legal services within a competitive market which is appropriately regulated to ensure public protection and maintains quality and independence of legal services in Scotland.

The Society supports the need to respond to new demands created by a changing market and believes that licensed legal services providers (LLSPs) will facilitate more modern and competitive delivery of legal services.

We are pleased that the bill appears to fulfil the policy intentions as set out in Wider Choice Better Protection, which is consistent with the Society’s own policy paper, Delivering Legal Services in Scotland, published in 2008. We therefore approve of the general principle of the bill, subject to the specific comments on the detailed provisions contained in this memorandum.

The key will be to establish the best possible regulatory framework within which a range of business structures can develop. We will continue to work closely with the Government as it develops the legislation and sets out the framework for the future of legal services delivery in Scotland.

This paper gives detailed comments on each section of the bill. However there are some issues of principle which arise from the bill and which are outlined as follows.

a) Independence of the legal profession. The regulatory objectives include: promoting an independent, strong, varied and effective legal profession. The professional principles require those providing legal services to act with independence and integrity and section 4 requires Scottish Ministers to act “so far as practicable in a way which is compatible with the regulatory objectives”. 
However at various points in the Bill, these independence issues are compromised. This applies especially in relation to section 6, section 29, section 35 and section 39.

b) **Obligation to consult.** Under the bill, Scottish Ministers are empowered to make regulations affecting approved regulators, LLSPs, the Scottish Legal Complaints Commission (SLCC) and the existing professional bodies. These powers by and large have no correlative duty to consult. Ministers should be required to consult with interested parties where this is not already stated in the bill.

c) **The need for a level playing field.** The bill should ensure, so far as practicable, a level playing field between LLSPs and “traditional” firms and between approved regulators and existing regulators. The regulatory objectives include promoting competition in the provision of legal services and to that end, the bill confers duties on both approved regulators and LLSPs, which seek to ensure that competition law is observed. Regulatory costs and the obligations of LLSPs should not distort competition within the legal services market.

The bill also specifies certain characteristics of the Society’s internal governance arrangements. The Council has fully considered these requirements and believes that they should be adopted in order for the Society to be a modern and effective regulator. The bill should ensure that other approved regulators meet such requirements in relation to the discharge of their regulatory functions.

d) **Access to justice.** The regulatory objectives include promoting access to justice and the professional principles oblige providers of legal services to support the proper administration of justice. The Society has a long-standing agenda to support access to justice by: i) better provision of legal aid; ii) supporting the reform of the civil justice system; iii) promoting initiatives such as arbitration, mediation and pro bono activities. It is important that the bill does not impinge on access to justice and that the safeguards in the bill increasingly build respect for this value into the system.

**SPECIFIC COMMENTS**

**Part 1: The Regulatory Objectives etc.**

Section 1 – Regulatory objectives

Section 1 should make reference to the ‘interests of justice’ and that this overarching principle should – with the ‘rule of law’ – assume paramountcy within the section.

Section 2 – Professional Principles

Section 2 should reflect section 1(3)(d) of the Legal Services Act 2007 which
refers to those exercising rights of audience as requiring to comply with their duty to the court to act 'with independence in the interests of justice'. Section 1(3)(d) reads as being exhaustive of the duty to the court. It should also require them to comply with other duties to the court, e.g. confidentiality.

While section 2(f) obliges those subject to professional principles to meet their obligations under any relevant professional rules, there should be a specific reference to treating the affairs of clients as confidential and in conformity to professional ethics.

Section 3 – Legal services

General

Legal services are defined very widely in section 3 and the definition appears to be similar to the way in which legal activities are defined in section 12 of the Legal Services Act 2007, except that the definition does not separately identify and define the reserved legal activities.

Nevertheless, the way in which legal services are defined would include, but is not restricted to, the legal activities which can only be carried out by qualified persons by virtue of section 32(1) of the 1980 Act. As a consequence, that section is amended to permit the provision of such activities by licensed legal service providers – see section 90(4).

However, the absence of a definition of reserved legal activities in the Bill is significant because sections 12-26 of the Legal Services Act 2007 provide that the regulation of legal activities only applies to those activities which are reserved legal activities whereas the Bill proposes to regulate the provision of all legal services not just the reserved ones. This shows the extent of the regulatory regime proposed for Scotland.

Detailed comments

Section 3(1)(a)(i) refers to the provision of legal advice and assistance in connection with “any contract, deed, writ, will or other legal document”. The reference to “other legal document” in section 3(1)(a)(i) is likely to be construed according to the *eiusdem generis* rule. This is too narrow. It would appear not to include, for example, documents such as Parliamentary Bills. What then is the position about legal services which consist in drafting Bills or amendments to Bills etc or other legal activities which may not fall within that exhaustive definition?

The example at section 3(2)(c) should be deleted on that grounds that:

a) mediation is not a ‘quasi judicial’ act
b) The canon of interpretation *eiusdem generis* applies.

Section 4 – Ministerial oversight
The Society is concerned about the extent of the powers which are given to Scottish Ministers by Part 2 in relation to approved regulators of those legal services providers who provide legal advice and assistance and/or representation.

We agree with the Government's policy objective that there should not be a Legal Services Board in Scotland. However, the grant of such powers to Ministers raises fundamental issues of constitutional propriety which occur at various sections throughout the bill. Section 4, obliging Ministers to act in a way which is compatible with the regulatory objectives, goes some way to ensuring good constitutional practice but section 4(2) does not oblige Ministers in an absolute sense inasmuch as they are only required to act in accordance with the regulatory objectives 'so far as practicable' and subject to their consideration of the appropriate way to meet those objectives. This phraseology should be clarified to tighten the obligation on Scottish Ministers.

There should be a similar provision in Part 1 requiring an approved regulator or a licensed legal services provider to comply with the regulatory objectives and professional principles. There are echoes of this throughout Part 2, e.g. section 20(1)(a), but that only applies to the internal governance arrangements and not its other functions or section 38 (key duties of licensed legal services provider). It is only in section 62 where there is the equivalent provision in relation to approved regulators. The Society proposes that in the interests of making this clear, section 62 should be stated upfront in Part 1 in view of its importance – even though this will mean that the expression “approved regulator” would have to be construed in accordance with Part 2.

For the same reasons, section 86 should be brought into Part 1, subject to the comments on that section.

**Part 2: Regulation of Licensed Legal Services**

Section 5 – Approved regulators

Section 5(1) requires clarification that an “other body” could include an incorporated company or unincorporated association. Does the reference to “a professional or other body” simply mean a body which is either professional or non-professional? Is there any reason why the body (whether professional or otherwise) should not include a body corporate or an unincorporated association? It should clarify if ‘a body’ could be either.

The Society is concerned about the order making power in section 5(6) to prescribe fees which Scottish Ministers may charge (a) an applicant to become an approved regulator and (b) an approved regulator. This implies that it is intended that regulators who are approved should be charged fees. It should be clarified why fees are being charged and what are the matters for which it is considered to be appropriate that fees should be charged, e.g. applications for authorisations to act. In this connection, it is not clear whether approved
regulators have to apply for renewal of their approval (see also comments on section 6). The power to prescribe fees should be subject to consultation.

Section 6 – Approval of regulators

_Wider Choice Better Protection_ stated at paragraph 5.16 that “the Scottish Government with the agreement of the Lord President should authorise regulatory bodies”. The Society believes that it is important for the Bill to reflect what was consulted upon in this respect.

The Society notes that according to section 6(3) Scottish Ministers must consult the Lord President, the OFT, consumer bodies and such other persons as they consider appropriate when deciding to approve a regulator. However, as the regulators will have a key role in the legal system and the system of the administration of justice, it is appropriate that approval should only take place with the Lord President’s consent.

Scottish Ministers should seek the approval of the Lord President and consult other bodies as to the conditions which they may impose under section 6(2) when they approve an applicant. In this connection it is not clear whether those conditions can include conditions as to the duration of the approval – cf section 7(4) which draws a distinction between duration and conditions in the case of authorisations to act.

In respect of section 6(5) and (6), there should be a right of appeal against Scottish Ministers refusing to grant an application or to grant it subject to conditions. Section 6(5) requires Scottish Ministers to notify an applicant if they intend to refuse to grant an application or to approve it subject to conditions but section 6(6) only entitles the applicant to make representations to Scottish Ministers or “to take such steps as it may consider expedient” – but it is not clear what this is intended to mean. This contrasts with section 13 which gives an applicant for a licence the right to appeal to the sheriff against a relevant licensing decision.

The regulation-making power in section 6(7) should be subject to consultation with relevant interested parties so that Ministers can act having taken a range of views into account.

Section 7 – Authorisation to act

It is not clear why it is necessary to require an authorisation to act in addition to a body becoming an approved regulator. One approval should be sufficient. Why should a body apply to become an approved regulator and yet not want to carry out its regulatory functions?

It should be clarified whether an approved regulator has to apply for such authorisation; section 7(6), (9) and (10) implies that a request has to be made but this should be made clear.
In relation to section 7(7), Scottish Ministers should be under an explicit obligation to provide reasons for withholding authorisation or imposing conditions.

There should be a right of appeal against Scottish Ministers refusing to grant an application or to grant it subject to conditions under section 7(8) (see comment upon section 6(5) and (6) above).

The regulation-making power in section 7(10) should be subject to consultation with relevant interested parties so that Ministers can act having taken a range of views into account.

Section 8 – Regulatory schemes

Section 8(4) provides for amendments to regulatory schemes to be subject to approval of the Scottish Ministers and requires them to consult the Lord President and others. That approval should be subject to the consent of the Lord President.

Section 8(5) empowers Scottish Ministers to make regulations enabling the regulatory schemes to deal with the provision by their licensed providers of non-legal services. It is not clear what this is intended to achieve. Is it necessary to authorise the inclusion of such matters in a scheme? If so, such a power should be included in section 8(3).

Section 9 – Reconciling different rules

Section 9(3) empowers Scottish Ministers by regulations to make further provisions about regulatory conflicts. In view of the potential width of this power, it should be subject to consultation and more specific definition.

Section 10 – Licensing rules

Section 10 provides for the licensing rules. These cover the conditions for becoming a licensed provider, the terms of the licences, their renewal and other issues including licensing fees. It is important to note that in accordance with section 62(3), any licensing regime should impose the minimum of bureaucracy while providing the best regulatory structure and approved regulators should have in mind these objectives when formulating licensing rules.

Section 11 – initial considerations

This section requires the licensing rules to provide for consultation with the OFT on a licence application and to state how the approved regulator would deal with a licence application where it would cause “a material and adverse effect on the provision of legal services”. The section also gives guidance to regulators as to when it is appropriate to consult the OFT. This is when the regulator believes that the licence may prevent competition within the legal
services market or significantly restrict or distort such competition. This is an important provision to ensure that competition and access to justice issues are properly considered by approved regulators.

Section 12 – other licensing rules

The Society has no comments to make on this section.

Section 13 – Licensing appeals

The Society has no comments to make on this section.

Section 14 – Practice rules: general

Section 14 provides for practice rules which must provide for the operation, administration and standards of licensed providers, the operational positions within licensed providers, accounting and auditing, professional indemnity, complaints and the steps to be taken by an approved regulator in the event of a breach of the regulatory scheme or a complaint being upheld.

The creation of practice rules is an obligation on approved regulators and practice rules form part of the regulatory scheme which requires to be put to Ministers under section 5(3) in order to be included in the application to become an approved regulator.

In addition to the specific subjects which must be included in the practice rules, the rules may include professional practice, conduct or discipline rules, which – in the approved regulator’s opinion – may be necessary.

These rules do not require the approval of the Lord President, although he, the OFT and other bodies will be consulted by Scottish Ministers in the context of approval of the regulator under section 6.

In formulating the practice rules, the obligation to reconcile different rules under section 9 must be taken into account.

As section 14 is currently drafted, there is no reference to a rule regarding compensation or fidelity fund arrangements. The Society is of the view that it is essential for proper consumer protection that adequate provision to ensure consumer redress in the event of dishonesty.

Section 15 – Financial sanctions

Section 15 provides for practice rules to include the imposition of a fine where there is a breach of the regulatory scheme or a complaint is upheld. The fine is subject to a statutory maximum.

The fine is payable to the approved regulator and must be applied to the cost of exercising the approved regulator’s functions under Part 2.
Questions might be raised as to whether Article 6 of ECHR (requirement for civil rights to be determined by an independent and impartial tribunal) would be complied with if the approved regulator both imposes and gets the benefit of the fine but it is likely that it would be because there is an appeal to the sheriff under section 15(4).

However, the way the fine is treated under this section is quite different from the way that fines are currently imposed upon solicitors. Fines imposed by the SSDT are payable to the Crown (although this may be because the fines are imposed by a tribunal not an administrative body).

Section 16 – Enforcement of duties

Section 16(1) provides that the practice rules must include a provision that it is a breach of the regulatory scheme for a licensed provider to fail to comply with its statutory duties. This is a very broad provision which could include failures not only under the bill but also under company law, health and safety law and any other legislative provision. Questions may arise as to whether it is appropriate that the approved regulator should determine such matters, particularly if they are unrelated to the provision of legal services.

There may be issues about the application of section 16 in connection with some of the duties under section 38, for example to “have regard to” the regulatory objectives. See comments under section 38.

Section 17 – Performance report

The Society has no comments to make on this section.

Section 18 – Accounting and auditing

Section 18 requires the practice rules to include an obligation on licensed providers to keep in place proper accounting and auditing procedures. This mirrors the Legal Services Act 2007 and the obligations imposed upon solicitors’ practices under the 1980 Act. The Society is of the view that the reference to the application of sections 35 to 37 of the 1980 Act will assist in creating a level playing field between LLSPs and traditional firms.

Section 19 – Professional indemnity

Section 19 requires the practice rules to oblige licensed providers to keep in place professional indemnity and to include provisions corresponding to the application of section 44 of the 1980 Act on an incorporated practice. Section 44 is discretionary and therefore there is a potential distinction between the arrangements under section 19 and those under section 44 of the 1980 Act. Section 19 reflects paragraph 7.35 in Wider Choice Better Protection. The Society agreed with that policy aim in its response.
However, section 19 also highlights the lack of compensation or fidelity arrangements which were consulted upon in paragraphs 7.26 to 7.31. In the Society’s view, it is essential for consumer protection that provision is made for financial arrangements to secure consumer redress.

Section 20 – Internal governance arrangements

The Society approves of the requirement that the internal governance arrangements of approved regulators should ensure that the approved regulator will act properly and independently in the exercise of its regulatory functions and allocate adequate resources to those functions and regularly review how those functions are carried out. However, there may be a conflict between section 20(1)(a), which requires the approved regulator to exercise its regulatory functions independently of any other person or interest, and section 27, which requires an approved regulator, in exercising its functions, to have regard to any guidance issued by Scottish Ministers.

The Society’s governance review has been progressing for two years. The first stage of the planned governance change is now complete, with the introduction of a Board and group conveners who have responsibility for representation and support; regulation; and registration and membership. The Board’s role is to provide direction and scrutiny of the Society’s committee and executive on behalf of Council. The second stage will review the committee structure in terms of focus, working practices and communications, with the aim of improving the Society’s effectiveness as a regulator and as a representative organisation.

Within the unified structure of the society practical distinction 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 references to Council. These committees have 50% solicitor and 50% non-solicitor members, ensuring transparency and balance between the solicitors and the consumer. Many other committees have non-lawyer members including Guarantee Fund, insurance and professional practice committees.

The Society believes that the governance changes in relation to the regulatory committee, and the provision of a statutory foundation in terms of section 92 reinforce the practical distinction of functions and enable the Society to comply with section 20(2)(b).

In relation to section 20(2)(c), the section should provide that any governing council of an approved regulator should have an appropriate proportion of members who are not members of the professional or other body which is the approved regulator and that any regulatory committee is composed of at least 50% of non-members of the professional or other body.

Section 21 – Communicating outside
The Society agrees with the section 21, which is a whistle-blowing provision and requires the governance arrangements of an approved regulator not to prohibit a person involved in regulation from communicating with other regulators.

Section 22 – More about governance

Section 22 empowers Scottish Ministers to make further provision about the internal governance arrangements of approved regulators. The Society is of the view that this provision could have an adverse impact on the independence of approved regulators and that such changes should require the consent of the Lord President.

Section 23 – Regulatory and representative functions

This section provides a safeguard to prevent Scottish Ministers from interfering in an approved regulator’s representative functions however, there requires to be further clarification of the grounds under Part 2 on which interference by Ministers in the regulatory function is permitted under section 23(3).

Section 24 – Assessment of licensed providers

Section 24(8), which allows a regulator to delegate its functions under this section “to any suitable person or body” is very wide. There is no specification as to what is meant by “suitable”. There should be further criteria for suitability for delegation in this section. Scottish Ministers should be obliged to consult with interested parties on the regulations made under sub-section (9).

Section 25 – Giving information to SLAB

The Society has no comments to make on this section.

Section 26 – Additional powers and duties

Section 26 empowers Scottish Ministers to make regulations giving regulators “such additional functions as they consider necessary or expedient” for the purposes of Part 2. Before doing so, Scottish Ministers are required to consult every approved regulator, the Lord President, and such other persons as they consider appropriate. Providing increased powers to regulators may have implications for the administration of justice and accordingly, the consent of the Lord President should be required, rather than him being simply a consultee.

Section 27 – Guidance on functions

There should be further definition as to the type of guidance which Scottish Ministers may issue. If such guidance were mandatory or subject to enforcement it could compromise the approved regulator’s independence. Clarification is needed as to the nature of the guidance.
Section 28 – Monitoring performance

Section 28 empowers Ministers to monitor the performance of approved regulators “in such manner as they consider appropriate”. This is to be done by reference to the factors specified in section 28(2), although these are not exhaustive. Nothing is said as to how such monitoring is to be carried out. It is important that the compliance monitoring is fair, open and transparent. The obligations to provide information within a set time under section 28(3) may have resource implications for approved regulators.

Section 29 – Measures open to Ministers

The powers given to Ministers under this section are very broad and require close scrutiny together with schedules 1 to 6. Care should be taken to ensure that Ministers in exercising the powers under section 29(4) do not impinge on the regulatory objectives or the professional principles. Furthermore, the provisions contained in section 29(2)(a) and (b) should require the consent of the Lord President; and section 29(2)(e) and (f) and schedule 6 should reflect paragraph 19 of Wider Choice Better Protection which requires the agreement of the Lord President to the revocation or amendment of authorisation. Ministers should be obliged to consult on the regulations made under section 29(6).

Section 30 – Surrender of authorisation

The Society has no comments to make on this section.

Section 31 – Cessation directions

Section 31 provides for when a regulator amends its scheme to exclude certain providers or the regulator’s authorisation is amended, rescinded or surrendered. In these circumstances Scottish Ministers may direct the regulator to take action which is necessary for the continued regulation of the licensed provider. Before making such a direction, consultation with interested parties should be required. Section 31(3) imposes a duty upon the regulator to comply with a direction “so far as practicable”. Should this not be “reasonably practicable”? 

Section 32 – Transfer arrangements

The Society has no comments to make on this section.

Section 33 – Extra arrangements

The Society has no comments to make on this section.

Section 34 – Change of approved regulator

Section 34 allows a licensed legal services provider to switch regulators
subject to the new regulator’s consent and notice being given to the current regulator and Scottish Ministers. In the Society’s view, it is not necessary for Scottish Ministers to be informed of such a decision.

Ministers may by regulations make further provision about transfers. There should be an obligation to consult with interested parties on the regulations.

Section 35 – Step-in by Ministers

Section 35 allows Ministers to establish a body with a view to its becoming an approved regulator. There needs to be further definition of the basis on which section 35 would be operated and what safeguards should be put in place to prevent the inappropriate use of this power. Again, Scottish Ministers should be obliged to consult with interested parties on the regulations made under this section.

Section 36 – Licensed providers

Section 36 provides for licensed legal services providers, which are business entities, offering to provide or providing legal services to the general public for fee, gain or reward under a licence issued by an approved regulator. The entity can only be a licensed provider if it has at least one solicitor holding an unconditional practising certificate. That certificate should be defined not only with reference to section 15 but also with reference to section 53 of the 1980 Act. This point arises again in respect of section 39(2).

Section 36(1)(a) may inhibit licensed legal services providers from offering pro bono services – this should be clarified. There should also be clarification of what it means for a solicitor to be “within an entity”. The same phrase occurs in section 38(2)(a) and (3).

Section 37 – Eligibility Criteria

There should be an obligation to consult with interested parties on the regulations made under this section.

Section 38 – Key duties

Section 38 sets out the key duties of a licensed legal services provider. It is significant that different language is used to describe the nature of the duty in each case. Section 38(1) and (2) requires a licensed legal services provider to:

1. Have regard to the regulatory objectives
2. Adhere to the professional principles
3. comply with its approved regulator’s regulatory scheme and the terms and conditions of its licence
4. Ensure that everyone within the entity complies with the code of conduct
The requirement to “have regard to” the regulatory objectives is the weakest form of duty because the House of Lords has held that a duty “to have regard” to a matter does not mean that it has to be followed but simply that, provided regard is had to it, it can be disregarded. Is it appropriate that the licensed legal services provider should be able to do this? cf section 4(2)(a) and 20(1)(a).

The requirement to have a Head of Legal Services and either a Head of Practice or Practice Committee was referred to in the Society’s policy paper. It is possible for one person to hold both the Head of Legal Services and the Head of Practice roles.

Section 39 – Head of Legal Services

The Society approves of the terms of section 39 and the role ascribed to the Head of Legal Services (which reflects the Society’s policy paper), subject to the comment made under section 36.

However, in relation to section 39(9), Scottish Ministers should not be empowered to make regulations directing the functions of solicitors.

Section 40 – Head of Practice

The Society approves of the terms of section 40, which reflects the Society’s policy paper. The power under section 40(7) to make regulations should be subject to consultation with appropriate persons.

Section 41 – Practice Committee

The Society approves of the terms of section 41, which reflects the Society’s policy paper.

The power under section 41(5) to make regulations should be subject to consultation.

Section 42 – Notice of appointment

The Society has no comments to make on this section.

Section 43 – Challenge to appointment

Section 43 provides that a regulator may challenge a licensed provider’s appointment of a person (“P”) as Head of Legal Services, Head of Practice or member of a practice committee on the grounds that the person is ineligible, unsuitable or there are other reasonable grounds for a challenge. If the approved regulator determines that the grounds of challenge are made out, section 43(4) enables it to direct the licensed provider to rescind the appointment.

1 Harvey v Strathclyde Regional Council 1989 SLT 612
Section 43(6)(a) provides that the licensing rules made under section 10(1)(b) and (c) are required to explain the basis on which suitability for appointment is determinable. Section 43(7) provides an example of what might be relevant in assessing suitability, i.e. a record of misconduct. There may be a danger that this example may restrict what is meant by “unsuitability” by reference to the eiusdem generis rule. In the case of disqualification, there are other conditions specified in section 46. It is assumed that similar conditions would also apply in determining P’s suitability for appointment but this is not expressly provided.

There is no provision for any appeal to the courts against any challenge made by the approved regulator to the appointment of P or any recission of his appointment – section 45(5) only provides for an appeal to the sheriff against a disqualification and not a challenge to appointment. This may raise questions as to the compatibility of section 43 with Article 6 of ECHR.

It should be made clear in section 43(3) that the grounds on which a challenge may be made do not include the conditions detailed in section 46, which – if met – would result in immediate disqualification from the position. It is unclear, however, how section 43(3) interacts with section 44(6) and 46(6), as in this case, if the condition were met, it would not necessarily result in immediate disqualification.

Section 44 – Disqualification from position

The Society has no comments to make on this section.

Section 45 – Effect of disqualification

This section provides that disqualification can be limited or unlimited in time and applies to all licensed providers, however regulated. It could be limited by reference to activities, whether carried out with or without supervision. The Society is of the view that the example in section 45(2)(b) should be deleted, as it is unnecessarily restrictive.

Section 46 – Conditions for disqualification

There are varying approaches to the conditions for disqualification in terms of compliance with bankruptcy and insolvency legislation and company directors’ disqualification. These provisions should be simplified and made more uniform.

Section 47 – Designated persons

Section 47(2) provides in effect that a designated person is a person who is designated by a licensed provider to carry out “legal work” in connection with the provision of legal services but it is not clear what is meant by “legal work”. The only qualifications for being a designated person are those stated in section 47(3)(b). What is meant by “legal work” should be clarified.
The Bill should also provide a procedure for how designation takes place.

Section 47(4) ensures that the reserved areas remain as they are at present. It refers to “a particular sort of legal work” when it is intending to refer to the kind of work mentioned in section 26(1) of the 1980 Act which can only be done by qualified persons. The description of qualified persons is extended by the amendment made in section 90(4) to include licensed legal service providers but not any designated person.

Section 48 – Listing and information

The list should be available to members of the public on request.

Section 49 – Fitness for involvement

The Society has no comments to make on this section.

Section 50 – Factors as to fitness

Section 50 details the factors for assessing an outside investor’s fitness. This echoes the Society’s policy paper. Section 50(2)(b)(ii) seems extremely broad in respect of compliance with any enactment.

In relation to section 50(4), Registered European and Foreign Lawyers or Multi-national Practices should be subject to the same presumption.

Section 51 – Behaving properly

The sanctions to be imposed on an outside investor for not acting properly should be clearly stated. Under the Bill, the accountability is not particularly clear. A failure to comply with section 51 should raise a presumption of unfitness.

Section 52 – More about investors

Scottish Ministers should consult interested parties on the regulations made under section 52(2). The definition of ‘investor’ and ‘outside investor’ under section 52(4) needs some further thought. Is it not clear when an investor may or may not become someone whom the licensed provider intends to become a designated person. It is not clear how the licensed provider’s intentions are to be determined.

Section 53 – Duty to warn

There is no definition of ‘serious financial difficulty’. This will need to be clarified.

Section 54 – Ceasing to operate
The Society has no comments to make on this section.

Section 55 – Safeguarding clients

Scottish Ministers should consult with interested parties on the regulations made under section 55(10).

Section 56 – Distribution of client account

The Society has no comments to make on this section.

Section 57 – Employing a disqualified lawyer

The Society has no comments to make on this section.

Section 58 – Concealing disqualification

The Society has no comments to make on this section.

Section 59 – Pretending to be licensed

The Society has no comments to make on this section.

Section 60 – Professional privilege

There should be a specific provision for an obligation of confidentiality to apply to the licensed provider and its employees and it should be reinforced by a criminal sanction where those employees are not subject to professional rules of conduct.

Section 61 – Input by the OFT

Scottish Ministers should be under an obligation to publish advice under this section.

Section 62 – Role of approved regulators

As with section 4(2), section 62(2) does not oblige approved regulators in an absolute sense.

It has already been suggested that section 62 should be put into Part 1 in view of its general importance.

Section 63 – Policy statement

Policy statements appear to be an unnecessary level of bureaucracy. If the approved regulator complies with the regulatory objectives and professional principles and the other provisions of the draft Bill, that should be sufficient.
Section 64 – Complaints about regulators

Section 64 obliges Scottish Ministers to investigate complaints about approved regulators. It should be clarified that any complaint must arise from a breach of a statutory duty under the bill and that such a complaint may only be made by a person having a direct interest.

Where the complaint is a complaint about how an approved regulator has dealt with a regulatory complaint (a handling complaint), as mentioned in section 57D of the 2007 Act, as amended by section 65, Scottish Ministers must refer the complaint to the SLCC. It would also appear that such complaints may be made directly to the SLCC under section 23-25 of the 2007 Act.

Section 64(6) enables Scottish Ministers to delegate any of their functions under section 64 (1),(3) and (5)(a) to the SLCC. Is it appropriate that such functions should be able to be delegated to the SLCC?

If it is appropriate, should not the SLCC deal with all complaints against approved regulators rather than involving Scottish Ministers in this role? Scottish Ministers should fund the SLCC to fulfil its role under this section.

It would be appropriate for the SLCC where there is partial or complete delegation to be under an obligation to inform Scottish ministers that:

a) a complaint against an approved regulator had been made; and
b) what finding and, where appropriate, sanction had been reached.

Section 65 – Complaints about providers

Section 65 inserts 5 new sections into the Legal Profession and Legal Aid (Scotland) Act. Section 57A applies the 2007 Act provisions about service complaints against practitioners to service complaints about licensed providers. In relation to new section 57B of the 2007 Act (regulatory complaints), this new species of complaint is a combination of service and conduct. There are issues of complaints-handling conflict, which need to be addressed, including the possibility of double-jeopardy.

In respect of new section 57C (levy advice and guidance) the Society questions whether it is appropriate that a licensed provider pays an annual levy to the SLCC in addition to the levies paid by a solicitor employed by the licensed provider. This element of double-counting is unjustified and abatement should be made for any individual levy paid, or individual exemption should be provided where a licensed provider pays the total levy.

Section 66 – Register of approved regulators

The public should be entitled to consult the register without incurring a fee.

Section 67 – Registers of licensed providers
The public should be entitled to consult the register without incurring a fee. Scottish Ministers should be required to consult with interested parties on the regulations made under section 67(5).

Section 68 – Lists of disqualified persons

The public should be entitled to consult the list without incurring a fee. Scottish Ministers should be required to consult with interested parties on the regulations made under section 68(6).

Section 69 – Privileged material

The Society has no comments to make on this section.

Section 70 – Immunity from damages

The Society has no comments to make on this section.

Section 71 – Effect of professional or other rules

The Society has no comments to make on this section.

Part 3: Confirmation Services

Sections 72-85

This part provides the structure for the approval of professional and other bodies as “approving bodies” for the purposes of approving confirmation agents who can prepare papers for the confirmation of executors. The Society is of the view that the reserved areas (including executry practice) should remain as they are currently constituted.

If the Government wishes people to be able to practice as confirmation agents this must be on a level playing field with other practitioners providing confirmation services, namely solicitors and executry practitioners. Accordingly, the creation of any approving body and any regulations made under sections 73 and 74 should require the consent of the Lord President. Confirmation agents should require to hold an annual licence from the approving body and should hold professional indemnity insurance and either fidelity guarantees or maintain a compensation fund to ensure consumer confidence and public protection.

The range of sanctions which may be taken by an approving body in relation to a confirmation agent in the event of a conduct complaint should include censure and a compensation order.
Part 4: The Legal Profession

Section 86 – Application by the profession

Section 86 applies the regulatory objectives to the Society and other regulating authorities. Confirmation approving bodies and confirmation agents are not mentioned here.

It has already been suggested that, in view of its importance, this section should be moved into Part 1.

Section 86(3) defines what is meant by the regulatory functions of inter alia the Council of the Law Society for the purposes of that section. It differs from the definition in section 23 for the purposes of Part 2 which refers to functions regulating the professional practice of legal practices and it does not distinguish those functions from its representative functions. It is also different from the definition in section 3B(9) of the 1980 Act as inserted by section 93(2) which refers to solicitors and incorporated practices. Such differences create issues of interpretation, which ought to be clarified.

Sections 87-89 – Regulation of the Faculty/changes to Faculty’s rules

The Society has no comment to make on these sections.

Section 90 – Qualified persons

Section 90(6) amends the definition of “unqualified person” in section 65(1) of the 1980 Act. The amendment refers to “legal services provider as defined in Part 2” but it does not identify where it is defined. It is suggested that, in the interests of clarity, the amendment should refer to where it is defined, namely section 33C(4) of the 1980 Act as inserted by section 91(1). It would even be better if there was a similar definition inserted in section 65(1) because it is difficult to find that definition for the purposes of other provisions in Part 2 cf the definition of incorporated practice in section 65(1).

Section 91 – Changes to practice rules

Section 91(1) inserts section 33C into the 1980 Act which invalidates any rule made under section 34 “which prohibits or unduly restricts” certain matters. There is likely to be uncertainty as to whether a particular rule “unduly restricts” those matters. There should be some further clarification.

Section 92 – Council membership

Section 92 empowers the Council to appoint non-solicitors to the Council. Scottish Ministers reserve the power to make regulations regarding criteria for members, subject to consultation. In new section 3A(3)(b) of the 1980 Act, inserted by section 92(2)(c), are the Society’s ‘objectives’ the same as the objects of the Society under section 1 of the 1980 Act?
Section 93 – Regulatory committee

Section 93 puts the regulatory committee on a statutory footing. There are issues regarding the definition of regulatory functions in new section 3B(9). Professional practice in the Society's understanding includes guidance and advice on professional ethics as well as the formulation and interpretation of rules, granting of waivers and analogous procedures of a regulatory nature. The definition therefore needs some further thought. In this connection, reference should also be made to the definition of “regulatory functions” of the Law Society in terms of section 86(3).

Section 94 – Removal from the solicitors roll

The Society has no comments to make on this section.

Section 95 – Exclusion from giving legal assistance

The Society has no comments to make on this section.

Section 96 – Availability of legal services

The Society has no comments to make on this section.

Section 97 – Information about legal services

Section 97 gives SLAB the power to require the Society, the Faculty and the Scottish Court Service to provide information in order to fulfill its obligations to Ministers. This obligation should be extended to any approved regulator.

Section 98 – Minor amendments

The Society has no comments to make on this section.

Sections 99 – 102

The Society has no comments to make on this section.

Schedule 1 – Performance targets

Does paragraph 2(2), which obliges a regulator to ‘do its best’ impose any kind of justiciable obligation?

Schedule 2 – Directions

The power to issue directions highlights the constitutional issue of Scottish Ministers having control over the providers of legal services. Providing the Lord President with a requirement to consent to directions would be an additional safeguard.
Schedule 3 – Censure

The power to censure highlights the constitutional issue of Scottish Ministers having control over the providers of legal services. Providing the Lord President with a requirement to consent to directions would be an additional safeguard.

Schedule 4 – Financial penalties

With regard to the appeal grounds, these are lacking inasmuch as there is no appeal on an issue of fact. This should be corrected.

Schedule 5 – Amendment of authorisation

The Society believes that the Lord President should consent to any amendment to an authorisation.

Schedule 6 – Rescission of authorisation

The Society is of the view that Scottish Ministers must accept the advice of the Lord President.

Schedule 7 – Surrender of authorisation

The Society has no comments to make on this schedule.

Schedule 8 – Investors in licensed providers

Paragraphs 1 and 3 contain requirements to give information. The requirements at paragraph 1(3)(a)(ii) seem to be extremely broad. This requires some clarification.

2 December 2009
INTRODUCTION

The Law Society of Scotland (the 'Society') welcomes the opportunity to comment on the Legal Services (Scotland) Bill – Financial Memorandum and has the following comments to make:

Consultation

Question 1 – Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

There were no questions regarding financial assumptions in the consultation exercise.

Question 2 – Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable.

Question 3 – Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

Question 4 – If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

If the Society seeks to become an approved regulator and the application is approved, there will be financial implications for the Society in that capacity.

The Financial Memorandum correctly states that there are two broad categories to the costs of being an approved regulator, namely:

- The costs of becoming an approved regulator; and
- The costs of running the licensing regime once approved.

Some of these costs will depend on the number of licensed providers likely to be established. The Financial Memorandum correctly states that this is a
difficult estimate to make. However, the memorandum goes on to say that it may be in the range of 150-250 (paragraph 236), and later uses the figure of 200 licensed providers to estimate the unit costs of regulation (paragraph 245). It is not clear where these figures come from. The Society is concerned that the figures are overly optimistic, especially as a starting point, in the current economic climate. The Society expects most firms that choose to become ABSs will be those which are currently Incorporated Legal Practices. There are currently 197 of these practices operating. It is unreasonable to expect that all or a very high percentage will become ABSs, but that would be the only way to reach the number of firms suggested in the Financial Memorandum. Furthermore, even if many firms eventually becomes ABSs, it may take some time for the option to gain popularity - by way of example Incorporated Legal Practices began in 2001 and uptake was slow initially.

The Society believes that the costs of setting up an ABS regulatory regime will involve costs for regulators. This cost is not discussed in the Financial Memorandum except in passing, but is likely to be more substantial than is suggested in the Memorandum. As set out in section 5 of the Bill, applying to become a regulator will involve:

- Developing a proposed regulatory scheme for licensing and regulating legal services, which includes the development of licensing rules and practice rules
- Developing a statement of policy
- Providing a description of its constitution and composition, its representative functions and other activities
- Providing other information as required
- Paying any fees that are charged

The development of a regulatory scheme to fit the new regime is likely to involve considerable time and expense for those hoping to become approved regulators. The Financial Memorandum does not set out how these costs are to be covered by approved regulators.

The Financial Memorandum goes on to estimate costs per LSP, based on the SLCC becoming an approved regulator. The Society again notes that estimate is based on the figure of 200, which may be overly optimistic, at least at the beginning of the licensing regime. Furthermore, the accounting given is simplistic and does not fully consider of some of the necessary costs such as governance costs which cannot be simply based on an organisation created for a very different purpose (e.g. complaints handling work). The Society notes that even though it is apparent that estimating costs is very difficult, approved regulators are being asked to provide information about proposed fees, assumed to be an initial application fee and an annual renewal fee.

The Society is currently beginning work on the financial modelling for a regulatory scheme, but until more details about regulations are known, it is very difficult to create a useful model. For example, section 24 requires an approved regulator to assess each LSP at least once every three years and
prepare a report on the assessment. 24(9) allows Scottish Ministers to make further provisions about this section. The cost of this duty may vary substantially depending on what will be required for the report. A desktop assessment based on paper forms completed by the LSP is likely to cost an approved regulator substantially less than an assessment where the approved regulator must visit each LSP. This is just one example of a case where more guidance is needed before the Society will be able to estimate costs.

Finally, the Society believes there are some implications that have not been taken into account. For example, the Bill includes among its objectives the promotion of access to justice and competition. It is possible that the Bill may have an adverse impact on these objectives which may have knock on costs, such as the requirement under section 11(2) to consult the OFT.

**Question 5 – Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

The Society believes it would meet its financial costs out of existing resources, in anticipation of recouping losses through licensing. That is of course predicated on the Society being accepted as a regulator, and receiving a reasonable number of applications to become LSPs.

The Society notes that under section 35 of the Bill, Scottish Ministers have step-in powers to act as an approved regulator should the need arise, which would require a substantial budget. In light of these powers, there may be scenarios where it would be prudent to support approved regulators, particularly with start-up costs.

**Question 6 – Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

As discussed above, the estimates set out in the Financial Memorandum are based on insufficient empirical evidence. The Society is concerned that they may fall outside a reasonable margin of uncertainty, particularly with respect to the estimate of take up by 200 licensed providers.

**Question 7 – If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

Not applicable.

**Question 8 – Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

Yes. The Bill provides Scottish ministers with a broad ability to make a number
of regulations. There may very well be costs associated with these regulations. The Bill currently gives Scottish Ministers the power to make regulations under 35 different provisions within the Act. Given these powers, it appears quite likely that there will be new subordinate legislation and developed guidance. It is difficult to quantify these costs.

Furthermore, there is a need to consider knock on costs to the Society, such as the potential impact the Society is concerned that as some firms choose to take the ABS route, the Bill may have an impact on both our Guarantee Fund and Master Policy. There is currently no provision in the Bill for a compensation fund. The Society believes a compensation fund is necessary to protect consumers. Also, if LSPs are not required to pay into a compensation fund, it creates an uneven playing field between LSPs and traditional firms.

No consideration seems to have been given to the possible cost implications for the Scottish Legal Complaints Commission in terms of its oversight regulation role which currently only extends to The Law Society of Scotland and the Faculty of Advocates but would require to extend to all regulators involved in the regulation of legal services providers to ensure a level playing field. Consideration also needs to be given to how the costs of the Commission would be recovered with this wider remit and if it was asked to carry out specific tasks for Scottish Ministers, for example the investigation of a regulatory complaint. As provided for in section 27(1) of the Legal Profession and Legal Aid (Scotland) Act 2007, it is only practising solicitors, advocates, conveyancing and executry practitioners and those non-legal professionals with rights of audience who pay an annual general levy to the Commission.

Finally, the Society welcomes the fact that the Bill does not contain provision for a Legal Services Board similar to the one in operation in England and Wales. This extra layer of governance has resulted in significant costs, which will ultimately be borne by the consumer of legal services or the tax payer.

2 December 2009
This Bill follows on from a consultation process carried out by the Scottish Government. As well as the formal consultation exercise which occurred in the early part of this year, there has been a Bill Reference Group of interested stakeholders. In addition, I have been consulted informally regarding certain aspects of the Bill at appropriate stages.

I want to indicate that I am not opposed to the general principles of the Bill. This means that I am of the view that the new arrangements which are proposed do not contain fundamental threats to the due administration of justice which cannot be contained by appropriate action taken under the legislative scheme which the Bill creates. In particular, I reiterate the view which I expressed in response to the consultation to the effect that I am not in principle opposed to the introduction of alternative business structures for the provision of legal services by solicitors in Scotland. This is contingent on the inclusion of adequate safeguards to be built in so as to ensure that the core duties of solicitors themselves are not compromised.

I see a key safeguard as being the approval, under section 6 of the Bill, of regulators of alternative business structures. In response to the consultation I indicated that I agreed with the proposal that this approval ought to be by the Scottish Ministers with the agreement of the Lord President. I see the Lord President as having a key role here. This is only partly in order to safeguard the quality of representation before the Courts. It is also so as to safeguard the necessary independence of the legal profession from government. The Lord President also has a general role of superintendence of the solicitor branch of the legal profession going beyond those members appearing in court; under the Solicitors (Scotland) Act 1980 the Lord President must approval all practice rules of the Society. In view of all these considerations, I remain of the view that the agreement of the Lord President should be required in relation to the regulation of alternative business structures (by which I mean the approval or decommissioning of a regulator or any alteration of the regulation). It may of course be that the considerations which the Lord President requires to take into account in deciding whether to agree are narrower than those which the Scottish Ministers require to take into account. If so, that can be reflected in the Bill. But I remain of the view that a consultative function is insufficient here.

Finally, I should indicate that I have considered the proposals for regulation of the Faculty of Advocates set out in Chapter 2 of Part 4 of the Bill and am content. In due course the Court will require to consider the detail of the regulation of the Faculty in light of the regulatory principles imposed by the Bill. This may of course lead to some modification of the current arrangements.

AC Hamilton
Lord President
16 December 2009
We refer to the Justice Committee’s Call for Evidence on the general principles of the Legal Services (Scotland) Bill.

We welcome the Bill as providing a more responsive and flexible framework within which providers of legal services based primarily in Scotland should be able to operate competitively and effectively in future. Our key concerns as a firm operating across the UK (and indeed, in terms of our client base, globally) are to ensure that we have an appropriate mix of resource available so as to be able to respond to client needs. We also believe it is in our interests as a firm that the legal profession should maintain a good reputation for high quality advice backed up by a strong complaints process and insurance arrangements, such that users of our services understand that there is real merit in using high quality legal services providers. Having said that, whilst we welcome principle-based and proportionate regulation, over-regulation can itself hinder competitiveness and should be avoided. There is, in our view, no evidence that the current regulatory framework is too lax and whilst any new framework for licensed providers should be transparent, it should not be over burdensome.

Against that background, we have the following comments in relation to the general principles of the Bill:

1. We welcome the permissive nature of the Bill, such that firms can remain regulated as they are, or seek to avail themselves of the new structure permitted by the Bill. Likewise, we agree that the regulatory net should not be widened. If providers of legal services wish to bring themselves within the regulatory net, so as to be able to describe themselves as licensed providers, they can do so relatively easily, but they then assume the burdens of compliance with the regulatory regime in return. In practice, the attractiveness of becoming a licensed provider under the new regime is likely to turn on the costs of adopting a new structure (principally, the costs of funding a new regulatory framework with few users amongst whom to spread the costs); and

2. We welcome the extension of privilege to cover legal services given by licensed providers. We understand the effect of s.60 of the Legal Services (Scotland) Bill to be, essentially, that privilege will attach to communications made by a licensed provider, who is not a solicitor but is providing legal services. In competition proceedings, \textit{AM & S v Commission 1982} stipulates that privilege will apply to written communications with lawyers “entitled to practise their profession in one of the Member States”.
The later Court of First Instance case of Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission 2007 to some extent reformulates this by not taking the matter of qualification into account and focusing on the concept of independence. We simply note for completeness the mismatch between the narrow scope of privilege under the AM&S formulation (in the context of competition investigations) and that of s.60.

Magnus P. Swanson
Chief Executive
16 December 2009
The perspective I bring to this written submission is that of a practitioner in private practice for approximately 18 years, thereafter Chief Executive Officer of the Law Society of Scotland for approximately 12 years and for the last year as Director of Professional Legal Practice at the Law School in Glasgow University and the principal of Douglas Mill Consulting. I was also involved as a Law Society of Scotland delegate in all Council and General Meetings and external meetings with the Scottish Justice Department and indeed Sir David Clementi in the run-up to the English White Paper. It is for that reason that I share the surprise of a number of solicitors in Scotland at the very significant and not wholly explained volt-face in Law Society of Scotland policy in relation to Alternative Business Structures. I would stress that the evidence/opinion contained in this Memorandum is however entirely personal. I have no vested interest in the outcome of this Bill.

Whilst there are literally dozens of issues contained in this Bill which I would welcome the opportunity to comment on in detail I will confine myself to what I see as the main issues from a legal, economic and regulatory perspective.

1. Perhaps the most surprising and disappointing aspect of this Bill is its lack of any significant research base. I was privileged to serve on the Scottish Executive’s Research Working Group on the legal services market in Scotland which reported in 2006 (ISBN: 0-7559-4937-4). This Group, comprising over 20 members representing all aspects of the legal profession and consumer interest produced a report in excess of 200 pages looking at a number of issues and seeking to identify a Scottish evidence base in the light of the then ongoing Clementi Report in England and Wales.

One of the issues examined was restrictions on business structures and the conclusion reached by the Committee was “The issue of Alternative Business Structures appeared to be likely to stay on the agenda and policy development work would be required to establish the extent to which they suited Scottish circumstances and how they might be best regulated if they were to become a reality in Scotland.” To the best of my knowledge no subsequent research or policy development took place. Particularly when this Report identified not just one market for legal services in Scotland but a number of segmented geographical and practice area markets, it is at best very surprising for a Parliament committed to introducing evidence-based
legislation to be proceeding without the underpinning research which such a profound piece of legislative change demands.

2. We are in the deepest recession the country has experienced in approximately 80 years. The philosophies behind this Bill are conceived in the heady days of the late 90s and early 2000s and surely require examination in the current economic climate. For instance, what would have happened to the legal profession had “institutional investors” taken over a number of significant firms in Scotland prior to the recession? Are the “big” firms in Scotland who profess interest in outside investment still as attractive an economic proposition as they were two or three years ago? Perhaps big is not as beautiful as it seemed when similar legislation was passed in England and Wales.

It is also surprising that, even if it is considered that the direction which this Bill takes the provision of legal services in Scotland is desirable there is no cautious desire to see how matters develop south of the border.

3. Independence of Scots Law and the Scottish Legal Profession - The Bill strikes directly at the heart of these and it is worrying to hear in some quarters that saying so is in some way “scare-mongering”. The potential for direct Governmental control of the legal profession contained in for instance section 35 could reduce Scotland to the type of legal profession seldom seen outside South America and Equatorial Africa. Whilst there are significant pressures towards the assimilation of Scottish and English law it surely ill-becomes a Scottish Parliament to facilitate that. I detect that the proponents of this Bill consider that opposition is in some ways Luddite and resistant of change. They set England and Wales up as the inevitable future but sadly ignore the profound opposition that the legal profession throughout Europe and in North America have to such outside investment and governmental control. Indeed this issue is and has been high on the agenda of the International Institute of Law Association Chief Executives at Annual Conference and is the subject of a concerned editorial in this month’s Canadian Bar Association Journal. This issue includes rights of audience complexities for large English firms which I understand are not wholly dealt with.

4. Regulatory Difficulties – I agree with the issues mentioned by Professor Alan Paterson from Strathclyde University in his Written Submission. I would say however that in my experience of being effectively the regulator of the legal profession in Scotland for approximately 12 years, my views are stronger based on significant direct experience. These difficulties take a number of forms:-

(a) Regulation of solicitors at the moment is a relatively straightforward matter as the ultimate penalty is striking a solicitor off the Roll of Solicitors and
denying him/her their livelihood. No such significant penalty will apply to non-lawyer proprietors.

(b) Regulating “conventional” solicitor firms and Alternative Business Structures is a profound conflict and an impossibility for the Law Society of Scotland. It is one thing for the Law Society to continue to regulate the conduct of individual solicitors employed in Alternative Business Structures but a practical impossibility for them to regulate the type of enterprise which could be attracted into the market.

(c) Combining regulation and representation. This obligation was contained in section one of the 1949 Act which established the Law Society of Scotland and remained possible and appropriate for well over 50 years. It is now for a range of reasons in terms of both actuality and perception, an impossibility. Whilst it would be entirely inappropriate for me to comment personally, recent moves amongst the high street profession to question the Law Society’s democratic/moral authority to represent its views are evidence of the profound change in the profession’s view of the Society’s ability to fulfil both halves of the section one obligation. Others in evidence have/will expand on this though from my experience of consulting with a large number of established practices, it would appear that they believe quite profoundly that the Law Society of Scotland stance in relation to this Bill is reflective of nothing more than their own self-interest and the desire to facilitate matters for large Scottish firms at the expense of the grass-roots. I appreciate these are controversial comments but they are borne out by a number of recent statements I have seen in the legal press.

The Law Society’s apparent acceptance of section 92 of the Bill which simply allows Scottish Ministers to control the representative body is, in the view of many, the final nail in its coffin as a representative body.

5. Rule of Law Issues – Whilst money laundering obligations sat uncomfortably on solicitors’ duties of confidentiality when they were introduced, they are now accepted as entirely necessary. Indeed the Law Society of Scotland and the legal profession in Scotland are to be congratulated for their excellent record in this area. The Bill quite simply facilitates ownership of legal firms and their use as money laundering portals. As Professor Paterson says, “Ensuring that the fitness for involvement test is effective to exclude criminal elements from investing in or taking control of law firms is a significant issue.” Significant and impossible to ensure. I have spoken to solicitors in Glasgow involved in criminal law who are very well aware of the potential danger of control by criminal elements. This will defy any simple test. When this issue was raised by the Law Society with the then Deputy Justice Minister Hugh Henry some years ago he was able to identify the real issues involved in certain areas of Scotland. The money laundering rule of law and mortgage fraud implications
are such that with the greatest conceivable respect the mechanisms in the Act are frankly risible. Again Professor Paterson is correct in identifying that for the protection of the public, the Guarantee Fund presently operated by the Law Society of Scotland is essential. It is entirely inappropriate for traditional solicitors to be asked to be joint and severally liable for the financial actings of non-lawyer proprietors. The alternative is the funding of a separate Guarantee Fund for Alternative Business Structures. This is an area where the Government has to be careful or the disaster of the Scottish Executry Services Board will be repeated.

I appreciate that the current Justice Committee will perhaps be unaware of the SCESB debacle. As a result of pressure from England and Wales the Westminster Government was forced to introduce in Scotland Licensed Conveyancers to compete with solicitors. Again no cognisance was taken of the different history, demographics and work areas of the profession North of the Border. Suffice to say that despite warnings from the Law Society of Scotland SCESB turned out to be unnecessary and a total failure. The Law Society of Scotland eventually was asked by the Scottish Government to take over the regulation of what I now understand to be no more than two/three Independent Licensed Conveyancers. The point of raising this is to highlight that dogma-based legislation can be costly to the public purse. The cost of running SCESB for a number of years including funding a Fidelity Fund and PI was a significant seven figure sum. The Justice Committee would be well advised to ensure that such history does not repeat itself.

6. A Regulatory Architecture – I have to say in passing that the financial memorandum is totally and utterly unrealistic. For Alternative Business Structures to work in Scotland on a regulatory basis there requires to be a strong body independent of both the Law Society of Scotland and the Government and it has to be funded properly. In other words, there would require to be a Scottish equivalent of the Legal Services Board down South with all the costs that would imply. One alternative is however for the English Legal Services Board to have jurisdiction over ABSs with “outlets” in Scotland although this may correctly be seen as politically inappropriate.

Douglas Mill
3 January 2010
Justice Committee

Legal Services (Scotland) Bill

Written submission from the Office of Fair Trading

1 Introduction

1. We welcome the Scottish Government’s Legal Services (Scotland) Bill (‘the Bill’) and the opportunity to comment thereon. We strongly support the introduction of Alternative Business Structures (‘ABS’). We believe it will allow those legal service providers who wish to adapt their businesses to the most efficient model that meets their customers' needs. This will consequently allow the market to work better for consumers.

2. In our view, ABS are likely to produce consumer benefits, such as more choice, higher quality services and lower costs. Their introduction in Scotland is likely to contribute positively to competition in the supply of legal services throughout Scotland and thereby benefit the Scottish economy and the public as a whole.

3. We welcome the removal of restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership.

4. Our key recommendations set out in our response to a consultation paper¹ produced by the Scottish Government (‘the SG’) on the regulation of legal services in Scotland (‘Consultation Response’)² were that:

   • The Bill and its regulatory objectives should apply not only to ABS but to traditional forms of practice and to all legal professionals including advocates.
   • Both the Law Society of Scotland and the Faculty of Advocates should separate their regulatory functions from their representational functions with a lay majority voting on regulatory and non-membership issues.
   • Scottish Ministers should exercise their oversight function with the assistance of a consumer advisory panel.
   • The Faculty of Advocates blanket restrictions on members forming partnerships and joining ABS should be lifted.

• The SG should consider a review of the QC appointments process.

5. We also set out the competition scrutiny role we envisage will be the most effective and most valuable to the Scottish Ministers (‘SM’) when determining competition issues and meeting the competition regulatory objectives in the Bill. This should ensure a more competitive legal services market in Scotland providing lower fees and increased choice for consumers, providing benefits to the Scottish economy as a whole and also serve the wider public interest.

2 The competition scrutiny role of the OFT

6. The Bill places a responsibility on SM to provide external oversight over professional or other bodies known as Approved Regulators which are seeking to license ABS. In England and Wales this oversight role is undertaken by an independent body, the Legal Services Board (‘the LSB’). The SG does not favour the creation of such a body.

7. The establishment of an oversight regulator has the effect of substantially removing professional rules within its remit from the scope of both UK and EC competition enforcement provisions namely the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly Articles 81 and 82 of the EC Treaty). This is because SM are unlikely to be considered ‘undertakings’ under these provisions (as SM are not engaged in economic activity). As such rules made by SM are not rules made by an undertaking and do not fall to be considered under these provisions. Alternative scrutiny arrangements are therefore required.

8. We would favour a mechanism whereby the OFT would be consulted by SM, on competition issues. Such a provision appears to exist in section 61, although the section is not entirely clear (see paragraph 15 below).

9. We would also wish to be able to bring to the attention of SM such competition issues that may from time to time arise in relation to the regulation of legal services. As a corollary, the Bill should provide an obligation on SM to respond to competition issues raised.

10. Existing provisions for effective competition scrutiny which bear consideration are found in the provision in section 57 of the Legal Services Act 2007 (‘the LSA 2007’). These provide OFT with an ongoing power to scrutinise regulatory arrangements and report to the LSB and a duty on the LSB to respond to competition concerns raised by OFT. In this capacity, OFT has investigation powers under sections 174 (3) to (5) of the Enterprise Act 2002 (‘the EA 2002’).

---

3 OFT 1076, April 2009, page 12
4 Section 4
11. These provisions allow OFT to be active, not merely passive, about competition concerns and to ensure that the LSB responds to these when raised.

12. We wish to draw to the Justice Committee’s attention that the Bill imposes no duty on SM to respond to OFT’s concerns. We feel that the effect of such an omission is that Scottish consumers may not benefit from similar competition scrutiny arrangements as consumers in England and Wales.

**Competition scrutiny powers under LSA 2007**

13. The LSA 2007 defines five areas where the OFT has been given a specific role:

- A. Section 57 (as referred to in paragraph 11 above) provides the OFT with the power to investigate if it perceives the behaviour of any approved regulator to be anti-competitive.
- B. Schedule 10 commits the LSB to seeking advice from the OFT on applications from regulators to become ABS licensing authorities.
- C. Advising on the recognition of new approved regulators in Schedule 4.
- D. Advising on additions, amendments and subtractions from the list of reserved activities in the terms set out under section 24 and 26, with the procedure defined in Schedule 6.
- E. Commenting on any proposals for the LSB itself to become an approved regulator defined in section 66.

14. The Bill does not include provisions A, D and E. Section 6 of the Bill commits SM to consult the OFT before deciding whether to approve an applicant as an approved regulator which is similar to the OFT’s role under B and C above.

15. There are provisions in the Bill such as in section 11 giving approved regulators discretion to consult the OFT where it believes that the granting of a licence may prevent or significantly restrict or distort competition. A similar test exists in section 61 though is unclear in which circumstances this would apply. The guidance notes suggest that this in relation to all competition matters but this is not reflected in the provision and we would suggest that this is clarified in the section.

**Competition scrutiny powers under the Bill**

16. The role of the OFT under the Bill is set out in the following sections:

- The OFT must be consulted by SM before deciding whether or not to approve an applicant as an approved regulator (section 6(3)).
- In respect of licensing rules, the OFT must be consulted where the Approved Regulator believes the granting of the licence application may have the effect of preventing competition within the legal
services market or significantly restricting or distorting such competition (section 11(2)).

- In respect of the regulation of licensed legal services, section 61 concerns the occasions when SM and Approved Regulators consult with the OFT in relation to competition matters and what they must do. SM and the approved regulators must take into consideration any advice given by the OFT (section 61).

- In respect of confirmation services, the OFT must be consulted by SM before deciding whether or not to certify an applicant as an approved body. In consulting SM must send the OFT a copy of the application and may send a copy of any revised application (section 74(3) and (4)). There is an obligation on SM to take account of any advice given by the OFT within the relevant timescale when they consult the OFT (section 82).

- In respect of advocates, SM must consult the OFT and approve a change in any professional practice, conduct or disciplinary rule which prevents advocates from forming partnerships, before such a rule can have effect (section 89). It supersedes a similar rule in section 31 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

- SM have the power to make directions in relation to an approved regulator. Where SM consider that the proposed direction may have the effect of preventing competition within the legal services market or significantly restricting or distorting such competition, the OFT must be consulted (Schedule 2(4) (3)).

- SM must send the OFT a copy of a notice of intention to rescind the authorisation of an approved regulator and consult the OFT accordingly (Schedule 6(4) (2)).

- SM must send the OFT a copy of a notice an approved regulators notice if surrender of authorisation and consult the OFT accordingly (Schedule 7(3) (1)).

17. As noted in paragraph 10 above the Bill provisions do not seem to provide a role for the OFT where it can provide symmetry of advice in both jurisdictions. This may result in a less effective competition scrutiny in Scotland.

18. We appreciate that powers exist under the EA 2002 which would allow the OFT to investigate and or refer any concerns by way of a market investigation reference to the Competition Commission. However we anticipate that the use of these powers could be seen to be disproportionate. They arise where OFT sees that there are features of a market which prevent, restrict or distort competition and must decide whether to make a market investigation reference (or accept undertakings instead). These provisions were not

---

specifically designed to provide competition scrutiny over an oversight body. It would be preferable for the Bill to place a duty upon SM to respond to competition concerns.

19. We also observe the absence of the powers of investigation under sections 174 (3) to (5) of the EA 2002 which may be due to issues of devolved competence. The effect is that the OFT would be unable to compel the production of evidence when considering whether the regulatory arrangements of an approved regulator (or any part of them) prevent, restrict or distort competition within the market for reserved legal services to any significant extent. This would therefore inhibit information gathering powers and could limit the effectiveness of any competition assessment.

20. We also note that the Bill omits a provision that SM may seek the advice of the OFT in relation to any additions, amendments and subtractions from the list of reserved activities and the OFT can choose to respond. We appreciate changes to the current reservations are not currently contemplated. However, we anticipate that it would be useful to provide for the future assessment of any such changes.

21. It would also be helpful if OFT could be invited to comment on any proposals for SM to become a temporary approved regulator as contemplated in section 35. (Such a provision exists under section 66 of the LSA 2007.)

3 The Faculty of Advocates (the ‘FOA’) and ABS

22. We are disappointed that the FOA will not permit the participation of advocates in ABS. As stated in our Consultation Response we have identified the prohibition on advocates forming partnerships with other advocates or with other professionals as amongst the most restrictive of competition.

23. Allowing partnerships between advocates and others has the potential to increase the availability of advocates, by attracting practitioners to new areas of practice and would pave the way for young barristers to gain varied legal experience. We do not consider that the operation of the ‘cab rank’ rule justifies this restriction. We have questioned whether the ‘cab rank’ rule does in fact ensure the right of representation since advocates may already decline a brief on the grounds of work load and have some scope therefore to

---

6 OFT 1076, April 2009, pages 17 - 18. See also:

OFT Report in Professions, March 2001 paragraph 50;
Consultation on the future regulatory framework for legal services in England and Wales, OFT 722, June 2004, paragraph 3.2;
Report by the Research Working Group on the Legal Services Market in Scotland, 2006, paragraphs 8.8-8.11, 8.23,8.24 and 8.42; and
OFT Response to Which? Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession, OFT 946, July 2007, Chapters 3 and 4
balance their workload and types of cases. We also queried the suggestion that removal of the existing rule would cause some clients to be significantly hampered in securing Counsel of the appropriate skill and experience.7

24. The ability of advocates to transfer to the solicitor advocate branch in order to participate in ABS does not alleviate the competition concerns of the OFT. We believe that the current arrangements for transfer lack transparency and appear to incur costs of time and loss of perceived status. There does not appear to be reciprocity for advocates who have become solicitor advocates to rejoin the advocate branch. The status of solicitor advocates as a relatively new branch of the profession is still being developed. Given the historical dominance of FOA members in advocacy in the Higher Courts, there are questions about whether transfer from this prestigious branch, losing a badge which appears to carry weight both with clients and with the courts, imposes a significant professional cost to practitioners.

25. One such cost may be, as described to the OFT, the perception that a solicitor advocate is less likely to earn the QC title than an advocate. In our Consultation Response,8 we revisited the discussions of the Research Working Group on the Legal Services Market in Scotland9 and the proposal that the award of QC status should be examined further, as recorded by the Group's report. The arrangements are of relevance to the question of comparability of status between solicitor advocates and advocates as well as in the wider context of consumer information. We believe there is a need to consider how this title is awarded, whether it is in the interests of consumers and whether it distorts competition. In general, the OFT considers for the QC appointments process to function effectively:

- appointments should be made on an objective basis;
- the appointment process should be fair and transparent and performed by a selection panel composed of professional and lay interests;
- entry should be subject only to candidates meeting a standard without influence of any kind of quota; and
- awards should be revalidated from time to time, and be capable of being withdrawn.

26. We note that the appointment process is still performed by a senior judge and selection is at his discretion, in light of views sought from other senior judges and senior members of professional bodies. This does not appear to meet the criteria the OFT has sought and we would propose that the SG should take this opportunity to review and develop the process.

7 OFT 1076, April 2009, page 18
8 OFT 1076, April 2009, pages 19 - 20
4 Oversight of the approved regulators

27. In our Consultation Response, we reiterated our strong preference for the oversight function to be performed by a new independent public body, such as the LSB in England and Wales. However, in the absence of such a body, we suggested that the oversight function of the approved regulators should be exercised by SM together with an advisory panel, subject to competition scrutiny by the OFT.¹⁰

28. We have expressed concerns that requiring the Lord President's agreement would be seen to introduce a possible conflict of interest, given his position as a judicial officer and a member of the profession. Regulatory independence of the oversight body is crucial to the credibility of the legislation with consumers and the general public.

5 Time limits for authorisation of approved regulators

29. We are disappointed with the inclusion of section 7(4)(a)(i), which allows authorisation to act as an approved regulator to be awarded without limit of time. We consider it necessary to have in place a robust procedure to review the authorisation of approved regulators, including reviewing how their regulatory scheme adheres to and applies the regulatory objectives and obligations. We therefore would wish to see the removal of section 7(4)(a)(i) so as to ensure that authorisation to be given only on a time-limited basis.

6 ‘Fit to own’ test

30. We have supported the introduction of the ‘fit to own’ test for ownership of a licensed legal service provider. We assume that the presumption in the Bill that an outside investor will be fit to own if qualified to practise as a solicitor is because a solicitor’s fitness to own is dealt with by the regulation of the individual solicitor.

31. This however deviates from the current proposals in England and Wales where the LSB has proposed that there should be one test for all owners of an ABS, whether they are lawyers or non lawyers. The objective of this provision is to ensure consistency across all licensed authorities so that ABS regulated by one licensed authority are not perceived to be riskier than those regulated by another licensed authority.¹¹

¹⁰ OFT 1076, April 2009, page 11
32. The LSB has also proposed that there will be an obligation to notify the appropriate regulator of any change of circumstances that is relevant to the test.\textsuperscript{12} We assume that rules placing such an obligation on ABS owners in Scotland would be a requirement of an approved regulator’s regulatory scheme, to ensure that if an outside investor, including a qualified solicitor, was no longer deemed fit to own, the regulator must be informed.

7 Separation of regulatory and representational roles

33. The OFT considers that it should be a pre-condition of the continuing regulatory involvement of the Law Society of Scotland (the LSS) and the FOA that they separate their regulatory and representative functions and do so to the satisfaction of the oversight body. We consider this critical to ensuring that regulation is in the public and consumer interest.

34. We believe that securing the independence of the regulatory arm acting with demonstrable independence from representational interests would be best achieved by a completely separate regulatory body. This is the model now in dentistry and in medicine with the British Medical Association and the British Dental Association representing members and the General Medical Council and General Dental Council regulating those professions. However we appreciate that the formation of a new body may not immediately be feasible but it should be a long term objective.

Governance of the Law Society of Scotland (‘the LSS’)

35. We welcome the proposals in the Bill to modernise the governance of the LSS. We welcome the requirement for the LSS’s regulatory committee to comprise of at least 50 per cent lay membership with a lay convenor.\textsuperscript{13} We agree with Consumer Focus Scotland that there should be a lay majority on the LSS Council as this will enhance public perception that the LSS is fulfilling its public interest role although we remain unconvinced that a representational body can do this effectively. We will be interested to see what steps the LSS will take in order to build public confidence, to make the public and consumers aware that it has a separate regulatory committee.

36. We also consider that the process for appointment of lay members is seen by both the public and the profession to produce qualified and genuinely independent members from a variety of backgrounds well suited to considering the consumer and public interest.

37. We believe the Bill could benefit from greater explanation of what is meant by the ‘representative functions’ and ‘regulatory functions’. We also query how regulatory independence will be safeguarded and suggest the Bill

\textsuperscript{12} Alternative business structures: approaches to licensing, Consultation paper on draft guidance to licensing authorities on the content of licensing rules, Legal Services Board, November 2009, paragraph 71

\textsuperscript{13} Section 93(3)
stipulates how and whom would carry out such the review contemplated in section 20(1)(c).

**Governance of the FOA**

38. We are also disappointed by the provisions relating to the governance of the FOA.

39. We do not believe the current provisions within the Bill offer sufficient clarity to allay fears about the lack of independent oversight of the FOA. The current provisions\(^{14}\) allow for the Court of Session to delegate regulatory responsibility to the FOA or Lord President but no further clarification is offered as to how this relationship would function in practice. We note the lack of any codified statement about how consumers or other individuals/organisations may refer regulatory concerns to the Lord President acting in his capacity as oversight regulator of advocates. We therefore remain concerned by the continued lack of clarity of the FOA’s regulatory and governance framework and believe the Bill would be strengthened if, as a very minimum, such further provisions clarifying these frameworks were to be added.

40. We consider that the FOA should have regulatory responsibility only where it can demonstrate that this will not conflict with its representational responsibilities. Consumers and the public at large are unlikely to trust any regulatory framework unless and until they are satisfied that it is separate and independent from representative self-interest.

41. The OFT’s view is that the FOA should also be regulated by the oversight body and that its representational and regulatory function split. If such amendment or alternation of the FOA’s prohibition of members joining ABS is not being pursued, we propose that the legislative framework should provide for the future alteration of the FOA’s governance structure without further recourse to primary legislation.

**8 Advisory panel**

42. In our Consultation Response, we favoured the setting of up an advisory panel which would represent the interests of consumers and to provide advice to SM (similar to the role of the Consumer Advisory Panel established under the LSA 2007 sections 8-11).\(^{15}\)

43. We are surprised that the Bill does not include provision for the establishment of an advisory panel to advise SM as this was a strongly favoured provision. The proposals for establishing an advisory panel were

---

\(^{14}\) Sections 87-89

\(^{15}\) OFT1076, April 2009, page 11
supported by more than three quarters of the consultation respondents.\textsuperscript{16} Whilst we welcome the intention of the SG, as set out in the Policy Memorandum accompanying the Bill, to use its powers to set up a panel at the implementation stage of the legislation,\textsuperscript{17} our preference is still for the advisory panel to be a statutory body to give it legislative backing.

44. In the absence of a new independent body as oversight regulator we believe an advisory panel would greatly assist SM in the exercise of their oversight role. We suggest that the panel be comprised solely of lay members from a diverse background, though including some with a clear consumer interest. We would strongly advocate including provision for such a panel in the Bill.

9 Regulatory objectives

45. We welcome the fact that the regulatory objectives will apply to all regulators of legal services in Scotland. Under section 38(1) (a) of the Bill, licensed legal services providers must have regard to the regulatory objectives. In order to create a level playing field this duty should be extended to all forms of practice and to all legal professionals including advocates.

46. OFT considers that there should be a single set of provisions that apply to the current structures and providers of alternative business structures. We are concerned that the higher standards for ABS might act as a disincentive for firms to move to ABS. It is important that the regulatory principles, which could be passported for some applicant approved regulators, are not seen as an added burden and have the practical effect of limiting the feasibility of some models of ABS, particularly some of the innovative models which may emerge in rural areas.

47. The OFT believes, as set out above, that the FOA and its members should similarly be subject to the regulatory arrangements set up under the new regime.

48. We welcome the inclusion of the objective of 'encouraging an independent, strong, varied and effective legal profession'. However, we are disappointed at the decision not to include the objective of 'increasing public understanding of the citizen's legal rights and duties' although we welcome the SG's recognition in the Policy Memorandum that this is an important policy aim.\textsuperscript{18}

\textsuperscript{16} Analysis of the Responses to the Consultation on the Regulation of Legal Services in Scotland, Research Findings No.15/2009, page 4

\textsuperscript{17} Policy Memorandum on the Legal Services (Scotland) Bill, 30 September 2009, paragraph 133

\textsuperscript{18} Policy Memorandum on the Legal Services (Scotland) Bill, 30 September 2009, paragraph 74
49. We are disappointed that complaints about approved regulators are to be made to SM rather than the Scottish Legal Complaints Commission (‘the SLCC’). We feel that this will have the effect of removing the single gateway for complaints. Our concern is that this may cause confusion for consumers. Moreover, while we note SM have the authority to delegate the investigation of such a complaint to the SLCC, the decision of whether the complaint is ‘frivolous, vexatious or totally without merit’ will always rest with SM.

50. We believe that consumer confidence in the complaints handling function is crucial and we are not convinced that there shall be such confidence in a complaints process if a decision as to the merit of a complaint lies with SM.

51. We are also concerned that there do not appear to be equivalent provisions to those contained in section 65 for approved regulators, for making complaints about how the regulators outlined in section 86 (which includes the LSS and the FOA) exercise their regulatory functions. We believe this requires to be set out in the legislation and we believe an appropriate body to deal with such complaints would be the SLCC.

10 Guarantee fund

52. We note that the Bill does not include any provisions in relation to the Guarantee Fund. While most claims are against sole practitioners as those who work in partnerships are likely to be covered by the Master Policy and under the Bill licensed providers would be required have an equivalent level of professional indemnity, our preference is for the Guarantee Fund to also apply to licensed providers so that consumers have the same protection irrespective of provider.

11 Professional indemnity

53. Section 19 includes a requirement for licensed providers to keep in place sufficient arrangements for profession indemnity and include a provision corresponding to that applying under section 44 of the 1980 Act in relation to incorporated practice. Currently this would be insurance under the ‘Master Policy’. We believe that ABS providers should have choices of insurance providers as indicated in our Consultation Response.¹⁹ We are concerned that any provision that might deny access to a range of insurers could inhibit development of ABS.

1 December 2009

¹⁹ OFT 1076, April 2009, page 17
Justice Committee

Legal Services (Scotland) Bill

Written submission from Professor Alan Paterson

Memorandum of Evidence to the Justice Committee from Professor Alan Paterson, Centre for Professional Legal Studies, Strathclyde University (The Centre is a think tank in relation to the legal profession, professional ethics, and access to justice). This evidence is given in my personal capacity.

Background

1. Alternative Business Structures are said to have many advantages for the public and the legal profession allowing greater innovation in delivery vehicles, new ways of providing holistic legal services and permitting non-lawyers to invest in providers of legal services. As against this it can also be said that there is little evidence of public or consumer demand for this reform, that it could permit supermarkets and bulk providers of legal services to cherry pick legal work in a way that may have a serious impact on high street law firms and on access to justice in rural areas. At a time when the regulation of financial services has conspicuously failed, the Government is right to argue in their Policy Memorandum (paragraph 46) that “light-touch” regulation is not the answer to the dangers inherent in the proposed reforms. Only robust regulation will do. We need adequate regulatory standards to protect access to justice in Scotland, especially in the rural areas and to sustain the rule of law and the proper administration of justice by insisting that those investing and participating in the provision of legal services through licensed legal services providers (LLSPs) are fit for ownership and practice. Moreover, LLSPs and those that work in them cannot be held to a lower standard of conduct and service or permitted to offer a lesser degree of public protection than the existing branches of the legal profession in Scotland.

Section 1 Regulatory objectives

2. I am happy with the drafting of the regulatory objectives. Although there was some debate in the England and Wales as to whether these should be ranked in any way, I do not believe that such a reform would strengthen the first section of the Bill and arguably it might weaken it.

Section 2 Professional principles

3. These principles are meant to enshrine the core values of the legal profession in Scotland and the UK, and could indeed do so, depending on how they are interpreted. On balance I consider that these obligations have been insufficiently spelt out. Whilst supporting headings (a) – (f) I would add a further
principle: (g) “act in a way that maintains public confidence in the profession” and elaborate headings (c) and (d) in the Bill. Thus heading (c) needs to stipulate that acting in the best interest of the client requires compliance with four further subsections:

   i) To observe the duty of confidentiality
   ii) To disclose all relevant information
   iii) To avoid conflicts of interest
   iv) To safeguard the client’s money and property.

The Government recognise that several of these are embodied within the duty to act in the best interests of the client (see the Explanatory Notes paragraph 14) but effective promotion and maintenance of this obligation requires that its content be spelt out in greater detail, especially if it is envisaged, as appears to be the case, that approved regulators might extend beyond the current regulators of the legal profession to include non-lawyer professional organisations. In my view these elaborations should be included in a schedule to the Bill.

Again in relation to obligation (d) I would suggest that as the Law Society has itself recognised, maintaining good standards of work entails compliance with four other standards:

   i) To be competent
   ii) To communicate effectively
   iii) To be diligent and
   iv) To show respect and courtesy

These could be included in delegated legislation. This would help to ensure that the degree of protection offered to the public by those working within alternative business structures or LLSPs will be same as currently pertains for clients of the legal profession today.

Part 2 Chapter 1 Approved regulators

4. The Government has accepted the bulk of the regulatory model for dealing with alternative business models which is enshrined in the Legal Services Act 2007 in England and Wales. However, they have rejected the concept of a super-regulator (the Legal Services Board) due to an unwillingness to create and fund another NDPB grounds (Policy Memorandum paragraph 51). This creates certain problems which Chapter 1 of Part 2 of the Bill does not entirely resolve. First, there may be a perception that the Ministers in exercising this function might cut across the independence of the profession. Given that Government will be required (rightly in my view) to comply with five principles of good regulation set out in the Better Regulation Task Force report (see Explanatory Notes paragraph 20) and subject to judicial review if they do not, I am not convinced that this is as big a threat to the independence of the profession as the
introduction of alternative business structures themselves. Some have argued that as a further protection to independence the Lord President should also have to approve applications to become an approved regulator, as well as Ministers. As a blanket proposition that might raise policy and accountability problems, however, there may be a more limited role for the Lord President, provided he is given adequate support staffing, to be satisfied as to the legal competence and professional probity of would be regulators. It would seem sensible that were the Lord President to have a determining role ( albeit over a lesser range of factors than Ministers ) as well as a consultative role, that in the former capacity he should be asked to have regard to the views of those consulted in terms of section 6(3)(b) & (c).

5. Secondly, the absence of a super-regulator in Scotland, in my view strengthens the case (set out in paragraph 5.21 of the Government Consultation paper) for an independent consumer panel to be established to advise Ministers (and possibly now the Lord President) on applications for authorisation (including the application of the regulatory objectives and professional principles) as well on the operation of the regulatory framework. This proposal was strongly supported in the Consultation responses and whilst appreciating the Government’s reluctance to create another NDPB, I believe it is important that such a body be created as in England and Wales. In the specific context of the education, training and admission of legal services providers who work within LLSPs I would favour the suggestion (also mentioned in the Consultation Paper) that the Joint Standing Committee on Legal Education should be consulted with respect to regulatory matters relating to the education, training and admission of legal services providers within ABSs.

**Section 9 Regulatory conflict**

6. One of the enduring problems in relation to bringing together providers of legal services from different professional and other backgrounds, particularly if they are to be in a partnership together, is how to deal with the divergences between their respective professional and other standards and codes of conduct. This has long been recognised as one of the principal difficulties with introducing multi-disciplinary partnerships (see A. Paterson. “Multi-disciplinary partnerships – a critique” 8 (2001) *International Journal of the Legal Profession* 161). An obvious risk would arise if the llsp were permitted to adopt the standards of practice and conduct of the lowest common denominator in the entity. The Bill does not entirely solve this problem. Regulating the llsp entity against the standards and conduct of the approved regulator ensures that the LLSPs will be held to the standards of the current branches of the legal profession in Scotland provided the approved regulator is a branch of the legal profession. However, were the approved regulator to be a professional body with less demanding professional standards than those currently expected of legal professionals e.g. in relation to conflicts of interest, then the protection for the public may be diminished. This is
why, in my opinion, it is so important that the professional principles in section 2 are expanded upon and section 9 is strictly enforced.

**Sections 19-19 Licensing rules**

7. I am generally happy with these provisions, with one major exception. There is no provision for a Guarantee Fund or a Compensation Fund to recompense client whose funds have been stolen by a member of a llsp. The requirement that there be adequate professional indemnity arrangements (section 19) is not sufficient protection even if they include fidelity cover, because the latter only operates if one member of the llsp is not involved in the fraud. Were a law firm to be taken over by persons with a criminal intent, the lack of an adequate compensation fund in the event that client funds are stolen by them, would be a major weakness in the client protection measures expected of LLSPs. In my opinion it is essential that any approved regulator has in place an equivalent to the Law Society’s Guarantee Fund backed by ancillary audits.

**Section 23 Regulatory functions**

8. The division between regulatory and representative functions is a tricky one. Some of the functions performed by professional bodies contain elements of both these functions. This is but one reason why I do not consider that we should follow the English model of requiring professional bodies to split themselves into two different entities, the regulatory part and the representative part. However, I equally do not think that professional bodies or approved regulators can be sole arbiters as to which heading a particular function comes under, which is why I disagree with the wording of section 23(1) of the Bill. Originally, the Law Society of England and Wales regarded legal education, admission and professional training as regulatory matters. In Scotland the Law Society regarded them as representative matters. In my view the English approach is more in accord with the public interest, although I could be persuaded that there is an element of a representative function as well.

**Chapter 2**

9. The Key to ABSs is how to regulate them effectively. Although there are a few jurisdictions which regulate law firms as well as the lawyers who work in them, this not the norm. However, when it comes to the regulation of ABSs there is a wide degree of consensus from Australia, England and Scotland that the ABS entity must be regulated as well as those who work in them. Moreover, the regulation is required to be proactive and robust. It follows that I am broadly content with the proposals for entity regulation of LLSPs (including the provisions of section 65). However, I would expect the approved regulator, the Head of Legal Services and the Head of Practice to have a duty to seek to ensure that LLSPs and all those who work in them should be required to comply with the
ethical and service requirements of the approved regulator and the professional principles in particular. I am not sure that the Bill as drafted goes as far as this.

10. Regulating the conduct of people who work in LLSPs is more complex, since by definition they will involve individuals drawn from a range of professional groups, and sometimes from none. In my view it is imperative that the conduct and service rules of the approved regulator will have to apply to every person who works in an ABS for the purposes of holding the entity to account, and that the Head of Legal Services and the Head of Practice be charged with monitoring and taking all practicable steps to ensure compliance with this. This goes further than sections 39 and 40 of the Bill.

11. One key problem remains. How is the conduct of individuals who breach the standards/professional principles of the approved regulator to be dealt with? For lawyers the answer is straightforward, they will be disciplined against the profession’s own professional principles. For other professionals the Bill’s proposal is that their professional body will discipline them against their own professional standards. If these are more permissive than those of the professional principles an anomaly will be created. Finally, non-professional members of the llsp will not be disciplined against any professional code, although they could be prevented from working in an llsp again. Given the likelihood that members of LLSPs will instinctively conform to the standards of their professional body, if any, it would seem that LLSPs are likely in practice to lead to a leavening of standards towards the more permissive end of the spectrum, unless all principals in the entity are personally held to the standards in the professional principles.

**Outside investors**

12. This is clearly a major area for concern. Ensuring that the fitness for involvement test is effective to exclude criminal elements from investing in or taking control of law firms is a significant issue.

**Confirmation Services**

13. As with LLSPs, if confirmation agents could handle client’s money it is imperative that they be required to have an equivalent to the Guarantee Fund.

**Part 4 Chapter 2**

14. The statutory framework for the regulation of the Faculty of Advocates is skeletal in the extreme, and goes against the whole thrust in the Bill towards transparent regulation of legal services providers. In my view, in the 21st century the case for a more a fleshed out regulatory framework (including laypersons) for Scotland’s independent referral bar speaks for itself.
Possible Additional issues

McKenzie Friends
15. There appears to be considerable confusion as to the status of McKenzie Friends (persons assisting a party litigant in the courtroom through advice, taking notes and providing moral support) in Scottish courts. A McKenzie friend was permitted to an appellant in a Scots appeal to the House of Lords (Malloch v. Aberdeen Corporation (No.2) 1973 SLT (Notes) 5) and other examples have been found. Whilst it has been suggested that the quickest solution to this problem would be an Act of Sederunt, in my view the time has come to recognise by statute, particularly in situations where legal aid is not available or affordable, that party litigants should be permitted to have a friend sitting beside them (not behind them) to offer support and assistance. This should either be an entitlement or a presumption with the presiding judge only being able to exclude such assistance where there is substantial and substantive evidence that to permit such assistance would be disruptive of the court. However, I believe that other considerations come into play if it is suggested that the McKenzie friend should speak on behalf of the partly litigant. Here I believe the judge should only allow such representation where he/she considers that it would be of assistance to the party litigant and the Court.

Contingency Fees
16. I agree with the Gill review that it would be premature to introduce these into Scotland without further consideration and consultation.

Professor Alan Paterson
2 December 2009
This is a brief submission by the Scottish Association of Law Centres on the Legal Services (Scotland) Bill.

The Scottish Association of Law Centres is the umbrella body for Law Centres in Scotland. Law Centres are community based charitable bodies. They employ solicitors to act for clients in social need. Law Centres deal mainly with issues such as housing law, debt, employment law and state benefits, and also act in other specific areas such as immigration and asylum, discrimination or domestic abuse. Law Centres deal with thousands of cases every year throughout Scotland. They are regulated by the Law Society of Scotland and we have no criticism of that regulation.

The Legal Services (Scotland) Bill introduces new “licensed legal services providers”, and a new regulatory regime. It is anticipated this will include the Law Society. These changes are being introduced to deal with problems identified in the legal services market. The changes proposed appear to be largely market-based. They will facilitate multi-disciplinary practices, and ownership by non-lawyers and parties external to Scotland.

Law Centres are community-based charities set up to help those in poverty or social disadvantage. We already help those who are often not directly assisted by the operation of the conventional legal services market. We are not sure therefore that a purely market-based reform will lead to substantial changes in this situation, although these changes may of course have presently unforeseen consequences.

Our main concern is one already voiced by other parties. If new licensed legal services providers appear, they may cherry-pick work which is presently profitable for current providers. Presently solicitors firms do provide some services which help those who are worst off. We are concerned that these changes will make it more difficult for them to do so.

We note the substantial powers given to Scottish Ministers, particularly in sections 28 to 29 and schedules 1 to 6 of the Bill. We would hope that this would go some of the way to alleviating these potential adverse consequences.

We would urge Parliament to give specific consideration to these issues. We would welcome any measures which would improve the position of our clientele.

Angus McIntosh
Scottish Association of Law Centres
January 2010
The need for high professional standards
The provision of legal services is a classic example of information asymmetry. Consumers instruct lawyers because they do not have the necessary knowledge and experience to conduct their own legal affairs. That knowledge and expertise resides with qualified lawyers who have trained for years before being licensed to practise. Consumers rely on their lawyers and their services – they are ‘credence goods’.

Typically the qualification process will involve a four year honours degree, a one year postgraduate Diploma in Legal Practice and a two year traineeship before being admitted to practise and a further three years before they may practise as an independent principal. This qualification process is not intended to restrict access to the profession but exists because of regulations put in place by the Law Society of Scotland to ensure high standards in order to safeguard the public in terms of its statutory duties under section 1 of the Solicitors (Scotland) Act 1980. Solicitors are required to comply with the requirements of primary legislation and Rules, Guidelines and Practice Statements issued by the Law Society of Scotland which presently extend to over 560 pages. They are obliged to maintain compulsory professional indemnity insurance through the Law Society’s Master Policy and to provide an unlimited guarantee against the dishonesty of their fellow professionals through the Scottish Solicitors Guarantee Scheme. They are subject to the alternative dispute resolution mechanisms of the Scottish Legal Complaints Commission [SLCC] and subject to the disciplinary sanctions of the Law Society including fines, suspension and striking off which are independently assessed and enforced by the Scottish Solicitors Discipline Tribunal which includes significant lay participation.

Information Asymmetries in the provision of Legal Services and the long term consequences
Consumers of legal services may be aware where they are not getting service because of a failure to communicate, for example. That is subject to specific rules in the Scottish Solicitors Standards of Conduct 2008 and Scottish Solicitors Standards of Service 2008 and may be the subject of a finding of inadequate professional service by the SLCC. However information asymmetry is such that consumers are often not in a position to make an informed assessment of the quality of the services they have received. For example in the course of a conveyancing transaction a failure to discover a title condition which impedes the use of a property may only come to light years later. The failure to accurately provide for the testator’s wishes in a will might only come to light after the death of
the testator. In relation to a divorce action a failure to properly consider pensions provision again may only come to light years later. This is because of the complex and long term nature of the consequences of legal advice and transactional work.

That there are so few claims against solicitors and the low and declining numbers of complaints in relation to inadequate professional service offers testimony to the high standards to which Scottish solicitors, in general, operate. Where the provision of legal services is opened up to non-solicitor providers the problems of information asymmetry will exist for the reasons set out above. We refer to this further below in relation to our discussion of ‘execution only’ legal services. If the standards of education and training including the developing of ethical standards of putting the interests of clients above those of the practitioners are not written into any scheme which comes into operation as result of the Bill then there is a significant risk that there will be detriment to consumers. That is likely to become apparent over a number of years and in the meantime more consumers are likely to be adversely affected.

Claims Management companies
In England, following the withdrawal of legal aid from personal injuries actions, and the opening up of contingency fees, there was a growth of claims companies. The practices of those companies were often not in the interests of consumers and led to third parties facing many claims which were spurious or completely fictitious. Third parties including many local authorities were obliged to investigate these complaints at considerable expense. There is presently evidence of consumer detriment occurring as a result of the activities of claims management companies soliciting claims in relation to bank charges which are allegedly unfair to consumers and according potentially recoverable. Consumers are being invited to pay fees up front and then receive no service whatever. The clear evidence of consumer detriment led to the Compensation Act 2006 and the regulation of such companies by the Ministry of Justice. We are not convinced by the statements in the accompanying Policy Memorandum that there is no need to regulate claims companies in Scotland simply because there are not a significant number operating in Scotland at present. In recent years a number of claims companies have come and gone in Scotland dealing with mis-sold endowment claims and now bank charges. Personal Injuries claims management companies regularly advertise for claims on UK-wide television.

We note that in relation to England and Wales, for reasons which are very similar to those we set out above, the Hunt Committee recommended that claims management companies which are already regulated in England are brought fully under the regulation of the Legal Services Commission [recommendation 48]. See http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf

Will writers
Evidence is building of consumer detriment through the growth of completely unregulated will writing services. Some of these services are using commercial practices which are outlawed by the Unfair Commercial Practices Directive such as ‘bait and switch’. An advertised fee is often £30 but the customer is then told that their circumstances are more complex and a fee of £400 is charged when the
value of the work is less. Advice is given on English law rather than Scots succession rights. In some cases extravagant claims are made in relation to saving Inheritance Tax and/or liability for care home fees without it being explained that the scheme proposed is, at best, doubtful and may be wholly unnecessary. Examples are situations where complex trusts are being sold suitable for IHT saving where the total estate falls well short of the IHT threshold. In other cases, there is evidence of will writers undertaking conveyancing business, usually completely ineffectively, which is a reserved matter where this is necessary to give effect to their scheme. Such will writers are not required to have professional indemnity insurance, have no alternative dispute resolution mechanism in relation to inadequate service or negligence, no protection against fraud and no professional body which has disciplinary powers nor any scheme for safeguarding stored wills where the will writer ceases trading for whatever reason. One recent example in the press relates to an English Will writer who misappropriated the estate leaving the beneficiaries with no compensation.


This is not a case of self interest by lawyers. The links below show these concerns being articulated by Which? and CABx share our concerns see: [http://www.which.co.uk/news/2008/02/steer-clear-of-will-writing-scams-132136](http://www.which.co.uk/news/2008/02/steer-clear-of-will-writing-scams-132136)


We also draw attention to the Report of the Hunt Committee in England and Wales on implementation of the Legal Services Act 2007. This recommends that will writers be fully regulated for essentially the same reason as we have stated above- [recommendation 47]. The report is obtainable at


**Continuing powers of attorney**

This area of law and practice has grown since the passage of the Adults with Incapacity (Scotland) Act 2000. The nature of the business has many similarities with the preparation of wills and trusts and managing the estate of an incapacax is analogous to trust and executry work. Many will writers are now offering these services as well. The client grouping here is more vulnerable than the makers of wills alone. The absence of any inspection regime and the safeguards offered by a clients account and the Guarantee fund are absent. The ability to restrict or dispense with caution in this area makes the risks even greater. This area should also be fall within the regulated perimeter and we set out more detail in this connection at:

**Confirmation Services**

We note the terms of the Bill in relation to Confirmation Services. At present the only reserved matter is in relation to the presentation of the inventory to court for confirmation and any petitions for appointment of executor. The acts of investigation, ingathering and realisation of estate are not reserved. We note that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 permitted the creation of a new breed of licensed conveyancing practitioners and executry practitioners or executry practitioners alone. That profession did not thrive and those few practitioners as qualified are now regulated by the Law Society of Scotland. We note that the former regulator, the Scottish Conveyancing and Executry Services Board, required an undergraduate law degree for the conveyancing practitioner and a two year full time undergraduate Diploma in Law as a requirement for those qualifying as executry practitioners alone. The Bill s75(2)(a) provides that a regulator of confirmation agents must describe the training requirements to be met by a prospective confirmation agent. We accept that the Bill is enabling rather than prescriptive of rules but there is no mention here of the educational requirements nor continuing professional development, only training. There is nothing about the length or nature of that training. The Bill, at the very least, must specify that prior education is required, the exact requirements of which might be left to the regulatory scheme. SCESB existed as regulator and operated wholly in the public interest. It reached its decision on qualifications on sound grounds. It is necessary in winding up an estate to understand the rules for validity of a will, the rules applying on intestacy, the interpretation of wills, questions of the legal concept of domicile, private international law and generally all aspects of the law of succession and its interaction with family law, property law and taxation. Things can be more complex where the deceased owned a business. We consider that the SCESB requirement was perhaps on the low side and we would encourage the amendment of the Bill to make adequate provision for the education and continuing professional development of licensed Confirmation Agents.

We note that the Bill as presently drafted refers to the regulatory scheme approved by a regulator to require a confirmation agent to have sufficient professional indemnity insurance [s75(2)(c)]. One of the central features of the solicitor regime which applies generally is the requirement to maintain a client account and ensure that the sums in the client account are sufficient to meet all clients claims in full. Solicitors are required to certify their compliance submitting returns every six months and are subject to inspection approximately every two years to ensure compliance. In the event of insolvency of the practitioner the client account is a separate fund held in trust for the clients. This is underpinned, in the case of Scottish Solicitors by the Guarantee Fund, an unlimited guarantee against misappropriation underwritten by all solicitors. The Bill is silent on such requirements and, if a regulator is empowered only by the Bill to regulate in terms of the scheme contained in the Bill, then providing protections similar to those enjoyed by clients of solicitors would be *ultra vires*. In any event, the regulator would only be acting *intra vires* in relation to the reserved acts of obtaining confirmation itself and not in relation to presently unregulated areas of ingathering and distribution where the opportunity for misfeasance may occur. We note that SCESB required separate client accounts for each matter but did not offer a protection equivalent to the Guarantee Fund.
We observe that banks have for many years offered a complete package of services in winding up estates which are generally much more expensive than using solicitors alone. In our view there is already competition in this area and the need for a further new breed of professionals is at best doubtful.

It needs little imagination to figure situations in the future, with licensed Confirmation Agents, where this can lead to consumer detriment. We note that in England, the Hunt Committee Report, mentioned above, recommends in relation to England and Wales that the whole probate services area not just the equivalent of obtaining confirmation be brought within the regulated perimeter [recommendation 47].

http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf

‘Execution only’ legal services
We are very concerned about the growth of ‘execution only’ legal services that is a legal service where a technical operation is performed but where no advice is given. This is true, for example, of Which? Legal Services – their terms and conditions in relation to Wills provide inter alia: “The Service does not provide legal advice”. “The Service uses software for the assembly and drafting of a Will based on the answers you have given in your Will Interview Questionnaire. Your Will will therefore be generated automatically to reflect the answers you have given. You alone are responsible in ensuring that the answers and information you provide are correct and accurate, and warrant this to be the case.” [emphasis added]

The full terms and conditions offered are available at:
http://www.whichlegalservice.co.uk/our-services/make-a-will/terms--conditions

The price charged for a will where they provide no advisory service is £89. This is around the figure which the majority of our members would charge for a will that is individually professionally written to meet the client’s exact requirements and where advice is offered. Which? advertise no internal complaints procedure nor specify one in their terms and conditions. There is no external regulator to complain to about their conduct or service. They make no statement about professional indemnity insurance, standards etc. At least they do state in the terms and conditions that they only offer wills which are good under English law. This may be contrasted with the terms of engagement which Scottish Solicitors are obliged to provide.

A consumer may well be attracted by Which? or similar providers and, given the nature of credence goods, such as legal services, be unable to make an informed choice as to the absence of advice and liability dealing with a consumer organisation compared with the full service offered by a Scottish solicitor for the same price which is subject to the full range features which are standard features of consumer facing professional services such as indemnity insurance and alternative dispute resolution procedures available to a consumer without charge.
The growth of ‘execution only’ services is an almost inevitable consequence of the proposals contained in the Bill and one where consumers are likely to suffer detriment because of the nature of those services. This can be described as market failure.

The regulated perimeter
The Bill offers what is likely to be a once in a generation opportunity, to get the regulatory framework right and that opportunity is being squandered by the failure to regulate businesses which can cause and are presently causing consumer detriment which in many cases will not become apparent for years. The Bill defines legal services in section 3:

(a) the provision of legal advice or assistance in connection with—
   (i) any contract, deed, writ, will or other legal document,
   (ii) the application of the law, or
   (iii) any form of resolution of legal disputes, or
(b) the provision of legal representation in connection with—
   (i) the application of the law, or
   (ii) any form of resolution of legal disputes.

It, however, does not extend the reserved areas which are set out in section 32 of the Solicitors (Scotland) Act 1980. It is provided in section 32(1) that it is a criminal offence for an unqualified person to draw or prepare:

(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.

Writ is defined to exclude wills and other testamentary writings, missives or mandates, letters or powers of attorney, or stock transfer forms.

In other words will writers, banks and other financial institutions can prepare and charge for wills. Claims companies can operate without any regulatory regime applying whatsoever. The Financial Services and Markets Act 2000, in contrast to this Bill starts from a general proposition, providing a general prohibition on engaging in the provision of financial services or advice concerning financial services with the exception of those who are authorised or exempt. Those which are regulated are then set out by statutory instrument, the Regulated Activities Order, which can and has been varied from time to time. It is a criminal offence under the Financial Services and Markets Act to undertake such work unless the person undertaking it is authorised or exempt from authorisation. The layout and style of that Act provided the inspiration for the Legal Services Act in England. Such an approach could be adopted in the Bill. It would be a comparatively easy change to make to the Bill to permit the Scottish Ministers by subordinate legislation to extend the current regulatory perimeter to other areas of legal services such as those outlined above. This might also be used to modernise the old-fashioned and out of date references in the 1980 Act –e.g. ‘writ’ seems out of place in a world of e-commerce.
We therefore would welcome (a) restatement of areas of legal services which are reserved to qualified practitioners and (b) a refining of those areas to include (i) the preparation of wills and testamentary trusts, (ii) the obtaining of Confirmation of Executors including the administration of estates of deceased persons and (iii) the activities of claims negotiation and management.

The introduction of ABSs
We have conducted a survey of our members and they are overwhelmingly (over 85%) opposed to the introduction of external ownership of legal firms. This and other similar concerns are addressed in the SPICe briefing paper of 5th Nov at page 10.

We find the justification for the introduction of ABS as set out in the Policy Memorandum confusing and contradictory. Paragraph 37 sets out what we believe to be correct, that there has been a polarisation of legal firms with a large number of small ‘high street’ firms which provide a range of legal services, largely within the reserved areas to individual consumers and a small number of very large commercial firms which provide services to business and the public bodies ‘the great majority of which is not subject to legal reservation to Scottish Solicitors [paragraph 40]. It is then suggested that Scottish Solicitors will be increasingly unable to compete with English Legal firms who have access to external capital and the ability to offer combined services with other professionals and that Scottish legal firms would either re-register as English legal firms or be bought out by English firms [paragraph 40].

Since the advent of incorporated practices and LLPs firms have been able to offer security by way of floating charges over their moveable assets including receivables and goodwill. – i.e. loan capital. So called external capital is in reality external ownership. As the ‘great majority’ of commercial firms’ practise is outwith the reserved areas there have been no barriers to practising as non-solicitor legal advisers with external shareholders or external ownership. There have been two high profile failures where major legal firms engaged in multi-disciplinary practices with international accounting firms. Both ended in dissolution.

That directors of finance, HR and IT cannot be partners in legal firms at present is true. With a little ingenuity, such persons can introduce loan capital secured by floating charge and be remunerated in such a way as they receive a bonus which would represent a share of profits without contravening any existing restrictions. Internally an incorporated practice or LLP can organise its affairs so that such persons can take an active and equal part in the management of the entity.

The Policy Memorandum fails completely to address the prospect that with external ownership it is more likely that Scottish firms will re-register in England or be taken over by English legal firms should the Bill be enacted.

The Policy Memorandum identifies that there are aspects of the current legal services market where there is limited competition: clients can have difficulty in accessing services, including in the areas of family law and debt, welfare and housing law [paragraph 41]. The evidence base for this was carried out before the
recession and it now appears that many newly qualified solicitors have been made redundant and what was true two years ago is no longer true. It may be that as a result of very specialised training some lawyers are not in a position to practise in such areas - but they can undertake additional training.

New non-lawyer providers are unlikely to move into areas where there may be demand if these areas are not profitable. These are not areas in which the commercial firms by and large practice. One of the consequences of the Bill will be that third party providers seek to provide services from which they can make generate profits. This is likely to be in the case in relation to conveyancing and private client business such as the making of wills and executries. That would impact on the profitability of high street legal firms. Over time that will reduce the availability of such services on the high street. Access to justice is unlikely to be a significant factor with third party providers and high street firms striving to compete the may withdraw from unprofitable areas of practice or be themselves forced out of business leaving legal services less obtainable than at present. We regard this as a real danger over the medium term.

There may be other ways in which SLAB might wish to fund the provision of legal services in relation to housing and welfare matters with a greater role for the not-for-profit sector. This however does not require the scale of changes or complexity of the Bill. And if this is the intention behind the Bill then we do not consider the response proportionate.

The European Commission in its 2004 Report suggests that the introduction of ABSs and removal of current regulations will help protect services in rural areas.

“For example, these regulations might inhibit lawyers and accountants from providing integrated legal and accountancy advice for tax issues or prevent the development of one-stop shops for professional services in rural areas.” [paragraph 60].

For a solicitor who is a sole general practitioner offering services in a rural community there will be little cross over with the practice of an accountant in the same community who will not deal with family law, crime, conveyancing or wills and succession. The complexity of the arrangements provided for in the Bill, which themselves will require to be fleshed out by considerable further rules which require to be complied with should the two practice within an ABS structure in addition to those a solicitor has currently to adhere to. The Commission’s comments show no appreciation of the administrative burden and it is accordingly hard to imagine small legal firms being remotely interested in taking advantage of the proposed reforms. They are likely to be forced into trying to protect their existing business from new entrants in the shape of ABS providers.

The independence of the legal profession.

We are very concerned at the direct involvement of the Scottish Ministers in the processes required by the Bill. The Scottish Ministers do so directly whereas in the Legal Services Act 2007 there is the establishment of a Legal Services Board in England which provides regulation at arms length from Government. The Policy Memorandum para 51 deals with this in these terms:
“The Scottish Ministers will fulfil the regulatory role fulfilled by the LSB in England and Wales. This maintains oversight of bodies seeking to regulate ABS. However, the Scottish approach achieves this aim without the complication and expense of establishing a nondepartmental public body. The Scottish Government believes this is more proportionate to the Scottish legal market. It also reflects the Scottish Government’s aims in terms of simplification of the public.

While ‘proportionate’ is one of the terms which appears in the Report of the Better Regulation Task Force it has become a word which is devoid of any meaning and there is no context stated and no evidence of what the debate might be in relation to the Scottish Legal Market. It is very disappointing, considering the statement in s1(a) of the Bill that one of the regulatory objectives is supporting the constitutional principle of the rule of law. It is not clear how the direct role of the Scottish Ministers meets this objective. The UN High Commission on Human Rights Declaration on the Role of Lawyers in Society [1990] states:

“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; … and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”. [para 16] and

“Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.” [paragraph 24].

The Council of Europe Recommendation R(2000)/21 provides:

Decisions concerning the authorisation to practise as a lawyer or to accede to this profession should be taken by an independent body. [art 2].

Further in Principle V 2 the Council of Europe recommend:

“Bar associations or other professional lawyers’ associations should be self governing independent of the authorities or the public.”

The European Parliament Resolution 23 March 2006 Point E opposed ABSs states:

“…the duties of legal professionals to maintain independence, to avoid conflicts of interest and to respect client confidentiality are particularly endangered when they are authorised to exercise their profession in an organisation which allows non-legal professionals to exercise or share control over the affairs of the organisation by means of capital investment or otherwise, or in the case of multidisciplinary partnerships with professionals who are not bound by equivalent professional obligations.”
The European Parliament was also supportive of the rule of law as being a fundamental characteristic of the legal profession.

These are high level views which command respect and the dismissal of any such arguments as not proportionate illustrate a fundamental failure to appreciate the constitutional significance of an independent and free legal profession which cannot be guaranteed where the Scottish Ministers directly authorise regulators. We are strongly of the view that there must be an intermediary body such as a Legal Services Board to satisfy the requirements of these international and European statements. Section 4 of the Bill is simply not enough.

The supposed imperative for ABSs at European level.

The Policy Memorandum refers to the European Commission’s Report on Competition in the Professions [2004] as being the genesis of reform in this area. We quote from the Commission’s Report:

“In the Commission’s view business structure regulations appear to be least justifiable in cases where they restrict the scope for collaboration between members of the same profession. Collaboration between members of the same profession would appear less likely to reduce the profession’s independence or ethical standards.” [paragraph 63]

And:

“Business structure regulations appear to be more justifiable in markets where there is a strong need to protect practitioners’ independence or personal liability.” [paragraph 64]

Even the Commission acknowledges therefore there are some professions where independence and ethical standards may outweigh the benefits to consumers. In our submission lawyers are such a profession and there the case for ABSs has not been made out. We find it difficult to understand why the Scottish Ministers have reached the view standing the terms of para 63 that it is unnecessary to seek to impose changes on advocates. We find this particular at odd with the lengthy and arcane procedures which are required to admit a solicitor advocate who already has rights of audience to the Faculty when an advocate seeking to move in the opposite direction can do so seamlessly. This point has simply not been addressed.

This distinction is borne out in the jurisprudence of the European Court of Justice [ECJ]. The decisions in Apothekerammer des Saarlandes v Deutscher Apothekerverband eV ECJ 19/05/09 and Commission v Italy of the same date both reach the conclusion that there may grounds of public policy which override the interests of competition law. While these cases deal with public health as the overriding factor, in our view, the rule of law has an even stronger claim to override competition law requirements.

The Services Directive 2006/123/EC provides for the free movement of service providers [art 16] but [in art 17] provides a derogation for lawyers as defined by the Lawyers Directive 1977/249/EC again recognising the special position of legal
services. The Qualification Directive 2005/36EC also makes provision for free movement of services [art 5] and again exempts regulated professions such as lawyers [art 7] and places the duties on the professional bodies to make reasonable adjustments. In relation to establishment provision is made for compensation measures, either a period of adaptation or an aptitude test [art 14] for professionals such as lawyers. The provision of legal services is therefore not treated, as yet, by the European Commission or the ECJ as commoditised in a way which can be dealt with as other services. We say more about free movement rights below.

Professional privilege
The Bill deals with professional privilege in s60. This is wholly inadequate. There are two aspects to legal professional privileges (a) the litigation privilege and (b) the advice privilege. The former needs no explanation but the latter clearly does. Any advice given by a lawyer to a client that is made in the course of his professional practice whether, it relates to any present litigation, an anticipated litigation, or any transaction or organisation of affairs is privileged. See for example the House of Lords case Three Rivers DC v Bank of England [No6] [2004] and Balabel v Air India [1988]. It is also important to bear in mind that it is confidential and is therefore immune from seizure even before any proceedings are commenced. See for example Andre v France ECtHR [2008] - a useful illustration before the European Court of Human Rights – the papers in the hands of a lawyer were privileged and ought not to have been seized by the tax authorities in seeking to build a case against a client. As drafted the Bill [s60 (2)] only applies the privilege in the course of proceedings – not at an earlier stage of anticipated proceedings and not in relation to advice in relation to transactions. This would therefore not be compliant with the European Convention on Human Rights and would not correspond to the current scope of legal professional privilege.

The view of the ECJ expressed in the AMS and AKZO Nobel cases is that lawyers employed by third parties do not possess legal professional privilege. The Bill would therefore provide professional privilege in proceedings to non-lawyers, assuming that the intention in relation to the proposed wording of a ‘solicitor acting for a client’ is intended to refer to a solicitor in private practice and yet the very lawyers employed by the non-lawyer ABSs would not be entitled to professional privilege. The result is the Bill is inconsistent.

Free movement rights
As Walter Semple has convincingly argued there is a real danger that the passage of the Bill into law would hamper those Scottish solicitors who wish to practise abroad. The Establishment of Lawyers Directive 98/5/EC permits the competent authority in host member states to refuse to recognise lawyers employed by non-lawyer firms [article 11.5]. Such lawyers are almost certainly going to be from those very commercial firms which are likely to seek external ownership. This is surely an unintended consequence of the Bill.

For a fuller discussion of Walter Semple’s argument see: http://www.slas.co.uk/news_detail.php?newsID=691&slas=ec60713470aec63e803b090012921fb2
Conclusions
While the Justice Secretary is on record as promising Scottish solutions to Scottish issues in relation to legal services, the Bill is no more than a poor reflection of the English Legal Services Act 2007.

The Bill as introduced does not offer a principled approach to the regulation of legal services. It pays no attention to the interests of consumers which is the only reason which justifies regulation in the first place. There is no consideration of the present perimeters of regulated legal services, nor is there provision to prevent actual or potential consumer detriment in adjacent areas.

The incompatibility of certain proposals in the Bill with European Community Law and Human Rights law has not been satisfactorily resolved.

The Commission’s competition policy does recognise that other factors may override that the provisions of articles 81 and 82 of the Treaty of Rome. The rule of law and the administration of justice are such reasons and the European Court of Justice has recognised exceptions in the greater public interest. There has not been, as far as we are aware, any demand from real consumers for the proposed changes. We simply observe that the supercomplaint which was in some ways the catalyst for this Bill was made by a body with a vested interest, as it is a provider of legal services.

While the Bill may offer some competitive advantage for a small number of legal firms it offers nothing but an uncertainty for the vast majority of legal practices operating in high street practice.

30 November 2009
Introduction

1. The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to respond to the Justice Committee's invitation to submit written evidence regarding the Bill and thus continue to participate in the debate over the delivery of legal services and alternative business structures (“ABS”).

2. As the body responsible for the administration and advising the Scottish Ministers on legal aid, the Board has a keen interest in the changes to be made to the way the legal services market operates, and particularly in facilitating access to justice.

3. The Board supports a mixed model of provision of legal advice services. This includes private sector provision, in addition to alternative forms of supply of legal advice services.

4. The Board’s primary interest is in ensuring an adequate supply of legal aid services, that these services are of an appropriate standard and that there are adequate protections for clients and the public purse.

5. The Scottish legal aid system has always been vulnerable to shifts in the legal services market and the introduction of the provisions envisaged by the Bill to the current structure of the profession on its own is unlikely to pose any greater risk to the stability of supply. The Board believes that the regulatory structures are the key to managing and minimising such risks.

6. The Board considers that ABS has potential advantages for consumers of legal advice services, by providing a different type of structure more suited to providing advice at different times, by different means and in a way that improves access to holistic and quality publicly funded legal services.

7. The key issue is access to justice and what effects ABS could have on that. The Board does not consider the Bill presents difficulties for access to justice – rather the opposite. ABS has the potential to increase access to justice by encouraging efficient business structures and other players into the legal services market. For example, small providers or medium sized firms may be able to spread their business risks by combining with other professionals to provide a wider range of services. Similarly, combinations of services provided from one core organisation might improve the outcomes for people requiring legal assistance. Effective regulation is however essential.

8. The Board is supportive of the provisions in the Bill which when taken together introduce ABS for legal services in Scotland in a manner which is transparent, robust and proportionate. The Board considers the provisions in
the Bill will not have a significant impact on the delivery of legal aid but is reviewing the detail of its legislation to ensure there are no consequential amendments needed to enable ABS to operate within the legal aid system.

9. It will however be key that if the proposed new role for the Board of monitoring the availability and accessibility of legal services in Scotland is to be effective, that bodies co-operate with the Board in the supply of information necessary to meet this additional function.

10. The Board has considered the provisions in the Bill and has identified a number of broad issues in which it has an issue and other matters of a more technical nature, all as discussed below.

The Regulatory Objectives etc

11. The Board considers that a statement of regulatory objectives supplemented by a statement of professional principles to guide approved regulators, such as are laid down in the Bill, are needed to put in place a regulatory regime that is transparent, robust and proportionate. In particular, the Board welcomes the inclusion of promoting access to justice as a regulatory objective of the Bill.

12. The Board observes however that the definition of the “legal services” to be regulated is capable of being construed widely and certainly beyond services to be provided by a solicitor or counsel. Although the wording of section 3(1)(a)(i) strongly suggests work undertaken by a solicitor or counsel, arguably, sections 3(1)(a)(ii) and (iii) do not.

13. The provision of legal advice or assistance in connection with the application of the law, or any form of resolution of legal dispute, could include advice or assistance given by Citizens Advice Bureau, Money Advice Centres or a host of other lay agencies and could include lay representation before certain tribunals.

14. As written, the provisions in section 3 do have a consequential effect on the Board’s ability to meet its new function under section 1(2A) of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) (ie to give Scottish Ministers such information as they may require relating to the availability and accessibility of legal services), as discussed below in paragraphs 25, 26 and 27.

15. The Board observes in passing that in section 3(i)(a)(ii) reference is made to the provision of legal advice and assistance in connection with “the application of law” which, by definition, is not restricted to Scots Law. The Board has cause to notice this terminology given that Section 6 of the 1986 Act in defining advice and assistance describes it as “oral or written advice provided to a person by a solicitor …. on the application of Scots Law …. “. That is including UK and EU law but not English and foreign law. There appears therefore to be an unintended consequence, by using this terminology, which widens the application of the section to English or Foreign law.
Regulation of Licensed Legal Services

16. As stated above, the Board believes that the development of appropriate regulatory structures is key to the managing and minimising of risks.

17. The Board welcomes its inclusion in the list of bodies with whom approved regulators must engage. The Board considers it is essential that it needs to be informed of any professional misconduct by a member of a professional association, in addition to the professional association concerned, where legal aid in its broadest terms, is involved. If this information is not made available the Board will not be able to fulfil its new function under section 95 of the Bill effectively, that is to consider whether practitioners should be excluded from giving legal assistance following the transfer of such powers from the professional bodies to the Board (currently section 31 of the 1986 Act).

18. Although section 25 of the Bill provides for the giving of information to the Board by the approved regulator, it appears that section 24(7) may allow information to be given to the professional association in advance of the Board. The Board observes that if it is to carry out its functions effectively there is a need to be informed of issues affecting legal aid as early as is practicable.

19. Picking up on the issues surrounding notification under section 25, the current section 31 of the 1986 Act construes “conduct” and “professional conduct generally” in a wider sense ie not restricted to professional misconduct but also conduct in relation to administrative matters. Accordingly, where legal aid or legal advice and assistance is being provided, the Board would need to be informed of conduct and services issues by the professional body and also the Scottish Legal Complaints Commission to fulfil its function effectively.

20. Section 36 provides that a LLSP is a business entity providing legal services to the general public for a fee, gain or reward (section 36(1(a)(ii)). The Board observes that by using this terminology not for profit organisations may be prevented from becoming LLSPs. We consider such organisations, if they wish to become LLSPs and subject to appropriate regulation, should be able to do so. There should be clarification of what is meant by, in particular, gain or reward.

21. The Board observes that in section 57(Employing Disqualified Lawyer) a licensed legal services provider (“LLSP”) must not employ or remunerate a person who had been struck off the roll of solicitors or suspended from practice as a solicitor as a “designated person” ie a person designated to carry out legal work in connection with the LLSP’s provision of legal services. There may be situations where such a person, although not struck off or suspended, has their practicing certificate restricted. Where such a restriction affects the provision of legal aid or advice and assistance, as may be the position in some cases, the Board considers that an LLSP should not be
permitted to employ such a person to provide legal aid or advice and assistance as part of the LLSP’s legal services unless the restriction allows that person to act under the supervision of another lawyer employed by the LLSP.

22. Given that section 57 prevents an LLSP from employing or remunerating a person who has been struck off the roll of solicitors it is not clear to the Board why section 57(2)(3) should enable an approved regulator to give written authority to an LLSP to employ a disqualified lawyer as a designated person. The Board considers that where it is intended that legal aid or advice and assistance is to be provided by such a person an approved regulator ought not to be enabled to authorise such employment.

Other Bodies

23. The Board welcomes the provision in section 96 of the Bill, to transfer from the relevant bodies to the Board of the power contained in section 31 of the 1986 Act to exclude solicitors and counsel from giving legal assistance. Currently the Board only has power to register and deregister solicitors from providing criminal legal assistance. It has no ability to prevent or suspend solicitors who are acting inappropriately from providing other types of legal assistance (eg civil, childrens, cases involving tribunals etc) and no ability to restrict counsel in any types of legal assistance. This is unlike the position of legal aid authorities in other jurisdictions.

24. As to the new monitoring and advice role introduced under section 97, the Board welcomes its wider monitoring function given its interest in a legal services market which facilitates and increases access to justice.

25. The Bill recognises that it will be necessary for the Board to obtain some of the evidence it needs to advise Scottish Ministers on the adequacy or otherwise of the supply of legal services from other bodies eg the Law Society, Faculty of Advocates or Scottish Courts Service.

26. In assessing this wider monitoring role, the Board anticipates having to obtain information from service providers other than those referred to in paragraph 25 such as, for example, Citizens Advice Bureaux, Tribunal Services and Consumer Focus Scotland.

27. The Board is currently free to request information from these service providers and would expect they would comply with any such request, if made. The Board would not see this as adding materially to their or the Board’s burdens. If, however, this information was not made available the Board’s ability to fulfil its obligations may be impaired. Rather than prescribing a longer list of bodies and adding to the list of bodies in section 97(2) to the Bill who must give the Board information it may be simpler to give the Board the ability to ask other bodies to provide specific information to the Board. Alternatively, the list should include the bodies referred to in paragraph 25 and also include any approved regulator.
Conclusion

28. The Board is happy to provide the Justice Committee with any further information it may require and if considered necessary to give that orally.

4 December 2009
Written submission from the Scottish Legal Complaints Commission

I refer to the recent publication of the Legal Services (Scotland) Bill ("the Bill") and to the request for submission of comments on the Bill from interested parties.

The SLCC has an important role in acting as the Gateway for complaints about legal services practitioners in Scotland and, as such, has an interest in the changes proposed by the Bill regarding complaints about licensed providers and others. The Bill envisages the SLCC having an enhanced role and involvement in the investigation of complaints about the new entities and we therefore wish to submit our views on the Bill and to be considered for invitation to give oral evidence before the Committee on 5 January 2010.

General comments

It is noted that the SLCC will act as the Gateway for all legal services complaints about licensed providers. Our future remit will encompass various different types of complaint including service, conduct, regulatory and handling.

We see that the Bill provides for service and conduct complaints to be investigated by separate bodies as is currently the case under existing legislation.

Whilst we appreciate that the reasons for service and conduct complaints being treated separately were examined when the Legal Profession and Legal Aid (Scotland) Bill was under consideration, we would question whether it is necessary or desirable for consumers or practitioners for such a separation to continue under the proposed legislation.

We are of the view that the interests of the consumer and practitioner would be better served if only one organisation was to have the right to investigate conduct complaints in addition to service. In our experience, consumers tend not to distinguish between the services and conduct aspects of a complaint. It follows that there is an expectation that all the circumstances of a complaint will be examined by one body, which would not be the case if the proposed regulatory framework was adopted. Simplification of the framework would also prevent practitioners responding to two different bodies.

The Bill as structured seeks to incorporate the provisions of the 2007 Act which may be regarded as overly complicated. There is an opportunity to simplify the complaint process by giving the obligation to investigate both service and conduct complaints to a single legal complaint handling body.
Streamlining in this way could still mean that ultimate disposal of a conduct complaint may still rest with the regulatory body. However we would like to present the case for streamlining the investigation aspect as a minimum.

**Areas of concern**

The following is a summary of other issues we would wish to address in more detail orally.

1. A strength of the SLCC system is that it offers a single Gateway through which all complaints pass. Moreover it is a strength that the SLCC determines how each complaint is to be handled. Where a complaint about the services of a licensed provider also involves the conduct of a non legal professional, we have a concern that the Bill does not make adequate provision for the actions to be taken by the SLCC as that Gateway. Such a complaint may form part of a larger complaint falling within our remit. Whilst the Bill allows Scottish Ministers to make future regulations, we think that the Bill should clarify if it is to be part of the SLCC’s Gateway function to assess the eligibility and nature of such complaints and if so, to decide to which regulatory body the complaint should be passed. We are not convinced memoranda of understandings between regulators will deal effectively with conflicts.

2. The Bill incorporates Parts 1 and 2 of the Legal Profession and Legal Aid (Scotland) Act 2007 when dealing with complaints about licensed providers and approved regulators. It is not clear, however, if the substitution of the approved regulator for the relevant professional organisation applies generally for all purposes of the Bill or only in relation to the specific circumstances covered by the new sections 57A and 57B (complaints about licensed providers and regulatory complaints). This has an impact on various areas of the SLCC’s functions including “handling” complaints about an approved regulator and the exercise of our oversight and monitoring functions. Some guidance is sought on whether Parts 1 and 2 of the 2007 Act are adequately applied to all situations which are likely to be dealt with by the SLCC.

3. It is possible that a complaint about a licensed provider may involve members of different professions. In that case there may be difficulties where more than one regulator has to investigate a complaint simultaneously and where the approved regulator is not the relevant professional organisation. An approved regulator may have a dual role as regulator and as the relevant professional organisation, but it may be that the approved regulator is not the relevant professional organisation. In our view, the Bill should contain adequate provisions for the passing of conduct complaints by the approved regulator to the relevant professional organisation and for the affected bodies to liaise with each other to determine the priority of investigation and agree any necessary measures for cooperation between the bodies to ensure that
any delays or conflicts in investigation are minimised. We suggest the SLCC has a role as a neutral Gateway body in this respect.

4 There appears to be an error in subsections (4) and (5) of the new section 57B (as applied by section 65 of the Bill). These subsections refer to “a conduct complaint against a licensed provider”, but in terms of the new section 57A(4) “A conduct complaint cannot be made about a licensed provider...”. We think some amendment of the wording in these subsections is required to correct this anomaly.

5 We have identified some situations where we believe it will be necessary for Scottish Ministers to make regulations to facilitate and improve aspects of the complaint process. We are unsure if it is appreciated how onerous such decision making may be.

I do not propose to comment in detail in this letter further on these or on other aspects of the Bill where amendments may be desirable. I would however welcome the opportunity of supplying oral evidence to the Committee.

As the SLCC is to be an integral part of the proposed complaint process, I would be grateful if you would consider inviting the SLCC to give evidence before the Justice Committee and I look forward to hearing from you about this. In the event that you do not consider our appearance before the Committee to be necessary, it would be our intention to submit written representations containing further details of our views on the Bill by 18 December 2009.

Jane Irvine
Chair
30 November 2009
Supplementary written submission from the Scottish Legal Complaints Commission

I write further to my letter of 30 November 2009 and now submit the Scottish Legal Complaints Commission’s (“the SLCC”) further representations on the Legal Services (Scotland) Bill (“the Bill”).

1 INTRODUCTION

1.1 The SLCC was established under the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) as an independent body to investigate complaints about legal practitioners in Scotland.

1.2 The SLCC is presently the sole Gateway for legal complaints against defined legal practitioners. The eligibility of the complaint is assessed, which includes determination of whether the complaint is frivolous, vexatious or totally without merit. The SLCC’s remit is to investigate complaints about inadequate professional services and to pass complaints about professional misconduct and unsatisfactory conduct to the relevant professional bodies (e.g. the Law Society of Scotland and the Faculty of Advocates).

1.3 The Bill introduces a regulatory framework for new forms of legal entities. It is proposed that the SLCC will be involved in dealing with complaints about those entities and their regulators. The SLCC is therefore pleased to have the opportunity of commenting on those aspects of the draft Bill that are likely to affect its operations.

1.4 The SLCC is approaching the Bill from a neutral position and accepts that its role in this consultation is limited to those areas which relate specifically to the complaints handling process allowed for under the provisions of the 2007 Act, as incorporated into the Bill. The SLCC also acknowledges the extended functions proposed by the Bill, which may impact on its current working practices and makes comment accordingly.

1.5 It is envisaged that the SLCC will receive at Gateway all complaints about Licensed Legal Services Providers (“LLSPs”) and all complaints about Confirmation Agents (“CAs”). The SLCC will investigate all service complaints about LLSPs and CAs. The SLCC will pass eligible conduct complaints about individual legal practitioners working within a LLSP and about CAs to the Approved Regulator (AR) or the Approving Body (for CAs) for investigation.
2 GENERAL COMMENTS

2.1 The SLCC should have the power under its existing and amended statutory functions to receive, process, refer, investigate and determine complaints. Consumers and legal services providers are effectively being provided with a one-stop shop for making their complaint. It is for the SLCC to ensure that the complaint process is properly managed. If this involves the referral of a complaint to another organisation, this requires to be adequately managed and communicated to the parties involved in the complaint. It is imperative that all potential service users are made aware of the SLCC’s core functions and any increased functions which may be imposed by the Bill. The SLCC has already been given the responsibility of advising about the complaint process under the provisions of the 2007 Act and to issue appropriate guidance as to how complaints are dealt with. It appears that this is to continue in terms of the Bill, although the extent to which the SLCC will be required to issue guidance is unclear, given the proposed overarching involvement of Scottish Ministers.

2.2 As the SLCC is a strong independent body serving as a single Gateway for legal complaints, regulation could be improved if its jurisdiction was widened to investigate all legal complaints, whether they be conduct, service, handling or the new regulatory type of complaint, about all legal service providers (including CAs). This will ensure consumers and legal services providers know which body has the responsibility for handling complaints and where complaints are to be made in the first instance. The Bill should be an opportunity to make services better for consumers. It should not create more complexity for consumers, nor for the practitioners who serve them. It will be for the SLCC to determine the type of complaint made and against whom, in the same way as the SLCC is doing at present for service, conduct and handling complaints. The SLCC, and not consumers or legal services providers, will then determine whether complaints are about ‘legal services’ or other services, such as financial or accountancy services. Responsibility would be placed on the SLCC to secure regulation of services and consumer redress in circumstances where things go wrong, which should reduce the risk of duplication of activities by regulators. Also, it is not left to the consumer to identify how or if the legal services provider is regulated; they know where to raise their concerns.

2.3 The Bill provides for service and conduct complaints to continue to be investigated by separate bodies. The SLCC is of the view that the interests of consumers and legal services providers would be better served if it was to have the right to investigate conduct complaints, in addition to service. It is the SLCC’s experience that a significant proportion of complaints comprise both service and conduct elements (i.e. hybrid). The SLCC considers that consumers often tend not to distinguish between these aspects and instead have an expectation that all the circumstances of a complaint will be examined by one body.
It is the SLCC’s view that consumers may not be able to properly distinguish between legal advice provided by a ‘legal professional’ and that provided by another professional in consultation with a legal colleague, or from a voluntary advisor who has no professional legal qualification. Service users may more easily understand concepts of ‘financial advice’, ‘legal advice’, ‘accountancy advice’ and ‘surveying advice’, but may not necessarily be alert to the providers’ qualifications or the composition of the LLSP or who indeed is providing the “legal services”. Simplification of the complaints process should make it easier for both legal services providers and consumers to understand and follow.

2.4 The ultimate disposal of conduct complaints could still rest with the AR. It is noted that a similar approach is envisaged under Section 64 of the Bill, in circumstances where the investigation of a complaint about an AR has been delegated for investigation to the SLCC, but the sanction to be applied is referred back to Scottish Ministers to administer. If the SLCC was to have the power to investigate the entire complaint, it would mean that, even if the complaint was of a hybrid nature, both consumers and legal services providers would only have to correspond with one organisation (the SLCC) during the course of the investigation of the complaint. The SLCC considers that simplifying the complaints process in such a way should improve service to both the consumer and the legal services provider, as it should reduce the length of time taken to investigate a complaint and be one port of call for any queries about the process. Decisions about which organisation should deal with the complaint and when will not have to be taken at the outset and information and evidence about the complaint will not have to be sent to, and reviewed by, two (or more depending on the hybrid nature of the complaint) different organisations.

2.5 Streamlining the complaints process by giving the SLCC the power to investigate all aspects of all legal complaints would also remove the difficulty that currently arises in trying to classify a complaint before the events giving rise to the concerns have been fully investigated and before all the evidence has been gathered. It would also avoid the need for discussions between the SLCC and ARs about how and when to deal with issues discovered during the course of the investigation that were not initially raised by the complainer, but which might be considered relevant to the existing complaint or sufficiently serious to warrant further investigation.

2.6 A more streamlined process would be in the best interests of consumers and legal services providers, as it should result in an earlier resolution of complaints and be more cost effective. The suggestion that the SLCC should investigate both the services and conduct elements of a complaint should also lead to greater consistency in the way that consumers’ concerns are investigated. In addition, any concerns about potential conflicts of interest in an AR investigating a
complaint about a member of the LLSP whom they also represent would be resolved.

2.7 The SLCC is able to expand its existing functions to incorporate the handling of additional complaints about LLSPs and those persons within the entity and, if delegated, complaints about ARs. However, the Bill needs to adequately legislate for these extended functions and provide a thorough set of regulations in order to allow the SLCC to practically carry out these tasks with adequate funding gathered from practitioners creating work for the body.

3 SPECIFIC COMMENTS

3.1 Complaints about LLSPs

3.1.1 Section 65 adds provisions to the 2007 Act to bring complaints about LLSPs under the current complaint system. It does this by applying Parts 1 and 2 of the 2007 Act to complaints about LLSPs. As Parts 1 and 2 of the 2007 Act contain provisions which may not be applicable to LLSPs and ARs, it is proposed that Scottish Ministers may modify these by regulations. The SLCC believes that some modifications will be necessary to achieve consistency between the two Acts in order for the provisions to work effectively in practice. There should be adequate consultation with the SLCC about any amending regulations to ensure that its views on the practical impact of applying Parts 1 and 2 to the new entities and the effect on its processes are fully considered. There are already existing difficulties with certain provisions of the 2007 Act, which could be replicated if there are insufficient regulations in place to avoid those pitfalls which the SLCC has already identified as hindering the complaints handling process. The SLCC considers that consultation is imperative.

3.1.2 In respect of the new Section 57B about regulatory complaints (added to the 2007 Act by Section 65), subsections (4) and (5) refer to the procedure and functions of the SLCC in respect of regulatory complaints being the same as for a conduct complaint “about a licensed provider”. However, in terms of Section 57A(4), a conduct complaint cannot be made about a licensed provider as an entity. There appears to be a discrepancy between the two sections and it is the SLCC’s view that this requires clarification.

3.1.3 Section 24(7) requires an AR to refer any complaint of professional misconduct about a member of a professional association disclosed by a special assessment to be notified to that association. This appears to be limited to cases where the alleged misconduct is identified by an assessment carried out by an AR. In practice, the SLCC may receive complaints relating to both legal and non-legal services and to legal and non-legal practitioners. Is the responsibility for allocating such a complaint to the relevant professional association or body to rest with
the SLCC or will this be undertaken by the AR? This requires to be clarified and reflected in the Bill.

3.1.4 The Bill makes no specific provision for the process whereby a conduct complaint about a non-legal practitioner is passed by the SLCC to the relevant professional body. Section 3 of the 2007 Act is of some assistance, but only if the definition of “practitioner” is altered to include non-legal practitioners for the purposes of Section 3. A consequence of applying Parts 1 and 2 of the 2007 Act to complaints about LLSPs is that the definition of “practitioner” is as stated in Section 46 of the 2007 Act. This will be an instance where amendment by regulations is likely to be required.

3.1.5 As Section 24(7) envisages that an AR will notify a professional association directly about a conduct complaint (arising from a special assessment) it would seem that the SLCC’s normal Gateway function would be bypassed. The SLCC considers that there should be provision in the Bill (or by regulations) for the SLCC to be notified of such complaints by the AR.

3.1.6 The power to monitor the performance of ARs lies with Scottish Ministers in terms of Section 28. One issue regarding this is that an organisation may have a dual role. For example, The Law Society of Scotland may be the AR for a LLSP, as well as being the relevant professional organisation (“RPO”) for a traditional firm of solicitors. The SLCC will retain its existing oversight role over RPOs (in terms of the 2007 Act), but cannot monitor the performance of that same organisation in its capacity as an AR under the provisions of the Bill. There is a resultant danger of duplication in oversight regulation and the SLCC wishes to clarify that the Bill will preserve or enhance its existing role in respect of ARs with a dual role.

3.2 Complaints about Approved Regulators

3.2.1 Section 64 imposes an obligation on Scottish Ministers to investigate any complaint about an AR. Scottish Ministers can however delegate certain of their investigative functions to the SLCC. The SLCC believes it is necessary to clarify if such complaints are to be delegated after Scottish Ministers have determined if the complaint is a regulatory handling complaint or frivolous, vexatious or totally without merit in terms of Section 64(2) or whether it will be left to the SLCC to decide the status of the complaint. The SLCC considers that some clarification of the extent of the functions that may be delegated is required and how Section 64 is to operate alongside the SLCC’s powers under the 2007 Act.

3.2.2 It is noted that the Bill proposes a slightly different wording for the assessment of frivolous, vexatious and totally without merit complaints to that contained in the 2007 Act. Section 5 of the 2007 Act states “Where the Commission proceeds to determine under Section 2(4)
whether a complaint is frivolous, vexatious or totally without merit and determines that it is none of these things, it must determine whether the complaint constitutes a conduct or services complaint”. Section 64(2) of the Bill states that “Scottish Ministers are not required to investigate (or may cease investigating) any complaint that they determine to be … frivolous, vexatious or totally without merit”. The SLCC considers that for reasons of consistency and transparency, the test in the Bill is adopted to test if any complaint is frivolous, vexatious and totally without merit.

3.2.3 There appears to be no procedure laid down in the Bill as to how a delegated complaint against an AR is to be dealt with (unlike other complaints which are covered by reference to the 2007 Act). Complaints about ARs may be of a different nature to service / conduct / handling complaints, therefore a different investigation procedure may be required.

3.2.4 The Section does not specify whether it is envisaged that the SLCC will be required to make a recommendation to Scottish Ministers, or whether there is a distinct cut off point once the investigation has concluded and there is sufficient evidence to make a decision about whether or not to uphold the complaint. It is noted the responsibility for imposing any sanctions against the AR rests with Scottish Ministers. They can take any of the measures specified in Section 29.

3.2.5 Section 64(7) allows Scottish Ministers to make separate regulations as to how such complaints are dealt with. Again, it is considered necessary for Ministers to consult with the SLCC about the creation of the regulations in order to ensure that it is able to manage these types of complaints. The SLCC will in due course have considerable data on regulatory process operation and expertise in regulatory oversight in terms of its functions in the 2007 Act. The SLCC suggests that Scottish Ministers may wish to call on this or oblige us to make general recommendations on regulatory practice including codes of conduct and service standards for legal services providers.

3.2.6 An AR is responsible for dealing with a regulatory complaint about a LLSP. It is possible for a complainer to make a handling complaint about the AR arising from the investigation of the regulatory complaint. The handling complaint is dealt with by the SLCC under the new Section 57D. If the AR does not comply with a direction made under Section 24(6) of the 2007 Act, the SLCC can take court action. The SLCC queries whether there should be specific provision in the Bill entitling it to make a complaint to Scottish Ministers about the ARs failure to comply with a direction before SLCC considers referring the matter to court. A complaint would be cheaper and possibly more effective solution than applying to the court, as it is Scottish Ministers who grant licences and impose conditions (and in certain cases) sanctions on ARs in terms of the Bill.
3.2.6 As Parts 1 and 2 of the 2007 Act may not apply automatically to complaints about ARs delegated to the SLCC by Scottish Ministers, the SLCC would like to see regulations imposing obligations on AR’s to cooperate and liaise with the SLCC in relation to complaints and related matters along the lines of Sections 37 and 38 of the 2007 Act.

3.2.7 It is not clear whether Parts 1 and 2 of the 2007 Act will apply to handling complaints about AR’s under Section 57D. Section 57A specifically applies these Parts to complaints about LLSPs but there is no similar provision in Section 57D. The SLCC considers that certain aspects of Parts 1 and 2 require to apply to handling complaints under Section 57D. If this is to be dealt with by future regulations made under Section 57D(2), the SLCC considers it appropriate for Scottish Ministers to engage in prior consultation with it about the applicable regulations.

3.2.8 The SLCC is funded by a levy on legal practitioners. Under Section 57C (added by Section 65), this is extended to include an annual levy on LLSPs. If the SLCC is to handle complaints about ARs under delegation by Scottish Ministers thereby relieving Scottish Ministers of that expense, consideration could be given to Scottish Ministers contributing to the cost of the investigation of such complaints and / or that a complaint levy should be imposed on an AR (and payable to the SLCC as part of the measures open to Scottish Ministers under Section 29) if a complaint is upheld.

3.2.9 The SLCC notes that it is anticipated that the only costs the Scottish Government will incur will be in relation to putting in place and monitoring ARs. The SLCC assumes that if the power to investigate complaints against and AR is delegated to the SLCC, that this is part of the “monitoring” function and that the costs involved in the investigation of those complaints will also be borne by the Scottish Government. This is not clear from the Bill.

I hope that our comments above are self explanatory, but if the Committee requires any clarification, please do not hesitate to contact me. I am disappointed not to be called to give evidence given the SLCC’s central role in complaints and conduct handling. The SLCC will continue to have an important role to play at the heart of the regulatory process and I am happy to participate in any further consultation or informal discussions about the Bill and future regulations.

Jane Irvine
Chair
18 December 2009
Thank you for the opportunity to comment on the above Bill. I have circulated the document to members of our Joint Central Committee and they have no comments to make.

Calum Steele
General Secretary
25 November 2009
Foreword
Scottish Women’s Aid (“SWA”) is a national organisation working for change on issues of domestic abuse, and an umbrella body to a membership of 40 autonomous Women’s Aid groups throughout Scotland, which provide temporary accommodation (refuge), information and support to women, children and young people who experience domestic abuse.

Introduction
We welcome the opportunity to comment on these proposals and are pleased to see that the regulatory regime is designed and intended to be robust, rather than “light touch.”

However, we do have specific concerns regarding the potential for inconsistency of approach in terms of regulators and how the Licensed Legal Services Provider structures (“LLSP”) will impact on the already dwindling supply of family law practitioners providing Civil Legal Aid funded services, particularly legal services to women, children and young people experiencing domestic abuse. Indeed, our concerns in relation to supply are reflected in paragraphs 57, 94, 95, 100 and 101 of the Bill’s Regulatory Impact Assessment, and the SPICe Briefing number 09/78 on the Legal Services (Scotland) Bill.

As we have said, there is already a diminishing supply of solicitors willing to undertake family law cases funded through Civil Legal Aid, as they are widely viewed as unprofitable, especially work in obtaining protective civil orders. Although there is demand for these services, the new LLSPs are unlikely to move into areas where there is demand but no profit incentive.

The Bill may prompt an increase in small firms merging with larger firms or individual practitioners merging. If this happens in relation to family law practitioners, and the new firm also chooses not to carry out Civil Legal Aid-funded work, then the pool of available solicitors immediately reduces. This restricts both access to justice and the available choice of suitable practitioners, because where two or three individual practitioners were accessible to both parties, the one “getting to the firm first” will now be the only person having access.

SWA hopes that the provisions of the Bill will maintain and, hopefully, increase the pool of solicitors available to handle the often complex cases where domestic abuse is involved. We do not want the reforms to produce a market where legal service providers concentrate solely on profitable areas of law, nor do we want to
see the situation where providers are not fully experienced, qualified or knowledgeable to deal with the issues, leading to the emergence of a two-tier legal system where those who can pay get access to a solicitor and the courts and those who cannot are denied this. As we have said, cases involving domestic abuse are often complex and women, children and young people experiencing domestic abuse need access to the best professional support and representation for their safety and welfare.

We note that the Bill’s regulatory objectives include the responsibility for promoting access to justice and obliges those providing legal services to support the administration of justice. However, promoting “access to justice” means different things to different people. It is, therefore, crucially important that the Bill does not encroach on the provision of legal services and access to justice, and that those charged with regulating the LLSPs, and overseeing the work of those regulators, ensure that this is to the fore.

This is particularly important in the case of the Law Society and the Scottish Legal Aid Board, which is tasked with a specific duty to monitor the availability and accessibility of legal aid services in Scotland. These bodies must advise Scottish Ministers without delay if the legislation results in a negative impact and we would expect Scottish Ministers, in turn, to act promptly in remedying any loss of access to, or numbers of, family law practitioners carrying out Civil Legal Aid-funded work.

We would now comment on certain individual sections of the Bill, as follows:-

**Section 1- Regulatory Objectives**
This section should state that an approved regulator or a licensed legal services provider must comply with the regulatory objectives.

**Section 2 – Professional principles**
The Law Society’s Service Standards state that “At the heart of providing a legal service are the interests and needs of the client. The importance of those interests and needs means that solicitors must adhere to the following overriding principles:

- Competence
- Diligence
- Communication
- Respect

The Law Society and their external, independent reference group, of which SWA was a member, put a great deal of time and effort into revising the Standards of Service and Conduct for the solicitor profession in Scotland - see [http://www.lawscot.org.uk/Members_Information/Standards/](http://www.lawscot.org.uk/Members_Information/Standards/)
It is, therefore, not acceptable to have only legal professionals governed by these rules and other professionals within the proposed new LLSPs governed by quite different and, perhaps, more lax regulation, which does not also refer to legal services.

Consequently, the principles referred to above should be included in section 2, to ensure that the protection currently in place for clients of the legal profession today will be the same as that offered by those practising within alternative business structures or LLSPs. In addition, it is vital that these principles are clear to both the providers of legal services and those proposing to act as regulators, particularly as the ABS proposals anticipate that approved regulators will include non-lawyer professional organisations as well as the current regulators of the legal profession.

Further, the list of principles also should be expanded to include the requirement to avoid conflicts of interest and (e), in particular, should state that persons providing legal services should comply with such duties as are normally owed to the court and all parties to the proceedings by such persons.

This section must state that an approved regulator or LLSP must comply with the professional principles, in addition to the regulatory principles at section 1.

Section 3- Legal Services
We note that subsection 2(c) excludes quasi-judicial functions like mediation from the definition of legal services which will be regulated by the Bill and we would ask why this is the case.

Mediation involves the resolution of, often, complex issues and both parties must be in an equal position of power, in terms of the process and decision making. Women experiencing domestic abuse are rarely in this position, which is why our stance is that mediation is not appropriate where domestic abuse is an issue. If undertaken wrongly, mediation can result in inappropriate decisions being made, whereby the safety of women, children and young people is compromised. Since mediation is undertaken by both solicitors and non-solicitors, this should rightly be regulated and monitored under the legislation.

This is an issue of particular concern to us given Lord Gill's Review recommendations that there should be an increase the use of ADR and mediation as an alternative to going to court and mediation should generally be promoted as a legal service within itself. Indeed, the Bill's Regulatory Impact Assessment, at paragraph 113, actively suggests that the ABS proposals would be a suitable vehicle for an increase in the use of mediation.

We are aware of instances of women being inappropriately steered and even pressured into mediation by the legal practitioner from whom they are seeking advice and representation on a civil matter involving domestic abuse. This
practice could become more prevalent if firms were to “tie-in” mediation services through lawyer or non-lawyer practitioners, as generally referred to in paragraph 125 of the Bill’s Regulatory Impact Assessment.

**Section 4 – Ministerial oversight**
The Bill only provides for Ministers to act in accordance with the regulatory objectives ‘so far as practicable’ and in a way that they “consider appropriate” to meet those objectives. This wording is very loose and should be clarified to place a more defined and tighter duty on Ministers.

We note that the Bill does not propose to establish a panel, the members of which would include representatives of those using legal services, which would advise Ministers on applications for authorisation and keep the regulatory framework under review. This would be an appropriate check and balance, particularly since there is potential for a conflict of interest arising due to regulatory bodies being organisations already monitoring and policing their professional members. This means that such regulatory bodies would be regulating both licensed legal services providers, and any of their own individual professional members working within these LLSPs, in addition to promoting the interests of these professional members.

**Section 5- Approved regulators**
- Applications must contain a commitment to promoting Civil Legal Aid - funded services, with reference to section 1. We will be interested to see whether regulators will be able to maintain a balance between ensuring access to justice and maintaining a regulatory regime
- The Explanatory Notes indicate that a “professional or any other body can become an approved regulator” and we would wish clarity on which “other body” this is envisaged as applying to.
- Potentially any organisation fulfilling the eligibility criteria will be able to apply to be a regulator. If there are numerous regulators, this opens the door to a lack of consistency between both the content of their respective, individual regulatory frameworks and their approaches to applying their duties under these frameworks. There must be a harmonisation of regulatory regimes to ensure that protection and standards are not diluted because of different approaches, so it would make sense to adopt a standard regulatory framework.
- The proposed terms of application must be consulted upon by Scottish Ministers.
- We note the possible tensions, discussed in the Policy Memorandum, relating to LLSPs being subject to the approved regulator’s regulatory scheme, and individual professionals within LLSPs being also subject to their own professional regulation. Given the commitment to the regulatory regime being robust, as discussed above, these issues must not become a valid excuse for non-compliance, or any relaxing in regulation. High
standards of professional conduct must be maintained for those seeking to provide legal services.

- We note that a policy of “proactive regulation” is to be pursued, which is positive since it is in the best interests of those using legal services that regulators regularly check that licensed providers are conducting their business commensurate with the regulatory objectives.

Section 6 – Approval of regulators

- Scottish Ministers must consult on the terms of the criteria for acceptance and rejection of applications under section 6(7).
- Section 6 should also specifically state that Scottish Ministers must be satisfied with the terms of the regulator’s proposed statement of policy, with reference to sections 5(1)(3(b), 62 and 63, before approving the applicant as an approved regulator.

Section 7 – Authorisation to Act

Section 7(4) (a) (i) is not acceptable in proposing that regulators of LLSPs be awarded authorisation to so act without limit of time. This authorisation must only be given for a fixed, limited period, subject to a strict procedure regularly reviewing their performance. This procedure should specifically address how their regulatory scheme has been working in practice and whether they have been actively, and appropriately, applying the regulatory and monitoring objectives and obligations.

Section 8- Regulatory Schemes

- Scottish Ministers must ensure that all regulatory schemes are similar to the Law Society’s Codes of Conduct and Service Standards- see our comment on Section 2 – Professional principles, above.
- Those accessing legal services must receive the same level of protection, whatever service they use, so there must be a level playing field and a visible equivalence of public protection between new regulators, existing regulators, existing legal service providers and new service providers. Specifically, the regulators should be tasked with ensuring, and monitoring, that LLSPs have in place a Guarantee Fund or equivalent provision to maintain the same level of protection currently afforded to those using legal services under traditional business models.
- There is the potential for conflict of interest if Ministers allow regulators to deal with their LLSPs providing other services, in addition to regulating legal services- what is envisaged here?

Section 9- Regulatory conflict

There is an issue here in ensuring that all regulatory schemes provide the same protection to users of legal services by imposing an equal level of requirements in their respective professional, and other, standards and codes of conduct.
The LLSPs will comprise individuals from different professional and other backgrounds, and therefore, by definition, they will be subject to various different professional and other standards and codes of conduct, which, in turn, may, or may not, provide an acceptable standard of protection, etc, equivalent to that currently incumbent upon members of the legal profession. There will also be the issue of regulating those members of LLSPs who are not subject to regulation by any professional body.

While regulators who are a member of the legal profession will be obliged to apply the Law Society Codes of Conduct and Service Standards, this does not apply to other, different regulators. It would go against the principles of sections 1 and 2 if a regulator were allowed to apply a lower, or more lax, threshold of professional standards than those currently applying to legal professionals. This would have the consequence of lowering the standard of protection that currently exists for users of legal services and this aspect of the approval process and reconciliation of different rules must be thoroughly and meticulously applied.

**Sections 19- Professional Indemnity**

This section is not clear enough on the protection required to protect clients and their funds; there is no provision for a Guarantee Fund or a Compensation Fund to recompense clients whose funds have been mismanaged or stolen by a member of a LLSP and indemnity insurance cover is not enough.

**Section 24 – Assessment of licensed providers**

Section 24(8) provides that a regulator can delegate its functions under this section “to any suitable person or body.” This wording is too loose as there is no definition as to who or what would be considered “suitable”, the criteria applicable when this delegation would be considered appropriate and why this power is needed wide.

**Section 28- Monitoring performance**

This section does not place a duty on Scottish Ministers to monitor the performance of approved regulators but leaves this as discretionary action. Scottish Ministers, or the body they delegate this function to, must be obliged to carry out this function.

**Section 36- Licensed Providers**

Currently, any solicitor based or working in a voluntary organisation must be employed by an entity so permitted under the Solicitors (Scotland) Act 1980 and related practice rules, namely a solicitors’ firm, or law centre, or they must, alternatively, be directly employed by the Scottish Legal Aid Board under Part V of the Legal Aid (Scotland) Act 1986.

By requiring that LLSPs charge fees for their services, this will continue to exclude the voluntary sector from being able to employ solicitors directly to give advice, or provide legal services to, their clients.
This proposal would preclude third sector organisations from providing services and information in response to the needs of their particular service users and should be re-visited to consider the issue of any voluntary organisation, in addition to the CAB, who would wish to employ a solicitor to provide free legal advice and information to their service users.

**Section 37- Eligibility criteria**

**Section 38- Key Duties**

The Bill makes extensive reference to members of LLSP being “professionals” and “individual practitioners”, and being regulated by “professional codes of standards and conduct”. What, however, is the position in regulating and disciplining members of the LLSP who are not members of any professional organisation and, therefore, not subject to any professional codes?

There is an issue here as to what standards/compliance would be required by regulators and Scottish Ministers from these persons, as it cannot be a lower standard than is in existence for solicitors.

**Section 39- Head of Legal Services**

**Section 40- Head of Practice**

The Bill must ensure that all those accessing legal services, whether through traditional business structures or by a LLSP, will receive the same level of protection. Therefore, these sections must state that the Head of Legal Services and the Head of Practice, respectively, have a duty to ensure that LLSPs and all those who work in them comply with the regulatory objectives, and professional principles as stated in the Bill.

At issue here are the possible differences in approach within the various professional codes of conduct and standards with regard to the level of standards required, what constitutes a breach and how rigorously monitoring and professional censure will be applied and enforced. If some have more of a “laissez-faire” attitude and approach than others, this will not engender confidence in other members of the legal profession, other legal service providers or those looking for legal advice or representation.

The earlier Consultation Paper discussed the Joint Standing Committee on Legal Education being consulted with respect to regulatory matters relating to the education, training and admission of legal services providers within ABSs and this should be taken forward in the Bill.

**Section 44- disqualification from positions**

**Section 46- Conditions for disqualification**

In section 44(4,) if a person is subject to a disqualification order under the Company Directors Disqualification Act 1986, or has been disqualified or removed by the court from a position of business responsibility, thus satisfying
the terms of section 46(4), they are, as a consequence, unfit to be regarded as a designated person able to carry out legal work within a LLSP. Therefore, the regulator must disqualify that individual from being a designated person.

This should also be the case for anyone satisfying the fourth condition under section 46(5), in terms of stating that this is an action that the regulator must, as opposed to simply “may”, take under section 44(5).

**Section 51 – Behaving properly**
Any failure to comply with the provisions of section 51 should raise an automatic presumption of unfitness, in terms of sections 49 and 50. Further, the penalties and sanctions to be imposed on an outside investor for not acting properly under this section should be clearly stated in the Bill.

**Section 64 – Complaints about regulators**
**Section 65- Complaints about providers**
Under the new regime, the public will have to decide whether their complaint falls under the new regulatory complaint, is a handling complaint, or a service or conduct complaint and whether it is against a LLSP or a member of that entity, who may or may not be a professional. Having a single gateway with a simple, uncomplicated process for submitting complaints will be of great benefit to those using legal services.

There is the possibility that a complaint about a licensed provider may involve members of different professions and it will be confusing for service users to have to contact two different regulatory bodies; conduct complaints will then require to be sent by the approved regulator to the relevant professional organisation.

In these cases, particularly, it will be helpful to have a single body investigating conduct complaints in addition to service complaints. They would oversee the whole process to ensure that complaints remitted to them are sent to the appropriate individual regulatory bodies and that they are not “lost” within the regulators’ system, but are followed up and monitored, so that consumers have a single, named and accessible point of contact.

Since the current single gateway for legal complaints is channelled through the Scottish Legal Complaints Commission (“SLCC”), it would make sense to continue this process for all legal complaints about approved regulators and LLSPs.

SLCC’s gateway function should also involve responsibility under section 64(2) to assess the eligibility (that is, whether or not they are frivolous, vexatious or without merit) and nature of such complaints. They would then decide which regulatory body the complaint should be passed to.
Section 66 – Register of approved regulators
Section 67 – Registers of licensed providers
Section 68 – Lists of disqualified persons

There should be no requirement that the public pay to consult any or all of these registers, they must be fully accessible to the public and any regulations made by Ministers in relation to these registers must be consulted on.

18 December 2009
Summary of Main Points

1. **Competence:** It makes no sense to give official approval for individuals to provide legal services to the public without legal education and training.

2. **Independence:** A lawyer employed by a non-lawyer does not become independent simply because a regulation says so.

3. **The Administration of Justice:** Solicitors play an essential role in the administration of justice. Their duties to the court and the administration of justice take priority over their duties to clients. To allow persons without legal education and training to act as solicitors threatens the administration of justice.

4. **Professional Ethics:** It makes no sense to oblige individuals to observe lawyers' rules of professional conduct without legal education and training.

5. **Cost of legal services:** Providing legal services is labour intensive. Lawyers are experienced and heavy users of information technology. The provision of legal services by unqualified persons will not reduce legal fees. It will cause additional problems for the public.

6. **Regulation of law firms and not individuals:** Indirect regulation of legal service providers through their employer does not meet the basic need for those who provide legal services to the public to have legal education and training and to be directly subject to professional discipline.

7. **The Threat to Scots Law:** The Legal Services Bill in England does not threaten English law. This Bill threatens Scots law and will lead to its marginalisation. The delivery of Scots law will come under the control of owners outside Scotland for whom Scots law is an alien system to be avoided where possible. Unlike England Scotland is a country of small towns and wide geographical spread. To weaken law firms not established in the main cities will poorly serve the Scottish public.

8. **International work:** External ownership of law firms has been considered internationally and rejected everywhere except England and Australia. It will not be adopted by law firms with international aspirations. It would be an obstacle for Scottish law firms working internationally.
9. **Non lawyer ownership of law firms:** The external ownership model obliges investors who are interested only in financial returns to observe professional ethics. This was the model for banks. It was abused. It is a failed system. It gives law firms a potential to sell out the goodwill of their businesses to investors. This gives investors interested only in the financial returns a role in the administration of justice. That is entirely inappropriate.

10. **Multidisciplinary Practices:** Professional ethics are essential to the delivery of legal services. Other professions carry out different functions with ethics suited to a different purpose. MDP’s would dilute lawyers’ professional ethics. This is contrary to the public interest.

11. **The Role of the Law Society:** The democratic processes of the Law Society mean that decisions are taken by majority vote. Members’ votes need not be cast in the public interest. Solicitors who provide services to individuals and businesses resident in Scotland are in the minority in the Society. The Law Society does not have statutory power to act as an Approved Regulator of other professions.

12. **Competition amongst Regulators:** Regulating solicitors in Scotland is onerous, expensive and high profile and requires a great amount of voluntary effort. Scotland is far too small to have competing regulators. The Bill follows an English model which is unrealistic in Scotland.

13. **The Faculty of Advocates and Solicitors:** The Gill Review of Civil Justice has proposed that much civil business will be transferred to the sheriff court from the Court of Session. The need for advocates to be instructed by solicitors in this and other types of business is not sustainable. It needs to be reviewed. *The Bill raises public interest issues not for decision by the legal profession.*
Walter Semple is a long standing member of the Council of the Law Society of Scotland. He was formerly Dean of the Royal Faculty of Procurators in Glasgow. He has experience of both large law firm practice and of sole practice. He has considerable experience of international practice of law. [www.waltersemple.com]

Catriona Walker is a private client lawyer who has for many years advised clients in the context of family law, conveyancing, wills, trusts, tax and succession. She is a member of the Society of Trust and Estate Practitioners and has direct experience of the issues referred to in this document which pose a threat to Scots private law.

Introduction

The Legal Services Bill would allow law firms in Scotland to be owned by persons not qualified to practice law. It would allow solicitors to enter into business with other professionals. It would allow those with no education or training in law to provide legal services. It introduces a scheme for competition amongst regulators of those who provide legal services. It is said that it will benefit consumers and increase competition.

1. Competence

The principle behind the Bill is that there is no requirement for providers of legal services to have education or training in law provided that they are not solicitors (clause 37(4)). The firm or organisation who is the legal service provider will take care of the competence and professional issues. The proposal that unqualified persons can provide legal services to the public at all, far less provide them more efficiently does not bear examination. The skills required of lawyers are hard learned and harder kept up to date. Huge investment is made in education and continuing education of lawyers.

A patient who visits a doctor does not expect a consultation with a medical services provider who is not required to be medically trained, on the basis that there is at least one doctor in the medical practice. The scheme of the Bill would create problems and difficulty for users of legal services in Scotland.

Providing legal services to the public without a full understanding the law and practice which applies to the case is dangerous business. It has led to increasing specialisation amongst solicitors. If any new system of regulation would require the equivalent level of education and training to that required of solicitors what is the point of creating an alternative? We have one already. It works. There is no benefit here for consumers, just disappointment. When mistakes are made there is work for lawyers in sorting out the mess. Is it in the public interest? No. For example, the evidence mainly from England is that unqualified will makers are causing real difficulties.
The Law Society has said that lawyers face the challenge that they will have to compete with new legal service providers. If lawyers are faced with the power of big brands such as Tesco or the Co-operative, they say that lawyers need to structure themselves in such a way as to compete successfully. To say that lawyers cannot compete effectively with supermarkets in providing legal services is absurd unless supermarkets are subject to less onerous conditions than lawyers are. To say that a change is needed because the consequences of the change will cause difficulty is to argue against the change.

2. Independence

The minister has made it plain that independence is fundamental. However if the Bill is to succeed you need to accept that that independence can be achieved by Regulation. The Bill is based on the principle a lawyer employed by a non lawyer can be independent of his employer if a Regulation says so. This defies common sense and experience. A lawyer who depends on a non lawyer for his income and his job is neither independent nor seen to be independent. A lawyer should not be subject to pressure to favour his or her employer and his prospects of future employment at the expense of the client. This is to replace good policy with bad.

3. The Administration of Justice

Solicitors are officers of court. According to statute, their authority to practise law is granted by the Court of Session, not by the Law Society. The purpose of this is to establish that they have a higher duty to the court and the administration of justice than to their clients. This rule is designed to ensure a fair, independent and reliable system of justice – a basic need of society. The Legal Services Bill would allow persons without legal education and training to provide legal services, equivalent to solicitors, in the name of consumerism.

Confidentiality of information given by clients to solicitors is an essential feature of a fair system of administering justice. It is protected from disclosure to the courts. The Bill deals with this problem by simply treating those with no legal education or training as solicitors (section 60). But they are not. To treat them in the same way as solicitors in the name of consumerism is unwise and bound to get in the way of fair justice and to be inconsistent with the statutory position and duties of solicitors as officers of court.

4. Professional Ethics

As the Bill acknowledges, high standards of professional ethics are essential to the effective delivery of legal services. The Bill claims to support these high standards by introducing a device to ensure that the core values of solicitors are applied by those without the education and training that solicitors are required to undergo. The core values include maintaining independence, avoiding conflicts
of interest and ensuring that information given to solicitors by clients remains confidential. The device adopted by the Bill involves a system of licensing investors in law firms. Observing the core values would be a condition of keeping the licence. But an individual legal services provider who has not qualified as a solicitor has not had to acquire the necessary knowledge and would have no individual responsibility to the court or a regulator.

5. Cost of legal services.

It is said that non lawyer ownership will reduce the cost of legal services, either through greater competition or new entrants delivering services more efficiently. The opposite is likely to be true.

There is no shortage of competition. In any event many legal services are not particularly price sensitive. Because there is often an “imbalance of information” between solicitor and client, the client may not be able to judge whether or not a fee is fair. New entrants can only be those without legal education and training.

The present system envisages that legal services are provided to the public by lawyers where it is economically possible for them to do so or where support is given from public funds. The areas of law where legal services are hard to find are generally those where clients cannot afford to pay. Legal services are labour intensive. This basic economic fact cannot be overcome by the provision of legal services by supermarket companies, banks or insurers. Solicitors provide a network of local offices throughout Scotland. If the financially viable parts of legal services are taken over by large commercial providers, this will lead to increasing centralisation and a loss for local consumers. It is a fact that the internet has changed the way of delivering many products and services. It is also a fact that most legal services do not readily adapt to this form of delivery any more than providing medical services does.

“Commoditisation” of legal services is the current buzzword. Solicitors have for long been heavy users of case management systems and the technology which allows them to deliver services efficiently. These efficiencies can most effectively be and are achieved by those who understand the law and the legal system.

A statutory system for non solicitor executry and conveyancers practitioners was introduced to Scotland in 1990. The take up was and remains negligible (at present about 3). Regulation of them was taken over by the Law Society at the request of the Scottish Government to avoid unnecessary expense. The Scottish Government should not re-introduce a system that has already failed in Scotland.
6. Regulation of the law firm and not the provider of legal services

It is said that the case is made for the Bill because unqualified paralegals provide legal services. But paralegals provide services to help their lawyer employers. Where is the demand for them to work for clients separately? If they want to qualify as solicitors, they have always been and will in future be encouraged to do so.

The alleged safeguard in the Bill is to provide for a Head of Legal Service and a Head of Practice or Practice Committee (clauses 39 to 41). They are to report to the Regulator any failures by the licensed provider or investor to perform according to the excellent requirements laid down in the Bill. But those who carry out the legal work, including “designated persons” under clause 47, are not required to be legally trained. It is in the public interest that they train themselves as solicitors. The expensive bureaucratic solution in the Bill addresses a problem which does not exist.

7. The Threat to Scots Law

In a debate on the Scottish legal services market in the Scottish Parliament on 15th November 2007, the Cabinet Secretary for Justice said:

"We are considering carefully everything that the OFT has said. We agree that change needs to happen, but I have no intention of adopting a model that is unsuited to our needs as a country. Our geography, demography and topography are different from those of England. We are a country of small towns, islands and archipelagos rather than a series of large urban metropolitan areas. The English bar has 14,000 members, whereas the Scottish bar has 470. An SNP Government will do what is right for Scotland. We will not preside over any diminution in the quality and integrity of the Scottish legal profession."

The proposals in the Legal Services Bill will introduce direct control of parts of the legal profession by commercial organisations based outside Scotland who will have little or no knowledge of the system and law of Scotland on which they are to provide legal services. They will also increase the financial challenges facing law firms who provide legal services in the “small towns, islands and archipelagos” of Scotland. The threat to local solicitors firms is a threat not a benefit to consumers.

A better way to frustrate the minister’s intentions would be hard to devise.

In theory Scots law is still protected by the Treaty of Union of 1707. England’s law is not under threat. Scotland’s law is under threat.
The only reason that Scots law has survived at all in the area of private law is that Scots-trained lawyers are implementing it. If legal services as envisaged by the Legal Services Bill are to be owned and controlled by banks, finance houses, accountants, surveyors, stockbrokers, supermarkets, (nearly all of whom are registered in England), the demise of Scots law will follow. It is naïve to think that these English based corporations will change to accommodate a system whose underlying ethos is foreign to them. They will advertise the front of house brand, channelling business to their own choice of ‘legal service provider’, selected on who knows what criteria. The threat is already evident. A couple of hundred sole practitioners in Scotland have just been wiped off the panel of Britannia Building Society, owned by the Co-op. Others could well follow this example.

It may be that Scots lawyers will take the lead, absorbing accountancy businesses, financial advisers, insurance agents, and banking services. A few firms may see themselves as stepping up to that role. If history is anything to go by, the more influence that the Scots have in England, the more anglicised they become. The OFT has already opined that it would not harm the Scottish consumer if these Scottish firms were to re-brand as English. This indicates disregard for the Scottish legal system as an integral part of the national identity.

8. International Work

It is said that these changes will better allow Scottish solicitors to compete internationally. The opposite would be true. Similar changes are being introduced in England. There is a strong incentive in Scotland to follow England. However no such changes are proposed in USA. Other Member States in the European Union have consistently refused to accept this type of change. An EU Directive on the Right of Establishment of Lawyers (98/5/EC at Article 11.5.) specifically allows a Member State to refuse to admit to practice any lawyer qualified elsewhere who is a member of a law firm where some of the owners are not members of the legal profession. The attack on independence in the Legal Services Bill has been rejected in other countries. Law firms with international aspirations will avoid ownership by non lawyers. These changes would pose a threat to international legal practice by Scottish solicitors.


Does the public really want a system where law firms are under the control of this or that commercial interest? Is it not better to keep a system where independence of solicitors’ ownership and control is maintained? The bill would allow advocates to maintain their existing rules requiring independence. Solicitors take part in much more litigation in Scotland than advocates do. Will MSP’s consider it good public policy to allow solicitors to compromise their independence?
Recent scandals in the financial services industry do not indicate confidence that investors with a purely financial interest in maintaining ethical rules can be relied on to do so. Yet this is what is proposed by the Legal Services Bill. Reports to a Regulator, if made at all, will always be made too late to deal with the situation in hand. Solicitors need to respect professional rules to maintain their livelihood. Investors in a law firm which breaches its licence conditions can sell their stake in the firm and move on.

The Bill would set up a system where the right to provide legal services could be bought and sold by investors. This may attract buyers and sellers and their advisers. However it threatens the integrity of professional ethics and the administration of justice. It offers nothing to consumers.

We were told when mutual building societies, the trustee savings banks and life insurance companies were sold to investors that consumers would benefit. They have not. The consumer argument has been a smoke screen for the interference of the finance industry far beyond what was necessary, with doleful effects. The Legal Services Bill would be the equivalent for solicitors. It would increase the chance of serious trouble which the present system has so far been able to avoid or deal with.

10. Multidisciplinary Practices

To allow solicitors to work in “multi-disciplinary practices” seems superficially to be attractive. However the history of this type of activity is not encouraging. High profile joint ventures between lawyers and accountants in Scotland have been tried. They failed. Lawyers and Accountants have different roles to perform. Lawyers represent their clients. For lawyers, real independence, keeping clients’ confidences and conflict of interest are paramount. Auditors have an entirely different function with different priorities. In consequence their ethical rules are different. The culture is different. No-one has shown how they can be reconciled. Which rules take precedence? Either would cause unacceptable problems for the other. This can only weaken the ethical environment of those who would be involved.

11. The Role of the Law Society

The population of Scotland is about 5 million, and there are over 10000 solicitors holding practising certificates which entitle them to practise Scots law. It is a competitive business. The solicitors can be divided into three roughly equal groups. About one third of solicitors work directly with individuals and business resident in Scotland. Another one third is the In-house Lawyers Group, a diverse group made up of civil servants and those who are employed by industry, local authorities and quangos. They each represent only one client, – their employer. They do not offer legal services to the public.
The remaining one third of solicitors is employed by the mega-firms who engage in corporate and commercial work, whose institutional clients are drawn from the financial sector, -banks and insurance companies and pension fund trustees. They operate cross-border in England and Scotland. Some of this group perceive that their business would grow by operating under the same market conditions as their counterparts in England.

Those who offer legal services to individuals and small business resident in Scotland are the minority. They are in the minority when motions are put to a General Meeting of the Law Society on such matters as the proposals behind the Legal Services Bill.

The Solicitors (Scotland) Act 1980 section 1 requires the Law Society of Scotland “to promote the interests of the solicitors’ profession in Scotland and the interests of the public in relation to that profession”. The statute imposes two potentially conflicting duties on the Society. The Legal Services Bill is supported by the Law Society on the basis of decisions made at a general meeting of the Society. Votes at a general meeting do not need to be cast on the basis of the public interest. This creates a potential conflict with the public interest.

Those opposed to the Legal Services Bill are concerned that because the proposal seems to offer to some solicitors the possibility to sell their firm’s goodwill at a high price to investors, this offers a potential financial interest which affects their objectivity.

This controversy well illustrates why the issue is too important to be left to solicitors to decide. Whilst MSPs must take note of what the Law Society has agreed to, the decision is one of public interest, and not for the profession. The public has a fundamental interest in the rule of law and an effective system to maintain it.

The support of the Law Society for the Bill forms part of the growing evidence that the Law Society should in future be limited to a role as Regulator. It should not compromise its public interest role as Regulator by trying to represent the interest of different parts of its diverse membership. This is a change that the Legal Services Bill should be making.

12. Competition amongst Regulators

Part 2 Chapter 1 of the Bill deals with “Approved Regulators”. It seems to be based on the English legislation. Clauses 5 and 6 set out provisions for a regulator of legal service providers which need not be the Law Society. How can it be realistic in a small jurisdiction like Scotland to have more than one regulator of those providing legal services? The regulation task of the Law Society is extremely onerous, high profile and expensive. It depends on a huge amount of voluntary effort. It is not credible that that this task should be duplicated by
others. The result is that this part of the Bill is unworkable and a major distraction from the difficult work of regulating legal services.

The power of the Law Society to act as Regulator is limited by its statutory objectives “to promote the interests of the solicitors’ profession in Scotland and the interests of the public in relation to that profession”. It has no power to promote the interests of other professions or of those who are not solicitors except as members of the public. The Law Society cannot act as Approved Regulator contrary to its statutory powers.

The Legal Services Bill would require a person without training in law:

- To have regard to supporting the constitutional principle of the rule of law (section 1(a)) as required by section 38(1)(a)
- To promote and maintain the professional principles (section 1(f)) as required by section 38(1)(a)
- To maintain good standards of work (section 2(d)) as required by section 38(1)(b)

The purpose of legal education is to equip those who provide legal services to do these things. We have a tried and tested system for the regulation of qualification in law. It is madness to set up another one in Scotland. It does not make a “closed shop” if those who provide legal services are required to have the education, and professional infrastructure to equip them to do so.

13. The Faculty of Advocates and Solicitors

Other changes are however needed to bring the legal profession up to date.

A working party chaired by Lord Gill has just published a Review of Civil Justice in Scotland. It has justifiably received a warm welcome. Scotland’s civil justice system has been falling behind. Action is needed. If it is implemented it will require a change to the structure of the legal profession.

Key features of the Review are a massive reallocation of work from the Court of Session to the Sheriff Court where there will be greater specialisation. The existing arrangements where advocates need to be instructed by a solicitor cannot survive such a change. The sheer number and cost of lawyers involved in pursuing litigation in the sheriff court will be unsustainable. Not only clients but also the legal aid fund should not support such a system. Advocates will need to work directly with clients in future as they do in most countries, apart from the UK. If senior advocates wish to work only with solicitors they are free to do that.

The division of the profession between solicitor and advocate does not function in international work. In general and in practice it is discarded by Scottish solicitors
and advocates who work outside the UK. To say that the Bill will assist Scottish lawyers in carrying out international work is wrong.

The restructure of the legal profession in Scotland offers an opportunity to address these matters by introducing far more flexibility. It is not being taken in the Legal Services Bill. These issues are not new. Why has the Law Society not addressed them?

Close

We live in a time where so much change happens that we are tempted to think that all change is good. The Legal Services Bill seems at first sight to increase the options for solicitors and clients. We submit that even if they do, which is far from clear, the Bill will cause problems much worse than those they are intended to address. The issues raised by the Bill are for decision in the public interest, and not in the interests of the legal profession. MSPs will have to consider whether despite the support of the Law Society, the proposals in the Bill are more likely to damage the real interests of the people of Scotland than to promote them.

Walter Semple and Catriona Walker
Solicitors
30 November 2009
Justice Committee
Legal Services (Scotland) Bill
Written submission from Shepherd and Wedderburn

Submission on Clause 37(4) of the Bill

Shepherd and Wedderburn LLP is one of Scotland's leading law firms and operates across the United Kingdom from offices located in Edinburgh, Glasgow, Aberdeen and London. We are regulated presently by both the Law Society of Scotland (LSS) and the Solicitors Regulatory Authority (SRA).

We wish to provide you with a submission on Clause 37 of the Bill, which deals with the criteria for eligibility to be a 'licensed provider' under the proposed regime and, in particular, sub-clause (4) which provides that an entity is not eligible to be a licensed provider if, inter alia, it "is a firm of solicitors".

We consider that this exclusion may undermine the level-playing field between Scottish firms such as Shepherd and Wedderburn and our competitors (actual or potential) in the legal services market within the United Kingdom. In our submission, the exclusion should be removed from the Bill.

Background

We understand that this exclusion gives effect to the policy intention outlined as follows in the policy memorandum accompanying the Bill:-

"137. A licensed provider will be any business which provides legal services under a licence issued by an approved regulator. It will not include existing forms of regulated legal practice, such as solicitors operating as sole practitioners, in partnership, or in an arrangement with a law centre, all of whom will continue to be regulated by the Society.

138. Some consultees argued that the new regulatory regime should cover all legal services, in traditional and new models. This might ensure consistency of regulation, but the Scottish Government has concluded that to do so would not be desirable.

139. It would either require the creation of a body similar to the Legal Services Board, which has been ruled out for the reasons set out in paragraph 51, or for Ministers (or some other designated person, such as the Lord President) to oversee regulation of individual legal professionals. It would, at least initially, inevitably involve a considerable degree of disruption and expense as a new regulatory framework was established for existing businesses, which expense would be borne by law firms and their clients. The involvement of Ministers in the regulation of individual lawyers, even
"at one remove, may also raise constitutional concerns about the independence of the profession".

We were among the consultees mentioned in para.138 who argued for the new regime to cover all legal services. However, we believe that the policy memorandum misses a fundamental point which we made in our consultation response. In essence, we made the point that, to the extent traditionally constituted firms and licensed providers will be in direct competition, then traditionally constituted firms should not be prevented from making the same choice of regulator as their competitors.

It is one thing to avoid the disruption which is (quite properly) identified in the policy memorandum at para.139 by requiring all traditionally constituted firms to submit to alternative regulation – it is quite another to prevent such firms choosing to do so if they wish.

Submission

We were (and remain) concerned that firms such as us may be put at a competitive disadvantage if we are not free to make this choice. In particular, we would appear to be prevented by the Bill from choosing a single regulator for the services provided by us to clients across Great Britain. This is a choice which would be open to competitors constituted as licensed providers. Our inability to make this choice could result in disadvantages in terms of cost, regulatory complexity and additional administration.

By way of example, we envisage that English law firms (presently regulated by the SRA alone) who choose to operate in Scotland under the new regime introduced by the Bill may be able to avoid dual regulation by the LSS, e.g., if the SRA were to be recognised as an approved regulator in Scotland.

We question whether it is appropriate, in an environment which features alternative regulatory arrangements, for the LSS to retain a legal monopoly in regulating traditionally constituted firms, rather than permitting such firms to have the same freedom of choice of regulator as their alternatively constituted competitors. Clearly, in such a scenario the onus would be on the LSS to persuade traditionally constituted firms to remain under its wing, presumably by offering a superior regulatory service and value for money. We regard that to be in everyone's interests.

Patrick Andrews
Chief Executive
15 December 2009
Justice Committee
Legal Services (Scotland) Bill

Written submission from the Society of Legal Scholars

1. The Society of Legal Scholars welcomes the opportunity to provide evidence in relation to the Legal Services (Scotland) Bill. The Society is a learned society whose members teach law in a University or similar institution or who are otherwise engaged in legal scholarship. It is the largest such learned society in the field in the UK and Ireland, with over 3,000 members. The great majority of members of the Society are legal academics and researchers working in Universities, although members of the senior judiciary and members of the legal professions also participate regularly in its work. The Society was founded in 1908 and is the oldest professional association of academic lawyers in the U.K. The Society's membership is primarily drawn from all jurisdictions in the British Isles. The Society, as one of the larger learned societies in the field of humanities and social sciences, is therefore the principal representative body for legal academics in the UK.

2. The majority of matters covered in the Bill will not have a direct impact on the Society and its members and therefore we limit ourselves to three general observations.

3. The Society is happy with the current arrangements in relation to the regulation of individual legal practitioners and looks forward to the continuation of its partnership with the professional bodies and the approved regulators on matters relating to the qualifications for entry to the professions. These are primarily regulatory rather than representative areas. It is important therefore that the approved regulators give sufficient attention to the professional principles (which we believe require further elaboration) and to the regulatory objectives in the training of those who will work in licensed legal service providers. This is an area where the Society strongly believes that there is a role for the Joint Standing Committee on Legal Education (JSC). This body offers an efficient and effective vehicle for ensuring that such matters are considered by those involved in all stages of the training of legal practitioners, but with a range of stakeholders represented to ensure that no one interest dominates in a self-serving way. The JSC is the body which represents all those with a professional interest in legal education and training in Scotland, and accordingly the Society believes that it is very important that the JSC is consulted about and asked to advise on regulatory issues to do with admissions and training for providers of legal services in alternative business structures. It is understood that this would occur before the decision is taken to approve a regulator since the choice of a regulator for alternative business structures inevitably carries with it questions with regard to the education and training of those involved. The Society believes that JSC should also be consulted on any other aspect of legal
education and training which may emerge in the course of the
development of the legislation.

4. More generally, given the potential for conflicts of interest in a diversifying
pattern for the provision of services, an advisory body offering review and
oversight of the regulatory framework seems desirable. The Society
accordingly supports the Government’s proposal for the establishment of a
consumer advisory panel (set out in para 5.21 of the Government
Consultation paper *Wider Choice and Better Protection*) for an
independent consumer panel to be established to advise Ministers (and
the Lord President if he acquires a determinative power over the
authorisation of approved regulators) on applications for authorisation
(including the application of the regulatory objectives and regulation
principles) as well on the operation of the regulatory framework.

5. The Society notes that promoting access to justice is one of the proposed
regulatory objectives (s.1). Although not at present well-developed, there
is potential for law clinics and other initiatives run through the Law Schools
to contribute to this goal. It is important, therefore, that in deciding on the
rules for regulating the provision of legal services these are not drawn up in
a way that might preclude beneficial developments along these lines. The
danger is that regulatory structures drawn up with commercial
enterprises in mind might inadvertently create unnecessary, or
unnecessarily burdensome, obstacles to the provision of services by other
bodies. There should of course be regulation of law clinics and the like to
protect consumers, but the structure and details of the regulation should
be appropriate for those circumstances, rather than having an ill-fitting
system devised for quite different circumstances

18 December 2009
Background

Solicitor advocates are solicitors who have been granted “Extended Rights of Audience” entitling them to present cases before the Supreme Courts of Scotland, namely the Court of Session in civil cases and the High Court of Justiciary in criminal cases.

Until the passing of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 only advocates who were members of the Faculty of Advocates were entitled to appear in those courts. Solicitors had automatic rights of audience only in the lower i.e. Sheriff and District, courts. However it is worth noting that for many decades, solicitors have been allowed to appear in the Court of Session whenever the Court is in vacation: Court of Session Act 1988, Section 48 (“Any solicitor entitled to practise before the Court shall have a right of audience before the vacation judge and in such other circumstances as may be prescribed”). Also, when the Court of Session’s Commercial Court was established in 1994, solicitors were allowed to appear whether or not they had extended rights of audience.

The first solicitor advocates were admitted in 1993 and since then over 250 solicitors have been granted extended rights (out of presently nearly 10,000 solicitors in Scotland). Over the same period the membership of the Faculty of Advocates has increased from about 280 to over 450.

The Society of Solicitor Advocates is a voluntary organisation representing the interests of solicitor advocates. The majority of solicitor advocates are members. Solicitor advocates are regulated by the Law Society of Scotland.

Principles of conduct

All practising lawyers in Scotland, whether they are solicitors (including solicitor advocates) or advocates, have been admitted to a public office following a course of education and professional training.

All are bound by certain principles of conduct. These principles are recognised and accepted by lawyers throughout the European Union. It is worth quoting from the Code of Conduct adopted by the Council of Bars and Law Societies of Europe (CCBE):
“In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.”

The CCBE Code goes on to describe general principles to which lawyers must adhere if they are to perform their function properly. These include

1. Independence
2. Trust and personal integrity
3. Confidentiality

**Appearing in a Scottish court**

It is important to understand that these principles are written into the Standards of Conduct of the Law Society of Scotland and the Guide to Professional Conduct of the Faculty of Advocates. Any lawyer appearing in any Scottish court must have these principles in mind however grave or trivial the matter in question.

These principles serve important practical purposes. In a democratic society based on the rule of law, the courts are the guardians of liberty and the protectors of rights. An independent system of justice is a fundamental cornerstone of a civilised society. It is the means by which the rule of law as governing human relationships is maintained. A civilised society requires a system for resolving disputes where parties are placed as far as possible on an equal footing. The purpose of this is to ensure that the strong do not prevail
irrespective of the merits of their position. The courts also represent a bulwark against state tyranny or the abuse of power.

If the courts are to perform these tasks properly and, so far as possible, reach the right decisions, they must be able to rely on the independence and integrity of those who appear before them. Equally, those who represent opposing parties rely on each other’s independence and integrity. This means that lawyers are bound to bring to the courts’ attention all relevant law whether or not it supports their own clients’ position. Factual representations must be based on evidence. Communications between lawyer and client are confidential.

The changes proposed by the Bill

At present all those who operate businesses which provide legal services to the public must themselves be lawyers. This means that the owners of the businesses are all qualified in the law and are as much bound by the same principles of conduct as each other. The interests of the business must recognise and, where necessary, be subservient to the wider obligations of the lawyer. If the owners of the business are not lawyers, the rules must be written to ensure that the interests of justice and not the interests of the shareholders will be paramount.

From the perspective of the court or a lawyer appearing in court, what difference will these changes make? Given that a lawyer already has to bear in mind the interests of the client, the court, his fellow professionals and the public, if shareholders are added to the list, how should a lawyer deal with a conflict of interest which arises between a client and a shareholder? Section 51 of the Bill does not presently deal adequately with this. The courts and clients must be able to rely on the integrity of a lawyer whoever is the owner of the business.

Rights of audience review

The Cabinet Secretary for Justice has appointed Ben Thomson to carry out a review into the exercise of rights of audience before the Supreme Courts in Scotland. The Society of Solicitor Advocates is participating in the review process. It is intended that the report of the review will be issued in March 2010. It is therefore probably premature to make detailed comments at this stage. However the Society strongly believes that the internationally accepted principles of conduct referred to above are the foundation for guaranteeing the independence of those appearing before the courts.

Contingency fees

The Society notes from the letter from the Minister for Community Safety that the Scottish Government is considering removing the rule against such fees in certain circumstances. The CCBE Code of Conduct also currently precludes
these. The suggestion is that these would be permitted where a collection of claimants would bring a group action where individually the claimants would be unable or unwilling to risk bringing their claims. In jurisdictions where contingency fees are presently permitted, such as the United States, there are other major differences in the way in which litigation is paid for. There each party is only liable for its own legal fees. The losing party therefore makes no contribution to the successful party’s fees. However, this means that those with the deepest pockets have an advantage. We should not be introducing such a radically different way of funding litigation in Scotland without very detailed consideration.

Even if it is intended that such fees would only be chargeable in group actions and without removing the rule that the loser pays the winners expenses, there are significant difficulties. In particular what would be the liability of the individual member of a group for the opponent’s expenses in the event the action failed? To what extent would the individual claimant’s interests have to give way to those of the group?

Making fees directly proportionate to the value of claims does not necessarily control the amount or cost of litigation. Removing the penalty for failure would also be likely to encourage the litigious who would have little to lose by bringing spurious claims. Finally contingency fees would not increase access to justice for consumers with family or debt problems.

8 December 2009
1. The Bill is very extensive and it is very difficult to deal with every detail. This briefing seeks to highlight some fundamental provisions in the Bill and their potential effect on justice in Scotland.

Permissive Legislation

2. The Bill is almost wholly permissive legislation. This therefore hands over to the Scottish Government extensive powers, within very broad limits, to effect those fundamental changes. The opportunity for scrutiny of Statutory Instruments, as will be known by all MSPs, can be extremely limited. Indeed it might be said that we would not know the effect of this legislation until subsequent implementation, operation and action, and if affecting justice in an adverse way, it would be too late.

Regulatory Objectives

Citizens

3. In any permissive legislation objectives are therefore crucial. Indeed they are the only bounds within which such permissive legislation can be tested or challenged.

4. One of the Regulatory Objectives is at section 1(b) which is about protecting and promoting the interests of consumers. A problem, however, is one of omission. At paragraph 74 of the Policy Memorandum, they agree that a substantial difference from the objectives in the LSA 2007 is the omission of the objective of "increasing public understanding of a citizen's legal rights and duties". The Scottish Government concluded that this was indeed an important policy aim but it was difficult to see how it could be achieved through regulation of legal services providers. They then go on to say in view of the balance that needs to be maintained between policy aims and proportional regulation, the Scottish Government decided not to include this Regulatory Objective.

5. It is hard to understand this reasoning.

- Firstly, there seems to be an assumption that consumers are the only persons to be provided with a legal service. That may be a definition which suits the banking industry or indeed financial services but it does not suit legal services. There are others who are provided with legal services who cannot in anyway be described as consumers. We cannot regard a person whose human rights have been breached by the State nor someone who needs a roof over their head nor a widow seeking an inquiry and damages in respect of the death of a spouse etc as falling within the definition of consumers.
• Secondly it may be said that the definition of consumer is to encapsulate all of these persons. That is stretching the definition too far and in any event those who take the narrower view will in fact fail to adequately recognise these others in our justice system. The proper term is citizens.

• Thirdly, there is section 1(c) in promoting access to justice. This combined with 1(b) would tend to lend weight to greater access to justice for consumers instead of greater access to persons who do not fall within that definition.

• Finally why such an important policy aim could not be achieved through regulation of legal services providers is hard to understand. That is basically saying that where citizens rights are concerned, this Bill would not promote access to justice for them.

The State and Legal Services

6. The legal model which the Scottish Government seems to have in mind is competition between private legal persons. The State is, in a sense, the referee making sure that matters are conducted fairly and there is healthy competition. That model however is inaccurate and, indeed, misleading. The “referee” is in fact playing in that game themselves. It is the State that is the litigant in 100% of the criminal cases and 50% in civil cases.

7. The State in its various entities and guises has, for example, a full panoply of lawyers under the Scottish Legal Directorate for the Scottish Government, has numerous legal departments throughout the country for local authorities and has a very large staff under the Crown Office for prosecution of crime through Procurator Fiscals etc not to mention its various agencies. It may be said that the Law Society of Scotland would be a regulator for the staff as many of them would be lawyers anyway. While it may be argued that the Law Society of Scotland might adequately regulate and control lawyers in private practice, it is recognised as being wholly inadequate in dealing with lawyers in State service (and the departments). They are also carefully protected by the government departments which they serve. Indeed even in terms of the Legal Services Bill, many of these lawyers do not deal with consumers anyway and do not in any event have them as clients. Their clients are in fact the State who as one of their own is hardly likely to take them to task.

8. Indeed we consider that the State legal staff should themselves be under a duty of care to members of the public and not be able to avoid, in some cases, an appalling lack of service, to those who are subject to a poor service by them not being clients. We can give examples of the inadequacy of service to members of the public from the State.

9. There is therefore a black hole in the Legal Services Bill.
State Control

10. Not only do we have a major user of legal services being unregulated, the position is more serious in that it is the State itself which is appropriating to itself all the powers of regulation. There is attached to this submission an appendix detailing the extent of the Ministers powers in terms of the Bill. This places the State in a very dominant position in respect of legal services and seriously undermines the independence of those legal services. To continue with the games analogy, the State is not only playing the game itself as a participant but as well as being referee, it controls who plays, who doesn’t play, the clubs and their sponsors (but not itself).

Multiple Regulators

11. The Bill also provides for multiple regulators not only vis a vis areas of legal service but multiple regulators over persons within each legal services provider itself. That is a recipe not only for confusion for the user of the legal services but dangerous for them in terms of potential conflicts of interest, contradictory codes of conduct and client privilege. Against such a background, policing would be crucial.

Ministerial Resources

12. Despite the fact that the Ministers are appropriating to themselves unprecedented powers, the resources which they are allocating to carry out these powers and police a major shift in the provision of legal services are paltry. These are covered in paragraphs 216 to 228 of the Financial Memorandum. This, in our view, seriously underestimates the costs in approving regulators. Most alarmingly, at paragraph 227 in relation to the requirement on the Government to monitor approving bodies and applying sanctions for breaches of the regulatory objectives and principles under the regulatory scheme, the estimated starting costs will be £13,193. That is a threadbare provision and wholly inadequate to police such a fundamental change i.e. a man and his dog. The Scottish Government is seeking to do justice on the cheap.

13. The consequences of lack of monitoring might be serious.

14. Legal services would be open to control by criminal minds. The involvement of any criminal element may be the attraction of profit and/or money laundering.

15. One needs only to consider taxi contracts to see how easily such inroads could be made. The criminal mind would be very adept at hiding their interest through other parties. We would have no confidence whatsoever that the Scottish Ministers’ monitoring would be in any way capable of policing such a situation.

16. There are also claims companies or claims farmers. There is no regulation of these in Scotland, unlike England under the Compensation Act 2006. This may be because the claims farmer phenomenon may be perceived as not being as prevalent in Scotland as in England and Wales. However they will become prevalent in Scotland because they are not regulated here and the Scottish market
would seem even more attractive having regard to the Government’s encouragement of contingency fees whereby as much as 30% or 40% of a client’s damages can be taken.

**Specific Regulators**

17. There are also concerns regarding approved regulators having divided interests. In our view, an approved regulator cannot, on the one hand, represent its members and on the other hand be charged with regulating them. This is a clear conflict of interest and one would militate against the other. Indeed it is almost impossible to fulfil both objectives.

18. Either that approved regulator has to give up its representation or not apply to be an approved regulator.

**International Markets**

**Globalisation and other markets**

19. It is accepted that the provision of legal services will have cross border and international dimensions. This may be particularly so with regard to national UK firms, legal services providers and investors.

20. It is important that there is liaison and co-ordination between these separate regimes especially between Scotland and England and Wales. In England and Wales there is a Legal Services Commission which is independent and separate from the government departments at Westminster and will develop its own approach.

21. In Scotland, on the other hand, we will have a Scottish Government seeking to fulfil the same kind of role as the Legal Services Commission. It will however have its own interests and will not be independent.

22. It is difficult to understand how proper liaison and co-ordination can exist between on the one hand the Scottish Government regulator in Scotland and an independent regulator in England and Wales (and not the Westminster government).

**The Consumer and Citizen**

23. We wonder whether in fact the Bill as presently framed, also seen in the context of other changes, is in fact confusing the consumer/citizen rather then helping them.

- There would be confusion between the lawyer being regulated by one body, presumably the Law Society of Scotland, and others involved in legal services regulated by other bodies all within the one entity.
- Each of the persons involved in the one entity will have their own codes of conduct and professional responsibilities.
• Each approved regulator will have to delve into and distinguish what they are responsible for and what others in the entity are responsible for. The Scottish Government will also have to monitor and control each of these approved regulator in those tasks.
• Depending on who is responsible, in addition, a complaint may have to go off in various directions. It may have to go to the approved regulator and the Law Society of Scotland (if not the approved regulator of the entity in question but of lawyers within it) and even if it is to do with the Law Society of Scotland, a complaint of inadequate service should go to the Scottish Legal Complaints Commission and a complaint of conduct should go to the Law Society of Scotland.
• If the complaint concerned litigation and also involved advocacy, the complaint may also have to go to the Faculty of Advocates, unless it was a complaint of service which would go to the Scottish Legal Complaints Commission. If there were two advocates involved, one a solicitor advocate and the other one an advocate, then the complaint would have to go to the Law Society of Scotland or the Scottish Legal Complaints Commission and/or the Faculty of Advocates and the Scottish Legal Complaints Commission for each person.

24. Is this not all in danger of becoming a mess?

Solution

• Consideration should have been given, and still needs to be given, to a Legal Services Commission for Scotland.
• This should be independent of the Scottish Government.
• It should adequately reflect in its membership not only lawyers but other professionals and lay persons.
• It would also be charged with a regulatory objective in respect of citizens.
• Those charged with legal services on behalf of the State should also have a duty to those for whom the public service is intended.
• It would remove the State from conflicts of interest.
• It would remove the State from an unhealthy control of legal services.
• It would also assist in removing the problems of multiple regulators.
• It would also assist in removing problems of specific regulators.
• It would also have to be fully funded especially if it is the only guarantee of the values we agree should still remain in our justice system.
• It should encompass the Scottish Legal Complaints Commission (SLCC).
• There would be one central point for regulation, conduct and complaints which would be readily understandable by the Scottish consumer/citizen.

Frank Maguire
Thompsons Scotland
30 November 2009
Appendix 1

Ministers Powers

1. In terms of section 5, they receive applications from the approved regulator, they then go through a process of approving the regulator which may or may not be subject to conditions, there is a process of consultation in terms of section 6(3), there are the procedures in copying applications etc, representations which may be made thereafter, authorisations in terms of section 7, imposition of restrictions on the regulator in terms of section 7(3) and time periods for that. There is then provision for amending regulatory schemes to the Scottish Ministers and consultation. There is then consideration regarding reconciling different rules in terms of section 9, Scottish Ministers making regulations for regulatory conflicts that may involve an approved regulator.

2. There is then licensing rules, appeals, practice rules, financial sanctions, enforcement duties, performance reports, accounting and auditing, professional indemnity - all of which would require to be approved by the Scottish Ministers for the particular regulatory authority.

3. There is then the internal governance arrangements. They need to liaise with other legal entities. There is also provision for the Scottish Ministers making regulations about internal governance arrangements for approved regulators.

4. Then the Regulatory Functions and Scottish Ministers' powers to carry out special assessments etc. Scottish Ministers may also by regulation approve additional functions they consider necessary. Then there is the consultation by the Scottish Ministers to every approved regulator, the Lord President and such other persons or bodies which they consider appropriate.

5. There is also the guidance to be issued by the Scottish Ministers.

6. Scottish Ministers will also monitor performance in terms of section 28 regarding more or less all of its activities.

7. There are also measures open to Ministers in terms of section 29, many of which are quite drastic in terms of subsection (4).

8. Then cessation directions and transfer arrangements to consider and also extra arrangements for the Scottish Ministers to make regulations etc. There is also section 35, step in by Ministers.

9. Then in Chapter 2, there are licensed legal services providers and then further powers by the Scottish Ministers to make regulations and then more regulations to be made by the Scottish Ministers, for example, in terms of section 40, head of practice, and section 41, practice committees and functions of committees.

10. There are then all of the provisions as to outside investors, factors as to fitness, behaving properly and more about investors. Again the Scottish Ministers
may make regulations. They will in any event have all of these matters to consider when considering the conduct of the regulatory authority and its competence.

11. In terms of Chapter 3, there are further provisions to achieve regulatory aims and here we have the Scottish Ministers requiring to consult the OFT, the issuing of policy statements by the approved regulator, again to be approved by the Scottish Minsters.

12. Then complaints about regulators in terms of section 64.

13. There is then the Scottish Ministers keeping a register of approved regulators in terms of section 66 etc. There is then another power by the Scottish Ministers making regulations regarding registers of licensed providers and lists of disqualified persons.

14. There is then again the Scottish Ministers approving bodies for confirmation services in terms of Part 3 and certification, regulatory schemes and financial sanctions.

15. There is then Ministerial intervention for approved bodies in terms of section 81.

16. There is then the legal profession in terms of Part 4.
Appendix 2

Extract from the Legal Services Bill Financial Memorandum

227. The Bill will also require the Government to monitor the approving bodies and apply sanctions for breaches of the regulatory objectives and principles, and of the regulatory scheme. The estimated staffing will be as follows. These figures represent the staffing requirements and costs after the initial bout of applications.

<table>
<thead>
<tr>
<th>1-2 approving bodies</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (5%)</td>
<td>£1,075</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>£3,000</td>
</tr>
<tr>
<td>1 x B2 (20%)</td>
<td>£7,300</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£13,193</strong></td>
</tr>
</tbody>
</table>
Written submission from Unite Trade Union Scottish Region

1. Introduction

1.1 Unite – the Union represents around 200,000 working people and their families throughout Scotland. We are the UK’s largest trade union with 2 million members in a range of industries including transport, energy, construction, financial services, manufacturing, print and media, the voluntary and not-for-profit sectors, local government and the NHS.

1.2 Unite’s representation services cover a range of issues, both inside and outside the workplace. We help with personal injury claims, employment matters, wills, conveyancing and many other legal issues.

1.3 The Scottish Government claim that this Bill will help Scotland’s legal profession grow and compete both in the UK and internationally, boosting competition and scope of access to legal services to the Scottish public. Indeed, there has been much publicity surrounding the consultation following the introduction of similar legislation at Westminster in the form of the Legal Services Act (2007) – dubbed ‘Tesco law’ in some quarters. The Bill will also allow the legal services industry to pursue Alternative Business Structures (ABS) which will permit external capital investment to Scottish legal firms.

1.4 Unite is concerned about the impact of any legislative developments which place emphasis on the marketisation of legal services. We are also concerned about the prospect of investment from the likes of multi-national banks and retailers into our legal system and its impact on service provision and issues of conflict of interest.

1.5 Our position is clear and incontrovertable, access to justice should be a fundamental right for every citizen in Scotland. Serving people, not profit should be the core principle of our legal system.

Which? Complaint and OFT Response

2.1 It is estimated that the legal profession contributes an approximate turnover of more than £1 billion per annum to the Scottish Economy. Legal services in Scotland are predominantly provided by solicitors and advocates. There were 10,434 solicitors holding practising certificates on 31 October 2008 and 456 advocates as at 28 August 2009. There

--

1 SPICe Briefing, Legal Services (Scotland) Bill, 5th November 2009- http://www.scottish.parliament.uk/business/research/date/documents/SB09-78.pdf

2 Legal Services (Scotland) Bill Policy Memorandum 1:4 - http://www.scottish.parliament.uk/S3/bills/30-legalServices/b30s3-introd-pm.pdf
are high levels of competition in some areas of the legal services market, such as commercial law, financial services and tax and residential conveyance.

2.2 In May 2007, under section 11 of the Enterprise Act (2002), consumer group Which? submitted a super-complaint to the Office of Fair Trading (OFT) arguing that the following restrictions imposed on providers of legal services in Scotland significantly harm the interests of consumers by stifling choice, inhibiting innovation, and excluding potential entrants from the legal services market. These restrictions are:

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

2.3 Which? also argued that the regulatory structure for legal services in Scotland should be reformed in order to accommodate the lifting of these restrictions. The case for reform put forward by Which? and the OFT was accepted by the Scottish Government in its policy statement to the OFT response of December 2007 which recognised the need for alternative business structures (ABS) to enable Scottish legal practitioners to deliver a more modern and competitive legal service.

The Scottish Government’s Justice Secretary has stated that the new proposals will help Scotland’s legal profession to compete internationally. At present the Scottish Law Society’s Practice Rules 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; and
- Solicitors from forming multi-disciplinary practices.

2.5 The Bill could remove these provisions and subsequently open up access to capital and investment, encourage specialisation and diversity of services for some service providers and allow others to benefit from shared work and their respective network of clients and contacts.

3. **Threat of the Legal Services (Scotland) Bill proposals**

3.1 Where sections of the Scottish legal fraternity have strongly advocated the proposals of the Bill, criticism has been widespread about the potential impact of opening up our legal services to the market and the swiftness of the Bill’s development in the Scottish context. On one hand the Bill will allow solicitors to secure investment and expertise
from outside sources, others have argued that the Bill will result in multi-nationals such as banks and supermarkets controlling the Scottish legal system and its services.

3.2 For Unite, the threat of multi-national companies such as banks or supermarkets influencing legal the provision and scope of legal services is unpalatable. We believe that if our legal system is left to the mercy of market forces investment will be concentrated into profitable areas of our legal system, or areas of vested interest to external investors, to the detriment of the user.

3.3 The outcome will be a potential legal desert where conflict of interest will be prominent. Certain legal services will be cheap and accessible but other, crucial, services will become increasingly inaccessible and unaffordable for citizens in Scotland. It is impossible not to be pessimistic when there has been such a rush to embrace this Bill in Scotland despite the fact that neither the OFT nor Which? provided an empirical Scottish case which showed the legal market in Scotland was failing consumers in terms of choice and competitiveness.

3.4 Indeed, in their July 2007 response to the super-complaint, the OFT stated that the legal services market in Scotland is different from that in England and Wales. While recognising that many of the same principles and benefits are likely to apply, the OFT did not assume that the changes currently being made in England and Wales will be automatically suitable for the Scottish market.

3.5 Unite believes that in this instance the Scottish Government have bowed to a small but influential section of Scotland’s legal services sector who are seeking to maximise their profits and promotion of their ‘brand’ of justice, much to the detriment of access to justice for working people and their families.

4. Conclusion

4.1 Unite is not adverse to change but we strongly oppose any plans that will have an adverse effect on the ability of working people and their families in Scotland to access and receive justice.

4.2 The provisions of the Legal Services (Scotland) Bill will create an open-door for third-parties with only profit on their agenda to influence, shape and dominate our justice system. The rhetoric that promises cheaper and more accessible legal services for our citizens belies a reality that will inevitably lead to widespread availability of services that are profitable to providers but with restricted access to other less financially alluring aspects of the justice system.

4.3 Put simply, the Bill is a further erosion of our fundamental right to access to justice. This is reflected not only in this Bill but also more broadly in the Gill Review and the policies of the SNP Scottish
Government. The Legal Services (Scotland) Bill represents another almighty push in the direction of profit. Working people and their families will be served-up certain brands of justice that are profitable to providers but will be vulnerable to having to pay a lot more for other legal services.

4.4 Unite has said previously that we are at a crossroads moment for the Scottish justice system in light of the Scottish Government’s expressed policies on civil justice. It is a basic human right that everyone should have equal access to justice - it should not depend on the depth of your pockets, or the scope of service being offered by legal service providers.

4.5 Our justice system should exist and function to serve people, not profit. We reinforce this position in light of the proposals contained within the Legal Services (Scotland) Bill.

1 December 2009
Introduction

1. In May 2007 Which? submitted a Supercomplaint to the OFT, asserting that consumer interest in Scotland was being harmed by the regulatory restrictions on lawyers and non-lawyers working together, and the prohibition on lawyers adopting appropriate business models. We also complained that people could not directly access an advocate without first hiring a solicitor. Advocates are compelled to practise as sole traders.

2. These practices act against the consumer interest because they prevent lawyers working in new, more innovative ways to offer better, and more cost effective services to the public. Consumers often favour ‘one-stop shops’, particularly around homebuying and selling. As well as saving money from economies of scale, we believe that the Legal Services Bill will also bring benefits in terms of more effective working practices and efficiencies brought into the legal service market by other professions and investors.

3. For example, key non-legally qualified staff in firms could be offered ownership rights in legal firms, allowing these firms the chance to attract high quality managerial and technical staff, allowing them to become more efficient and competitive, and passing on benefits for consumers.

4. Reform of legal services in the UK was driven by the 2004 European Commission report on Competition in Professional Services, followed by the Clementi report in England and Wales, which recommended a new regulatory framework which allowed more choice for consumers in how they access legal services, and choice for lawyers in how they work.

5. The Scottish Bill has much in common with the new English and Welsh regulatory regime, but will crucially lack the independent regulator.

Independent regulation of legal services

6. We believe that legal services should be independently regulated, and that it is difficult for an organisation to both represent its members effectively, and to regulate itself. There is a fundamental conflict of interest which would be best addressed by legal services being regulated by a Scottish Legal Services Board, independent of the legal profession and government.

7. This could be done by vesting regulatory control of the Scottish legal profession and of third party entrants directly in a newly established Scottish Legal Services Board. Such a Board could also be responsible for consumer protection. Alternatively, a Scottish Legal Services Board could
oversee the Law Society and the Faculty of Advocates, which would then regulate the third parties who wished to enter the market. This would put Scottish consumers on an equal footing with those in England and Wales.

8. However, the Bill does not propose to set up a Legal Services Board, proposing instead that Scottish Ministers will license and regulate the regulators, who will in turn regulate firms who choose to provide legal services under the new arrangements.

9. This leaves a risk of interference from Government, whereas a separate regulator would enshrine independence from Government, which is preferable.

Law Society's change of governance

10. The Law Society’s planned changes in governance will improve but not completely address the difficulties caused by self regulation. Like Consumer Focus Scotland, we urge more lay involvement in Council, and would prefer to see more than the mooted 20% of non-lawyer members. This will promote more public confidence in the Law Society.

11. We welcome that the regulatory committee will have at least 50% lay membership and a lay convener. This is a meaningful step forward in separating the representative and regulatory functions.

Advocates should be allowed to modernise too

12. We believe that advocates should be included in the new arrangements, and included in the Bill. It would be better for consumers of legal services if advocates were also permitted to work with solicitors and other providers of legal services. This would lead to improved access to justice, modernisation of services and better understanding by the public of these services. We see no reason for advocates to be denied this choice and opportunity. In our view, knowledgeable consumers would like to be able to engage the services of an advocate directly, which is still not normally the case.

13. Leaving a section of Scottish legal services out of planned modernisation makes no sense to us. We call on the Faculty of Advocates to rescind its rule preventing advocates from working with other lawyers. Which? thinks that advocates’ regulatory framework should be more radically reformed, with greater lay involvement and a separation of representative and regulatory functions.

Consumer protection

14. There is to be a ‘fit to own’ test, among other proposed safeguards, with which we agree. Users of legal services must be assured of the highest standards and protections, but we believe this can be provided by the Bill as proposed.
15. There will be regulatory objectives and professional principles which will apply to regulated businesses and legal professionals. We welcome measures to modernise the governance of the Law Society in particular and are pleased to note that all regulators of legal services in Scotland will be subject to the new regulatory objectives. And we welcome the fact that the Bill contains a new commitment to ‘protecting and promoting the interests of consumers’ and agree that this should be in addition to the public interest, as these are not always the same thing.

**Licensed conveyancers and executry practitioners**

16. Which? would like to see the encouragement of more competition in this area. For example, we do not consider it appropriate that the Law Society regulates licensed conveyancers. For real competition to flourish, they should be independently regulated.

17. We agree that permitting a professional or other body to apply for executry rights would permit more choice and competition for consumers.

**Advisory panel**

18. We welcome the Government’s intention to set up an advisory panel to advise Ministers on applications for authorisation and keep the regulatory framework under review. We believe there should be a lay majority membership and a lay Chair. We think this should be a statutory body with a strong consumer interest.

**OFT powers**

19. We also think it would be in the consumer interest if the Bill gave the OFT the power to investigate if it perceives the behaviour of any approved regulator to be anti-competitive and to publish a report; which is the power granted in the LSA 2007 (English) Act. Instead, in Scotland the OFT is to have a narrower power, only to investigate competition issues relating to applications by approved regulators, licensed providers and approving bodies. We see no reason for this difference in regimes.

**Complaints**

20. We are pleased that the Scottish Legal Complaints Commission will remain a gateway for all legal complaints. It would be preferable if the Commission was also to deal with so-called ‘conduct complaints’ too, rather than the practitioner’s professional body, as will continue to be the case.

**Claims management companies**

21. We would have preferred to see claims management companies regulated. Although we accept that the situation regarding claims management companies may be different in Scotland because of legal aid provision, the lack of regulation of claims management companies is a
regulatory gap leaving issues of crossborder inconsistency which can leave consumers disadvantaged.

22. We are asking the Claims Management Regulator for England and Wales if he has concerns about the issue of crossborder inconsistency.

McKenzie Friends

23. Which? supports the introduction of McKenzie Friends in Scottish courts. The ability of a party litigant to have a lay supporter to help him or her is an important principle and a vital practical help.

24. There is little doubt that some litigants in Scotland are unable to find a lawyer to represent them in court and are forced to represent themselves on occasion. A McKenzie Friend can make a huge difference to a party litigant, providing knowledgeable support, and helping address the issue of equality of arms in court, which is an important, and possibly a human rights issue.

25. To the best of our knowledge, it is only in the past fortnight that permission has been granted for the first two McKenzie Friends ever to be permitted in a Scottish civil court. Therefore we do not accept that the system of McKenzie Friends has already been operating in Scottish courts. We would however like this to become the norm, unless the McKenzie Friend is unacceptable by reason of poor conduct.

26. Otherwise we think there should be a presumption that a McKenzie Friend will be acceptable. A McKenzie Friend should of course sit beside the litigant where they can be useful, rather than the idea of seating the MF behind the litigant, which strikes us as ridiculous. There is no point in making it more difficult for the litigant to receive help.

About Which?

27. Which? is the UK’s largest independent consumer organisation, a charity funded by sales of our magazines and other services, and represents the consumer voice on many issues including legal services.

1 December 2009
We write with our submissions in relation to the Legal Services (Scotland) Bill.

We also confirm our acceptance of the Committee’s invitation to give oral evidence on 15 December. We confirm that, when giving oral evidence, we are happy to assist the Committee on any issues, whether or not specifically covered in this written submission. The WS Society will be represented at the session by the Deputy Keeper of the Signet, Caroline Docherty, and by me as the WS Society’s Chief Executive. We are both solicitors and full members of the WS Society.

Our submission is set out on the following pages. We have included an historical perspective to place our comments in context. We have restricted our comments to points of principle rather than a detailed section-by-section review. The headings under which our submission is presented are as follows:

**Definitions**
- Early history
- 20th century history
- 21st century history
- Current position

**Regulatory and representative functions**
- Meaning of representative function
- Level playing field
- Government control v. independence
- Conflict of interest between solicitors’ and alternative models
- Conflict of interest between regulatory and representative functions
- Unfair competition issues
- Financial transparency

**Proposed restriction to one function**
- Consultation with solicitors’ representative bodies

**Conclusion**

We submit as follows:

**Definitions**

1. **Bill** means the Legal Services (Scotland) Bill as published at today’s date.

2. **LSS** means the Law Society of Scotland.
3. **WS Society** means The Society of Writers to Her Majesty’s Signet, also known as The WS Society.

4. The words “we” and “us” refer to the authors of this letter (the Deputy Keeper of the Signet, Caroline Docherty, WS, and the WS Society’s Chief Executive, Robert Pirrie, WS) who are authorised by the WS Society’s Council to make a submission to the Justice Committee in relation to the Bill.

**Early history**

5. We start by putting the WS Society’s role in relation to the regulation and representation of the Scottish legal profession in historical perspective.

6. The origin of Scotland’s independent legal profession \(^1\) – the separation of the judiciary and legal practitioners (at that time advocates and writers) from the government – was the creation of the College of Justice in 1532.

7. The College of Justice originally comprised the judges of session (now the Court of Session), the advocates (now the Faculty of Advocates) and the writers to the signet (who became formalised as the WS Society). The writers to the signet were responsible for producing documents requiring the Scottish monarch’s seal (i.e., the signet), including court documents.

8. The College of Justice established a justice process independent from state affairs and, as such, is regarded as the foundation of the Scottish legal system as it is today.

9. The WS Society has been a part of the independent legal profession in Scotland from 1532 (if not earlier) until the present day.

**20\(^{th}\) century history**

10. The role of the WS Society continued to evolve in relation to the regulation and representation of what in the 20\(^{th}\) century became the Scottish solicitors’ profession

11. In 1933 the WS Society, along with other bodies of solicitors in Scotland, including local faculties, formed part of the General Council of Solicitors in Scotland which both regulated and represented the newly unified Scottish solicitors’ profession \(^2\).

---

\(^1\) This is to leave aside the technicalities of whether the judiciary are part of the legal profession.

\(^2\) Formed by the Solicitors (Scotland) Act 1933 and the successor to the Joint Council of Legal Societies of Scotland created in 1922 (of which body the WS Society’s senior office bearer, the Deputy Keeper of the Signet, was chair *ex officio*).
12. Following the establishment of the LSS after the Second World War\(^3\), the WS Society ceased to have any direct involvement in the statutory regulation of solicitors in Scotland. The WS Society continued to maintain its own standards for admission and membership and retained its representative function which continues to this day. It is worth noting that many Presidents of the LSS have been members of the WS Society and there has always been close liaison between LSS and the WS Society.

13. As an independent representative body, the WS Society has promoted the highest standards of competence and integrity in legal services in Scotland. The WS Society offers legal support services to Scotland’s solicitors (e.g., research, information and library services, professional development and training, and accommodation, in the form of The Signet Library building, for working, meeting and ceremony), providing a forum for discussion, debate and the exchange of ideas, and representing our members in relation to law reform and other matters.

21\(^{st}\) century

14. Today the WS Society is flourishing.

15. Full membership of the WS Society (i.e., WS status) is open to individuals who have qualified to be a solicitor and have engaged as a legal adviser for a minimum of 3 years, whether or not holding a practising certificate as a solicitor from the Law Society of Scotland. Affiliate membership is available for less experienced lawyers, including trainee solicitors and solicitors up to 3 years qualified.

16. More younger lawyers are joining and participating in the WS Society than ever before.

17. We have approximately 1,100 members. The majority of our members are practising solicitors in private practice. To give this some context, in the 1980s membership was around 790.

18. The suffix “WS” may be used by full members of the WS Society and by law firms where the number of WS members within the firm exceeds 50% of the number of partners (or members of a limited liability partnership) of that firm.

19. Today most of the WS Society’s services are available to both members and non-members. Members of the WS Society and WS status law firms benefit from the services either as part of their membership or at significantly discounted prices.

---

\(^3\) Under the Legal Aid and Solicitors (Scotland) Act 1949.
20. With a base in Edinburgh, the WS Society is a national body and, with changes in technology, the WS Society aims to increase its membership by supporting solicitors’ practices throughout Scotland.

21. In recent years the WS Society has invested significant resources in renewing its relevance and value to the Scottish legal profession. Examples of significant investment include:

a. Developing Scotland’s largest centre for the Professional Competence Course (PCC) for trainee solicitors, one of the compulsory elements of training currently required for qualification as a solicitor. Approximately 1,300 trainee solicitors have attended the PCC at The Signet Library. The PCC is part of a range of continuing professional development (or CPD) training programmes provided by the WS Society, making the WS Society the most significant independent institution provider of the PCC in Scotland (outside the academic sector). These are examples of the WS Society providing significant services to support solicitors, law firms and in-house legal departments to comply with LSS’ regulatory requirements.

b. Designing and launching The Signet Accreditation, a programme to accredit Scottish solicitors (not only WS members) in specific practice areas by means of a rigorous assessment process, giving equal weight to client-focused skills and priorities as to technical knowledge of law and legal practice. The programme is run by an independent board chaired by Lord Cullen of Whitekirk. The programme has received international recognition for its innovation, particularly in the United States of America.

c. Creating a high quality executive team, headed by a Chief Executive who is a solicitor and WS member.

Current position

22. As these examples illustrate, the fact that the WS Society has not had a statutory regulatory role for the last 60 years or so has given it independence and freedom to undertake representative functions for solicitors (including providing valuable support services):

---

4 For the last two years we have organised the main crofting law conferences in Scotland, held in Inverness. We also run the main annual agricultural law conference in Scotland.
5 The WS Society has been invited to the USA to give keynote presentations on accreditation on four occasions over the last three years, including twice at the American Bar Association.
a. promoting regulatory objectives (to use the language of the Bill), assisting solicitors, law firms and in-house legal departments to understand and fulfil regulatory requirements; and

b. promoting professional principles (again using the language of the Bill), encouraging and enabling solicitors to attain ever higher standards of competence and integrity.

23. It is one of the WS Society’s objectives to ensure that “WS” continues to be recognised, in the UK market and internationally, as a distinctively Scottish brand of excellence in legal services.

24. Symbolic of its place in the Scottish legal system, the WS Society continues to own and maintain from its own resources The Signet Library building in Parliament Square, Edinburgh. The Signet Library is the only iconic building for the solicitors’ arm of the Scottish legal profession, reflected in the fact that it is the venue for the LSS’ annual ceremony for the admission of new solicitors.

Regulatory objectives and professional principles

25. It follows from paragraph 22 above that the WS Society is a strong supporter of the regulatory objectives and professional principles set out in the opening sections of the Bill. Our fear is that some of these very objectives and principles may be compromised without further amendment to the Bill.

26. Our concerns relate to the relationship between the regulatory and representative functions and to the independence of the solicitors’ profession in Scotland.

Regulatory and representative functions

Meaning of representative function

27. The Bill recognises (e.g., section 23 as regards an approved regulator, and section 93 as regards LSS) a distinction between regulatory and representative functions in relation to the legal profession.

28. We regard the regulatory function as self-explanatory. We regard the representative function as including two distinct, if overlapping, meanings. The first meaning is what is sometimes referred to as the “trade union” function of lobbying, defending and promoting the interests of members. The second meaning is that of providing support services to assist members and their businesses, including helping them achieve regulatory compliance.

29. We take references in the Bill to the representative function as embracing both meanings. However, the Bill does not appear to recognise the distinction
(see the definition in section 32(2)). Indeed, we are not clear that the meanings of “regulatory” and “representative” are the same for approved regulators (under Part 2 of the Bill) and LSS. There may be a need for greater clarity in the light of our concerns below (see paragraphs 36 – 47 below) about the conflict between the functions.

**Level playing field**

30. Following on from the preceding point, it is important that there is a “level playing field” between the approved regulators of non-traditional legal service businesses (i.e., alternative business structures or ABS) and the regulators of traditional solicitors’ businesses. The same goes as between the different types of businesses themselves.

**Government control v. independence**

31. The effect of the Bill, once enacted, is to tighten government control of the regulatory function in relation to legal services. This partly arises from the provisions (in Part 2 of the Bill) for government approval of approved regulators of non-traditional legal service providers (i.e., alternative business structures or ABS). It also arises, in relation to traditional business models (i.e., solicitors in law firms and in-house), from the provisions in Part 4 of the Bill which introduce government control over the composition of the LSS’ Council (section 92) and the creation of a regulation committee of at least 50% lay members (section 93).

32. If both regulatory and representative functions sit within the same body (as the Bill contemplates), it has to be recognised that, whatever the intended safeguards, the inevitable effect of closer government control of the regulatory function will be closer government control of the representative function. It is fundamentally untenable to have the representative function for solicitors within a body whose Council is indirectly controlled by the government and whose responsibility it is to regulate the legal profession through a non-solicitor controlled committee. We question how the independence of the solicitors’ profession will be protected under these arrangements.

33. It is important that the independence and integrity of the legal profession are guaranteed sufficiently to command public confidence. We question how public trust can be maintained in the independence of a body which may ultimately be controlled by the government.

34. It is equally important that solicitors have trust in the independence and representative nature of any body charged with representing them. It is our perception that trust in the LSS by solicitors has already been dramatically eroded in recent times (e.g., motions and questions at recent annual and special general meetings). We question whether solicitors will have confidence in, and identify with, the LSS when, under its constitutional legislation (if the Bill goes
through without amendment), it is ultimately controlled by the government. This is even more of an issue when the LSS would be the instrument, through its regulation committee, of non-solicitor controlled regulation.

**Conflict of interest between solicitors’ and alternative models**

35. Our concerns as detailed above are compounded by the possibility of regulation and representation of non-traditional legal service providers being handled by the same body as provides regulation and representation of traditional solicitors’ firms. The same body could regulate non-traditional models (i.e., alternative business structures or ABS) and solicitors firms, but it is difficult to see how they could credibly represent both.

**Conflict of interest between regulatory and representative functions**

36. Furthermore, taking the wider interpretation of the representative function (see paragraph 28 above), regulation and representation cannot be combined in one body because the services provided as part of the representative function may impact upon regulatory compliance. For example, compliance with the anti-money laundering regime may depend upon the quality of anti-money laundering training provided as a service by a body with a representative function. There is no disguising that this would produce a straightforward conflict of interest on the part of the body in question.

37. The Bill fails to address – indeed only further compounds – the conflict/contradiction in the Solicitors (Scotland) Act 1980 which gives the LSS the conflicting objects of “promoting the interests of the solicitors’ profession in Scotland” and “promoting the interests of the public in relation to that profession” (section 1).

38. The conflict of interest between these objectives was identified by many as no longer tenable for the 21st century in the aftermath of the Clementi Report in England and Wales. Far from addressing this point, the Bill compounds the problem by allowing regulatory and representative functions to be combined. There are then the added ingredients under the Bill of increased government control of the regulatory function, and the potential for the conflicting regulatory and representative functions for both solicitors’ and alternative business models to be handled by the same body.

**Unfair competition issues**

39. Service provision under the representative function, when combined with the regulatory function, also results in unfair competition with other representative bodies providing similar services.
40. For example, LSS’ Update Department competes with the WS Society’s own CPD programmes and does so with the advantage of data, marketing and funding available to it by virtue of its regulatory function. This unsatisfactory situation would be perpetuated, if not made worse, under the Bill as it stands.

Financial transparency

41. The fusion of regulatory and representative functions in one body also results in a lack of financial transparency. It becomes difficult to identify the element of cross-subsidy between the two functions.

42. Much of the recent concern among the LSS’ membership about finances and the level of the annual practising certificate fee payable by solicitors to the LSS (e.g., motions and questions at recent LSS annual and special general meetings) has been the lack of transparency between purely regulatory functions and other, optional and possibly income generating, representative functions. There has been, and remains, a concern that costs associated with representative functions may be subsidised out of regulatory function income. For example, it would be a concern to a particular firm if their solicitors’ practising certificate fees were in effect to be subsidising support services which that firm does not require, but from which other firms derive benefit.

Proposed restriction to one or other function

43. The only guaranteed way to protect the independence of the solicitors’ profession, and preserve the integrity of the representative function, is to separate the two completely and prohibit any body charged with the regulatory function from also carrying out representative functions.

44. The alternative approach is that taken in England and Wales where the regulatory and representative functions are separated within one body, distinguished with separate branding and internal structures. We do not favour this route for Scotland.

45. In our view, to allow any body or group of bodies between them, to monopolise both regulatory and representative functions, particularly under increased government control, will not promote “competition in the provision of legal services” (s. 1(c)(ii) of the Bill), nor “an independent, strong, varied and effective legal profession” (s. 1(d)), nor will it facilitate solicitors to “act with independence and integrity” (s. 2(b)).

46. There is a danger of LSS monopolising both regulatory and representative functions and the Bill as drafted would only encourage this approach and accelerate disillusionment within the solicitors’ profession.

---

7 The Solicitors Regulatory Authority and the Law Society of England and Wales are two brands within one entity.
47. We propose, as regards solicitors, that LSS’ role is limited to the regulatory function and that solicitors are allowed to determine independently by whom and how they are represented. Organisations such as the WS Society already undertake representative functions and, indeed, would be capable of doing more within a framework along the lines of a reprise of the Joint Council of Legal Societies – e.g., a Joint Council of Representative Legal Societies.

Consultation with solicitors’ representative bodies

48. Following on from the idea of such a Joint Council of Representative Legal Societies, we consider there is a need for a more entrenched mechanism for consultation with the representative bodies of solicitors. Scottish Ministers are empowered to make regulations at various points in the Bill. The Bill should impose such an obligation.

49. A further role for a Joint Council would be to assist the Lord President with matters requiring his consultation (as provided in the Bill), particularly those affecting the independence of the legal profession. This might be regarded as a reprise of the College of Justice of 1532 which takes us back where we started in this submission.

50. The role of the Lord President in safeguarding the independence of the legal profession is vital and it is important that the Lord President’s office has the necessary support to undertake this function. This also applies in relation to the regulation of non-traditional legal service providers (i.e., alternative business structures or ABS) and we would urge that the Lord Presidents’ approval should be required for the Scottish Ministers’ approval of approved regulators (under Part 2 of the Bill).

Conclusion

51. The solicitors’ profession in Scotland has always prided itself on its independence and integrity. It is right that a new regulatory framework should be created to enhance choice and competition in the market for legal services in the 21st century. It is also essential that the independence, integrity and vitality of the Scottish legal profession are also assured for the future.

52. We trust the Justice Committee find this submission of assistance and we shall be happy to assist further with oral evidence.

Robert Pirrie
Chief Executive
1 December 2009
Justice Committee
Legal Services (Scotland) Bill

Supplementary written submission from Consumer Focus Scotland

1. Consumer Focus Scotland welcomes the opportunity to provide supplementary evidence on proposed Stage 2 amendments to the Legal Services (Scotland) Bill which the Scottish Government has indicated it is considering putting forward.

McKenzie Friends and Lay Representation

2. Consumer Focus Scotland recently provided evidence to the Public Petitions Committee on Petition PE 1247 calling for the introduction of McKenzie Friends in Scotland.1 Consumer Focus Scotland believes McKenzie Friends can provide valuable support to unrepresented litigants, who may find court processes particularly confusing, intimidating and even frightening. Our recent research exploring the views and experiences of civil sheriff court users, commissioned jointly with the Scottish Legal Aid Board, found that those who were unrepresented were particularly likely to be concerned about having to stand up in court on their own to address the sheriff and not being able to understand the language being used by the sheriff and other legal professionals.2 Although keen to present their case to the sheriff, most reported being nervous about representing themselves. By providing moral support or indeed offering guidance, for example suggesting questions for the litigant to ask, a McKenzie Friend may help the litigant present their case better, which we see as an advantage not only to the unrepresented litigant but also to the court and the other party in the litigation.

3. The recent debate and discussion surrounding McKenzie Friends in Scotland during consideration of Petition PE1247 and following the publication of the report of the Scottish Civil Courts Review, which recommended their introduction, has highlighted the confusing picture that exists in this area. The confusion surrounds two main points:

a) Whether the use of McKenzie Friends in the traditional sense of the term is already permitted by the Scottish courts or whether such a facility requires to be introduced;

b) Whether McKenzie Friends should have rights of audience.

‘Traditional’ McKenzie Friends

4. In our evidence to the Public Petitions Committee we supported the introduction of McKenzie Friends in their traditional sense; that is, offering

---

1 Consumer Focus Scotland (July 2009) Evidence to the Public Petitions Committee on Petition PE 1247
2 The Views and Experiences of Civil Sheriff Court Users: Findings Report, published by Consumer Focus Scotland and the Scottish Legal Aid Board, July 2009.
moral support and providing assistance such as taking notes and quietly giving advice. We noted the presumption in England and Wales is strongly in favour of McKenzie Friends being allowed and we stated we would like to see such a presumption adopted in Scotland.

5. Consumer Focus Scotland does not hold any information on cases where McKenzie Friends have or have not been permitted by the courts and as such cannot comment with certainty on the question of whether a McKenzie Friend facility already exists or requires to be introduced. It is our perception, however, that their use is not widespread and certainly that there cannot be said to be a strong presumption in their favour. We believe the current confusion highlights the need for the rules surrounding the use of McKenzie Friends to be formalised to clarify this area and ensure the acceptance of McKenzie Friends in the Scottish courts.

6. It has been suggested, given the Lord President’s view, as expressed in a letter to the Public Petitions Committee, that McKenzie Friends are currently permitted in Scotland, that guidance from the Lord President in the form of a practice note would be sufficient to clarify this area. Although we believe such a Practice Note, similar to that issued by the President of the Family Division of the Judiciary of England and Wales, might usefully set out the parameters of what a McKenzie Friend can and can’t do and provide guidance to the judiciary on the rules, we do not think that on its own this is sufficient, particularly as it could be subject to change by a future Lord President. It is Consumer Focus Scotland’s view that the best way to ensure that there is a strong presumption in favour of a McKenzie Friend is to enshrine this right in primary legislation. This would make the use of a McKenzie Friend a tangible right, which would be in the interests of consumers who may wish to ask for permission to have one. It would also clarify the rules for the judiciary, court service and consumers alike. The current confusion surrounding this area suggests such legislation is a necessary step. Such legislation should not be prescriptive but should set out the general principles surrounding the use of a McKenzie Friend.

7. We would accept that such a right should not be absolute however, and while we would advocate there should be a strong presumption in their favour, we believe the court should retain the discretion to refuse the use of a McKenzie Friend, for example in cases where the McKenzie Friend is being unduly disruptive to court proceedings. We would also support Lord Gill’s view that rules should be put in place to ensure McKenzie Friends are not remunerated for their assistance. We believe this is a necessary measure to protect consumers from unscrupulous practice emerging.

3 See for example Guidance of the President of the Family Division of the Judiciary of England and Wales: McKenzie Friends, dated 14 October 2008 [Link no longer operates]
4 Lord President of the Court of Session letter of 3 November 2009
5 Report of the Scottish Civil Courts Review, Volume 2, Chapter 11 at paragraph 53
Rights of Audience

8. The report of the Scottish Civil Courts Review recommended that “a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances where the court considers that such representation would help it.”6 At the time of our evidence to the Public Petitions Committee on Petition PE1247, we highlighted the fact there is legislation in England and Wales providing the court with a discretionary power to grant unqualified persons, including McKenzie Friends, a right of audience or the right to conduct litigation in relation to particular proceedings7 and suggested at that time that there may be merit in considering whether similar legislation should be introduced in Scotland.

9. However, at that time we also drew attention to the confusing array of different rules on rights of audience for representatives who are neither solicitors nor advocates. Such representatives are not currently permitted at all in the Court of Session or in most sheriff court ordinary cause actions, including repossession cases, aside from the limited rights of audience granted to others in certain instances as described below. In small claims cases,8 summary cause cases,9 cases under the Debtors (Scotland) Act 198710 and the Debt Arrangement and Attachment (Scotland) Act 200211, the sheriff retains discretion to decide whether an authorised lay representative is a ‘suitable person’. More recent court rules relating to sequestration proceedings provide, however, that the sheriff must be satisfied that the representative ‘is able properly to represent the debtor’.12

10. There are also formal rules under sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 allowing professional bodies to apply for their members to be granted a right of audience and the Association of Commercial Attorneys recently has been granted rights of audience in construction and building law cases. We are also aware that rights of audience have been granted to non-lawyers in Scotland’s courts by virtue of certain UK legislation. The Commissioners for Revenue and Customs Act 2005, for example, provides that rules may be made granting rights of audience in the courts to Revenue and Customs officers. Similarly, section 49 of the Child Support Act 1991 provides for such rules to be made in respect of representation of any party in related proceedings by someone who is not a solicitor or an advocate.

11. This picture has been further confused by the proposed section 7 of the Home Owner and Debtor Protection (Scotland) Bill. The wording in section 7

---

6 Report of the Scottish Civil Courts Review, Volume 2, Chapter 11 at paragraph 53
7 Courts and Legal Services Act 1990 sections 27 and 28. See also Guidance of the President of the Family Division of the Judiciary of England and Wales: McKenzie Friends, dated 14th October 2008 [Link no longer operates]
8 Act of Sederunt (Small Claims Rules) 2002, rule 2.1
9 Act of Sederunt (Summary Cause Rules) 2002, rule 2.1. Note: lay representatives may normally appear only at the first calling of a summary cause case.
10 Act Of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Rule 1.3
11 Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002
12 Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008, rule 15
of the bill mirrors that of most existing provisions, stating that the sheriff must be satisfied that the representative is a suitable person to represent the debtor, but also states that an order may prescribe persons or bodies as ‘approved lay representatives’. This signifies a change in approach from existing rules: rather than simply requiring representatives to be authorised by the party, it brings in an element of prior approval by the authorities.

12. In considering the approach to rights of audience for non-lawyers, there must be a balance struck between protecting consumers and reassuring the court about the competence of any such representative, and making sure consumers have access to and choice of representation should they wish it. While we agree that McKenzie Friends might usefully represent an unrepresented litigant in some cases, we would be disappointed if the rules allowing such representation were to further complicate an already complex picture. While we support efforts to ensure that people representing consumers in court are competent to do so, we believe adding another set of rules would be confusing for consumers. We would therefore be keen that all rules surrounding rights of audience for lay representatives be reviewed, with a view to making the rules as uniform and cohesive as possible.

Regulation of Will Writers

13. In our response to its consultation paper “Wider Choice and Better Protection,” we suggested that the Scottish Government also give consideration to the potential to introduce regulation for individuals/organisations offering will writing services.\(^\text{13}\) We are therefore pleased that the Scottish Government is currently consulting on proposals to regulate non-lawyer will writers, with a view to amending the Legal Services (Scotland) Bill at Stage 2.

14. In 2006, the Scottish Consumer Council, one of our predecessor bodies, undertook research into wills and knowledge of inheritance rights in Scotland, which found that only 37 per cent of respondents had a will.\(^\text{14}\) The research also found, however, that many people do not have a good understanding of the succession rights of a deceased person’s family where no will has been left. While we welcome the recent recommendations of the Scottish Law Commission to update the law of succession to reflect the complex family structures that commonly occur, we are concerned that this research indicates that many people are not making an informed decision about whether or not they should make a will.

15. Following the publication of our research, the SCC held discussions with the then Scottish Executive regarding a public awareness campaign to encourage people to think about making wills, and raise awareness of the consequences of intestacy. Whilst the Scottish Executive had indicated in principle that it may be able to provide funds, the work did not go ahead due to competing budgetary priorities. Discussions were then initiated with the

\(^\text{13}\) Consumer Focus Scotland (April 2009) Response to “Wider Choice and Better Protection: a consultation paper on the regulation of legal services in Scotland” at page 17

\(^\text{14}\) Scottish Consumer Council (2006) Wills and Awareness of Inheritance Rights in Scotland
Law Society of Scotland regarding joint work on this issue, but this was not pursued further due to the pressure of other work. We remain interested in revisiting this work in the future.

16. Although the SCC’s research found that 94 per cent of those who had a will had it drafted by a solicitor (with only 4 per cent having drafted it themselves and 2 per cent using a pre-printed form or completing it on the Internet), we have concerns that these more informal methods of drafting wills have dangers associated with them. Not everyone’s circumstances are straightforward, while certainly in the past, pre-printed forms commonly applied English rather than Scots law. We have therefore been keen to promote the need for people to obtain proper legal advice before making a will, in order to ensure that the will is effective and accurately reflects their wishes. The cost of drafting a will through a solicitor is relatively low, particularly as many firms will use wills as a loss leader in order to obtain the legal executry work required to administer and distribute the testator’s estate in the future. Solicitors are of course regulated by the Law Society of Scotland and the Scottish Legal Complaints Commission, providing assurance to consumers as to the quality of the services provided, and consumers have means of recourse should problems arise. In light of this, and because of the complexities of the law, the complicated personal and family circumstances which people may have, and the serious consequences experienced by their family should things go wrong, our position has been that in order to be absolutely sure that their wills reflects their wishes, in the current market, consumers’ best solution is to see a solicitor.

17. That is not to say that we believe solicitors are the only people capable of providing such advice, however, and indeed other areas of practice, such as social welfare law and money advice, illustrate that non-solicitor advisers can have knowledge and expertise as good as, if not better, than many solicitors. Although will writing firms have had little presence in Scotland in the past, we are aware some of them have begun to advertise their services here. Whilst we have no specific evidence of consumer detriment caused by will writers in Scotland, we have concerns that bad practice will not be discovered until a person has died, by which time it is too late and the family must deal with the consequences of the bad practice. The Institute of Professional Willwriters has expressed concerns that the recession will lead to an increase in the number of unscrupulous will writers. We are keen supporters of increased competition and choice for consumers but believe that that choice must be between high quality, accessible, affordable services. We are keen that any developments in the provision on will writing services must be done in a properly regulated market to ensure consumers receive high quality advice and are properly protected from poor or unscrupulous practice. We therefore would welcome inclusion within the Legal Services (Scotland) Bill of provision to regulate will writers and support the inclusion of such provisions at Stage 2.

---

15 The Law Society of Scotland estimated in 2006 that many firms of solicitors prepare wills of a straightforward nature for between £50 and £100; see Scottish Consumer Council (2006) Wills and Awareness of Inheritance Rights in Scotland

Contingency Fees

18. It is our understanding that the Minister no longer proposes including amendments on contingency fees at Stage 2. The SCC, and now Consumer Focus Scotland, has been supportive of the use of speculative (or conditional) fee arrangements, which are of course currently permitted. Although there are perhaps limited circumstances in which they may be useful, we see potential for contingency fees to 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.

19. In its response to the civil courts review, the Scottish Consumer Council expressed disappointment that contingency fees were not discussed in the consultation paper. We believe that other alternative means of funding litigation, such as ‘before the event’ legal expenses insurance and contingency fees, should be considered in Scotland.

20. The issue of contingency fees is particularly pertinent given the Scottish Civil Court Review’s recommendation that a multi-party action procedure be established in Scotland. We have long been a campaigner for the introduction of such a procedure: the Scottish Consumer Council first recommended this as far back as 1982.17 While we have previously argued for a Class Action Fund to be created to fund such litigation18, we are aware that contingency fees, and particularly the creation of a contingency legal aid fund, have been discussed as a potential funding option. We are also aware, however, that concerns have also been raised about use of contingency fee arrangements in equal pay cases. We therefore believe there is merit in exploring further what benefits and potential drawbacks contingency fees might offer to consumers and we look forward to contributing to this discussion at a later date.

7 January 2010

---

17 Scottish Consumer Council (1982) Class Actions in the Scottish Courts
Supplementary written submission from the Law Society of Scotland

I refer to the Official Report of the meeting of the Justice Committee of 15 December 2009. I have been asked by a member of the profession to clarify the statement which I made that "the Bill will not affect the reserved areas under the Solicitor’s (Scotland) Act 1980 -". At this point, Mr Brown asked the question about the description of the current reserved areas which I then answered.

I perceived my remarks to be taken in the context of the extent of the reserved areas and whether they should be added to, rather than who is able to exercise the reservation.

The Committee is well aware of the provisions at Part 3 relating to confirmation agents and that the introduction of confirmation agents will mean that another category of person can prepare writs relating to confirmation.

As I pointed out in evidence, licence providers will also be able to exercise the reserved areas.

I hope that this clarification is helpful.

Michael P. Clancy
Director, Law Reform
17 December 2009
Supplementary written submission from the Law Society of Scotland

I refer to Walter Semple's letter to you dated 8 January 2010 regarding the evidence given on the Legal Services (Scotland) Bill by the Law Society of Scotland on 15 December 2009.

First of all I strongly deny any implication that the Society misled the committee in the evidence it gave. The Society endeavours at all times to provide any Parliamentary Committee with accurate responses to questions raised by MSPs. We firmly believe that no error arose within the evidence we gave on 15th December.

Mr Semple refers to col 2494. It is worthwhile noting the whole exchange between Cathie Craigie MSP and the Society:

“Cathie Craigie: The granting of one licence for the whole of Scotland might produce an imbalance. One licence might make it easy for people to deal with their legal needs over the telephone or by going to Edinburgh or Glasgow. I apologise if I am taking a wee step back, but why are we going in the direction in the bill when, from the written evidence that we have received, it seems that only two other countries in the world—England and Australia—have done the same?

Michael Clancy: People can get legal advice over the telephone or internet at the moment. Therefore, we are not persuaded that the granting of a licence will cause a rush of people to leave their traditional relationships with firms to seek advice from a firm that has obtained a licence and is doing all its business over the internet. The challenge of new technology and how the legal profession in its broadest sense relates to clients through it is a topic for another day.

On support for change in the way in which legal services are delivered, sure enough the Legal Services Act 2007 in England and Wales is the first exponent in these islands of changes in the way in which solicitors can relate to other professionals and deliver services. There have also been changes in Australia, and changes are afoot in Europe, too—we cannot forget what is happening in Europe. An earlier question related to the Clementi review in 2006-07 but, before that, Commissioner Monti had embarked on a European Commission-sponsored review of the legal profession in Europe in which he found a number of restrictions. That resulted in a relaxation of restrictions in countries such as France, Germany and Italy.

I take it to be understood that we cannot compare the legal profession in France to that in Scotland, as there are inherent differences, but it is possible in France for certain arrangements to be made in terms of what is called la société pluridisciplinaire. In Germany, under the
Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France, the règlement intérieur national allows for similar changes. In Italy, all the restrictions have been removed on certain forms of relationship between lawyers. We tend to think of Europe as fortress Europe, with no change happening there. That is not entirely true. I understand that Spain and some of the Nordic countries now permit external ownership."

The Society's evidence was factual and focused on the question asked. The comments made gave examples of the types of arrangement which are provided for in various European jurisdictions. Sources for the propositions were given which amplified evidence given the previous week by Professor Paterson. The response was not intended to be a detailed exposition of the rules in respect of these matters in individual member states but rather an answer to the question asked.

It is noted that Mr Semple's evidence to the committee contains the following:

“Other Member States in the European Union have consistently refused to accept this type of change.”

This evidence is of course directly contradicted by the Society's comments in the evidence session. We stand by these remarks.

The Society was not asked about the views of the CCBE in relation to the English Legal Services Act 2007 and therefore reference to those views was unnecessary. We take the view that this document is, in any event, of dubious relevance to the matters currently before your Committee. You will note that Mr Semple makes no reference to this document in his own earlier written evidence.

The Committee has already received Mr Semple's evidence about the EU Establishment Directive. You will note that the terms of article 11.5 to which Mr Semple refers are permissive only and not mandatory. Further, the CCBE document to which he has referred contains the following comment:

“Thus, ABSs will be able to be established abroad and provide legal services, where these services in the host state do not fall within the scope of reserved activities. The scope of reserved activities differs from one jurisdiction to another.”

It will therefore be for LLSPs to decide in which jurisdiction and in which areas of law they want to practice: this bill will enable LLSPs to make that kind of decision.

The Scottish Parliament has already received the certificates of competence from both the Cabinet Secretary for Justice and the Presiding Officer to the effect that the Bill is within competence and therefore complies with inter alia EU law. That accords with the Society's view. Accordingly the Scottish Parliament can legislate in the way the Bill proposes and the Society supports
that objective.

I hope this is helpful.

Ian S Smart
President
11 January 2010
Supplementary written submission from the Law Society of Scotland

Please find enclosed our supplementary evidence which is intended to address a number of issues that arose during our oral evidence session on 15 December, and which comprises the following:

- Analysis of responses to the Society’s consultation on alternative business structures
- Possible business models under the bill
- Some statistics on the legal profession in Scotland

I hope this information is of some assistance to the Committee.

Ian S Smart
President
22 January 2010

1. Consultation analysis

Breakdown of responses received to LSS consultation *The Public Interest: Delivering Scottish Legal Services*.

92 responses were received in total. Some responses were from individuals, some came from solicitors on behalf of firms and faculties and some were on behalf of other organisations. Given the qualitative nature of the responses we did not consider it appropriate or necessary to assign specific differential weights.

<table>
<thead>
<tr>
<th>Legal firms</th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – 5 partners</td>
<td>26</td>
<td>28</td>
</tr>
<tr>
<td>6 – 15 partners</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>16 – 29 partners</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>30 + partners</td>
<td>22</td>
<td>24</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>71</strong></td>
<td><strong>77</strong></td>
</tr>
</tbody>
</table>
2. Possible business structures

The Bill will allow additional business structures to supply legal services in Scotland. Existing firms do not have to embrace any of the new permissible structures. A summary of possible business models is set out below:

**Traditional models**

**Sole Practitioner**

No change. According to section 37(4) of the bill, an entity is not eligible to be a licensed provider if it consists of a single solicitor practising under the solicitor’s own name, or a solicitor otherwise practising as a sole practitioner.
**Limited companies, partnerships and LLPs**

No change. According to section 37(4) of the bill, an entity is not eligible to be a licensed provider if it is a firm of solicitors or an incorporated practice.

At present a solicitors firm is allowed to offer non legal services and the entity is regulated by the Society. These services typically include estate agency and financial management/advice. The individuals carrying out some of the non legal services may be regulated by others e.g. FSA.

**Law Centres**

No change. According to section 37(4) of the bill, an entity is not eligible to be a licensed provider if it is a law centre as defined in section 65(1) of the 1980 Act.

**Licensed Legal Services Providers (LLSPs)**

**New Model A – Partnership plus**

Entities looking to make no change to services they are currently providing.

Entities are not looking for outside investors with all investment being internal and limited to current and past principals and employees. They might want to give the Practice Manager or other professionals the status of partner/member. This would allow creation of Employee Share Ownership Trusts for example.

The entity could be a limited company, partnership or LLP.
New Model B – Multidisciplinary practice (MDP)

A one-stop shop comprising “managers” from legal and other professions providing legal and other services to clients. The entity could be a limited company, partnership or LLP.

The ABS would be a joint practice of lawyers and non-lawyers who would share the fees received for the delivery of legal and non-legal services to clients. This could be, for example, a niche property practice with surveyors, architects, town planners, property managers, builders, decorators, furniture removers and conveyancers. The Regulator would regulate only the legal services; other professionals would be regulated by their own regulators.

Under the current MDP Practice Rules solicitors cannot form a legal relationship with a person or body who is not a solicitor with a view to jointly offering professional services as a MDP. This means that non-lawyers cannot have a stake in ownership of the firm but does not preclude them from being remunerated with a share of the profits.

New Model C – Outside Capital

Permissible for up to 100% outside capital.

**Private equity investment**

Representatives of the private equity house might become members of the LLSP incorporated practice, and the private equity company may hold shares in the LLSP. The Regulator would have to carry out appropriate due diligence and monitoring on the investor.

**Listed firms**

The LLSP firm might be floated on AIM/stock market—subject to stock market/corporate governance rules and the Regulator being able to pre approve the transfer of shares.

In all cases the Regulator would have to carry out appropriate due diligence and monitoring on the investor.

New Model D – Not for profit organisations

Not-for-profit organisations providing legal services but who charge a fee, e.g. charities.
New Model E - In-house team

In-house teams expanding into the market (e.g. local authorities). Currently can not offer services to the public. Could set up licensed entity and sell or provide services to public or associated entity.

3. The Legal Profession in Scotland

General end-of-year information from 2009

<table>
<thead>
<tr>
<th></th>
<th>No of practising solicitors</th>
<th>Men Admitted</th>
<th>Women Admitted</th>
<th>Number of Principals</th>
<th>Number of Consultants</th>
<th>Number of Associates</th>
<th>Number of Employees</th>
<th>Number of Male Solicitors</th>
<th>Number of Female Solicitors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10243</td>
<td>184</td>
<td>343</td>
<td>3561</td>
<td>274</td>
<td>1135</td>
<td>4696</td>
<td>5555</td>
<td>4688</td>
</tr>
</tbody>
</table>

Firms by number of partners (as at 31.10.2009)

<table>
<thead>
<tr>
<th>No of partners</th>
<th>Glasgow</th>
<th>Edinburgh</th>
<th>Rest of Scotland</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>173</td>
<td>85</td>
<td>340</td>
<td>1090</td>
</tr>
<tr>
<td>2</td>
<td>53</td>
<td>33</td>
<td>205</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>21</td>
<td>13</td>
<td>97</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>12</td>
<td>11</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>1 to 4</td>
<td>259</td>
<td>142</td>
<td>689</td>
<td>1090</td>
</tr>
<tr>
<td>5</td>
<td>6</td>
<td>5</td>
<td>23</td>
<td>18</td>
</tr>
<tr>
<td>6</td>
<td>5</td>
<td>1</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>7</td>
<td>6</td>
<td>3</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>5</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 to 9</td>
<td>23</td>
<td>15</td>
<td>60</td>
<td>98</td>
</tr>
<tr>
<td>10-14</td>
<td>6</td>
<td>4</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>15-19</td>
<td>6</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 to 19</td>
<td>12</td>
<td>10</td>
<td>14</td>
<td>36</td>
</tr>
<tr>
<td>20-24</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>25-29</td>
<td>0</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20 to 29</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>30-34</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>35-39</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>
### Firms by geographical spread excluding branch offices (as at 15.01.10)

<table>
<thead>
<tr>
<th>City / Town</th>
<th>Number</th>
<th>City / Town</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABERDEEN</td>
<td>72</td>
<td>BLAIRGOWRIE</td>
<td>4</td>
</tr>
<tr>
<td>ABOYNE</td>
<td>1</td>
<td>BLANEFIELD</td>
<td>2</td>
</tr>
<tr>
<td>AIRDRIE</td>
<td>11</td>
<td>BLANTYRE</td>
<td>6</td>
</tr>
<tr>
<td>ALEXANDRIA</td>
<td>4</td>
<td>BO’NESS</td>
<td>2</td>
</tr>
<tr>
<td>ALFORD</td>
<td>1</td>
<td>BRECHIN</td>
<td>2</td>
</tr>
<tr>
<td>ALLOA</td>
<td>5</td>
<td>BRIDGE OF WEIR</td>
<td>1</td>
</tr>
<tr>
<td>ALLOWAY</td>
<td>1</td>
<td>BROXBURN</td>
<td>2</td>
</tr>
<tr>
<td>ALNESS</td>
<td>1</td>
<td>BUCKIE</td>
<td>1</td>
</tr>
<tr>
<td>ALVA</td>
<td>1</td>
<td>BURNSIDE</td>
<td>1</td>
</tr>
<tr>
<td>ANNAN</td>
<td>4</td>
<td>BURNTISLAND</td>
<td>1</td>
</tr>
<tr>
<td>ANNIESLAND</td>
<td>1</td>
<td>CALLANDER</td>
<td>1</td>
</tr>
<tr>
<td>ARBROATH</td>
<td>8</td>
<td>CAMBUSLANG</td>
<td>1</td>
</tr>
<tr>
<td>ARMADALE</td>
<td>1</td>
<td>CAMPBELTOWN</td>
<td>2</td>
</tr>
<tr>
<td>ARRAN</td>
<td>2</td>
<td>CARDONALD</td>
<td>1</td>
</tr>
<tr>
<td>AUCHINleck</td>
<td>1</td>
<td>CARLUKE</td>
<td>3</td>
</tr>
<tr>
<td>AVONBRIDGE</td>
<td>1</td>
<td>CASTLE DOUGLAS</td>
<td>2</td>
</tr>
<tr>
<td>AYR</td>
<td>24</td>
<td>CLYDEBANK</td>
<td>5</td>
</tr>
<tr>
<td>AYTON</td>
<td>1</td>
<td>COATBRIDGE</td>
<td>8</td>
</tr>
<tr>
<td>BANFF</td>
<td>3</td>
<td>COUPAR ANGUS</td>
<td>1</td>
</tr>
<tr>
<td>BARRHEAD</td>
<td>2</td>
<td>COWDENBEATH</td>
<td>3</td>
</tr>
<tr>
<td>BATHGATE</td>
<td>4</td>
<td>CRIEFF</td>
<td>3</td>
</tr>
<tr>
<td>BEARSDEN</td>
<td>6</td>
<td>CROSSHILL</td>
<td>1</td>
</tr>
<tr>
<td>BEITH</td>
<td>2</td>
<td>CUMBERNAULD</td>
<td>9</td>
</tr>
<tr>
<td>BELLSHILL</td>
<td>3</td>
<td>CUMNOCK</td>
<td>3</td>
</tr>
<tr>
<td>BIGGAR</td>
<td>1</td>
<td>CUPAR</td>
<td>7</td>
</tr>
<tr>
<td>BISHOPBRIGGS</td>
<td>2</td>
<td>CURRIE</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>DALBEATTIE</td>
<td>1</td>
</tr>
<tr>
<td>Town</td>
<td>Number</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DALKEITH</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DALRY</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DENNISTOUN</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DINGWALL</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOLLAR</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DORNOCH</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUMBARTON</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUMFRIES</td>
<td>11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNBAR</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNBLANE</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNDEE</td>
<td>39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNFERMLINE</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNOON</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DUNS</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EAST KILBRIDE</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EDINBURGH</td>
<td>178</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ELGIN</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ELLON</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EYEMOUTH</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FALKIRK</td>
<td>17</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FORFAR</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FORRES</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FORT WILLIAM</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FRASERBURGH</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GALASHIELS</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GIFFNOCK</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GIRVAN</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GLASGOW</td>
<td>288</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GLENROTHES</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GOUROCK</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GOVAN</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GRANGEMOUTH</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GRANTOWN-ON-SPEY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GREENOCK</td>
<td>11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GULLANE</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HADDINGTON</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HAMILTON</td>
<td>22</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HAWICK</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HELENSBURGH</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HUNTY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>INVERGORDON</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>INVERNESS</td>
<td>29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>INVERURIE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IRVINE</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JEDBURGH</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JOHNSTONE</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KEITH</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KELSO</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KILBARCHAN</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KILMACOLM</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KILMARNOCK</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KILSYTH</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KILWINNING</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KINGUSSIE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KINROSS</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KIRKCALDY</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KIRKCUDBRIGHT</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KIRKINTILLOCH</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KIRKWALL</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KIRRIEMUIR</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LANARK</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LANGHOLM</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LARGS</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LARKHALL</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LENZIE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LERWICK</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LEVEN</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LINLITHGOW</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Count</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------</td>
<td>-------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LOCHGILPHEAD</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LOCKERBIE</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MAUCHLINE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MILNATHORT</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MILNGAVIE</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MOFFAT</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MONIFIETH</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MONTROSE</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MOTHERWELL</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MUIRHEAD</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MUNLOCHY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MUSSELBURGH</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NAIRN</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NEWMILNS</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NEWTON MEARNS</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NEWTON STEWART</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NORTH BERWICK</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OBAN</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OLMELDRUM</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PAISLEY</td>
<td>27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PEEBLES</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PERTH</td>
<td>16</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PETERHEAD</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PITLOCHRY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PORT GLASGOW</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PORTREE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PRESTWICK</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RENFREW</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ROTHESEAY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RUTHHERGLEN</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SALTCOATS</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SKELMORLIE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SOUTH QUEENSFERRY</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ST ANDREWS</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STENHOUSEMUIR</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STIRLING</td>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STONEHAVEN</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STONEHOUSE</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STORNOWAY</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STRANRAER</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STRATHAVEN</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STROMNESS</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAIN</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THURSO</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TORRYBURN</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TROON</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TURRIFF</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UDDINGSTON</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WHITBURN</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WICK</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WISHAW</td>
<td>11</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total count</strong></td>
<td><strong>1228</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
During my appearance before the Justice Committee on 12 January, you referred to recent representations made to the Committee regarding European law. You asked if I was “totally satisfied that the Bill is compliant with European Union law”. I offered to provide a written response to this question. This is set out below, along with a response to some other specific questions relating to EU law made in written representations to the Committee.

In addition, Mr McKay and I undertook to provide the Justice Committee with information regarding the provisions for sanctions that can be taken against licensed providers and those who work within them. This information follows the response to the questions relating to EU law.

Compliance with European Union law

- **Legislative competence**
  The Scottish Government is totally satisfied that the Bill is fully compliant with EU law and therefore within the legislative competence of the Scottish Parliament. Given that the Bill has been introduced in the usual way, this is also a view shared by the Lord Advocate and the Presiding Officer.

- **Ability of Scottish lawyers to operate in other Member States**
  It has been suggested that a Scottish solicitor practising in a licensed legal services provider (“licensed provider”) may be prohibited from being recognised as a lawyer in other Member States, as a result of Article 11.5 of Directive 98/5/EC (practice of a lawyer in another Member State).

Directive 98/5/EC of the European Parliament and of the Council facilitates the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. What Article 11.5 of the Directive provides is that if a host Member State prohibits a lawyer from practising within a grouping in which some persons are not members of the profession, then the host Member State may refuse to allow a foreign lawyer who is registered to practise in its home state in his capacity as a member of the grouping. The provision leaves it up to the host Member State whether or not to allow the grouping; it is a discretionary power. If a lawyer wished to practise in another country, then he or she could do so in another capacity (not as part of a prohibited grouping).

Article 11.5 of that Directive also allows a host Member State to oppose the opening of a branch or agency where the rules governing a grouping of lawyers in a home Member State are incompatible with those of the host Member State. If a traditional firm of solicitors in Scotland choose to set up a
licensed provider and wanted to also set up an office in another host Member State they would have to consider where they could do this.

Therefore, a host Member State, which does not permit alternative business structures, may prohibit a Scottish solicitor, who is practicing in a licensed provider, from practising law on a permanent basis, and may oppose the opening of a branch or agency in that Member State. However, a Scottish solicitor who decides to work on a permanent basis in a Member State would be seeking new employment, so would not be working for a licensed provider. Also, although it is accepted that licensed providers may decide to open offices in another Member State, it is anticipated that such instances would be rare. Nevertheless, neither the Bill nor the Directive bars them from so doing. It is a matter for Member States, a number of which have made provision for alternative business structures. In fact, the benefits that will flow from the ability to set up a licensed provider, such as increased access to capital and the opportunity to adopt a more flexible business model, may allow more firms to consider opening offices in other Member States. Also, to be clear, the Bill has no impact on Scottish solicitors not working in a licensed provider who wish to practise law elsewhere in Europe.

• **Legal professional privilege**

It has also been suggested that lawyers practising in firms owned by non-lawyers may not be recognised as independent by the European Court of Justice, and thus not be entitled to legal professional privilege ("privilege").

To give some background on this issue, the policy intention is that, as long as communications on any of the legal services are provided by a licensed provider, then privilege will apply because the provision of legal services will be by solicitors or supervised by solicitors, or by designated persons. This is set out in section 60 of the Bill.

What this means is that clients of the new bodies will have the same privilege as they would have had if they had instructed a traditional sole practitioner or law firm, as long as the communications are carried out by a lawyer or under the supervision and direction of a lawyer, or by “authorised persons” (in the Bill, those “authorised” are referred to as “designated persons” – see section 47). Importantly, the ordinary rules of privilege apply, not anything more than that. We have followed the approach in the UK’s Legal Services Act 2007 and no challenge has yet been raised about privilege and alternative business structure entities there.

The importance of privilege in safeguarding the public interest in the proper administration of justice was one of the main messages of the Court of First Instance in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*.

On the scope of privilege under Community law, the Court of First Instance in the *Akzo* case rejected Akzo’s plea that it should be extended to cover in-house lawyer communications. This follows the earlier European Court of Justice case of *AM&S*. The Court held that a lawyer cannot have the
required degree of independence if they are employed by their client. However, it did hold that internal documents drawn up exclusively for the purpose of seeking legal advice from a lawyer were privileged. Akzo is under appeal and so the extent to which advice provided by in-house solicitors is protected is somewhat unsettled.

Unlike in Scotland, in some Member States such as France, in-house lawyers cannot belong to a law society and many Member States exclude in-house communications from privilege. As always, it is necessary to look at any particular country and the circumstances within it.

These appear to be the main issues relating to Community law which have been raised in evidence to the Committee.

**Sanctions against licensed providers**

Firstly, I would like to take this opportunity of clarifying Mr McKay’s comments on sanctions in answer to Cathie Craigie. He said:

“The schedules to the Bill set out a range of sanctions. Some measures might be pre-emptive, such as performance targets, but schedules also make provision on censure, financial penalties, directions and so on.”

Whereas this is true, these provisions relate to sanctions that can be applied by the Scottish Ministers to approved regulators and not the licensed legal services providers (“licensed providers”). I apologise for any confusion this might have caused.

The Legal Services (Scotland) Bill sets out the framework under which licensed providers are to be regulated by approved regulators. As licensed providers comprise entities which may involve legal and non-legal, professional and non-professional people, the regulation is essentially at entity level.

Section 8 sets out the approved regulator’s responsibility to create and implement a regulatory scheme for its licensed providers, and describes what must be included in the scheme. Subsection (2) requires the scheme to include details about two sets of rules – the licensing rules and the practice rules.

Sections 10 and 11 give details about the licensing rules. These rules are to be about various matters, including the “circumstances in which licences may be revoked or suspended” (see section 10(1)(c)(ii)).

Therefore, the ultimate sanction provided for in the Bill is that of suspension or revocation of a licensed provider’s licence which has the effect of preventing an entity from operating as a licensed provider.

In addition, an approved regulator must have practice rules which provide for the measures to be taken against a licensed provider if there is a breach of
the regulatory scheme or if there is a complaint upheld against the licensed provider (see section 14(1)(f)(i) and (ii)). The rules may also include such further arrangements as to the professional discipline of licensed providers (see section 14(3)).

Section 15 states that practice rules may provide for financial sanctions to be taken against licensed providers by approved regulators where there is a breach of the regulatory scheme or if there is a complaint upheld against the licensed provider.

Section 38 sets out the key duties of licensed providers, including the requirement to comply with the regulatory scheme of their approved regulator; have regard to the regulatory objectives; and adhere to the professional principles. Section 16 provides that practice rules must specify that failure to comply with section 38, any other duties under that Part of the Bill, or duties under any other enactment, all constitute a breach of the regulatory scheme. Any such breach could result in non-renewal, revocation or suspension of the licensed provider’s licence (see section 12(2)(b)).

Section 18, on accounts rules, requires that an approved regulator’s practice rules must contain an equivalent to sections 35 to 37 of the Solicitors (Scotland) Act 1980, which contain provisions on maintaining proper accounts, keeping clients' funds separate, having proper accountants' certificates and so on. Failure to comply with the provisions will attract sanctions commensurate with professional misconduct.

Although regulation is essentially at entity level, there is provision as regards individuals within the licensed provider.

- The Head of Legal Services can be disqualified from position under section 39(3).
- Sections 44, 45 and 46 provide for the disqualification from position of Head of Legal Services, Head of Practice, membership of the Practice Committee, and designated person either indefinitely or for a fixed time period (the designated person may be disqualified from being such, or from particular activities, or from unsupervised activities). Any disqualification extends to that person being employed in any other licensed provider.
- Section 51 forbids an outside investor from acting in a way which is incompatible with the regulatory objectives and the professional principles of the Bill, the licensed provider’s duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of licence, and its other duties.
- Section 57 provides that a licensed provider, knowing that a person is disqualified from practice, must not employ or pay that person, and section 58 makes it a criminal offence for such a person to seek or accept such employment.
- Section 68 provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider.
• Section 71 makes it clear that the Bill does not affect any professional rules which regulate a professional (other than a solicitor or an advocate), including sanctions. Sections 88(5) and 91(3) deal with the effect of professional rules of solicitors and advocates. Therefore, there is no change to rules or sanctions relating to individual professionals.

• Section 91(2)(a)(i) amends section 34 of the 1980 Act so as to allow Law Society rules to cover solicitors in licensed providers.

I believe that all this provides a robust set of sanctions that can be applied against licensed providers and those who work within them. Finally, there is a further backstop. As I said in my evidence, the general criminal law also applies.

If you require any further information on these or other issues, please let me know.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
21 January 2010
Thank you for your letter of 23 February [please see the annexe] requesting clarification on what sanctions for an offence or breach by an outside investor are available under the Legal Services (Scotland) Bill.

As you note, section 51 prescribes what is improper behaviour by an outside investor. However, it is necessary to go back to sections 49 and 50 to understand the sanction available.

Section 49(1) provides that an approved regulator must be satisfied that all outside investors are fit to have an interest in the licensed provider at the licensing and renewal stages and must monitor the fitness of all investors at other times. Also, under section 49(2)(a) the approved regulator's licensing rules must explain how an outside investor's fitness for having an interest in a licensed provider is to be determined. The factors that are relevant as to fitness are set out (non-exhaustively) in section 50.

Section 49(2)(b)(ii) provides that the licensing rules must prescribe that, where the approved regulator determines that the investor is unfit, if issued, the licence is to be revoked or suspended. Section 50(2)(b)(iii) makes it clear that a person is unfit if they have contravened section 51 or there is a significant risk that they will do so.

This means that the sanction for breach of the behavioural requirements set out in section 51 is that the approved regulator must either revoke or suspend the licensed provider's licence. As a result, the licensed provider would cease to be able to operate. The intention is that a licensed provider will ensure that an outside investor behaves properly or it will face the consequences of this robust sanction.

Should the licence be suspended or revoked, the licensed provider would be able to make representations to the approved regulator, or the investor in question could take steps to rectify matters (for example, by resigning from the entity).

In addition, breach by the licensed provider itself of the sorts of things to which section 51 relates (including where this is caused by the behaviour of the outside investor) would lead to revocation or suspension of the licence: see sections 12(2)(b) and 16(1)(a) (as read with sections 38 and 40(6)).

I hope this clarifies the matter for the Committee.

Fergus Ewing MSP
Minister for Community Safety
26 February 2010
Annexe

Letter from the Convener to the Minister for Community Safety

Legal Service (Scotland) Bill: outside investors

As you know, the Committee is presently considering its stage 1 report on the Legal Services (Scotland) Bill.

You will be aware that there have been concerns expressed in the evidence received by the Committee about issues relating to outside investors. At its meeting this morning, the Committee agreed that I should write to you on the particular issue of sanctions. Your recent letter to me outlined the sanctions available against licensed providers and noted that although regulation is essentially at entity level, there was provision as regards individuals within the licensed provider. As detailed in your letter, section 51 forbids an outside investor from acting in a way which is incompatible with the regulatory objectives and professional principles. However it is not clear to the Committee what sanctions for an offence or breach by the outside investor would be available. The Committee would be grateful for your response on setting out the position.

A reply in time for the Committee’s next meeting on 9 March would be very much appreciated.

Bill Aitken MSP
Convener, Justice Committee
23 February 2010
Justice Committee
Legal Services (Scotland) Bill

Supplementary written submission from the Scottish Law Agents Society

Following our giving of oral submissions we were invited to make further submissions in relation to potential the ethical issues relating to potential likely new models of business.

We accept that there may be some specialist formations which may prove attractive but in our view these are not likely to offer services to consumers, in the strict sense of an individual not acting in the course of a business. There are already examples of these types of service being offered under existing restrictions:

(a) an employment lawyer working in collaboration with a human resource management specialist.
(b) A construction lawyer working in collaboration with a building surveyor.

In relation to new arrangements we make comments on some of the combinations we think are the most likely.

Solicitor and Estate Agent
Of services offered direct to consumers the most obvious combination of services is likely to be a tie up between a conveyancing solicitor and an estate agent. Estate agents are subject to a very light touch regulatory regime in terms of the Estate Agents Act 1979 as amended. There is a negative licensing system which permits the OFT to bar estate agents from practice on cause shown but there are no *ex ante* barriers to practice whatever. In relation to conflicts of interest The Estate Agents Act 1979 s21 provides that where an estate agent has a personal interest in land he may not enter into negotiations with a consumer until he has disclosed that interest. This does not even require the estate agent to record their consent that the agent should continue to act. This is a very weak protection for consumers. The Solicitors (Scotland) Practice Rules 1986 operate on the basis of an absolute bar on solicitors acting in any conflict of interest situation. Solicitors may apply to the Law Society of Scotland for a waiver. Where no waiver is granted the solicitor must resign the agency. This is a far stronger protection than the corresponding rule in England and Wales where the doctrine is one of informed consent. The conflict is disclosed and the client consents to the solicitor continuing to act. The problem we perceive with the English rule is that the client may feel under pressure to consent to allow a transaction etc to proceed quickly.

There are different types of conflict of interest situations –

(i) solicitor with a personal interest
(ii) solicitor with competing interests of two clients concurrently
(iii) solicitor with competing interests of two clients consecutively.
We note that the Estate Agents Act 1979 applies only to example (i) and applies a different and lower standard than that applying to solicitors and that (ii) and (iii) are not addressed at all. In our view this is a fundamental problem which cannot easily be resolved within a single business entity.

**Solicitor and chartered surveyor**
The conflict of interest provisions for chartered surveyors can be found at [http://www.rics.org/site/download_feed.aspx?fileID=807&fileExtension=PDF](http://www.rics.org/site/download_feed.aspx?fileID=807&fileExtension=PDF). The requirement is disclosure of a potential conflict but does even appear to require informed consent to be granted. It does however appear to cover at least type (i) and (ii) conflicts. For the same reasons as given above we consider that these are fundamental differences in the basis on which conflicts of interest are managed.

**Solicitor and financial adviser**
Financial advisers may operate in a variety of areas which are covered by separate sections of the FSA Handbook relating to investment business [COBS], mortgages sales [MCOB] and general insurance sales [ICOBS]. All are subject to the High Level Principles for Business [PRIN]. PRIN 2.6 “A firm must pay due regard to the interests of its customers and treat them fairly”. And PRIN 2.8 “A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client” are the most relevant. These PRIN statements are directly enforceable but it is clear that these rules envisage lower standards that those applied by the 1986 Conflict Rules which apply to solicitors. Again our view is that it is impossible to reconcile two different standards operating within the same business entity.

Similar rules were in force for financial advisers in the early 1990s when the mis-selling of home income plans came to light, causing some elderly home owners to lose their homes and more recently when the problems associated with shared appreciation mortgages sold in the late 1990s have again caused problems. If the legal services involved in the creation of the charge documents is reduced to an execution only basis and that legal service is provided by a lawyer employed by a financial adviser in an alterative business entity one of the safeguards of independent legal advice is removed. It is not difficult to imagine consumer detriment in such circumstances.

**Solicitor and Chartered accountant**
In terms of the ICAS Code of Ethics para 220 accountants must be aware of the risks of conflict of interest and evaluate the threats of such conflicts. In terms of para 220.3 the doctrine of informed consent is applied. For the reasons given above this lower standard is not compatible with those applied to Scottish solicitors by the Conflict of Interest Rules 1986. Para 220.4 offers additional safeguards in the form of ‘Chinese walls’ – separate teams acting for each side with confidentiality agreements for staff preventing such conflicts. In *Marks and Spencer plc v Freshfields* [2004] M&S obtained an injunction to prevent Freshfields acting for a prospective bidder for M&S on the basis that had previously acted for M&S and therefore were party to confidential information. A Chinese walls defence was rejected by the Courts as not appropriate for legal services business. Further in *Prince Jefri Bolkiah v*
KPMG [1999] it was held by the House of Lords that an accounting firm owed duties to a former client for whom they had undertaken forensic accounting work, much of which was of a type undertaken by lawyers in relation to preparation for litigation. That duty was on the defendants to demonstrate that ‘Chinese walls’ were sufficient to protect the plaintiff’s interests, and that they failed in that duty. These cases illustrate that the culture and obligations for dealing with conflicts of interests are fundamentally different for the legal profession and other professions.

In relation to accountants, we simply observe that the definition of legal services in the Bill s3 is broadly drawn and would cover advising on the interpretation of tax legislation which is routinely undertaken by accountants. In an alternative business entity the Head of Legal Services in terms of the Bill s47 as drafted would have responsibility for supervision of those services. This serves to illustrate some of the problems in this area.

Confidentiality
We refer back to our principal submission. Lawyers and their clients enjoy legal professional privilege for all categories of business. The extension of that privilege contained in the Bill applies only to legal proceedings only and does not replicate the general advice privilege. Thus a client instructing the non-solicitor parts of an entity would have less protection than if he had entrusted that business to a firm of solicitors.

Money Laundering
The structure of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007 SI 2007/2157 which transpose the requirements of the 3rd Money Laundering Directive 2005/60EC into UK law are built upon imposing reporting requirements on the ‘regulated sector’ as therein defined in POCA Schedule 9 and the Money Laundering Regulations Schedule 3. The Directive applies to legal professionals, real estate agents, accountants, financial institutions and advisers etc. However where an alternative business entity did not fall within those requirements it would not fall within the regulated sector for the POCA offences and the Money Laundering regulations which require suspicious activity reports to be made to the Serious Organised Crime Agency and require client identification prior to undertaking business. This would be a particular problem where a new regulator came forward which is not listed in the Money Laundering Regulations. Outwith the regulated sector there are no disclosure requirements. If the point of entry of a consumer is in relation to non-legal services offered by an alternative business entity there would be no requirement to identify the client and no disclosure requirement for suspicious activities where this fell outwith the regulated sector requirements. The reporting requirement might be addressed by s28 of the Criminal Justice and Licensing (Scotland) Bill but this relates to serious organised crime but does not apply to an individual acting alone. It provides no answer to the client identification requirements.

18 December 2009
Supplementary written submission from Walter Semple, solicitor, Glasgow and Catriona Walker, solicitor, Aberdeen

Introduction

I sent a submission to the Justice Committee on 30th November 2009 along with Catriona Walker. In light of the evidence given by the Law Society of Scotland on 15th December, I offer a supplementary submission to the Justice Committee with new information. Catriona Walker has seen and approved the following letter.

I attach for ease of reference an extract from the Law Society’s evidence to the Justice Committee given on 15th December (Annexe A). I refer to column 2494 and to evidence given by Michael Clancy.

Réglement Intérieur National in France

In evidence Michael Clancy said: “I take it to be understood that we cannot compare the legal profession in France to that in Scotland, as there are inherent differences, but it is possible in France for certain arrangements to be made in terms of what is called la société pluridisciplinaire. In Germany, under the Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France, the règlement intérieur national allows for similar changes.”

I have examined the Réglement Intérieur National (RIN) in France. It is consolidated as at 16th May 2009. The relevant Articles are Articles 16 and 18. I have copied them and made my own (private) translation of what I believe are the most important parts for the present purpose. I enclose both documents (Annexes B and C).

It is apparent beyond doubt that the RIN provision for multidisciplinary networks in France strictly forbids profit sharing between avocats and others and any submission of avocats to the control of others.

Examination of the Legal Services Bill shows that its proposals for profit sharing with non lawyers directly and fundamentally conflict with the requirements in Article 18.2. of the RIN in France. Indeed as I read Article 18.1. they conflict with French law. I submit from this that the Society has given incorrect or misleading evidence to the Justice Committee on this fundamental point.
CCBE Position Paper of 4th September 2009

I further enclose CCBE RESPONSE TO THE SOLICITORS REGULATION AUTHORITY’S CONSULTATION ON NEW FORMS OF PRACTICE AND REGULATION FOR ALTERNATIVE BUSINESS STRUCTURES published by CCBE on 4th September 2009 (Annexe D). Section IV describes the European Legal Framework. It explains the position in Germany referred to by Michael Clancy. It refers to the consequences of the strict ethical rules applied in Germany.

The CCBE is the representative body for all practising lawyers in Europe. The Law Society of Scotland is directly represented on the CCBE.

The facts set out in that recent CCBE document bear no resemblance to the representations made by the Law Society in evidence. No reference was made by the Law Society in evidence to this document or what the document contains. The matters which the document deals with are fundamental. Section V includes at the beginning: “The CCBE would advise, if this were the question put forward by the SRA (the SRA is in England and Wales), not to go ahead with the ABS project.”

The conclusions at Section V have been not been explained to the Justice Committee or taken into account in the Law Society’s evidence. On any view the CCBE document is highly relevant and should be before the Justice Committee.

The EU Establishment Directive 98/5/EC

The Law Society’s written and oral evidence makes no reference to this legislation. It is binding law throughout the EU including Scotland. It is both highly important and highly relevant - in particular Article 11(5). Article 11.5. specifically allows a Member State to refuse to admit to practice any lawyer qualified elsewhere who is a member of a law firm where some of the owners are not members of the legal profession. Yet the Law Society made no reference to it even when challenged by the Justice Committee during oral evidence.

I believe that the Law Society cannot expect the Scottish Parliament to make good decisions in the public interest on this legislation if it does not candidly give the correct and relevant information to MSPs regarding EU law and practice. It has manifestly failed to do this.

Yours sincerely

Walter Semple
9 January 2010
Annexe A

Copy of transcript of Law Society's evidence given by Michael Clancy to the Scottish Parliament Justice Committee on 15th December 2009

Column 2494

On support for change in the way in which legal services are delivered, sure enough the Legal Services Act 2007 in England and Wales is the first exponent in these islands of changes in the way in which solicitors can relate to other professionals and deliver services. There have also been changes in Australia, and changes are afoot in Europe, too—we cannot forget what is happening in Europe.

An earlier question related to the Clementi review in 2006-07 but, before that, Commissioner Monti had embarked on a European Commission-sponsored review of the legal profession in Europe in which he found a number of restrictions. That resulted in a relaxation of restrictions in countries such as France, Germany and Italy. I take it to be understood that we cannot compare the legal profession in France to that in Scotland, as there are inherent differences, but it is possible in France for certain arrangements to be made in terms of what is called la société pluridisciplinaire. In Germany, under the Bundesrechtsanwaltsordnung, solicitors or lawyers can enter into relationships with accountants, tax accountants, patent agents and others. In France, the règlement intérieur national allows for similar changes. In Italy, all the restrictions have been removed on certain forms of relationship between lawyers. We tend to think of Europe as fortress Europe, with no change happening there. That is not entirely true. I understand that Spain and some of the Nordic countries now permit external ownership.
Annexe B

Règlement Intérieur National de la profession d'avocat

(Consolidated up to 16th May 2009)

Article 16 - Réseaux et autres conventions pluridisciplinaires (L. art. 67 ; D. 27 nov. 1991, art. 111)

Définition d’un réseau pluridisciplinaire

16.1 L’avocat peut être membre ou correspondant d’un réseau pluridisciplinaire dans les conditions énoncées au présent article.

Il ne peut participer à une structure ou entité qui aurait pour objet ou pour activité effective l’exercice en commun de plusieurs professions libérales, la loi française en vigueur excluant toute participation d’un avocat à une telle structure ou entité.

Pour l’application du présent texte, constitue un réseau pluridisciplinaire toute organisation, structurée ou non, formelle ou informelle, constituée de manière durable entre un ou plusieurs avocats et un ou plusieurs membres d’une autre profession libérale, régie ou non, ou une entreprise, en vue de favoriser la fourniture de prestations complémentaires à une clientèle développée en commun.

L’existence d’un tel réseau pluridisciplinaire au regard des règles françaises d’exercice de la profession d’avocat suppose un intérêt économique commun entre ses membres ou correspondants, lequel est réputé établi lorsque l’un au moins des critères suivants est constaté :

Le terme « avocat » englobe les avocats d’un Barreau étranger ou ayant un titre reconnu comme équivalent dans leur pays d’origine

Principes

16.2 L’avocat ou la structure d’avocats membre d’un réseau pluridisciplinaire doit s’assurer que le fonctionnement du réseau ne porte pas atteinte aux principes essentiels de la profession d’avocat et aux textes légaux et réglementaires qui lui sont applicables. À défaut, il doit se retirer du réseau.

En aucun cas, le fonctionnement du réseau ne peut notamment porter atteinte à l’indépendance de l’avocat et il appartient à celui-ci de veiller à l’application effective de ce principe.

Constitue notamment une atteinte à l’indépendance le fait, directement ou indirectement
• d’accepter d’être partie à un mécanisme conduisant à une répartition ou à un partage des résultats ou à un rééquilibrage des rémunérations en France ou à l’étranger avec des professionnels non avocats ;
• d’accepter une relation de subordination de l’avocat ou un contrôle hiérarchique de l’exécution de ses missions par d’autres professionnels non avocats, notamment ceux ayant une activité de caractère commercial.

L’avocat membre d’un réseau pluridisciplinaire doit veiller en toutes matières à ce que la facturation fasse apparaître spécifiquement la valeur de sa propre prestation.

**Secret professionnel**

16.3 Les avocats membres d’un réseau pluridisciplinaire doivent pouvoir justifier à toute demande du Bâtonnier de l’Ordre auprès duquel ils exercent que l’organisation de l’ensemble du réseau ne met pas en cause l’application des règles du secret professionnel.

**Conflits d’intérêts**

16.4 L’avocat participant à un réseau pluridisciplinaire doit veiller à ce que les procédures adéquates d’identification et de gestion des conflits d’intérêts soient appliquées.

D’une façon générale, un avocat membre d’un réseau pluridisciplinaire est tenu d’observer l’ensemble des dispositions de l’article 4 du présent règlement qui sont relatives au conflit d’intérêt.

Le respect des règles relatives aux conflits d’intérêts qui s’impose aux avocats, en application des dispositions de l’article 4 doit être apprécié non pas au niveau du seul cabinet d’avocats, mais de l’ensemble du réseau.

**Dénomination**

16.5 L’avocat membre d’un réseau pluridisciplinaire doit veiller à ne pas créer de confusion dans l’esprit du public entre sa pratique professionnelle et celle des autres professionnels intervenant dans le réseau.

L’avocat membre d’un groupement d’exercice qui participe à un réseau reste soumis aux dispositions législatives et réglementaires relatives à l’usage de la dénomination ou la raison sociale de ce groupement.

Afin d’assurer une parfaite information du public, sa dénomination ou raison sociale sera différente du nom de son réseau et il devra distinctement faire mention de son appartenance à celui-ci.
Périmètre

16.6 Un avocat peut participer à un réseau pluridisciplinaire exclusivement constitué entre membres de professions libérales réglementées sous la seule condition de se conformer aux dispositions du présent article.

Un avocat ne peut participer à un réseau pluridisciplinaire non exclusivement constitué de membres de professions libérales réglementées qu’à la condition d’en avoir fait préalablement la déclaration à l’Ordre auprès duquel il est inscrit, cette déclaration devant être assortie des informations et documents visés à l’article 16.8

L’Ordre devra faire part de ses observations éventuelles dans les deux mois de réception de la déclaration.

Incompatibilités

16.7 Un avocat membre d’un réseau ne peut entrer en contravention avec les dispositions de l’article 111 (a) du décret n° 91-197 du 27 novembre 1991 relatif au principe d’incompatibilité de l’exercice de la profession d’avocat, avec toutes activités de caractère commercial ; directement ou par personne interposée.

Lorsqu’un avocat est affilié à un réseau national ou international, répondant à la définition de l’article 16.1. ci-dessus, et qui n’a pas pour activité exclusive la prestation de conseil, il doit s’assurer avant d’exécuter une prestation pour le compte d’une personne dont les comptes sont légalement contrôlés ou certifiés par un autre membre du réseau en qualité de commissaire aux comptes, ou dans une qualité similaire, de ce que ce dernier est informé de son intervention pour lui permettre de se conformer aux dispositions de l’article L. 822-11 du Code de Commerce, et de ses textes d’application.

Il en est de même pour la fourniture de prestation de service à une personne contrôlée ou qui contrôle, au sens des I et II de l’article L. 233-3 dont les comptes sont certifiés par le dit commissaire aux comptes.

Transparence

16.8 Les avocats ou cabinets d’avocats membres d’un réseau pluridisciplinaire doivent déposer auprès de leur Ordre l’ensemble des accords ou documents sociaux permettant à celui-ci de disposer, au cas par cas, d’une information nécessaire et adéquate sur l’ensemble de la structure juridique, économique et financière du réseau, quelle que soit la loi applicable à celui-ci et le ou les pays où il intervient :

- organigramme général du réseau faisant apparaître les différentes entités mais aussi les accords de partenariat entre les membres du réseau ;
- exposé sommaire permettant de comprendre le rôle joué par les différentes entités et accords visés ci-dessus ;
• description sommaire des professions et métiers auxquels appartiennent les membres du réseau ;
• liste des membres ;
• description des organes de décision du réseau :
  o organigramme des organes de décision distinguant le cas échéant l’organisation par pays (comment les différentes professions participant au réseau sont organisées pour la France), l’organisation internationale par métier (comment les avocats des différents pays sont organisés) et l’organisation internationale ;
  o pour les différents organes de décision : mode d’élection, mandat et pouvoirs réels.

• description des modes de participation aux frais et aux résultats :
  o comment les différentes composantes du réseau participent (directement ou indirectement) au financement du cabinet d’avocats français (ex : fonds propres, prêts, redevances pour services, prise en charge d’une partie du financement de charges incombant au cabinet d’avocats) et, réciproquement, comment le cabinet d’avocats français participe au financement d’autres composantes du réseau ;
  o comment les associés du cabinet d’avocats français sont intéressés directement ou indirectement aux résultats d’autres entités d’avocats du réseau (ex : quote-part dans les résultats au travers de structures de services, valorisation de participations, systèmes de retraites, notamment sous forme de contrats de consultant).

• description des informations introduites dans les bases de données et procédures relatives à l’accès :
• description des mesures mises en place afin d’assurer le contrôle interne du respect des règles déontologiques (ex : conflits d’intérêt, risques d’atteinte à l’indépendance, moyens d’éviter de profiter passivement du démarchage effectué par d’autres membres) ;
• justification de l’existence pour tous les membres du réseau de garanties individuelles ou collectives d’assurance de responsabilité civile professionnelle excluant toute solidarité de principe entre membres de professions différentes.

Article 18 – La collaboration interprofessionnelle

Principe général

18.1 L’avocat qui participe de manière ponctuelle à l’exécution d’une mission faisant appel à des compétences diversifiées en collaborant avec
avec ceux-ci et le client commun une convention tendant à organiser les modalités de cette collaboration.

Au sens des dispositions figurant sous le présent titre, les termes « autre professionnel » sont utilisés pour désigner toute personne physique ou toute structure d’exercice exerçant une autre profession libérale, que celle-ci soit ou non réglementée par la loi.

Déontologie interprofessionnelle

18.2 Sous réserve de réciprocité résultant de l’adoption par les professionnels concernés des principes ci-après énoncés, l’avocat est tenu de faire application, dans ses relations avec un autre professionnel, des règles de confraternité, de loyauté et de courtoisie en usage au sein de sa profession.

Il s’interdit notamment de critiquer auprès du client commun ou de tiers le contenu ou la qualité des prestations fournies par l’autre professionnel sans avoir préalablement recueilli les observations de celui-ci.

Sous la même réserve, l’avocat qui collabore avec un ou plusieurs autres professionnels doit s’efforcer de ne pas, par ses actes ou son comportement, mettre en défaut ou rendre plus difficile le respect, par les professionnels avec lesquels il collabore, des règles déontologiques dont relèvent ceux-ci.

L’avocat ne peut intervenir dans un domaine pour lequel un autre professionnel détient une compétence exclusive en application des textes qui régissent sa profession. Il peut néanmoins assurer la coordination de la mission en veillant à répartir les interventions conformément à l’intérêt du client de telle manière que chaque question soit traitée par le professionnel le plus compétent pour y répondre.

Indépendance et incompatibilités

18.3 La collaboration entre membres de professions différentes ne pouvant s’effectuer que dans le strict respect des règles d’indépendance applicables à chacun des professionnels concernés, l’avocat ne peut accepter ni une relation de contrôle hiéarchique de ses prestations par un autre professionnel ni une quelconque immixtion dans l’organisation et le fonctionnement de son cabinet de la part des professionnels avec lesquels il collabore.

Avant d’accepter d’intervenir dans une mission à caractère
pluridisciplinaire, l’avocat doit s’assurer que les conditions dans lesquelles son intervention est envisagée ne sont pas susceptibles de porter atteinte aux règles d’indépendance formulées par sa réglementation professionnelle, et ce tant vis-à-vis des autres intervenants que du client prescripteur de la mission commune.

Il doit veiller à ne participer directement ou indirectement à aucune démarche tendant à préconiser la fourniture au client de prestations, services ou produits à caractère commercial proposés par des tiers.

Il doit respecter tant les règles d’incompatibilités spécifiques à sa profession que celles qui sont applicables aux autres professionnels.

Confidentialité des correspondances

18.4 Avant de correspondre à titre confidentiel avec un autre professionnel, l’avocat doit veiller à obtenir de celui-ci un engagement garantissant le respect du caractère confidentiel des correspondances ayant cette qualité.

L’avocat doit en tout état de cause respecter le caractère confidentiel des correspondances reçues d’un autre professionnel dès lors qu’il y est fait expressément mention d’un tel caractère par l’apposition de la mention « confidentielle ».

Il ne peut en conséquence remettre à quiconque de copie d’une correspondance émanant de l’un des professionnels agissant dans le cadre d’une mission commune dès lors que cette correspondance a été qualifiée de confidentielle par son auteur. Il ne peut davantage faire mention d’une correspondance confidentielle dans un document n’ayant pas ce caractère.

Cette règle s’applique tant à la correspondance elle-même qu’aux documents qui peuvent y être joints, sauf mention contraire expresse. Elle n’a cependant pas en elle-même pour effet d’interdire de faire état verbalement des informations ou indications non confidentielles contenues dans les correspondances et documents communiqués.

Secret professionnel

18.5 Le fait pour un avocat de collaborer avec d’autres professionnels pour l’exécution d’une mission commune ne peut conduire à ce qu’il soit d’une quelconque manière porté atteinte au secret professionnel.

En particulier, le fait qu’une information ayant un caractère confidentiel soit
connue de plusieurs personnes tenues au secret professionnel n’est pas de nature à libérer les professionnels concernés de leur obligation au secret à l’égard des tiers.

Dès lors, ne peuvent être échangées entre les professionnels participant à la mission commune, et seulement entre ceux-ci, que les informations communiquées ou recueillies dans le cadre de la mission commune et nécessaires à son exécution.

Si l’avocat estime que le fait pour le client de conférer un caractère confidentiel à certaines informations est de nature à entraver le bon déroulement de la mission commune, il lui appartient d’apprécier en conscience si son intervention peut dans ces conditions se poursuivre à charge pour lui d’en informer le client.

**Responsabilité civile professionnelle**

18.6 L’avocat doit veiller à ce que les prestations effectuées par lui au titre de la mission commune soient effectivement couvertes par son contrat d’assurance de responsabilité civile professionnelle.

Il ne peut participer à un contrat de mission commune comportant une clause de responsabilité solidaire des intervenants, chaque professionnel participant à une mission commune devant être personnellement seul responsable de ses interventions et diligences.

Il doit préalablement à l’acceptation de la mission commune se faire communiquer par chacun des autres professionnels le montant de sa garantie d’assurance responsabilité professionnelle ainsi que les coordonnées de sa compagnie d’assurance.

**Transparence des rémunérations**

18.7 L’avocat ne peut recevoir que la juste rémunération des prestations qu’il fournit à l’exclusion de toute rétribution prélevée sur le travail d’un autre intervenant.

A l’effet d’assurer la transparence de la facturation des prestations accomplies par les divers intervenants, la rémunération de chacun d’eux doit être individualisée et portée à la connaissance du client.

L’avocat ne peut ni se porter garant du paiement à l’égard des autres intervenants ni procéder à un recouvrement pour compte.
Annexe C

RIN FRANCE: APPROXIMATE ENGLISH TRANSLATION OF EXTRACTS

Article 16 - Networks and other multi-disciplinary agreements (L. art. 67; D. November 27, 1991, 111.)

Definition of a multidisciplinary network

16.1 The lawyer may be a member or correspondent of a multidisciplinary network in terms of this article.

He cannot participate in a structure or entity that has the purpose or essential activity of joint practice of several professions, as French law in force excludes any involvement of a lawyer in such a structure or entity.

For the purposes of this text, a multidisciplinary network consists of any organisation, structured or not, formal or informal, lasting for a period of time, between one or more lawyers and one or more members of another liberal profession, regulated or not, or a company formed to promote the provision of complementary services to clients developed in common.

The existence of such a multidisciplinary network under the rules of French practice of the avocat requires a common economic interest between its members or correspondents, which is deemed to be established when at least one of the following criteria is found:

The term “avocat” includes lawyers in a foreign bar or with a foreign qualification recognised as equivalent in their country of origin.

Principles

16.2 The avocat or the structure of avocats which is a member of a multidisciplinary network must ensure that the operation of the network does not affect the essential principles of the profession of avocat and legal texts and regulations applicable to it. Otherwise, he must withdraw from the network.

In no case can the operation of the network affect the independence of the avocat and it is for him to ensure the effective application of this principle.

It is a violation of the independence is constituted by, directly or indirectly:

- to agree to be party to a mechanism leading to a division or sharing of profits or an adjustment of remuneration in France or abroad with professionals who are not lawyers;
• to accept a relationship of subordination of the lawyer or hierarchical control of the execution of his tasks by other professionals who are not lawyers, especially those having a commercial activity.

The *avocat* member of a multidisciplinary network must ensure in every respect that the invoicing shows specifically the value of his services.

**Article 18 – Inter-professional Collaboration**

**General Principle**

18.1 The *avocat* who participates in a timely manner in the execution of a task requiring diverse skills by working with professionals who are not qualified as *avocats* may for that purpose enter into with them and the common client an agreement to arrange the terms this collaboration.

For the purposes of the provisions contained in this title, the term "other professional" is used to describe any individual or any enterprise carrying on another liberal profession, that whether or not it is regulated by law.

18.2…

**Independence and Incompatibilities**

18.3. The collaboration between members of different professions can only be done with strict compliance with rules of independence applicable to each of the professionals involved. The *avocat* may not accept either a relationship of hierarchical control of its services by another professional or any interference in the organisation and functioning of his law firm from the professionals with whom he collaborates.

Before agreeing to participate in a multidisciplinary enterprise, the *avocat* must ensure that the conditions on which he takes part are not capable of affecting the independence rules made by his professional regulation, and this both vis-à-vis other members of the enterprise and also the client who has instructed the joint activity.

The *avocat* must ensure that he does not participate directly or indirectly to any action designed to offer to the client the provision of benefits, services or commercial products provided by third parties.

The *avocat* must comply with both rules incompatibilities specific to his profession as well as those applicable to other professionals.
Civil Liability

18.6. (part)….. paragraph 2: He (the lawyer) may not participate in a joint task which includes joint and several civil liability of those taking part. Each professional involved in a joint task personally and alone must be responsible for his work.

Transparency of Remuneration

18.7. The lawyer can only receive fair remuneration for the services he provides to the exclusion of any fee charged for the work of another participant.

For the purpose of ensuring transparency in invoicing for services performed by the other participants, the remuneration of each must be separated and made known to the client. The lawyer can not guarantee payment as regards other participants nor take part in any general accounting.

Translation by Walter Semple
7 January 2010
Annexe D

CCBE response to the Solicitors Regulation Authority’s consultation on new forms of practice and regulation for alternative business structures

I. Introduction

The Council of Bars and Law Societies of Europe (CCBE), through its member bars and law societies, represents more than 700,000 European lawyers.

In this capacity the CCBE wishes to comment, from a European perspective, on the issue of non-lawyer owned firms as discussed by the Solicitors Regulation Authority (SRA) of England and Wales in its consultation paper on regulating alternative business structures (ABS): ABSs in this sense are business structures which "enable lawyers and non-lawyers to share the management and control of a business which provides reserved legal services to the public." (3.1)

While the SRA, in response to the Legal Services Act 2007 (the Act), no longer discusses whether it is desirable at all to grant licenses to non-lawyer owned or non-lawyer managed business structures providing legal services, and merely wants to learn how such business structures should be regulated, the CCBE has always taken the view that in the best interest of clients, including consumers, the introduction of such business structures should be avoided.

The SRA consultation focuses on ABSs as opposed to Legal Disciplinary Practices (LDPs). LDPs of mixed kinds of lawyers, and with up to 25 per cent non-lawyer managers, have already been regulated and some are already in existence.

II. SRA Consultation Paper Objectives

The SRA, like the Legal Services Board (LSB), is clear about its objective that the first ABS licenses will be granted by mid-2011. The intention is to open the legal services market to non-lawyers and facilitate new entry in such a way that non-lawyer entrants into the market would work together with lawyers to provide legal and other services within a single ABS. Such business structures need to be licensed to be allowed to provide reserved legal services.

The SRA’s approach starts from three assumptions:

- the prompt liberalisation of legal services as set out in the Act is assumed and in the SRA’s eyes to be welcomed in the public interest;
- the debate should concentrate upon the desired outcomes for consumers and how regulation can best assure those outcomes;
there should be no assumption that traditional business structures are inherently safe and new structures are inherently risky.

While we may share the view that the debate should concentrate upon the desired outcomes for clients and how regulation can best assure those outcomes, we disagree in so far as we believe that the discussion between the SRA and European bars and law societies outside England and Wales will have to include the question of whether ABSs are qualified at all to improve access to justice or promote consumer interests in any other way. Furthermore, it is anything but obvious to us that opening the legal services market to non-lawyers could be the appropriate means to encourage an independent, strong, diverse and effective legal profession. In our eyes existing law firms from England and Wales have proven to be very competitive and economically successful abroad.

The SRA, like the LSB, seem to take it for granted that market mechanisms will bring about additional benefits once the market has been opened to non-lawyers. The consultation paper does not explain however why the same market mechanisms do not or would not bring about the same benefit within the existing competition between solicitors, barristers, and other professions in the legal services market. These professions are organised into very different business structures such as sole practitioners, small and medium-sized law firms, as well as Magic Circle firms. This approach may be due to the fact that the Act itself is actually based on the assumption that existing legislation and professional rules have constrained consumers and restrained normal market pressures on law practices (1.2). This may also explain why the authors of the LSB discussion paper consider that opening the legal services market to non-professionals will undoubtedly bring about advantages, while they assume that these business structures do not constitute additional risks for clients’ interests.

The SRA identifies three types of ABS that it considers likely to emerge:

1. firms, which are basically like traditional law firms or LPDs, but with involvement of one or more individual non-lawyer managers (which may not be limited, as now, to 25 per cent ownership or control, without external ownership, and providing solicitor-type services only);

2. complete or partial external ownership with the legal services being provided through a so-called ring-fenced entity;

3. combinations of different services within one entity, the MDP model.

It is to be understood that for all three structures it is envisaged that solicitors practise under their professional title.
III. CCBE views on LDPs / MDPs and ABSs

From a European perspective, the view is quite different. Legislation and professional regulatory rules in all EU Member States have, within a short period of time, been liberalised to an extent that was unimaginable a few decades ago. The number of practising lawyers in most Member States has more or less exploded and competition has intensified. Regulations that restricted legal services locally have been removed. Through the Lawyers’ Services Directive (77/249/EEC) in conjunction with other instruments, lawyers and law firms from EU Member States can provide legal services in 30 European states, with even more jurisdictions, including practice in the respective national law in all jurisdictions concerned. Due to the European Lawyers’ Establishment Directive (98/5/EC), individual lawyers and law firms can establish a practice in any Member State. Thus, legal services markets have been extended enormously.

Liberalisation of Member State regulations and increasing competition have brought about significant changes in the way legal services are offered, as well as changes to the structure of existing law firms. The process will continue not only due to competition but also due to a changed perception of professional conduct rules. Whereas in the past professional rules focused on the profession, and to a certain extent served the interests of the professionals themselves, nowadays it is common ground that professional rules can solely be justified by reasons relating to the public interest, especially the protection of clients and the proper administration of justice. What used to be regarded as a privilege of the lawyer can only be upheld if it in fact protects clients or is necessary to serve other reasons in relation to the public interest. Likewise, restrictions to the way in which law is practised by individual members of the profession must be justifiable in a public interest, like the requirements for the proper administration of justice or client protection. We believe that any further development that might be necessary to meet clients’ needs will be achieved within the existing European legal services market provided by the respective legal professionals in an increasing number of law firm structures, and do not see any advantage for clients if the market is opened for non-lawyers.

Legislation and professional regulatory rules differ from Member State to Member State. But all jurisdictions have in common the concept of the legal profession’s core values protecting the client’s interest, and at the same time guaranteeing the proper administration of justice: independence, confidentiality, and the avoidance of any conflict of interest. In addition to these professional conduct safeguards, competition as well as professional rules have substantially improved the quality of legal services, notably by means of continued professional training and specialisation. Within a few decades the legal profession has adapted to changes in society and clients’ needs, and has within a very short period of time undergone more substantial changes than in the whole century before. In the eyes of almost all Member State legislators, as well as in the eyes of the profession itself, it seems evident that this desirable
evolution progresses within the existing system of the legal profession, whereas
the benefits of opening the market to non-lawyers are uncertain and could
compromise the integrity of the legal profession.

IV. European legal framework

Articles 43, 49, and 56 EC grant freedom of establishment, freedom to provide
services, and prohibit all restrictions on the movement of capital between the
Member States. These provisions are subject to certain conditions laid down in
Articles 44-48, 50-55, and 57-60 EC.

Restrictions on the freedoms of establishment, service, and on the free
movement of capital can also derive from Member State regulation, when
justified by overriding reasons of public interest, provided that these restrictions
are applicable without discrimination on the grounds of nationality, are
appropriate for securing the objective pursued, and do not go beyond what is
necessary for attaining that objective.

To achieve the liberalisation of specific legal services (as provided for by Article
52 paragraph 1 EC and Article 44 paragraph 1 EC), the European institutions
have adopted the Lawyers' Services Directive 77/249/EEC and the Lawyers' Establishments Directive 98/5/EC. Both Directives contain an exhaustive list of
professions considered to be lawyers in the sense of the Directives. As far as the
United Kingdom is concerned, the Directives are applicable to Advocates,
Barristers and Solicitors. Both Directives address the individual members of the
listed professions, and joint practices of lawyers, as defined in the Directives, are
authorised in all jurisdictions.

The situation is different, however, for business structures in which some
persons are not members of the profession. Under Article 11 paragraph 1 point 5
Directive 98/5/EC, a Member State may refuse to allow a lawyer registered under
his home-country professional title to practise in its territory, in his capacity as a
member of his grouping, insofar as it prohibits lawyers practising under their own
professional title from practising in such business structures. In fact, almost all
European jurisdictions have chosen to do so. Most jurisdictions prohibit all
business structures where persons who do not have the status of lawyer within
the meaning of the definitions given in both Directives hold entirely or partly the
capital of the grouping, use the name under which it practises, or exercise de
facto or de jure the decision-making power.

Some European jurisdictions allow LDPs and Multi-Disciplinary Partnerships
(MDPs) under certain conditions. In some jurisdictions non-lawyers may become
partners of a law firm if they are members of a regulated profession whose
professional code of conduct is comparable to that of the legal profession. Where
LDPs or MDPs exist, this does not necessarily imply that clients will enjoy the
benefits of a “one-stop-shop” where the whole range of services of all
professions present in the LDP or MDP can be demanded. In Germany for example, where MDPs have a long tradition, the different roles and responsibilities of lawyers, notaries, and auditors often leads to incompatibilities: if a notary has assisted the concerned parties in conveyancing or any other contract, his partners must neither advise nor represent any of the parties involved if questions about the interpretation or the validity of such contract arise; if lawyers have advised or represented one party in a due diligence or in contractual negotiations, their notary partner is prohibited from notarising the contract that his lawyer partners have negotiated. An auditor may be prohibited from auditing a company that relied on his partner’s advice, or his drafting of contracts and similar activities to the extent that the auditor would have to evaluate the outcome of his partner’s activities. The view is that the auditor’s independence in this case would be compromised, while the notary’s impartiality towards all parties concerned and the lawyer’s duty to act in the sole interest of the client are incompatible.

Thus, in many cases the client’s expectations cannot be met and the “one-stop-shop” will be perceived as being a form of deceptive packaging. On the other hand, the absence of these strict rules would compromise the integrity of all professions involved.

Whereas LDPs and MDPs are accepted to a certain extent, Member State legislators outside the UK are not likely to come to the conclusion that ABSs could be helpful to improve the scope of legal services as demanded by consumers and other clients. France, Italy and Denmark seem to accept non-lawyers, who earn their living in a law firm, becoming partners of that very law firm. The only Member State which accepts external capital in law firms, to a certain extent, is Spain. There is no evidence yet whether such Spanish firms will be regarded as law firms by other European jurisdictions.

Under Article 11 paragraph 1 point 5 of the Lawyers’ Establishment Directive 98/5/EC, if the same prohibition is applied to home-state lawyers, a host Member State may refuse to allow European lawyers to practise in its territory in their capacity as a member of such a grouping.

If a Member State applies Article 11 paragraph 1 point 5 to LDPs, MDPs and ABSs, the question arises whether primary European law – the EC treaty - as interpreted by the ECJ could be in conflict with the provisions of the Directive.

The ECJ has recently held, in Commission vs. Italy (C-531/06) – which concerned pharmacists, not lawyers – that Member States may take the view that the interests of a non-pharmacist in making a profit would not be tempered in the same way as those of a self-employed pharmacist would be (para. 84), if non-pharmacists were to be allowed to acquire stakes in pharmacies, or if non-pharmacists were to be allowed to run retail pharmacies, and rules designed to ensure the professional independence of pharmacists would not be observed in
practice. In the absence of EC directives or regulations dealing with the ownership of pharmacies, the ECJ examined the Member State legislation in the light of the EC treaty alone, i.e. the freedom of establishment and the free movement of capital. Although the Member State legislation considered in the case restricts both freedoms, according to the ECJ these restrictions can be justified by overriding reasons in the public interest.

Although it is undeniable that lawyers, like other persons, will have the objective of making a profit, due to their professional status lawyers - like pharmacists (para. 61) - are presumed to operate their law firm not with a purely economic objective, but also from a professional perspective. Their private interest connected with the making of profit is thus tempered by their training, by their professional experience, and by the responsibility which they owe, given the fact that any breach of the legal rules of professional conduct undermines not only the value of their investment but also their own professional existence.

It seems evident to us that non-lawyers who invest their money in ABSs can neither be expected to be in that situation, nor can they be expected to refrain from the legitimate demand to influence the firm’s policies and to seek the economically appropriate return on investment.

The overriding reasons relating to the public interest are, of course, different in the lawyer’s case. It is not the protection of the public health that is at stake. In the absence of specific Community rules in this field, the ECJ has consistently held that Member States are free to regulate the exercise of the legal profession in their respective territories (Wouters C-309/99 para. 99). The overriding public interest reasons are the sound administration of justice, protection of the ultimate consumers of legal services, in conjunction with the necessary guarantees in relation to the lawyers’ integrity and experience. Rules applicable to the legal profession may greatly differ from one Member State to another. Thus, there is no conflict between the provision of Article 11 of the Lawyers’ Establishment Directive and primary European law.

The fact that freedom of establishment is guaranteed for companies as well as for individuals does not have an impact on this. Restrictions of companies’ freedom of establishment can be justified for the same overriding reasons relating to the public interest as restrictions of natural persons’ freedoms (Inspire Art C-167/01 para. 107; Centros C-212/97 para. 26). The ECJ makes a clear distinction: where the host-state rules of company law must not be applied, provisions concerning the carrying on of certain trades, professions, or businesses of the host state may, under certain conditions, restrict freedom of establishment (Inspire Art para. 121; Centros para. 26).

Thus, ABSs will be able to be established abroad and provide legal services, where these services in the host state do not fall within the scope of reserved activities. The scope of reserved activities differs from one jurisdiction to another.
Another question is whether legal services can be offered as lawyers’ services. We expect that a large majority of jurisdictions will apply Article 11 paragraph 1 point 5 Directive 98/5/EC to ABSs. The effect would be that even advocates, barristers, and solicitors practising within an ABS could not provide legal services under their professional title in a large number of European jurisdictions.

V. Conclusions
The CCBE would advise, if this were the question put forward by the SRA, not to go ahead with the ABS project. We understand however, that the decision to license such business structures has been taken by the Act and is assumed from the SRA’s point of view.

Regulating LDPs and MDPs already requires a delicate balancing of interests, economic and non-economic. We see the lawyer’s duties to maintain independence, to avoid conflicts of interest, and to respect client confidentiality endangered if non-lawyers are allowed a significant degree of control over the affairs of the firm. Different roles, different professional rules, and different reserved activities constitute conflicts that need additional and more detailed regulation.

Non-lawyers, who do not practise as regulated professionals themselves, constitute additional risks to clients and the due administration of justice. The public’s perception of their participation as investors, or Heads of Legal Practice, or both, could compromise the integrity of the business structure as a whole. The way in which legal services are delivered has effects not only on the clients themselves but also on the judiciary and third parties. It is of utmost importance, that not only clients but also courts, the public sector, and even the adverse party in a conflict can rely on the lawyer’s integrity.

Lawyers in most jurisdictions are obliged to accept instructions that, from a purely economic perspective, are not profitable e.g. legal aid. The client needs to be confident that its case, even under these circumstances, is given the necessary attention. Where mere economic aspects seem to prevail, doubts will arise whether the defence of clients’ rights is taken more seriously than other interests, even where the regulation stipulates that the company’s duty to the court will prevail over all other duties, and the duties to its clients will prevail over the duty to the shareholders.

The SRA seems to be aware of the fact that ABSs need additional and more detailed regulation, and envisages that supervisory visits by the regulator may become necessary (1.1). If opening the legal services market has to go hand-in-hand with additional, more complicated and probably less transparent regulation, as well as regulators interfering in day-to-day practice, there are concerns whether this really constitutes a liberalisation and is in the interest of the consumer.
It may be preferable to have fewer, but clear and strict, professional rules which are transparent for lawyers as well as for clients. We share the view that punishing non-compliance should not be the only outcome of regulation. We believe that less complicated, clear, and transparent rules deriving from the European core values of the legal profession are more apt to support and encourage firms to comply with professional rules, than the entry of non-lawyers combined with more detailed regulation and supervisory visits.

If ABSs are licensed, it should be made transparent to clients that these structures are not law firms, and it should be mandatory to make this obvious in the company’s firm name. In addition, due to the fact that lawyers will practise within these structures under their professional title, the regulation of ABSs should provide for the following rules:

- The possibility that different activities of the ABS could be incompatible should be regulated in the sense that instructions, that are incompatible with other instructions already accepted by a member of the business structure, must not be accepted by another member practising within the same firm;

- The observation of lawyers’ professional duties must be made mandatory by state regulation, not only by contract, for all natural persons holding shares or working within the structure.

The CCBE thus agrees with the SRA’s intention to regulate law firms, LDPs, MDPs, and ABSs, as well as individuals, so that the code of conduct and other relevant rules and regulations, including enforcement and disciplinary powers, are directly applied to the firm itself, and to all managers and employees.
Catriona Walker and I sent a submission to the Justice Committee on 30 November 2009 and a supplementary submission on 8 January 2010.

In light of the evidence given by the Law Society of Scotland on 15 December, we believe that there are three additional documents which the Justice Committee should see before it makes its Report. We submit them as additional evidence.

The documents are:

1. The Minute of the 2008 AGM of the Law Society showing the way in which proxies were used. This may contain confidential material so we are sending it separately. A summary showing the essential information is enclosed at Appendix 1.

[Note by the Clerk to the Justice Committee: The Minute of the 2008 AGM of the Law Society of Scotland is a private and confidential document. The Parliament does not have the agreement of the Law Society to publish the Minute.]

2. The Consultation Analysis showing the evidence base on which the Law Society relied when reporting to the profession in April 2008. This is enclosed together with a short note from us (Appendix 2) with our interpretation of it.

3. Memorandum of Evidence by the President of the Federal German Bar to the House of Lords and House of Commons Joint Committee on the Legal Services Bill dated 22 June 2006 at pages 289/290. A copy is enclosed (Appendix 3).

The reason for sending this evidence is to correct the misunderstanding that other European countries are adopting measures which would allow full ownership of law firms by non lawyers. This is not the case in Germany or France or elsewhere in Europe or in the USA. We have already provided evidence for the position in France.

We have not suggested that the Bill is not EU compliant.

The link to this evidence from the Federal German Bar is:

The President of the German Bar said in his evidence to the Joint committee:

"If in your country ABS are authorised to be set up, as is provided for in the Bill, it is our understanding of the Bill and of the preceding White Paper that firms authorized to provide legal services could have shareholders from outside the profession, such as banks and insurance companies. It is our further understanding that the management of such firms would not necessarily be in the hands of a majority of lawyers. Those legal bodies being inconsistent with the requirements of German law, we are therefore of the opinion that German Rechtsanwälte as well as solicitors and barristers established in Germany would infringe German professional rules if they became a member of such type of an ABS. Those firms would therefore encounter a major obstacle in Germany."

Walter Semple
20 January 2010
APPENDIX 1

[Note by the Clerk to the Justice Committee: Although the information contained in Appendix 1 had been redacted and account had been taken of issues of confidentiality by the submitters, the Minute of the 2008 AGM of the Law Society of Scotland is a private and confidential document. The Parliament does not have the agreement of the Law Society to publish the Minute.]

APPENDIX 2

We have noted the following points from the Law Society’s Consultation Analysis:

- Of the 92 responses, only 78 came from law firms and local faculties. The remainder did not come from the practising profession.
- 33 of the responses did not answer the questions but gave comments as free text. By implication no statistical account was taken of the free text.
- No indication is given of whether particular responses were made from lawyers or from other parties, e.g. ICAS, OFT, SCC, Which and others who together made up 14% of the responses.
- The number of responses from the profession is a dangerously small proportion to rely on if the opinion of the profession is to be assessed.
- Page 8: Q1. (LDPs) It is not said how many respondents addressed this issue. There is no evidence that a majority of all respondents were in favour.
- Page 10: Q4. (MDPs) It is not said how many respondents addressed this issue but of those who did, a minority thought that the legal services market would benefit from a move towards MDPs. A substantial majority seems to have thought not.
- Page 12: Q6. (Core values) Half of the responses addressed this question and of those, none apparently thought that the core values of the profession would be enhanced by MDPs. Only a quarter thought that the core values would not be undermined. Many of them applied conditions.
- Page 13: Q7. (Guarantee fund/Master policy). The overall consensus was that the Guarantee Fund and Master Policy would not be able to survive ABS. This is no mandate for change.
- Page 14: Q8. (Access to justice) Two thirds of those who answered the question thought that access to justice would not be improved by MDPs. We are not told how many answered and how many were from the profession.
- Page 15: Q10. (Shareholding) Three quarters of respondents answered this question and of those, a small majority did not think the legal services market would benefit from a move towards a shareholding model. Those in favour were therefore less than 38% of respondents.
- Page 17: Q12. (Proportion of external ownership). The majority thought that a limit should be imposed so that solicitors retained control or majority ownership. This does not appear in the Bill.
• Page 19: Q 16. (Non-lawyer ownership.) The Majority of those who responded did **not** support a move towards non-lawyer ownership and control. This does not appear in the Bill.

• Page 21: Q 19. (Legal privilege). The consensus was that legal professional privilege **should** remain solely with the solicitor. This does not appear in the Bill.

It is for members of the Justice Committee to form their own view in relation to the evidence given by the President and The Director of Law Reform. We ask the committee members to consider whether the Consultation Analysis demonstrates any “dominant support” from the profession for the changes proposed or that “it was what the profession wanted”.

**APPENDIX 3**

Memorandum of Evidence
by the President of the Federal German Bar

to House of Commons and House of Lords Joint Committee

on the Draft Legal Services Bill

22 June 2006

We have been informed of the Draft Legal Services Bill (the “Bill”) as it has been presented to the United Kingdom Parliament by your Government on 25 May 2006. Under the call for evidence of same date we take the liberty of submitting evidence as to certain obstacles which Alternative Business Structures (“ABS”) would encounter in Germany. Before doing so, we would like to present our organisation.

The Bundesrechtsanwaltskammer (“BRAK”—German Federal Bar) has been instituted by an act of parliament as the self-regulatory body of the German legal profession. As the umbrella organisation it represents the 27 regional Bars and the Bar at the Federal Court of Justice which represent a total of currently approximately 139,000 lawyers (German Rechtsanwälte and foreign lawyers established in Germany) in the Federal Republic of Germany.

BRAK does not want to interfere in internal affairs of another Member State of the European Union13 and therefore does not comment on the Bill generally. This should not be interpreted as a support in favour of those aspects of the Bill on which we do not comment. The reason why we submit this evidence is that as of today a number of English firms of solicitors are active in Germany where they play a major role in the area of business law. Solicitors and Barristers of England and Wales as well as German Rechtsanwälte are members of those firms, either as partners or as employed lawyers. In view of the present situation it is therefore not unlikely that, if the Bill becomes the law of your country, ABS will seek to set up branches or subsidiaries in Germany.

Under European law as implemented in Germany, solicitors and barristers who are established in Germany are subject to the German rules of professional conduct in the same way as are German Rechtsanwälte. They
have to register with the regional German bar (Rechtsanwaltskammer) of which they become a member having full membership rights. This means that all lawyers who are permanently present in the German branch of an English law firm, be it as a partner or as an employed lawyer, have to comply with the German professional rules.

In compliance with the constitutional requirements applicable in Germany, the status as well as the major rights and duties of lawyers have been laid down in a federal act of parliament. In addition to setting up those essential rights and duties, the same law has put in place an assembly of delegates, who are democratically elected by all lawyers, to adopt certain more detailed rules.

German law attaches paramount importance to the independence of lawyers and of their profession. The first section of the law on the legal profession defines the Rechtsanwalt as an “independent organ of the administration of Justice”. The Rechtsanwalt and any European lawyer established in Germany shall exercise his/her profession free from external influence and only as determined by himself/herself. German law authorizes law firms to adopt a large variety of legal forms, including those existing under the laws of other EU Member States, but in view of this overall requirement of independence it provides that only lawyers and members of some other professions which have similar rules of conduct shall be partners and/or shareholders of a law firm. It further requires that its partners/shareholders shall be personally active in the firm. It also requires that such firm shall be managed under the responsibility of lawyers and that in case other professionals exercise in the same firm, the managing body shall consist of a majority of lawyers.

If in your country ABS are authorised to be set up, as is provided for in the Bill, it is our understanding of the Bill and of the preceding White Paper that firms authorized to provide legal services could have shareholders from outside the profession, such as banks and insurance companies. It is our further understanding that the management of such firms would not necessarily be in the hands of a majority of lawyers. Those legal bodies being inconsistent with the requirements of German law, we are therefore of the opinion that German Rechtsanwälte as well as solicitors and barristers established in Germany would infringe German professional rules if they became a member of such type of an ABS. Those firms would therefore encounter a major obstacle in Germany.

In view of the importance of the German market for legal services in Europe we think that it is necessary to draw your attention to this particular aspect of your future legislation. We remain of course at your disposal for any further information you may need.
I refer to the written and oral evidence submitted by Caroline Docherty, as Deputy Keeper of the Signet, and me, as Chief Executive of the WS Society, in connection with the Justice Committee's Stage 1 scrutiny of the Legal Services (Scotland) Bill.

I have been asked by a member of the WS Society to reiterate the basis upon which Caroline Docherty and I submitted our evidence. We stated in our written submission of 1 December 2009 that we are the authors of the submission and that we are authorised by the WS Society's Council to present evidence as respectively the Deputy Keeper of the Signet and Chief Executive. We also made it clear in our oral evidence that the WS Society has not conducted a survey of our members' views on the Bill.

Our membership is diverse and in giving evidence we were not seeking to represent the views of our membership. We are acutely conscious of the position we hold, within a Society which represents a very wide cross-section of the profession, from large firms, to High Street firms in rural areas, and in-house lawyers. Within the WS Society's membership, it is probably fair to say that every shade of view on the Bill is represented. This is why we took the approach of submitting evidence from Caroline as our most senior member, the Deputy Keeper of the Signet, and me, as Chief Executive with management responsibility for the WS Society as a professional body.

As we made clear in both our written and oral evidence, our principal concern with the Bill is its impact on the independence of the solicitors' profession and on the ability of the Law Society of Scotland to continue to fulfil both the regulatory and representative functions for the solicitors' profession. I refer you to paragraphs 31 – 50 of our written submission of 1 December. It is fundamental that the representative function for solicitors should be independent, autonomous and inclusive.

We trust our evidence, and this letter, are of assistance to the Committee.

Robert Pirrie
Chief Executive
11 January 2010
Justice Committee
Legal Services (Scotland) Bill
Letter from the Minister for Community Safety

I am writing to inform you of the main Stage 2 amendments to the Legal Services (Scotland) Bill which are currently under consideration. As has been discussed between my officials and the Justice Committee clerks, we want to ensure that the Committee is given prior notice of the areas in which amendments may be proposed by the Government, in order to allow appropriate consideration to be given.

The main areas under consideration are:

- **Contingency fees**
  We are considering whether it would be desirable to remove some of the current restrictions on contingency fees in litigation in Scotland. Contingency fees, broadly defined, are fees calculated as an agreed percentage of any damages awarded to the client resulting from a successful court action. Some similar forms of fees contingent upon success are currently permissible, but it has been suggested that greater use of contingency fees, perhaps combined with new forms of multi-party actions, could make it more attractive for businesses to litigate in Scotland rather than elsewhere, and increase access to justice.

  Contingency fees were not provided for in the Bill as introduced, as it was felt that any relevant recommendations in the unpublished (at the time) Scottish Civil Courts Review should be taken into account. In addition, we intend to conduct a consultation on contingency fees to further inform policy development. This is due to commence in December.

- **McKenzie friends and lay representation**
  A “McKenzie friend” is a lay assistant to someone representing themselves in court, who can help by giving advice, taking notes, and providing moral support. In light of the recommendations in the recent Scottish Civil Courts Review and ongoing debate around this issue, we are now considering whether those without a right of audience (such as McKenzie friends) should be able to address the court in certain circumstances.

- **Regulation of will writers**
  This issue of whether or not will writers should be regulated has recently been raised by the Law Society of Scotland, and is also covered in “The Hunt Review of the Regulation of Legal Services” in England and Wales which was published last month. We have not yet considered this issue in depth, but if we were to introduce regulation in this area, we envisage that it would be similar in
operation to that proposed for confirmation agents in the Bill as introduced.

- **Possible adjustments to regulation of rights of audience in the Supreme Courts**
  In the appeal into the case of *Woodside v HMA* 2009 SLT 371 (18th February 2009) Lord Gill considered that there were problems with the system of rights of audience, particularly involving solicitor advocates, that did not appear to be unique to that case. He thought it would be opportune if there were to be a review of the working system overall covering both advocates and solicitor advocates. Such a review is now being conducted by Ben Thomson (see [http://www.scotland.gov.uk/News/Releases/2009/09/28101030](http://www.scotland.gov.uk/News/Releases/2009/09/28101030)).

  Once the recommendations of the review are published in March 2010, we will consider whether any amendments to the Bill may be appropriate.

- **Various amendments to the Solicitors (Scotland) Act 1980**
  Some adjustments to the Solicitors (Scotland) Act 1980 are sought by the Law Society of Scotland. While most of these are small changes, we are giving some consideration to issues surrounding the Scottish Solicitors Guarantee Fund. In particular, we have been in discussion with the Law Society regarding the possibility of introducing a cap on payouts from the Guarantee Fund, and whether the way in which the fund currently operates requires any revision.

  Briefing notes on contingency fees and McKenzie friends can be found in annexes A and B respectively. The proposal to regulate will writers is, as stated above, at a very early stage, and we do not currently have detailed plans to share with you. However, when this area of policy has been further developed, we will of course give the Committee more information. Similarly, we will keep the Committee apprised of any policy developments relating to rights of audience, or any of the other areas raised above.

Fergus Ewing MSP
Minister for Community Safety
November 2009
Annexe A

Contingency Fees - overview

Background

1. Contingency fees are a way of funding litigation. They refer to cases in which a lawyer will only receive a fee based on a percentage of any award if the case is successful (either as a result of an out of court settlement or with a favourable court decision). They are a common way of funding litigation in the United States of America.

2. Conditional fee arrangements are available in England and Wales. Under these arrangements the client pays nothing if no recovery is obtained and pays an “uplift” of up to 100% of the normal fee if there is recovery (sometimes known as a “success fee”). Under the Access to Justice Act 1999, the success plaintiff can recover the “uplift” from the defendant.

3. At present, contingency fees are not available in Scotland. However, solicitors and advocates may undertake work on a speculative basis. Speculative fee arrangements, as with conditional fees, are arguably a form of contingency fee. Under such arrangements, the lawyer only receives their fee if successful, and as in England and Wales an uplift of up to 100% on this fee is permitted. However, speculative fee arrangements cannot be entered into if legal aid is being received.

Scotland

4. Contingency fees are prohibited in Scotland under the criminal common law. The prohibition was set out in “institutional writings” in the 18th Century, which form part of the basis of Scots criminal law. The prohibition was described by the phrase pactum de quota litis. The prohibition is intended to prevent a solicitor or advocate having a personal stake in the outcome of a client’s case, the concern being that this might influence the lawyer’s conduct of the case.

5. For advocates, the common law prohibition is repeated in the Faculty’s “Revised 2008 Scheme for the Accounting For and Recovery of Counsel’s Fees”. Paragraph 4 of the Revised 2008 Scheme says “Counsel are not permitted to accept instructions on a contingency basis, i.e. that fees will be based on any quantum measurement of the outcome”.

6. Solicitors can negotiate with advocates, in advance of instruction, about fees to be paid in any case or matter. Negotiations can include arrangements for speculative fees or deferment of fees. Advocates may, but are not bound to, accept instructions on a speculative basis (i.e. where the solicitor is only to be paid a fee if the client is successful in the litigation).

7. As mentioned above, the restrictions do not prevent ‘no-win, no-fee’ arrangements. It is already possible for a solicitor or advocate to agree not to
charge a fee in the event of failure, but to charge an enhanced fee in the event of success.

8. There have been calls to allow legal practitioners in Scotland to agree contingency fee arrangements with potential litigants. The hope is that this will improve access to justice by allowing cases to be brought which might not otherwise be affordable, particularly complex cases involving multiple pursuers.

Proposals and reaction

9. The Dean of the Faculty, in the Scotsman on 26 January, called for the adoption in Scotland of class action (also known as multi-party action) procedure. Class action is litigation on behalf of a group of claimants. The Dean has also suggested that contingency fees may be an appropriate method of funding such class actions.

10. The Law Society of Scotland’s initial response to proposals on contingency fees was lukewarm - “The Society’s policy is that fees which cannot be recovered in law should not be encouraged.” Its view is that “any proposal to encourage their use on a widespread basis creates a number of problematic issues which would need to be addressed”.

11. The Faculty, Law Society and SLAB share the view that regulation of the use of contingency fees would be required if they were introduced. It should be noted that any such regulation could also potentially be extended to cover current use of contingency fees, such as in claims management.

Civil Courts Review

12. Lord Gill’s recently published Civil Courts Review concludes that it is premature to recommend changes to the current regime governing fees dependent on success, although it does propose that the matter should be addressed urgently by a Working Group on Judicial Expenses which, elsewhere in the report, it recommends.

The issues

13. Contingency fees raise a number of issues. Some of the most important are as follows.

- Why should contingency fees be preferred to conditional fee arrangements?

- Should contingency fees be limited to class actions? If so, it would require class actions to be introduced at the same time, assuming that they are within scope.
• Should contingency fees be limited to a percentage of the damages awarded in a successful case, and if so, what should that limit be?

• Is the Legal Services (Scotland) Bill the appropriate vehicle for making provision for contingency fees?
Annexe B

McKenzie friends and lay representation in court

Background

1. The term McKenzie Friend has its origins in a divorce case, McKenzie v. McKenzie [1970] 3 All ER 1034, although the concept in common law predates this. A McKenzie friend is a lay assistant to someone representing themselves in court, who can help by giving advice (for example, suggesting questions to ask or advising on procedures to be followed), taking notes, and providing moral support. Such assistants are currently permitted both in England & Wales and in Scotland.

2. However, the role of a McKenzie friend can be expanded further in England and Wales. Under sections 27 and 28 of the Courts and Legal Services Act 1990, the court can grant rights of audience to lay representatives in certain circumstances, and it is possible for this power to be used to allow a McKenzie friend to address the court directly.

3. In Scotland, there are several examples of situations where non-lawyers – known as “lay representatives” – are able to act in court on behalf of a party to a court action in Scotland. These include small claims hearings and certain Sheriff Court procedures such as time-to-pay applications under the Debtors (Scotland) Act 1987. These procedures are considered to be relatively simple, and they relate to situations where it is important from a policy perspective to support accessibility.

4. Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) Scotland Act 1990 provide a means for professional bodies to apply for “rights of audience” and “rights to conduct litigation” on behalf of their members. Such rights enable them to represent, and initiate court action on behalf of, clients in the same way as lawyers. Only the Association of Commercial Attorneys has been granted such rights.

5. In addition, there is provision in the Home Owner and Debtor Protection (Scotland) Bill to allow representation of a debtor or entitled resident by an approved lay representative in court proceedings in relation to the possession or sale of a residential property. The lay representative in this case must be approved by a person or body prescribed by the Scottish Ministers using secondary legislation.

Parliament

6. The issue was raised in the Scottish Parliament on 7 May 2009 when the Cabinet Secretary for Justice said in reply to a Parliamentary Question from Margo MacDonald:

“The right honourable Lord Gill’s civil courts review is considering the issue of McKenzie friends. I look forward to receiving his report, which
is expected in June, and I will carefully consider all his recommendations about McKenzie friends and about wider issues concerning those who represent themselves in court. Those wider issues include the funding of court actions, improved court procedure and other methods of dispute resolution."

7. The Public Petitions Committee considered PE1247 on 6 October 2009. This petition, by Stewart Mackenzie, calls on the Scottish Parliament to urge the Government to introduce a McKenzie friend facility in Scottish courts as a matter of urgency. There was broad support from the committee for considering the matter further.

8. However, in his response of 3 November 2009, the Lord President argued that assistance from McKenzie friends is already permitted in Scottish Courts (subject to the discretion of the presiding judge), and that their “introduction” was therefore unnecessary. He also stated that the judges of the Court of Session had no objection in principle to the introduction of a discretionary power similar to that available in England & Wales for allowing rights of audience to be extended to lay persons.

Scottish Courts review

9. Lord Gill’s report was published on the 1 October 2009. His recommendation on McKenzie friends is as follows:

“We therefore recommend that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances where the court considers that such representation would help it. Whether such a person would be of assistance would be at the discretion of the court. Without prejudice to its general discretion, the court should be entitled to refuse to allow any particular person to appear on specific grounds relating to character and conduct. The court should be entitled to withdraw its approval at any time. The court's decision should be final and not subject to appeal. The rules of court should specify the role to be played by the individual and should provide that he is not entitled to remuneration.”

10. The Lord President has indicated that he isn’t sure that rules of court are enough, given that solicitors and advocates both have formal rights of audience (and commercial attorneys). He believes that broadening the class of persons with rights of audience should probably be done by primary legislation rather than rules of court.

Issues

11. There are a number of policy issues in relation to McKenzie friends:

- Given that McKenzie friends are already permitted in Scottish courts, subject to the discretion of the presiding judge, is there any need to make specific provision relating to them?
Should a litigant representing themselves have a presumed right to have a McKenzie friend? This issue is whether the litigant should ask the court’s permission to have a McKenzie friend, or whether the litigant should just introduce the McKenzie friend at the start of proceedings. The second option would not preclude the court from removing the McKenzie on the grounds of misconduct or on the ground that the McKenzie friend’s continuing presence will impede the efficient administration of justice.

Should a McKenzie friend have a right of audience? It will be noted that in England and Wales the McKenzie friend can address the Court in certain circumstances, but they cannot cross-examine witnesses.

Should the Legal Services (Scotland) Bill be used as the vehicle for making provision?
Thank you for your letter of 17 November in which you indicate the main areas in which you are considering lodging Stage 2 amendments to the above Bill. It is certainly helpful to have as much notice as possible of the topics on which Ministers are considering proposing amendments, as this can help the lead committee to ensure that relevant evidence on those topics is invited during Stage 1. The background information in the annexes to your letter is also helpful, as is the commitment to keep the Committee informed as your thinking develops.

I was, however, a little surprised by the number and extent of the topics mentioned in your letter. Without suggesting that they necessarily raise any concerns in relation to the procedural rules on admissibility, they do raise distinct issues from those provisions already included in the Bill on introduction. The prospect of these topics being added into the Bill at Stage 2 therefore has implications for the committee’s programme of scrutiny.

A particular issue arises in relation to contingency fees, on which your letter suggests you will not be consulting until December, and in relation to rights of audience in the Supreme Court, where you say you will be considering amendments only after the publication in March of the result of an ongoing review. In both cases, it seems unlikely that the Committee will have a clear indication of what any amendments might involve before it has concluded most or all of its Stage 1 evidence-taking. As a result, it may be necessary for the committee to allow time at Stage 2 for further evidence-taking on the implications of whatever amendments you have, by then, decided to bring forward. This may impact on the timetable for completion of the amending stages of the Bill.
Justice Committee

Legal Services (Scotland) Bill

Letter from the Minister for Community Safety

Thank you for your letter of 24 November regarding our prospective Stage 2 amendments to the Legal Services (Scotland) Bill.

You have raised issues about the prospective Stage 2 amendments to the Bill. In particular you are concerned about the potential introduction of provisions on contingency fees and rights of audience in the Supreme Courts and the resulting impact on the timetable for the completion of the Bill. We accept that these amendments raise distinct issues from those provisions already included in the Bill and, therefore, implications for the Committee’s programme of scrutiny and the timetable for completion of the amending stages of the Bill. However, we should note that most of the issues have arisen since the Introduction of the Bill, such as the proposals on McKenzie friends as set out in the Report of the Scottish Civil Courts Review.

Nevertheless, we accept your concerns and have decided on the following approach.

Contingency fees

We will not make provision for contingency fees at Stage 2. We are committed to consulting on this matter, but this is likely to be as part of a wider review of the regime governing fees dependent on success as recommended by Lord Gill in the Report of the Scottish Civil Courts Review. Depending on the results, provision could be made for contingency fees in a future “Gill Bill”. Further, it should be noted that the issue of contingency fees was raised by the Dean of the Faculty of Advocates in January 2009 in relation to class actions. The Judiciary are considering the matter of such actions at present in the light of the recommendations of the Scottish Civil Courts Review and their recommendations may have a bearing on proposals in respect of contingency fees.

Rights of audience in the Supreme Courts

We do not intend to include any controversial or complex changes to rights of audience at Stage 2. However, we expect that the review being carried out by Ben Thomson into this matter will report in March, with an interim report in January. Therefore, where primary legislation is necessary to implement relatively straightforward changes which we consider to be clearly beneficial, particularly if they relate closely to matters already covered in the Bill we may consider amendment at Stage 2.
McKenzie friends and lay representation

In light of the recommendations in the recent Scottish Civil Courts Review and ongoing debate around this issue, we are now considering whether an amendment is required so that those without a right of audience (such as McKenzie friends) should be able to address the court in certain circumstances.

Regulation of will writers

We are considering an amendment to allow for the introduction of regulation for will writers. We intend to initiate a consultation on this matter in December, but envisage that any regulation would be similar in operation to that proposed for confirmation agents in the Bill as introduced.

Various amendments to the Solicitors (Scotland) Act 1980

We are considering various minor amendments to the Solicitors (Scotland) Act 1980. These are sought by the Law Society of Scotland. This includes issues surrounding the Scottish Solicitors Guarantee Fund.

Fergus Ewing MSP
Minister for Community Safety
4 December 2009
Justice Committee

2nd Meeting, 2010 (Session 3), Tuesday 12 January 2010

Note by the Clerk

1. At its meeting on 8 December 2009, the Committee took evidence on the Legal Services (Scotland) Bill from Professor Alan Paterson, University of Strathclyde. Professor Paterson undertook to provide the Committee with information on the Australian standards on third-party ownership of legal firms.

2. Professor Paterson has now heard back from the two Australian regulators (Steve Mark, Legal Services Commission for New South Wales) and John Briton (the Commissioner from Queensland).

3. The attached emails detail their exchange. Professor Paterson has also flagged up an article of last year on external ownership “Views from an Australian Regulator” by Steve Mark from the Journal of the Professional Lawyer. Link below:

Dear Steve and John

Scotland's Government is moving on with its reform plans. There are two or three knotty problems so any suggestions on them would be welcome. I have attached the initial version of the Bill:  [http://www.scottish.parliament.uk/s3/bills/30-legalServices/index.htm](http://www.scottish.parliament.uk/s3/bills/30-legalServices/index.htm)

1) Theft of client's funds. Do either of your States require a client security fund / compensation fund/ Fidelity Fund to cover this for alternative business structures / MDPs ILPs? One reading of Steve's paper from last year suggests that the legal profession's Fidelity Fund would cover it only if the legal practitioner was involved. What happens if he isn't? Fidelity cover on the Indemnity Insurance?

2) What do your jurisdictions do where an accountant and a lawyer are involved together in providing legal services in an MDP and get into a conflict of interest? The two professions have different rules on conflicts, (accountants are more willing to have informed consent and information barriers). Even if the entity is held to the higher standards required of lawyers, what happens about the discipline of the individual practitioners? If it is left to their professional bodies the lawyer partner might be disciplined but not the accountant partner, for the same behaviour. What do you do?

Best wishes
Alan

Dear Steve and John

I refer to my earlier email. The Justice Committee of the Scottish Parliament would be most grateful if you could send us any information on the points I raised with you as well as a further point, namely the "fitness to own / invest" test. Has Australia had any problems with undesirable persons investing in or "buying" law firms and what safeguards exist to prevent crooks doing just that?

One final point. When we discussed this two years ago, the unifying statute had not been passed and therefore few really large / national firms had taken advantage of the possibility of floating on the stock exchange or receiving external investment from non-lawyers. Has this changed?

Every best wish
Alan
Dear Alan

I have just spoken to Steve and he will reply to you early next week on both our behalves. We have been busy with the national legal profession reform project in addition to our day jobs - hence the delay.

The answer to your question re MDPs is yes. You can go to our website for more information (www.lsc.qld.gov.au) including our Act. There will be materials on Steve's website also.

Cheers
John

Dear Alan

Below will be some brief comments in response to your query. I hope that this is sufficient. If not, please let me know and I will try and get more fulsome information.

1. In all jurisdictions in Australia there exists the “Fidelity Fund” to cover theft of client funds. These extend to all legal structures including MDPs and ILPs. However, it is the nature of the funds that they will only be activated by theft of client funds by a legal practitioner (but it may extend to theft by a staff member under the supervision of a legal practitioner). If a theft occurred within a multidisciplinary practice where the funds were not held in the trust account, such theft would not be covered even if committed by a legal practitioner. It would appear that the ramifications of this are that theft by a non lawyer of monies held by the firm would only be covered by the Fidelity Fund when they were held in the trust account and the theft was committed under the supervision of a legal practitioner. Unfortunately, I cannot give a simple answer to the question of whether Fidelity cover would be covered by the Professional Indemnity Insurance Scheme. This is because it differs from State to State and, at least in New South Wales, would only (I think) address negligence by a legal practitioner which may include negligence in relation to failure to supervise.

2. I am not entirely clear what you are asking here. As a regulator of the legal profession (which, of course, includes MDPs and ILPs which may involve the activities of an accountant) any conflict of interest will be looked at in terms of the Legal Profession Act that I administer. The requirement that the solicitor/director of an incorporated legal practice ensures that appropriate management systems exist for compliance with the Legal Profession Act and a requirement to disclose any breach of
the regulations, rules or legislation even if done by a non lawyer would seem to result in
the highest common denominator approach, assuming lawyers hold the highest
common denominator. Your question about who would be punished in a disciplinary
sense is to some extent correct as we can only “punish” legal practitioners. However,
the requirement in relation to appropriate management systems would suggest a failure
in such systems where a non lawyer were to act in a conflict situation which would be
covered by the Legal Profession Act if committed by a lawyer. Indeed, this is one of the
reasons why I have been a strong advocate for accepting complaints against firms
rather than individuals. In that regard, you may be interested to note that in the present
cclimate in Australia, where we are attempting to create a national regulatory scheme,
there is almost unanimous support for my submission to allow for complaints against
firms.

I hope this is sufficient information to respond to the questions you are addressing.
Again, if not, please let me know.

Regards
Steve Mark

Dear Alan

On your third point on fitness to own, at present there is no fitness to own or invest test
per se for incorporation other than the normal corporate regulator test as for all
companies. In addition the requirement for solicitor directors to oversee the conduct of
all other directors may have a positive effect. So far this has not been a problem in
Australia.

No legislation has been passed to ensure that the legal profession act takes
precedence over corporate law. This is perhaps due to the move here towards a
national regulation scheme and individual states are awaiting the outcome of those
discussions.

Steve
Justice Committee

2nd Meeting, 2010 (Session 3), Tuesday 12 January 2010

Note by the Clerk

1. At its meeting on 5 January 2009, the Committee took evidence on the Legal Services (Scotland) Bill from the Institute of Chartered Accountants of Scotland (ICAS). During the evidence session, Vivienne Muir, ICAS’s Executive Director of Regulation and Compliance, spoke of the application process for a non-accountant to become a regulated member of ICAS and agreed to send the Committee a copy of the relevant application form¹. Please find attached a copy of this application form.

# AUDIT REGULATION APPLICATION FOR REGULATED NON-MEMBER STATUS

Please reply to:
Professional Authorisation Department
The Institute of Chartered Accountants of Scotland
21 Haymarket Yards
EDINBURGH
EH12 5BH

<table>
<thead>
<tr>
<th>Firm Name:</th>
<th>Firm No:</th>
</tr>
</thead>
</table>

## PART 1

All principals in a firm applying to the Institute for registration as a company auditor must be either members of one of the three Institutes of Chartered Accountants, the Association of Chartered Certified Accountants, or Regulated Non-Members (RNMs) of the Institute. A firm should submit a separate form for each applicant for recognition as a RNM

<table>
<thead>
<tr>
<th>1. Firm</th>
<th>INSTITUTE USE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td>O/</td>
</tr>
</tbody>
</table>

  Post Code

  Telephone Number (including STD code)

<table>
<thead>
<tr>
<th>2. Name of applicant in full (block capitals)</th>
<th>INSTITUTE USE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr/Mrs/Miss/Ms</td>
<td>RNM/</td>
</tr>
</tbody>
</table>

  Surname

  Forenames

  Date of Birth

<table>
<thead>
<tr>
<th>3. Previous Grant</th>
<th>Has the applicant been recognised as an RNM by the Institute for Investment Business?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes [ ] No [ ]</td>
<td>If “Yes”, give details below of the firm in which he/she was a principal if different from above and the period of the grant</td>
</tr>
</tbody>
</table>

  Firm Name

  Firm Number (if known) RNM Number (if known)

## PART 2
4. Applicants for recognition are required to demonstrate that they are “fit and proper” people.

The following questions should be answered ‘yes’ or ‘no’, but a ‘yes’ answer will need further explanation.

**“FIT AND PROPER”**

**Financial Integrity and Reliability**

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. In the last ten years has a court, in the United Kingdom or elsewhere, given any judgement against you about a debt?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. In the last ten years have you made any compromise arrangement with your creditors?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Have you ever been declared bankrupt or been the subject of a bankruptcy court order in the United Kingdom or elsewhere, or has a bankruptcy petition ever been served on you?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Have you ever signed a trust deed for a creditor, made an assignment for the benefit of creditors, or made any arrangement for the payment of a composition to creditors?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Convictions or Civil Liabilities**

**Note:** There is no need to mention offences committed before the age of 17 (unless committed within the last ten years) and road traffic offences that did not lead to a disqualification or prison sentence.

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Have you at any time pleaded guilty to or been found guilty of any offence?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If so, give details of the court which convicted you, the offence, the penalty imposed and the date of conviction.

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. In the last five years have you, in the United Kingdom or elsewhere, been the subject of any civil action relating to your professional or business activities which has resulted in a finding against you by a court, or a settlement being agreed?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Have you ever been disqualified by a court from being a director, or from acting in the management or conduct of the affairs of any company?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Good Reputation and Character**

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Have you, in the United Kingdom or elsewhere, ever been:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- refused the right or been restricted in the right to carry on any trade, business or profession for which a specific licence, registration or other authority is required?
• investigated about allegations of misconduct or malpractice in connection with your professional activities which resulted in a formal complaint being proved but no disciplinary order being made?

• the subject of disciplinary procedures by a professional body or employer resulting in a finding against you?

• reprimanded, excluded, disciplined or publicly criticised by any professional body which you belong to or have belonged to?

• refused entry to or excluded from membership of any profession or vocation?

• dismissed from any office (other than as auditor) or employment or requested to resign from any office, employment or partnership?

• reprimanded, warned about future conduct, disciplined, or publicly criticised by any regulatory body, or any officially appointed enquiry concerned with the regulation of a financial, professional or other business activity?

• the subject of a court order at the instigation of any regulatory body, or any officially appointed enquiry concerned with the regulation of a financial, professional or other business activity?

9. Are you currently undergoing any investigation or disciplinary procedures as described in 8 above?
PART 3

Recognition as a Regulated Non-Member does not permit an individual to be responsible for an audit or sign an audit report unless he is a Qualified Individual.

A Qualified Individual must hold an “appropriate qualification” in terms of section 31 of the Companies Act 1989, article 34 of the Companies (Northern Ireland) Order 1990, or section 187 of the Companies Act 1990 of the Republic of Ireland, and must satisfy the Audit Registration Committee of similar experience of audit work as would be required of a member of the Institute.

Holders of an “appropriate qualification” should complete this section.

5. I hold an appropriate qualification by virtue of:

   PLEASE TICK

   a. a recognised professional qualification obtained in the UK;

      Please specify the qualification ________________________________

      and date qualification gained ________________________________

   b. an approved overseas qualification plus any additional examination passes specified by the Secretary of State;

      Please specify the qualification ________________________________

      Name and address of the body awarding the qualification:

      Name ________________________________

      Address ________________________________

      ______________________________________

      ______________________________________

      Details of examinations passed ________________________________

      ______________________________________

   c. (1) authorisation on 31 December 1989 by the Secretary of State under s389(1)(b) of the Companies Act 1985;

      (2) if yes, was authorisation granted under s13(1) of the Companies Act 1967?

   d. under the transitional arrangements of s31(5) of the Companies Act 1989;

      Please give details ________________________________

      ______________________________________
PART 4

To be completed by all applicants.

6. I enclose a copy of my *curriculum vitae.*
   (Applicants who are seeking recognition as Qualified Individuals should provide details of appropriate auditing experience.)

7. The undernoted individuals are willing to provide (1) a character reference and (2) a reference as to my technical ability.
   (Where possible the technical reference should be provided by a member of the Institute or another recognised professional body with whom the applicant has worked in the last five years.)

(1) ___________________________________ (2) ___________________________________
   ___________________________________  ___________________________________
   ___________________________________  ___________________________________
   ___________________________________  ___________________________________

PART 5

Fees

8. Please complete either A or B below:

   A  I enclose a cheque, made payable to the Institute, for £1117.00 in respect of the application fee and annual fee for 2008. I understand that, should my application not be accepted, the fees will be returned, less a 10% administration charge.

   or

   B  I am a Regulated Non-Member of the Institute and agree to pay the subscription for 2007 when invoiced.

Signed ........................................................................................................ Dated ...........................................

647
PART 6

Application and Undertakings

I, (insert full name) .................................................................................................................. hereby apply to the Council to be recognised as a Regulated Non-Member of the Institute of Chartered Accountants of Scotland under Chapter XX of the Rules.

I certify that the details provided in this application are correct.

I know of no reason why there should be any doubts as regards my being a fit and proper person to be a Regulated Non-Member of the Institute.

I undertake that, if accepted as a Regulated Non-Member, I will comply with the Royal Charters, Rules, Bye-laws and Regulations which at the time of acceptance, or thereafter, are in force. In particular, I will:

a. observe and uphold the ethical and professional standards of the Institute;
b. perform faithfully and promptly any service that I am retained or employed to undertake in my professional capacity;
c. provide promptly and willingly all such information and assistance as I am able, if asked to do so by the Institute in pursuance of its duties.

I understand that I shall not be entitled to call myself a chartered accountant and that recognition does not confer any rights, acknowledgements, status or designatory letters on a Regulated Non-Member or entitle a Regulated Non-Member to be publicly represented as having such.

I acknowledge that, if recognised as a Regulated Non-Member, I shall be subject to the disciplinary machinery of the Institute for any failure to comply with its Rules, Bye-laws or Regulations.

Signature ........................................................................................................................................ Date ........................................
Note from the Clerk

At a recent Committee meeting, members requested information on where most of the work of the larger commercial law firms is actually undertaken.

The Law Society of Scotland has forwarded the attached research paper by International Financial Services London (IFSL) Research on Legal Services 2009 (prepared by the Law Society of England and Wales, UKTI and the City) which gives details of the financial value of London in the legal services market.


The overall value of legal services market in London is around £14bn (whereas the value of the whole Scottish market is in the region of £1bn). According to the Law Society of Scotland there are presently 250 active Scottish solicitors in London and 10 in Brussels.
Thank you for your letter of 3 March [please see the annexe] in connection with the Stage 1 timetable for the Legal Services (Scotland) Bill.

I can confirm that the Bureau agreed at its meeting on 9 March to recommend to the Parliament that the Stage 1 timetable for the Legal Services (Scotland) Bill be extended to 30 April 2010. You may be aware that the Parliament agreed to this motion on 10 March.

Alex Fergusson
Presiding Officer
16b March 2010

Annexe

Letter from the Convener to the Presiding Officer

I am writing to you as chair of the Parliamentary Bureau. As you know, the Justice Committee is presently considering its stage 1 report on the Legal Services (Scotland) Bill.

The deadline for completion of Stage 1, as agreed by the Parliament, is 26 March 2010 and we expect to be in a position to publish our report later next week as planned. The Committee has very recently received notification of a Special General Meeting of the Law Society of Scotland which is to take place at the end of this month. The outcome of that meeting will be of direct relevance to this Bill and, in the view of the Committee, it would be in the interests of all members for the outcome of that meeting to be known before the Stage 1 debate takes place.

I understand that the Minister for Parliamentary Business is seeking an extension to the deadline for completion of Stage 1 for other reasons. I write merely to confirm that the Justice Committee is supportive of an extension which would allow us time to consider the outcome of the Law Society meeting prior to the Stage 1 debate.

Bill Aitken MSP
Convener, Justice Committee
3 March 2010
Letter from the Minister for Community Safety to the Convener

Announcement on proposed amendment to section 92 of the Legal Services (Scotland) Bill

I wanted to make you aware that at last night’s Law Society of Scotland ABS Roadshow in Edinburgh, I announced that I will bring forward an amendment to the Legal Services (Scotland) Bill, following representations from the Law Society of Scotland (the Society). The amendment will seek to remove section 92(4), (5) and (6) of the Bill which gives the Scottish Ministers powers to regulate on the appointment of lay members to the Council of the Society.

The power of Scottish Ministers to make regulations specifying the proportion of lay members and the criteria for selection was intended as a fall-back, only to be used in the unlikely event that there would be a need to resolve any disagreements regarding the proportion of lay members. However, following representations from the Society, in which it re-affirmed its commitment to lay appointments, I no longer consider it necessary for Scottish Ministers to have this fall-back power.

Of course, section 92(1), (2) and (3) of the Bill will still, for the first time, allow lay members to be appointed to the Council of the Society. This reflects the Society’s important statutory duty to promote the public interest as well as the interests of the profession.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
19 March 2010
I am writing to alert you to a potentially serious regulatory problem.

Under the Legal Profession and Legal Aid (Scotland) Act 2007 section 2(4) each time the SLCC receives a complaint we have to determine as the very first step if it is frivolous, vexatious or totally without merit. If we find it is determined to be frivolous or vexatious or totally without merit, the complaint is rejected and goes no further. Formal notice is served on both parties to this effect.

If we determine a complaint is not frivolous or vexatious or totally without merit, and meets other ‘eligibility’ criteria such as being made within timescales, it is categorised as either conduct or service under section 5 of the Act, and accepted as eligible. Complaints about service are dealt with by the SLCC and complaints about conduct are passed to the appropriate professional body for investigation. Notice is served on both parties to this effect.

Whatever our decision – whether to accept or reject a complaint – the decision can only be changed through the mechanism of appeal to the Court of Session.

The SLCC is now increasingly concerned that these sections of the Act are not working in the public interest or in the interest of either party – complainers or practitioners. The main issue with the Act is the inability to reconsider a decision made in these very early stages and the lack of power to revise such decisions except through the appeal mechanism. The consequences of this are expense, unnecessary delay in the complaint process and potential unsatisfactory professional conduct going unaddressed.

These issues are exemplified by outstanding appeals made by the Law Society of Scotland (LSS) against SLCC decisions to accept conduct complaints.

At present the Law Society of Scotland has lodged four appeals to the Court of Session effectively stating they are not willing to investigate complaints referred to them on the basis they consider the SLCC should have done more preliminary investigation or the complaints could never amount to either misconduct or unsatisfactory professional conduct. The first appeal commenced November 2009 and is ongoing; the three later appeals are sisted and rest in the court system. (We also have three appeals lodged by practitioners in close contact with the Law Society on similar grounds).
This is concerning to the SLCC because:

- The level at which these appeals are to be heard within the Court of Session means they are not likely to be heard quickly.
- One consequence of this is there are seven practitioners whose conduct should be investigated and either cleared or found to have transgressed yet the allegations are simply in limbo.
- The other main consequence is the uncertain position complainers are being left in and the impression of the profession as a whole this is creating.
- The refusal of the LSS to accept complaints suggests to the SLCC that they are not taking a risk based approach and welcoming “intelligence” about their Members, but are rather continuing as they have previously to take action only where they are confident issues can be substantiated. This is extremely concerning at a time when they seek to be confirmed as a legal services regulator under the progressing Legal Services (Scotland) Bill; a proposal for opening up of legal services with alternative practice models when sharper and faster regulation may be required.
- There are also longer term consequences for the SLCC and practitioners in relation to costs. At the simplest level, the profession is having to pay twice in relation to the appeals – they ultimately fund both the LSS and the SLCC, both sides of the appeal. The nature of the appeals is creating an uncertain and high-risk environment for the SLCC in terms of its business model and the level of its reserves. We are acutely aware that our sources of funding are limited so have built the risk of fundamental changes to our business-model into the level of reserves we are holding this and next financial year. This will enable us to address in-year changes. Future years can only be funded by increases to the levy if the resultant business model is more expensive. The longer we have to wait for decisions and the more of these appeals are lodged, the greater the impact on financial planning and the reserves we hold. The more reserves we hold, the greater the impact on our ability to release money to reduce the general levy.

All of these concerns are significant but I come back to the impact on lack of investigation of conduct. We have serious concerns about the lack of action over practitioners where a complaint has been made about their conduct. The SLCC is a new modern body with emphasis on driving up legal standards and intended as a means of ushering in new conduct procedures where earlier interventionist action is taken where practitioners appear to have transgressed. Those aims are being thwarted at present, not only by the remaining and in my view incorrect emphasis on a criminal test for misconduct, but also now by appeals to the Court of Session by their regulatory body.

At present we are having to write to complainers and practitioners stating in very simple terms: “Your complaint is in limbo”. I fully recognise Court
processes take time. I fully recognise the Law Society of Scotland’s right to appeal to the Court of Session. I fully recognise the 2007 Act will be tested in the court. What the SLCC Board cannot stand by and say nothing about, is the very real problem emerging of conduct allegations sitting without any action being taken on them because of the current rush to appeal.

It is also sending the wrong message to the profession as a whole as it is effectively saying that if you are a practitioner who wishes to avoid regulatory action, the appeal process under the Act is your strongest ally. That cannot be right.

I am writing to you now, partly to alert you to our concerns and partly as a courtesy because this issue will leap into the public domain shortly. It is likely to come sharply in focus as we publish our budget within the next 3 weeks and as Court processes move forward. It seems to me it would be wholly remiss of the SLCC not to alert the Justice 2 Committee of the issue whilst you consider responsibilities for future regulation under the Legal Services (Scotland) Bill.

Jane Irvine
Chair to the Board of the Scottish Legal Complaints Commission
26 March 2010
I welcome the Committee’s support for the general principles of the Bill, while noting the various concerns raised in its Stage 1 Report (“the report”). As the Committee is aware, I committed to giving further consideration to many of these areas during my evidence session in January. In advance of the Stage 1 debate, therefore, I thought it would be useful to respond to the main concerns raised in the report.

**Direct employment of solicitors by charitable bodies**

The Committee notes that section 36 of the Bill imposes a restriction on eligibility to be a licensed legal services provider (“licensed provider”), as the entity in question must provide legal services to the public for a fee, gain or reward. It expresses concern at this restriction, suggesting that it is in contradiction with the Bill’s main aim of expanding the business models open to those providing legal services, and that it is “restricting the way in which not-for-profit organisations can provide legal services”. It notes its sympathy for the concerns expressed by Citizens Advice Scotland.

I would like to emphasise again that our intention when drafting the Bill was to ensure that charitable bodies are not burdened by unnecessary regulation and cost. Also, the Bill does nothing to restrict the way in which such bodies can operate. However, given the concerns raised during the Committee’s evidence sessions, we are giving this issue further consideration. My officials met with Citizens Advice Scotland (“CAS”) on 12 February to discuss this in more detail. CAS made it clear that, rather than becoming involved in the new regulatory scheme, it wants provision to simply allow Citizens Advice Bureaux (“CABx”) to directly employ solicitors.

We are currently considering whether it may be possible to resolve this issue without involving CABx (or similar bodies) in the new regulatory scheme, with all the burdens which that entails. The current restriction on CABx employing solicitors directly stems from section 26(1) of the Solicitors (Scotland) Act 1980 ("the 1980 Act"), which makes it an offence for any solicitor "upon account of or for the profit of any unqualified person" to do a number of things such as act as an agent in any court proceedings, and prepare certain writs. However, law centres are currently able to employ solicitors as a result of a specific exemption in section 26(2) of the 1980 Act, which was inserted by paragraph 29 of Schedule 8 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. A similar exemption for CABx and similar bodies may prove the most effective way of allowing them to do the same. However,

---

before a decision on this matter can be taken, full consideration will require to be given to the implications of such a change.

Ability of Scottish lawyers to operate in other Member States

The Committee expresses some concern in the report at the suggestions that Scottish lawyers wishing to work abroad may be negatively affected by the Bill\(^2\). In particular, it has been suggested to the Committee that a Scottish solicitor practising in a licensed provider may be prohibited from being recognised as a lawyer in other Member States of the EU, as a result of Article 11.5 of Directive 98/5/EC (practice of a lawyer in another Member State)\(^3\).

Directive 98/5/EC of the European Parliament and of the Council facilitates the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. What Article 11.5 of the Directive provides is that if a host Member State prohibits a lawyer from practising within a grouping in which some persons are not members of the profession, such as a licensed provider, then the host Member State may refuse to allow a foreign lawyer who is registered to practise in its home state in his capacity as a member of the grouping. The provision leaves it up to the host Member State whether or not to allow the grouping; it is a discretionary power. If a lawyer wished to practise in another country, then he or she could do so in another capacity (not as part of a prohibited grouping), for example, as a solicitor in a traditional firm.

Article 11.5 of that Directive also allows a host Member State to oppose the opening of a branch or agency where the rules governing a grouping of lawyers in a home Member State are incompatible with those of the host Member State. If a traditional firm of solicitors in Scotland choose to set up a licensed provider and wanted to also set up an office in another host Member State they would have to consider where they could do this.

Therefore, a host Member State, which does not permit alternative business structures, may prohibit a Scottish solicitor, who is practicing in a licensed provider, from practising law on a permanent basis, and may oppose the opening of a branch or agency in that Member State. However, an individual Scottish solicitor who decides to work on a permanent basis in a Member State would be seeking new employment, so would not be working for a licensed provider. Also, although it is accepted that licensed providers may decide to open offices in another Member State, it is anticipated that such instances would be rare. Nevertheless, neither the Bill nor the Directive bars them from so doing. It is a matter for Member States, a number of which have made provision for alternative business structures. In fact, the benefits that will flow from the ability to set up a licensed provider, such as increased access to capital and the opportunity to adopt a more flexible business model, may allow more firms to consider opening offices in other Member States.

---


Again, to be clear, the Bill has no impact on Scottish solicitors not working in a licensed provider who wish to practise law elsewhere in Europe.

**Application of regulatory objectives and professional principles**

The Committee raises questions about the extent and application of the regulatory objectives set out in section 1 of the Bill\(^4\). The regulatory objectives are intended to guide the actions of all regulators of legal services. Under sections 62 and 75 of the Bill, approved regulators and approving bodies must act in a way which is, so far as is practicable, compatible with those regulatory objectives. However, under section 86 of the Bill, the objectives also apply to other regulators of legal services (such as the Law Society of Scotland (“the Society”) and the Faculty of Advocates (“the Faculty”)). For the avoidance of doubt, the regulatory objectives apply to regulators of legal services only in the exercise of their relevant regulatory functions.

Traditional legal practices will not be required to have regard to the regulatory objectives, as licensed providers are under section 38(1)(a) of the Bill. As the Committee has noted, the Bill is primarily concerned with the regulation of the new entities which will be permitted, not with imposing new regulatory burdens on existing firms. However, as the Society and the Faculty will be subject to the regulatory objectives, all solicitors and advocates will be required to adhere to the professional principles set out in section 2, whether they are practicing in licensed providers or in traditional firms.

**Multiple approved regulators**

The Committee comments that it is not convinced of the benefits of having more than one or two approved regulators. It also expresses some concern over the prospect of bodies from outside Scotland seeking to become approved regulators\(^5\).

With regard to the number of approved regulators, I would repeat that we do not think it likely that there will be more than one or two. The Society and ICAS are the only bodies which have expressed an interest so far, and we do not have any indication that there will be any more. As the Committee points out, Scotland is a small jurisdiction, and so it is unlikely that many bodies will feel it is worthwhile or sustainable to apply to become an approved regulator.

With regard to the second point, this is an issue which I have discussed with several members of the Committee. In particular, we have been asked to consider whether the Solicitors Regulation Authority (“the SRA”), which is the regulatory arm of the Law Society in England and Wales, might consider applying to become an approved regulator.


The Bill itself would not prevent the SRA from applying to become an approved regulator. However, given the Law Society’s position as a statutory body with regulatory powers relating to solicitors in England and Wales only (which are principally set out in the Solicitors Act 1974), it is difficult to see how its functions could extend to regulating providers of legal services in a different jurisdiction.

In the case of other bodies from outwith Scotland applying (or in the unlikely event that the SRA did have the legal competence required), any applicant would obviously have to demonstrate to the Scottish Ministers that they have the appropriate skills and knowledge necessary to effectively regulate legal services in Scotland.

Role of the Lord President

The Committee notes the concerns which have been raised around the possible threat to the independence of the legal profession posed by the role of the Scottish Ministers in the new regulatory regime, and suggests a greater role for the Lord President in the approval of approved regulators.

With regard to the role of the Scottish Ministers in overseeing the regulatory system, we consider this to be an appropriate and proportionate solution. We do not think that a “super regulator” similar to the Legal Services Board in England and Wales would be suitable for Scotland, as we believe that the size of the market does not justify the expense to the market, the consumer, and the taxpayer of establishing a new NDPB. The implementation costs of the Legal Services Board in England and Wales to 31 December 2009 were £4.58 million, and the budget for running costs for the first full year beginning April 2010 is £4.74 million. While the costs might be lower for such a body in Scotland, they would still be substantial.

Given the powers already available to the Lord President in respect of individuals having rights of audience in the courts, it was concluded that it should not be necessary also to require the Lord President’s approval of the regulatory regimes for businesses which employ such individuals. Instead, the Bill requires the Scottish Government to consult the Lord President (alongside others) in relation to an application by a body for a licence to be an approved regulator.

However, we have been listening to those who have called for the Lord President to have an equal role to the Scottish Ministers, particularly in relation to this approval process, and to those consumer bodies who are against such an enhanced role. We are currently considering an amendment at Stage 2 to give the Lord President a greater role in the process of approving approved regulators.

---

Compensation fund

The provision of a compensation fund to give clients of the new licensed providers protection against fraud, similar to that currently offered by the Scottish Solicitors Guarantee Fund, has understandably been the subject of much discussion over the past few months. As noted by the Committee\(^7\), it is our intention to insert appropriate provisions to give such protection to consumers at Stage 2.

Step-in powers

The Committee states that there should be further detail in the Bill around when the step-in powers in section 35 might be used; that there should be an obligation to consult on any regulations made under this section; and that the use of step-in powers should be for as short a period as practicable\(^8\).

We have given this section further consideration, and are currently drafting an amendment which will emphasise the “last resort” nature of this power. However, we do not agree with the Committee that there should be an obligation to consult on any regulations made under this section. As has been discussed, these powers are to be used as a last resort, where licensed providers would otherwise be left unregulated (for example, as a result of an approved regulator going out of business unexpectedly). In such a situation, swift action would be required, and there is unlikely to be sufficient time for consultation. Introducing such an obligation could risk the discontinuation of robust regulation of licensed providers, and is therefore inappropriate.

Branding

The Committee notes the concerns raised by ICAS over the “branding” of licensed providers\(^9\). We are currently giving this issue further consideration, and will put forward an appropriate amendment at Stage 2 if necessary.

Designated persons

The Committee asks for some clarification of the Scottish Government’s reasoning behind section 47, which makes provision for “designated persons”\(^10\). It should first be noted that the Bill makes no changes to the areas of work reserved to solicitors in the Solicitors (Scotland) Act 1980 (“the 1980 Act”). At present, unqualified persons are able to work in these reserved areas if such a person proves that he or she 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 remuneration paid under a contract of employment). This allows paralegals in legal practices, for example, to work in the reserved areas. Section 47 of the Bill makes similar provision for licensed providers.

Furthermore, incorporated practices (known as LLPs), of which there are 197 in Scotland, are able to work as a business entity in reserved areas. Section 90(4) of the Bill amends the Solicitors (Scotland) Act 1980 to make similar provision for licensed providers. In addition, in respect of licensed providers, section 39 of the Bill provides for a Head of Legal Services who must be a solicitor and is to manage the designated persons with a view to ensuring that they comply with the regulatory objectives and professional principles.

In summary, the Bill makes no changes to the reserved areas; makes similar provision for unqualified persons working in reserved areas in licensed providers as exists at present for traditional firms and LLPs; and provides additional safeguards for licensed providers in the form of the Head of Legal Services.

In relation to the Committee’s observation that no action can be taken against individual investors who are not designated persons (outside investors), we intend to introduce appropriate sanctions at Stage 2. This is described in more detail below, in response to the Committee’s comments about sanctions against such individuals.

The Committee also suggests that consideration be given as to whether designated persons should be required to meet particular standards, for example having specific training or experience.

We believe that any attempt to set out specific training requirements or qualifications would risk defeating the purpose of this provision which, as the Committee notes, is to mirror the existing situation whereby qualified and unqualified individuals employed by legal practices are permitted to work in the reserved areas. It would impose an additional burden on licensed providers, and would therefore risk creating an uneven playing field between the new entities and traditional legal practices.

In addition, if certain requirements were to be imposed on designated persons, it may be necessary to revisit the appropriate exclusions relating to unqualified persons in the 1980 Act. It would be inconsistent, and potentially confusing to consumers, to, for example, require paralegals working in licensed providers to have certain qualifications, but not those performing exactly the same job within traditional practices. On the other hand, if such requirements were to be introduced in all traditional firms providing legal services, the cost implications would be substantial and could lead to such firms going out of business.

---

However, we are currently considering an amendment which would clarify that all unqualified designated persons carrying out legal work within a licensed provider must be adequately supervised by a suitably qualified person (i.e. a solicitor), with ultimate responsibility for this supervision falling on the Head of Legal Services. While not imposing an unnecessary burden on licensed providers, we feel this would ensure that work carried out is done so in a properly supervised manner.

**Fitness to own**

The Committee notes the concerns around the prospect of external ownership of firms providing legal services, and around the proposed “fit to own” tests\(^\text{12}\). I agree with the Committee that this is certainly an area worthy of debate and discussion, and since the Stage 1 evidence sessions we have given the relevant sections of the Bill further consideration. We believe that the safeguards set out in the Bill are robust, and do not intend to make changes to these. However, as always, we welcome any suggestions which may improve these provisions.

By way of additional reassurance, it may be useful to outline exactly what protection the fit to own provisions give. While it is not possible to totally remove the risk, we can minimise it, and to do that we have put in place a stringent fitness for involvement test, which is set out in sections 49 and 50 of the Bill. Section 49(2)(b)(ii) of the Bill provides that an approved regulator can revoke or suspend the licensed provider’s licence where an outside investor is deemed to be unfit. This is the ultimate sanction, as the licensed provider would no longer be able to carry on business. There is also a requirement in section 51 for all outside investors to behave in a proper way, which includes a prohibition on exerting undue influence on those within a licensed provider, and section 40(6)(b) gives the Head of Practice an explicit duty to report any breach of section 51 to the approved regulator. Furthermore, section 52 of the Bill provides the Scottish Ministers with a power to make, if required, regulations to make further provision on this matter.

I feel that it is worth highlighting section 50 of the Bill in particular. This section provides that an outside investor’s “probity and character (including associations)” should be considered when assessing fitness. This is deliberately broad, to ensure that factors other than bankruptcy and criminal activity can be considered, and gives wide discretion to the approved regulator to prevent unsuitable individuals from getting involved in the provision of legal services. This can be contrasted with procurement legislation, which I know has been the subject of some debate recently. The Public Contracts (Scotland) Regulations 2006 provide that economic operators can be rejected where a criminal offence has been committed, but there is no provision for the taking into account of other matters, such as the individual’s associations.

You will have noted that there has been widespread agreement that these provisions are robust. Even the Scottish Law Agents Society, which is opposed to the Bill, considered these measures are adequate and stated so in their oral evidence to the Committee on 15 December13.

Issues raised by SLCC relating to complaints handling

As the Committee notes14, the SLCC has raised some questions around the handling of complaints, both in general and relating to the new categories created by the Bill. The two main issues focus on whether the SLCC should be given the role of investigating conduct complaints as well as service complaints, and on the exact process for complaints against approved regulators.

The SLCC argues that the process for complaints against legal practitioners under the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) should be altered to give the SLCC the role of investigating all complaints, rather than just service complaints as is currently the case15. While there may be points in favour of such a system, we feel that this would be a major policy shift requiring significant consideration and consultation. In addition, given how recently the 2007 Act was enacted, we feel it would be premature to make a significant change to the system put in place by that legislation. Therefore, we do not intend to change the current system whereby conduct complaints are investigated by the relevant professional body.

It is worth pointing out that while the Bill does introduce new categories of complaints, this should not result in increased complexity for the consumer. It is our intention that the SLCC will act as gateway for all complaints relating to approved regulators, licensed providers, and confirmation agents. Where this is not the case in the Bill as presently drafted (as with complaints against approved regulators), we intend to introduce appropriate amendments at Stage 2.

In relation to the second point relating to complaints about approved regulators, for which provision is made in section 64 of the Bill, this is an area to which we are currently giving further consideration. As mentioned above, it is our intention that the SLCC be the gateway for all complaints relating to legal services, including those against regulators, and we will offer an amendment to this effect at Stage 2. Amendment will also be made in relation to the funding of such complaints, in light of issues raised by both the SLCC and the Law Society of Scotland. However, no significant amendments are planned to section 64 relating to exactly how the process will work, as is suggested by the SLCC. As set out in the delegated powers memorandum, we believe it would be more appropriate to specify such operational details using subordinate legislation, through the power given to the Scottish Ministers under section 64(7).

15 SLCC. Written submission to the Justice Committee (LS14a), 2010.
The SLCC has also made more detailed comments relating to the operation of the complaints process, and to specific provisions in the Bill. We intend to give these points further consideration before Stage 2, and discuss with the SLCC if appropriate.

**Sanctions on outside investors**

As described above, inappropriate behaviour by outside investors can ultimately result in the suspension or revocation of a licensed provider’s licence. While this sanction is not aimed at the individual outside investor directly, it would have a serious impact as it would significantly diminish the value of their investment (given that the firm in question would no longer be able to operate as a licensed provider). However, the Committee has suggested that consideration be given to allowing a “more targeted approach”, with sanctions which can be used against individual outside investors.\(^{16}\)

While we believe that the sanctions available are robust, we are giving further consideration to introducing such a sanction which could be used in relation to individual outside investors, and which would allow such individuals to be disqualified from acting in that capacity (as is possible with the other named positions within licensed providers, such as Head of Legal Services or Head of Practice).

The Committee also asks for details of the safeguards available for consumers in the event of a licensed provider losing its licence. These safeguards are set out in section 55 of the Bill, and would apply where a licensed provider has had its licence revoked or suspended. Section 55 sets out the requirements placed on the licensed provider in question (including the need to prepare final accounts detailing all sums held on the behalf of clients) and, crucially, allows the approved regulator to issue directions to it in order to protect the interests of clients. Such directions may concern making certain documents and information, or money held on behalf of clients or in trust, available. For example, where the licensed provider has ceased to exist, clients may find it difficult or time consuming to gain access to documents, information, or money, not least if the former point of contact is no longer available. The approved regulator’s ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could therefore be used to mitigate the impact on clients.

Furthermore, subsection (6) allows recourse to the Court of Session should the licensed provider fail to comply with any directions given by the approved regulator. The Court may make various orders to preserve the clients’ positions, such as varying the approved regulator’s directions as it sees fit, or imposing conditions, or freezing bank accounts.

---

Finally, subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps taken to safeguard the interests of clients in the circumstances described in subsection (1).

**Confirmation services – lack of compensation fund**

The Committee highlights written evidence from the Scottish Law Agents Society (“SLAS”) which notes that while work carried out by solicitors is covered by the Guarantee Fund (which can offer compensation to clients in the event of financial loss through fraud), no such protection is offered to clients of confirmation agents. Confirmation services are those which consist of drawing or preparing papers on which to found or oppose an application for the confirmation of a person as the executor in relation to the estate of a deceased person. This is a comparatively straightforward administrative process and does not involve the handling of client funds. Therefore, it was not thought necessary to make provision for fraud in respect of this work. As the Committee notes, however, there is provision requiring confirmation agents to put in place sufficient arrangements for professional indemnity insurance.

**Review of Rights of Audience in the Supreme Courts**

In previous communications with the Committee, I have raised the possibility of amendments to the Bill at Stage 2 relating to the recommendations of the Review of Rights of Audience in the Supreme Courts. However, in light of initial reactions to Ben Thomson’s report, we feel that further consideration and discussion is likely to be required before a decision can be made about implementing any of the recommendations. Therefore, we will not be introducing any amendments in this area at Stage 2.

**Ability of SLAB to request information**

As the Committee notes, the Scottish Legal Aid Board (“SLAB”) raises several points in its written submission. As with suggestions made by others, these are being considered in advance of Stage 2. With regard to the suggestion that SLAB should have the general power to require bodies such as Consumer Focus Scotland or CABx to supply it with information in relation to its new role in assessing the availability and accessibility of legal services, we feel that this is unnecessary. As SLAB points out in its submission, it is currently free to request information from these bodies, and there is no reason to expect that they would refuse. Nevertheless, we will consider whether there is a possibility that SLAB’s ability to carry out its duties under section 96 could be compromised as it suggests, and if so whether appropriate amendment should be made at Stage 2.

**Law Society of Scotland referendum**

The Committee mentions the ongoing debate within the legal profession regarding the introduction of alternative business structures. As it will have noted, the recent referendum held on this subject supported the proposals in the Bill, albeit by a narrow margin. The profession previously voted in favour of alternative business structures at the Law Society’s AGM in 2008, proposals which were also supported by a majority of respondents to a public consultation by the Scottish Government.

Nevertheless, we remain keen to have constructive discussions with those who have concerns over the Bill, and, in advance of the referendum result, offered to meet with the Scottish Law Agents Society again.

**Financial memorandum**

The Committee invited the Scottish Government to reconsider the figures given in the financial memorandum and to provide clearer justification for the assumptions made in arriving at the illustrative costs.

The monitoring costs for the Scottish Government in respect of approved bodies are estimated at between £29,500 and £48,600 per annum. These costs are fairly modest as we will monitor the approved bodies using existing staff and within current budgets.

In the financial memorandum we estimated the costs for an approved regulator to be between £103,000 and £173,000 per annum plus £100,000 set-up costs. If extra accommodation was required, these costs would be higher. These costs were based on the actual costs of setting up the SLCC. It is noted that, despite criticising the estimate, neither the Law Society nor ICAS gave an estimate as to what they consider the costs might be. As the Law Society pointed out, the costs are dependent on the number of licensed providers, which is difficult to estimate. If there are less than 200 licensed providers, we acknowledge that the unit cost for each entity is likely to be higher than shown in the financial memorandum. These costs would have to be covered by the licensing fees to be paid by licensed providers. We will continue to keep these estimates under review and will consider any figures provided by the Law Society or ICAS, or any other body.

The Law Society suggested that there would be an increased cost to the SLCC. The SLCC would have to investigate with the new regulatory complaint in addition to being the gateway for conduct complaints and the investigation body for services complaints. It is anticipated that these extra costs would be paid for by the levy on licensed providers.

I hope this is helpful, and look forward to the Stage 1 debate.

Fergus Ewing MSP
Minister for Community Safety
16 April 2010
I refer to Jane Irvine’s letter of 26 March about the Legal Profession and Legal Aid (Scotland) Act 2007.

The Society’s position is that it has tried very hard to make the provisions in question which relate to the Scottish Legal Complaints Commission (SLCC) sift as to whether a complaint meets the eligibility criteria under Section 5 of the Act work.

The Society’s concern is that the SLCC are of the view that it requires to make no enquiry to take account of information beyond the correspondence received in the sifting process. Because of this, both the SLCC and the Society end up investigating matters that ought to be sifted out. The purpose of sifting is to ascertain whether a complaint is in fact eligible for investigation.

The fact that an investigation has been raised gives those making complaints unjustified expectations and also causes anxiety to the solicitor complained against.

The SLCC is correct that at the moment the SLCC’s decisions, whether to accept or reject a complaint, can only be changed through the mechanism of an appeal to the Court of Session. The Society agrees that this is an unduly expensive and cumbersome means of correcting a decision sometimes made without a full appreciation of what is involved in it.

The Society agrees with the SLCC that this issue requires to be resolved. The Society does not agree that there is a “current rush to appeal”. The Society has appealed four cases out of 124 passed over by the SLCC as eligible for investigation. Rather, the Society is concerned that the SLCC is not employing its discretion appropriately is failing to adequately sift cases and that in all the circumstances, given the constraints of the legislation, the appeals are necessary.

The Society is also working with the SLCC and the Scottish Government to propose a change to the Legal Profession and Legal Aid (Scotland) Act 2007 to ensure that the appeal route is not the only option to be taken.

I hope that this is helpful. If you wish further information, please do not hesitate to contact me.

Michael P Clancy  
Director, Law Reform  
20 April 2010
Note: (DT) signifies a decision taken at Decision Time.

The meeting opened at 2.00 pm.

**Legal Services (Scotland) Bill:** The Minister for Community Safety (Fergus Ewing) moved S3M-6168—That the Parliament agrees to the general principles of the Legal Services (Scotland) Bill.

After debate, the motion was agreed to ((DT) by division: For 92, Against 2, Abstentions 0).
Legal Services (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-6168, in the name of Fergus Ewing on the Legal Services (Scotland) Bill.

15:13

The Minister for Community Safety (Fergus Ewing): I am delighted to open the debate on the general principles of the Legal Services (Scotland) Bill.

At the heart of the bill is the removal of current restrictions on how solicitors can organise their businesses. The bill will allow solicitors to form partnerships with non-solicitors, to create businesses that offer a range of legal and non-legal services and to seek investment from outside the profession. The bill will also introduce a robust regulatory regime to govern those new entities. However, the bill is enabling rather than prescriptive, so traditional business models will remain an option. No solicitor's practice in Scotland will be forced to choose an alternative business structure.

Let me spell out some of the opportunities that the bill will create. First, it will open up opportunities for the larger legal firms, which is excellent news. We are all for that. The reality is that the partnership model restricts such firms' options to grow and compete in the international business market. The multidisciplinary practice is an attractive model for firms that wish to bring a range of services under one umbrella. I believe that the bill will encourage firms to remain Scottish rather than choose to be regulated in England.

The provisions will also allow such firms to bring their office managers, accountants and paralegals into the partnership. They will have the opportunity to seek to join other professionals so that they might continue to be viable in challenging economic conditions.

In December, the Law Society of Scotland, through its estimable president, Ian Smart, gave the committee an excellent example of the opportunities that the bill might provide. He said that a business could offer

"a land acquisition service that scouted out land for clients. The business would have a land agent, a surveyor and a solicitor to deliver a seamless service that involved identifying and valuing the ground, negotiating the price and acquiring the ground. That would all be done by one partnership of different professionals."—[Official Report, Justice Committee, 15 December 2009; c 2479.]

Contrary to what some people have claimed, the bill offers possibilities to smaller and medium-sized
solicitor firms to bring others into the partnership and to join with others so that they might continue to be viable and competitive in challenging economic conditions. The bill has been supported by business experts and the Scottish law forum, which explicitly endorsed the ABS model as being good for business. I have given just a few examples—members will no doubt come up with their own.

The bill will create an environment in which we will see economic growth, opportunities, more jobs being created, more business being done in Scotland, more business being done by legal firms in Scotland, and more business being done by Scottish legal firms further of Scotland. It will be a particular benefit in years to come—it will certainly be a huge benefit in the medium to long term—to young Scots and young lawyers, as more work will be created, there will be more business for them to do and there will, therefore, be more opportunities for jobs. I hope that everyone will join me in endorsing the view that the bill is an outstanding opportunity for people in the legal profession in Scotland to avail themselves of new business frameworks that will permit them to grow their businesses and create jobs and opportunities for fellow Scots.

Robert Brown (Glasgow) (LD): The minister will agree that a significant part of the legal profession, particularly smaller firms, do not exactly share his enthusiasm for the bill. What assurance can he give them that the bill will not damage their particular interests and the future of traditional legal firms in Scotland?

Fergus Ewing: I will address that matter specifically later. I will say now simply that the experience abroad in another jurisdiction—although that jurisdiction is not identical to ours—is extremely encouraging. Similar frameworks were created in Australia 10 years ago, and there were predictions of doom at that time. In particular, there were predictions that small businesses would go to the wall. We have received authoritative statements and evidence from Australia—albeit that the evidence is not a thorough analysis of exactly what is happening there right now—that nothing could be further from the truth. Experience there has shown that small firms have benefited from the opportunities that were created 10 years ago. The doomsayers have been proved wrong. I will address that matter further later on.

The bill will not set up a super-regulator quango in Scotland that is equivalent to the Legal Services Board in England and Wales. By not doing so, we will save tens of millions of pounds. Despite understandable fears about the proposals, I have no doubt that they will result in necessary change that will benefit the legal profession, the consumer and the wider Scottish economy.

I welcome the Justice Committee’s comments in its stage 1 report and its support for the general principles of the bill. The committee suggested that a number of points be considered further. I accept the vast majority of those points, and in my formal response to the report, I set out our plans to address them.

I am pleased that there has been much debate about the proposals in the legal profession in recent months. However, many of the arguments that have been put forward by those who oppose the bill have been misinformed, exaggerated or downright misleading. Many opponents of the bill whom I have met and with whom useful discussions have taken place have raised legitimate and reasonable concerns, but the rather lurid accusations that have been made by a few people risk turning a constructive discussion about the future of the legal profession in Scotland into an unedifying stramash. I would like to take a few minutes to refute some of the more outlandish claims that have been made about the bill.

First, the bill will not destroy the independence of the legal profession in Scotland, nor will it endanger Scots law. All of us, regardless of party, support a strong and independent Scottish legal profession. That is set out in the regulatory objectives in section 1 of the bill, to which the Scottish ministers are bound.

Secondly, the bill will not give the Scottish Government control of the Law Society of Scotland—we have quite enough to do. Provisions to give the Scottish ministers powers in relation to lay members of the council of the Law Society were always seen as a last resort. They would never have allowed the Scottish Government to control who was a member of the council. However, after further discussions with the Law Society, I have decided to lodge an amendment to delete those regulation-making powers at stage 2 because they are not necessary, given the assurances that we have received from the Law Society.

Thirdly, the bill will not allow criminals to take over law firms. The fit-to-own tests in the bill are robust. Regulators will have wide powers to reject people whose “probity and character” suggest that they are unfit to own a firm that provides legal services. The relevant provision takes account of the “associations” of applicants. The bill proposes an extremely strong system of safeguards, and we are not aware of any comparable legislation in this country that offers more protection. Furthermore, we are, following constructive suggestions from the Justice Committee, preparing additional sanctions that can be used to disqualify individual investors from the new licensed providers.
Other suggestions that have been made by people who are in possession of overdeveloped powers of imagination are that the bill will give the Scottish Government control over the legal profession, that the recent referendum on ABS was rigged by the Law Society and that drug barons will be able to use licensed providers to launder money. I could go on. Although I appreciate the depth of feeling that debate on the bill has provoked, those suggestions have been unhelpful.

The profession has now voted in favour of ABS twice, albeit by a narrow margin in its referendum involving the whole of the solicitors branch of the profession in April, and has voted against it once. Although I am sure that it will continue to discuss the issue—we remain open to discussing any concerns—I think that we must also move forward.

The bill was designed primarily to open up the legal services market in Scotland. It certainly presents significant opportunities for the legal profession, but we should not overlook the benefits to the consumer and, indeed, to the wider economy. Consumer groups have come under criticism for being unable to give definitive proof that ABSs will provide consumer benefits, but that is understandably hard to do, given that the entities in question do not yet exist and that experience in other jurisdictions is relatively limited.

James Kelly (Glasgow Rutherglen) (Lab): The minister is discussing the benefits of the bill. Earlier, he said that the bill would result in “tens of millions of pounds” being saved. How does he feel about the Institute of Chartered Accountants of Scotland’s view that the bill’s provisions will be costly to introduce and operate? Does he feel that the financial memorandum is fit for purpose, when it suggests that the proposed regulatory changes will cost less than £100,000 to implement?

Fergus Ewing: My reference to saving tens of millions of pounds is based on the fact that the cost of the Legal Services Board is, as I understand it, circa £4 million to £5 million per annum. In Scotland, we would not have required a quango of that size, so that level of cost would probably not have been incurred. However, even if the cost had been only half that—a couple of million pounds a year—running such a quango would have cost tens of millions of pounds over the years.

I am extremely proud of the fact that my officials have developed a proposal that will cost the taxpayer a tiny fraction of that. In fact, I am absolutely delighted to introduce a proposal that will provide a uniquely Scottish solution by applying to a problem our traditional assets of thrift and common sense, so that instead of setting up a new quango that is not required, we are simply setting up a robust regulatory regime, the cost of which we have estimated, as Mr Kelly said, to be less than £100,000. I know that that figure has been criticised, but neither ICAS nor the Law Society has offered an alternative figure. Until we know how many regulators there will be, it is simply not possible to state with any certainty what the cost will be, although I am delighted that a significantly more economical solution is to be provided in Scotland than has been provided south of the border, where a different route has been chosen.

Consumer groups can speak from years of experience of monitoring the introduction of more competition into restricted markets. Increased competition generally results in increased choice, lower costs and the development of more consumer-focused business models. Austin Lafferty, my former colleague at the University of Glasgow, recently opined that he does not think that solicitors who are doing a good job have anything to fear and that if they are doing a good job, they can stand up to any competition. He said that if they are providing a quality service, their clients will come back to them, they will trust them and they will continue to give them their business. There is no reason to doubt that there will be significant benefits for the consumer, which is also a good thing.

As Labour members will no doubt be aware, Bridget Prentice repeatedly stressed the consumer benefits that were driving the Legal Services Bill during its passage through Westminster. She said: “Consumers today want their legal services delivered the same way other services are: they want a high quality, cheaper and more personalised service to suit their individual needs and one that is easy to access”.

In addition, Lord Neuberger, the Master of the Rolls in England and Wales, predicted just this month that increased competition as a result of the Legal Services Act 2007 would lower the costs of litigation and lead to the development of new business models. I understand the fears about such increased competition, particularly in the current economic climate, but I have confidence in the ability of Scottish firms to innovate and to thrive under the opportunities that will be provided through the bill.

We must not overlook the dangers to the Scottish economy of not passing the bill. The four largest law firms have already threatened to move to London if the bill fails to take advantage of the opportunities that are offered by the Legal Services Act 2007. We cannot afford to lose firms to England. The long-term sustainability of the Scottish legal profession will be threatened if Scottish firms are not able to operate on a level
playing field. The biggest danger to the profession and to Scots law is in doing nothing.

Of course, the bill does not only make provision for alternative business structures: it also includes statutory codification of the framework for regulation of the Faculty of Advocates, provisions to allow non-lawyers to apply for confirmation rights, and provisions that will enable the Scottish Legal Aid Board to monitor the accessibility of legal services, which last point will further strengthen access to justice. We have already substantially increased the fee rates that are payable to solicitors for civil legal aid as well as making it available to potentially one million more Scots. Furthermore, at stage 2, we intend to lodge an amendment to allow citizens advice bureaux to employ solicitors.

The Deputy Presiding Officer: Perhaps the minister could draw his remarks to a close. You will get another shot at the end.

Fergus Ewing: I just have two paragraphs to go, Presiding Officer.

We also plan to lodge other amendments, including provisions relating to McKenzie friends and regulation of non-solicitor will writers. I have been encouraged by good cross-party support on those and on all issues in the bill, which I appreciate and welcome, and which I am sure will continue today.

In conclusion, we need to ensure that the Scottish legal profession remains competitive, and that it is free to develop innovative and flexible new business models that are to the benefit of consumers, the profession and the nation.

I move,

That the Parliament agrees to the general principles of the Legal Services (Scotland) Bill.

15:29

Bill Aitken (Glasgow) (Con): I am pleased to present the Justice Committee’s stage 1 report on the bill. At the start, the committee took the view that this would be a relatively non-controversial matter and that the concerns of witnesses could be dealt with in relatively short order. I regret that that has proved not to be the case. Perhaps for the first time in my political career, I have been proved wrong.

The bill has, as its genesis, a European Commission review of competition and liberal law self-regulation systems, dating from 2003. Another driver for change was the UK’s response to a 2001 report by the Office of Fair Trading, which challenged the restrictions on competition in certain professions, including the legal profession.

Following an initial review and consultation by the Department for Constitutional Affairs, Sir David Clementi was appointed to conduct an independent review of the regulation framework in England and Wales. On the basis of Sir David’s report, the UK Government brought forward the Clementi proposals in a bill that became the Legal Services Act 2007. It is anticipated that alternative business structures will be commenced in England and Wales sometime in mid 2011.

In Scotland, the previous Executive established a working group to examine the legal services market. It reported in May 2006. Shortly before the previous Scottish Parliament elections, Which? submitted to the Office of Fair Trading a supercomplaint under section 11 of the Enterprise Act 2002, stating that the consumer interest was being harmed by, among other things, restrictions on solicitors and advocates providing services jointly, and restrictions on third-party entrants to the legal services market. In response to the complaint, the OFT said that it was supportive of greater liberalisation of the market and it called on the Scottish Government and the Scottish legal profession to take matters forward and to consider how best the restrictions might be limited. After what might be described in another place as a sundry procedure, and following consultation involving both the Government and the Law Society of Scotland, the Government introduced the bill, which came before the Justice Committee for stage 1 consideration.

What had been thought to be a relatively non-controversial measure turned out to provoke a great degree of discussion both within and outside Parliament. The committee considered it to be essential that those whose views were not supportive of the bill should have the opportunity to give evidence.

The committee considered the bill over nine meetings and received more than 40 pieces of written evidence. The oral evidence sessions involved the OFT, Which?, the Faculty of Advocates, the Law Society, the Scottish Law Agents Society, the Scottish Legal Action Group, the WS Society, the Scottish Legal Aid Board, solicitor advocates, Professor Alan Paterson, Consumer Focus Scotland, the trade union Unite and the solicitor Gilbert Anderson. The committee also heard from Fergus Ewing, the Minister for Community Safety.

I record the committee’s appreciation of all those who provided written and oral evidence, all of which was carefully considered. I also thank the committee clerking team—in particular Anne Peat—and my colleagues on the committee, whose dedication and professionalism is well known in this Parliament.
I think that it is fair to say that, if we had been left to our own devices, the matter would not have been a legislative priority. However, we were mindful of the UK position, so we accepted that a failure to legislate could prejudice an important sector of the Scottish legal profession.

It is important to accept, and the committee report recognises, that the bill is permissive legislation and that the vast majority of Scottish law firms will not seek to use it. The committee also recognises that the principal beneficiaries will be commercial lawyers at the upper end of the scale and that, although it is important that they be given appropriate opportunities, we require to ensure the protection of the core values of the legal profession in order to protect the interests of both justice and consumers. In that respect, the committee identified a number of issues that the Government should address at stage 2. In particular, the committee was concerned about the regulatory objectives in part 1, so we invited the Government to confirm that its intention is for the regulatory provisions to apply to delivery of all services. The Government responded positively—Mr Ewing has underlined that today.

The committee was also concerned about the prospect of bodies external to Scotland becoming approved regulators, so I am delighted to note that the Government has given assurances in that respect. The committee also reflected on the combining of representation and regulatory functions in one body. I appreciate that the distinction already exists in organisations such as the Law Society, and that it can create what some might term “creative tension”. How the dual role will apply to the Law Society is a matter for it to resolve, but the committee does not want such difficulty to be exacerbated by additional provisions.

The committee also took the view that there was not sufficient evidence to require the establishment of a body in Scotland that would be similar to the Legal Services Board for England and Wales. As there is no equivalent of the Legal Services Board, the role of Scottish ministers becomes extremely important, and the committee expressed concerns about ministerial involvement in relation to the new approved regulators and licensed legal services providers. Independence from the Scottish Government is crucial, and the committee agrees that the Lord President should have a much greater role in the process of approval of regulatory bodies, and that his agreement should be given before any regulator is approved. I am pleased that the Government has stated that it will consider lodging at stage 2 an amendment that will give the Lord President such an extended role.

In respect of the lack of a provision that would require licensed legal services providers to contribute to a guarantee fund, the committee welcomed the minister’s undertaking to give further consideration to that important suggestion, and we look forward to more explicit explanations and answers being provided at a later stage. Although I can understand the concerns that have been expressed in relation to certain aspects of the bill, the committee will undertake to scrutinise matters carefully at stage 2—particularly, the question of a guarantee fund.

The committee was also concerned about the step-in powers in section 35. It agreed with the Law Society that the bill should detail when that provision might be used and that there should be an obligation on ministers to consult on any regulations made in that respect. I am pleased to note that the Government has given the issue further consideration and is currently drafting an appropriate amendment emphasising the last-resort nature of the power. However, I think that the committee will be just a little disappointed with the other aspect of the Government’s response, in which it states its opinion that there should not be an obligation on Scottish ministers to consult on any regulations made under section 35.

The committee also raised issues about the description of licensed legal services providers, and I know that the Scottish Government is giving further thought to that, as well.

Much concern was expressed about outside investors. A broad range of stakeholders expressed anxiety that legal services entities would be subject to prey by organised crime, and that the definition of “fitness to own” is inadequate to deal with that. The committee acknowledged those concerns and had sympathy with much in the views that were expressed. At the end of the day, however, the committee’s view is that no test can provide a guaranteed protection against undesirable third-party investment. In those circumstances, the fitness-for-ownership tests must be as robust as possible. Members of the Law Society have also expressed concern about the fitness-to-own provision, which has been reflected in internal debates in the legal profession.

The committee has also raised concerns about legal profession privilege. Again, that and the obligation of confidentiality were referred to in the stage 1 report, so I am pleased to say that the minister has given an undertaking to review the matter.

Sections 64 and 65 relate to complaints about approved regulators: the provisions provoked some criticism. The minister undertook to check whether any further provisions are required, so
that, too, is an issue that I envisage being debated at stage 2.

Lastly, in respect of part 2 of the bill, the committee had concerns about how sanctions will be applicable to outside investors and how they will operate in practice.

Part 4 of the bill deals with the legal profession, and the committee agreed with the Government that there is no need to impose alternative business structures on the Faculty of Advocates, although I suspect that some advocates might want to re-badge as solicitors in order to take advantage of any ABS arrangements. The reverse might also apply. In respect of advocates and solicitor advocates, the Thomson review on rights of audience in the supreme courts was published on 17 March, and I know that the Government will be giving close consideration to that report.

There are other issues of governance relating to the Law Society, and the committee is pleased that the Government has already moved to explain that it will lodge stage 2 amendments on non-solicitor membership of the Law Society. That is a most welcome development.

Parliament will appreciate that a great deal of time and effort has gone into the stage 1 report. We shall presently move towards stage 2, which I hope will be characterised by focused arguments, especially outwith the Parliament.

There are sincere differences and divisions in the profession, which is understandable. However, at times, the tone has been unfortunate. I feel particularly sorry for Ian Smart, the president of the Law Society, a man with whom I have seldom been particularly compatible but who has suffered some criticisms that have been decidedly unfortunate. Someone once said:

“I hold every man a debtor to his profession”.

When someone seeks to repay that debt by putting his head above the parapet I do not think he should be subject to the criticism to which Ian Smart has been subject.

The committee, as ever, will be willing to consider constructive amendments. I urge all concerned to approach the issues win the spirit of compromise and conciliation. The Parliament’s mood is to legislate, but we wish to do so to ensure that the Scottish legal profession emerges strengthened rather than weakened, and so that it moves constructively forward while retaining all that is good within our legal profession and fitting it to accept the challenges of the future.

15:40

Richard Baker (North East Scotland) (Lab): In reforming our legal services sector in Scotland, the first principle must be access to justice—maintaining it and improving it. In changing the law with a view to extending the availability of legal services, we must not unintentionally restrict access to justice for some people in our society. There are important questions about how we strike the right balance in making the changes.

The case for alternative business structures was first considered in the previous session. We acknowledge that the finding of the Office of Fair Trading requires a response from the Scottish Government and that changes be made in our legal services industry. There can be benefits to consumers if change brings more co-location of legal and related services—a one-stop shop model, as it is being called—but there are important questions about how, in opening up the potential for new business structures, we can maintain current valued legal services.

We can use the legislative process to improve access to justice and give our law firms a competitive edge, but we are not persuaded that the bill will necessarily achieve that. There are big questions about the timing of the legislation and the scope of the changes. We do not argue that changes to legal services in England and Wales should simply be imported north of the border. Our system is part of an international legal services industry, but we must ensure that changes that are made in Scotland are right for our legal services here. The changes down south were made before the global banking crisis and it will take time to see what effect they will have.

Let us acknowledge that, as both Bill Aitken and the minister said, there are genuinely and passionately held views within the Law Society on both sides of the debate, particularly about the independence of the profession. I note that the minister has sought to give reassurances on some of those points. Labour members have met people on both sides of the debate and we benefited throughout stage 1 from advice from some of those who have expressed their concerns about the proposed changes. We valued the input of Ian Smart, whom Bill Aitken mentioned, and the evidence that he gave to the committee represented the strongest case that was put in favour of the bill.

The Law Society’s referendum showed that there is great interest among its members on the issue and that views on it are divided. I hope that Parliament and, indeed, ministers will now play a role in moving the debate forward.

I say in favour of the bill that we know that, in challenging economic times, new investment in legal services is welcome. We all want our law graduates to move on to practice in successful Scottish firms. However, concerns have been raised about how access to legal services that are
provided by small firms, often in rural areas, can be maintained if a move to alternative business structures threatens their survival. As Bill Aitken said, Frank Maguire of Thompsons and others have expressed their fear that, under the proposals, there is potential for organised crime to become involved in ownership of firms. The minister stated again that the regulatory regime around the reforms will be adequate to address that concern. That makes the issue of regulation vital, but the bill allows any number of regulators, even if the Law Society and ICAS are the two organisations that are expected to apply. No legal services board of the type that exists in England and Wales has been proposed. I still have concerns about how, in that context, there will be uniformity of regulation. Moreover, the financial memorandum’s claim that regulation will cost less than £100,000 does not strike me as being realistic.

At least we have stage 2 for proposing changes not only in that area but in others. I am, for example, disappointed that the Cabinet Secretary for Justice did not agree to regulation of no-win, no-fee companies, which has been introduced down south. We will lodge amendments on that and on the regulatory framework at stage 2.

We must also look to make progress on the vexed question of external ownership or investment, so I am pleased that the minister has met people on both sides of the debate and that those who have expressed concerns have made constructive proposals. For example, members will have seen the proposal from Mike Dailly of the Govan Law Centre for a co-ownership model with a 75:25 per cent split. It is good that Parliament, the committee and the Scottish Government will have a range of proposals to decide on.

These matters are not simple; they are technical and often complex, so I urge ministers to take adequate time to ensure that they are properly considered. The saying “More haste, less speed” might well apply here. As the convener said, anyone who thought that these matters were uncontroversial and merely technical will have been thoroughly disabused of that misconception. That is because our legal services industry and the principle of access to justice in a legal system that we rightly cherish and are proud of are important in Scotland, and that is why, in proceeding with the bill, we will need an extensive debate about the changes that must be made at stage 2.

David McLetchie (Edinburgh Pentlands) (Con): I find it interesting to reflect on the fact that only a few months ago the Parliament completed its consideration of the Tobacco and Primary Medical Services (Scotland) Bill. A feature of that bill, which has now received royal assent, was the debate over the appropriate business model for the providers of general practitioner services. Members will recall that, thanks to the craven failure of Labour and the Liberal Democrats to support the policies that they had advocated and enacted when they were in government, the present Scottish Government was able to pass a measure specifically barring third-party commercial providers from having a stake in general practitioner practices, which must be wholly owned and run by practising GPs. According to the Scottish Government, such a business model is in—indeed, is essential to—the public interest.

With this bill, however, it appears that, when it comes to legal services, precisely the opposite is claimed to be in the public interest. GPs can share the profits that they make out of the national health service only with other GPs, but solicitors are to be permitted to sell their businesses to and share profits with non-solicitors, notwithstanding the public interest obligations that are currently imposed on them by statute and the fact that, in some cases, a significant amount of revenue is derived from criminal and civil legal aid. In other words, they are providing services and running businesses that, in 2008-09, were partly financed by the taxpayer to the tune of approximately £117 million.

As a former solicitor in private practice and a member of the Law Society of Scotland, I am grieved by the division of opinion and turmoil in the legal profession over this measure. As members will be aware, consideration of the bill was specifically postponed to allow MSPs to be aware of the outcome of the Law Society’s special general meeting on the topic and to ensure that our debate could be informed by the views of our legal professions. That initial meeting was preempted by a referendum in which the Law Society’s position in favour of the bill was endorsed by the tiniest of margins. Last week, however, when the special general meeting was reconvened, members voted against alternative business structures by a margin of 3:2. I understand that at the annual general meeting, which will be held next month, the position will be finalised.

The situation has been confused rather than clarified by what has happened but, in essence, we have to acknowledge that the divisions in the profession represent a difference in economic interests as well as a difference in view about the nature and ethics of a profession that many solicitors firmly believe is fundamentally different from a commercial concern. In essence, the solicitors who are opposed to the concept of alternative business structures are no different
from the GPs who successfully lobbied the Government to bring about a change in the law to secure their monopoly of ownership and provision of services through their practices. Those solicitors believe that external ownership is incompatible with the concept of an independent profession; that conflicts of interest would arise; that the standard of service would fall; and that many of the consumer protections that are inherent in the regulation of the legal profession as currently organised would be diluted or lost in legal services businesses that are owned by third parties and regulated by others.

Some will see the proposals as a final stage in the process that started in the 1980s with measures to introduce competition between legal firms, such as the ability to advertise, through to allowing third-party providers to compete with solicitors in respect of the provision of certain services, to the present proposals, which will enable third parties to own law firms. Many of the dissenting solicitors, if I can call them that, believe that those who favour the scheme predominantly come from larger firms, whose owners are interested simply in selling out their businesses for a one-off pot of gold to one of the major international accountancy practices. As we have heard, others fear the development of Tesco law, with an employed solicitor in every supermarket. However, let us not forget that, notwithstanding those strongly held differences of view, a commitment to professional ethics and standards is shared, I believe, by all solicitors, whether they practise law in large commercial firms or in small family ones.

The fundamental point is that, as others have said, the reforms are in essence forced on the legal profession and the Parliament by the report of the Office of Fair Trading, following the super-complaint from *Which?*, and by changes in the system in England and Wales. Accordingly, I have a lot of sympathy with my former professional colleagues, both those who resist the tide of change and others who want and recognise the need for change. The Law Society has tried hard and manfully to reconcile those positions. I am sure that its office-bearers and council members will be troubled by the divisions that have emerged.

The Scottish Conservatives support the bill and we will vote for it at stage 1. In doing so, we recognise the present system of legal services provision and regulation has many features that are in the public and consumer interest and that those features need to be sustained in the new regime. In that respect, I identify the guarantee fund, which protects clients in the event of the misappropriation of funds by dishonest practitioners. I also identify the requirement for professional indemnity insurance; the disciplinary code, to deal with complaints of professional misconduct; and accounts rules and a tough inspection regime, to ensure that client funds are not imperilled.

The rules of the approved regulators must provide a level playing field, so that, whichever legal services provider a member of the public chooses, they can have confidence that that provider is subject to a system of effective regulation. We have such a system at present—it has stood clients in Scotland in good stead until now and it does not receive the credit and acknowledgement that it deserves. I firmly believe that, in changing the system, we need to build on the best and must not settle for the lowest common denominator on standards.

15:53

Robert Brown (Glasgow) (LD): As has been said, the bill raises complex issues. The divided view among solicitors has made assessment of its merits particularly difficult for the Justice Committee. I am bound to say that, although the committee earlier paid tribute, through the convener, to the evidence that the various witnesses gave, the case for the bill was not helped by the highly unimpressive evidence from *Which?* and the Office of Fair Trading, which, far from establishing the basis for the bill, tended to undermine the case for it substantially.

As has been said, part of the difficulty is that the bill has different implications for different parts of the legal profession and the so-called legal services market. I strongly dislike using the concept of a market to describe my former profession, as it is a highly inadequate definition of what solicitors do and the context in which they operate.

Our whole approach to professional regulation has changed profoundly since the banking meltdown. A lot of attention focused on the faults of light-touch regulation, but the real problem in banking was the replacement of traditional prudent and professional banking practices by a new breed of money wizards with too little depth in the banking profession and too much adherence to slick sales methods, greed and obscene levels of unmerited bonuses. In short, the problem was a loss of ethics and not primarily a failure of regulation. There are lessons in that for us, too. A vibrant legal profession with values and standards developed over many years, independent of Government and not beholden to outside funders, seems to me to be at the heart of our democracy and the rule of law.

The desire to allow the development of new business structures is driven, as I think we all agree, by the larger commercial firms. The extent
to which English law has become the international legal system of choice, not just in these islands but across the rest of Europe and beyond, is not commonly recognised. The committee raised concerns that we could gain equal access to the English market for Scottish legal firms only to find ourselves barred from parts of the continent where there are greater restrictions on who may practise law and under which business model. Our fears on that front were not established but, in any event, the issue of access to the European market is dwarfed by the need for equal access to the much larger English market. I am therefore satisfied that it is in Scotland’s interests to allow our commercial firms to operate in comparable ways to those of their colleagues in England and to do so under the umbrella of the Scottish legal system.

I am by no means convinced that the requirements around business structures, ownership and investment apply to anything like the same degree to the bulk of the profession operating in private practice. We have to draw inferences from the hostility to the proposals articulated by the Scottish Law Agents Society and others and by almost half the membership of the Law Society. Ways must be found to modify the proposals, particularly in so far as they affect that part of the profession with no significant international or cross-border practice. Although it is said that alternative business structures are voluntary and no one would be forced into adopting new structures, the reality is that wider arrangements for funding, ownership and partnership with other professions will affect everyone. Unrestrained competition in other spheres has seen the virtual disappearance in many areas of traditional town or suburban shopping centres, of post offices and even of off-licences, and it will not necessarily be different with solicitors when there is less competition and choice rather than more.

The second implication is that Scottish solicitors must continue to belong to and be regulated by one body. David McLetchie rightly talked about the key components of the guarantee fund and the master policy, but those depend on the continuing contribution of the whole profession, not least of the larger firms, without which the economics of those key client protections could become shakier.

I will sketch out what I think is possible. There is scope for some multidisciplinary partnerships—an obvious example is between solicitors and accountants or other tax professionals. However, we have to be careful in that regard because such partnerships often raise the conflicts of interest that David McLetchie was right to warn against. The suggestion of partnerships between solicitors and surveyors that was made by *Which?* seemed improbable in the extreme and shot through with undesirable conflicts of interest.

We have to look carefully at the idea that seems to be advancing of multiple and competing regulators with all the complex issues that that brings. I do not mean that we should be looking at the super-regulator role that the Scottish Government rightly put to one side; no one would suggest a rival regulator to Her Majesty’s Inspectorate of Education, for example. The Law Society is the obvious regulator and we should consider whether proceeding on that basis is an option available to us. One encouraging outcome of the complex proceedings at the Law Society was a clear commitment to and recognition of the importance of the society being the key regulator.

The bill must be more restrictive about outside ownership and investment, given all the problems of designated persons and undue and unprofessional influence that we have talked about—we do not want any Robert Maxwells in this sphere. That was one of the clearest messages from the Law Society’s debates on the matter.

On behalf of the Liberal Democrats I am prepared to offer support for the general principles of the Legal Services (Scotland) Bill at stage 1, but only on the basis that a fundamental rethink is required of some of the details, which might involve substantial and radical surgery of the bill at stage 2. At this stage, we make no commitment to support the bill at stage 3. A satisfactory resolution of those challenges will require statesmanship and flexibility on all sides. I am in no doubt that the Justice Committee stands ready to respond properly on an issue that is uncomplicated by party positions.

I suggest that the minister might consider building on his meetings with the various bodies involved by having a more organised round-table discussion involving representatives of the Law Society, the Scottish Law Agents Society, the minister and his officials and perhaps members of the Justice Committee to re-examine some of the principles of the bill along those lines in the light of today’s debate.

I discovered, somewhat to my surprise, that very few areas or functions are the sole province of professional lawyers, whether solicitors or advocates. However, the public would normally expect to rely on the advice of a qualified professional to help them to resolve many practical business and personal issues, just as one would expect a complicated medical operation to be carried out by a trained and qualified surgeon. In my view, much of the talk about opening up the market and providing increased competition is hogwash. It is about opening up the market to people who are not professionally qualified in law, who perhaps do not subscribe to the ethics of the law and who, in some instances,
may regard offering legal services as the same as selling cornflakes or yoghurt. That is not my view of the law and the profession of lawyers or what the public expect of them.

It seems to me that the bill must sustain the legal profession. As the convener said, it must strengthen it rather than weaken it, because it is in the public interest to do so.

None of the difficulties is the fault of the Scottish Government. The minister has brought great enthusiasm and technical expertise to the proposals. The Government proceeded after proper consultation and on the basis of what it thought was the view of the legal profession.

The Law Society officers have also formulated their views in accordance with the democratic rules of the society and have had a somewhat torrid time as people got to grips with the bill.

This is a difficult and complex area. We require flexibility and statesmanlike approaches to dealing with it. Getting it right is of significance to the future of the profession.

16:01

Nigel Don (North East Scotland) (SNP): As usual, I do not want to spend too much time repeating what colleagues have already said. Instead, I will look at one or two issues and perhaps offer a few helpful comments.

The first thing that I will do is go right back to the very beginning and point members in the direction of section 1, which sets out the regulatory objectives as

“(a) supporting the constitutional principle of the rule of law,

(b) protecting and promoting—

(i) the interests of consumers,”

and

“(ii) the public interest generally,

(c) promoting—

(i) access to justice”

and

“(ii) competition in the provision of legal services,

(d) promoting an independent, strong, varied and effective legal profession,

(e) encouraging equal opportunities”

and

“(f) promoting and maintaining adherence to the professional principles.”

I take us back to those objectives simply to make the point that that is the intention of the law. Some of the comments that have been made have tended to suggest that the bill might be there to undermine those things, but it is made clear at the beginning that that is not the intention. We have to ensure that, when the bill is out there working, it sticks to its original principles.

I am conscious that there is concern about ethical principles. Section 2, which I will not quote, expands on those. It was clear in evidence to the committee that the minister felt that nobody who is involved in any of the alternative business structures should be subject to any lower ethical standard than the standard to which lawyers are subject at present.

Robert Brown: On the question of ethics, does Nigel Don accept that writing all that down in the bill is one thing but imbuing it right through the legal profession is something else?

Nigel Don: I take Robert Brown’s point, although I would also make the point that those who have trained as lawyers have those ethics, in exactly the same way that those who have trained as medics have them—it is part of what they do. In exactly the same way, I might say that, for those in my profession of chemical engineering, safety is their middle name. That does not alter the fact that we should ensure that those ethical standards are somewhere in the text of the bill—it does not matter where. There is an argument that the professional privilege, which is accorded in section 60, assumes those kind of ethical standards. However, it might be worth ensuring that we write them down.

Another issue is how we might allow businesses to describe themselves. I do not think that there has been any comment on that yet, so I would like to make some. Some people have described it as branding, which I think is an error. I ask members to turn their minds to the idea of a can of soup, which I hope will be helpful. The brand would be the “Heinz”, “Campbell’s” or “Baxters” on the label. They all make tomato, minestrone, mushroom and other soups. The descriptor is the word “tomato”, “minestrone” or “mushroom”; the brand is “Heinz”, “Campbell’s” or “Baxters”.

Reserved descriptions are known in the law of food. Once upon a time, we used to buy margarine. We no longer buy much margarine because little is sold as margarine. That is because the reserved description is that margarine must be 80 per cent fat. We look for reserved descriptions of legal service providers, so that potential clients know from the business’s description what they will get. The branding is the commercial name and the descriptor should say what the business is.

With that in mind, some possibilities arise. Members will understand that I present them not because I think that they represent the right
answer but because they might be a way of progressing the debate and finding sensible words. If a future firm were composed of 60 per cent solicitors and 40 per cent accountants, it might be at least reasonable to describe it as “solicitors and accountants”. If the numbers were the other way round, it would be “accountants and solicitors”. If the split were 50:50, we would have to resolve that—how that would be achieved does not really matter.

A firm would have to say underneath its description and in letters that were not too small that it was a regulated legal services provider, so that we were clear that it fell under the umbrella of the bill. I suggest simply for further comment that, if the split were not 60:40—if the percentage of solicitors were more than 80 per cent and the percentage of accountants or others less than 20 per cent—the firm might be “solicitors with accountants”, along with the subtitle of being a regulated legal services provider.

We will have to produce a table with such descriptions. I have merely presented some thoughts in the hope that other people can improve on them. In connection with that, a firm should not have to be 100 per cent solicitors to describe itself as a firm of solicitors. Perhaps being at least 90 per cent solicitors would be enough.

I will push on quickly because time is against me, as always. The suggestion has been made and continues to be made that advocates should be able to be involved in alternative business structures. It is worth putting it on the record that we do not have many practising advocates. They are supposed to obey the cab-rank rule, to which I will return briefly. If they were allowed to be involved in alternative business structures, the number who would not have a conflict of interest would be reduced, which is clearly not in the interests of competition.

Paragraph 10 on page 58 of the Thomson review quotes an authority that suggests that the cab-rank rule is “a polite fiction”. The Faculty of Advocates might choose to address that issue, because the perception is that the system does not work as well as it should.

I endorse Richard Baker’s view that we must accept the bill in principle and push it forward. We must see whether we can improve it—I am pretty sure that we can. I take on board Robert Brown’s comments about the effects of unrestricted competition, of which we must be aware. Voting down the bill is in no way the right thing to do at this stage. We must proceed with the bill today and find out whether we can improve it, in the light of the many comments that we have received.

16:09

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Usually when we consider change in legislation on any issue, areas where there is confusion become clearer and areas where there are controversies become more or less controversial. That is life in the Scottish Parliament. The experience of the Legal Services (Scotland) Bill has been no different, but the bill could bring major change to the delivery of our legal services. It is clear that the profession is divided on the way forward and that the Government and we in the Parliament must ensure that the concerns that have been expressed are heard and properly considered. We should not attack people whose views differ from ours.

We should remember that the most important outcome is to ensure that all of us—regardless of where we live or how much we have in our pockets—have access to justice. To have that, people need to be able to access an independent solicitor.

We may be where we are because of the super-complaint that was made on consumers’ behalf, but the committee received little evidence that the public had been consulted on the matter and no solid evidence that the public would get a deal financially or otherwise, leaving me with concerns that the complaint was brought in the interests not of the public but of the big business model.

Encouraging business is not a bad thing—it is good to have a playing field that allows our legal profession to compete in the international market—but it must not be at the cost of destroying the profession’s confidence. A one-door approach to legal, financial and accountancy services may seem attractive to some, and modernisation of our system may be due, but there are too many ifs, buts and maybes to rush through the measure. If Parliament agrees to allow the bill to progress, the next stages cannot be rushed to meet the Government’s timetable—we need to get this right.

The issue of the so-called Tesco law has split opinion in the legal profession in Scotland. John McGovern, president of the Glasgow Bar Association, has been quoted as saying:

“The professional interests of high street solicitors are clearly different to the professional interests of big commercial firms.”

That is true. The needs of small communities and individuals for legal services must also be considered.

There is a case for saying that a number of smaller, independent firms could be overshadowed by the larger conglomerates. The problems that are faced by the main street butcher
or baker when a new superstore opens nearby are similar to the problems that small solicitors firms could face. With the possibility that cheaper legal advice could be acquired along with the out-of-town weekly shop, it is understandable that more small partnerships are venting their concerns. There are viable arguments on both sides, but a number of the fears that have been put forward are fair and need to be aired.

That is not the only potential flaw in the bill. Another relates to the plans to allow those without links to the legal profession to hold majority stakes in law firms. To me, that is fundamentally wrong. There is a chance that felonious individuals, entrenched in organised crime or the drug trade, would invest and become the majority owners of legal practices. As a consequence, legal service providers could become pawns to Scotland’s criminal underworld, leaving our lawyers compromised as a result of dodgy investors. It may sound like something out of a Hollywood gangster movie, but those in the organised crime trade are not stupid: if they see an opportunity to gain access to the respectability of a firm that is providing legal services, they will pounce on it. The minister mentioned the fit-to-own test. The test that we have heard about so far is not right. There are questions that need to be asked, answered and fully examined during the bill’s next stages.

Scotland’s legal system is unique. Our approaches on many issues are different from those in the rest of the UK. Sometimes that is good and sometimes it is bad, but it is clear that our legal profession is deeply divided—so much so that Ian Smart, who has been doing a good job as the president of the Law Society of Scotland, stated recently that relations could be “unbridgeable”. I do want to disagree with him, as he happens to be one of my constituents, but I hope that in this instance he is wrong and that a resolution can be found. However, the fact is that there is no consensus. The tone of the minister’s speech this afternoon did not do anything to take matters forward. Like Robert Brown, I hope that the minister will think on that.

We must remember that our job is to ensure that the bill gives the best deal to both solicitors and clients, who are our constituents. We must listen to both sides. I am against tampering with the traditions of our legal services on a major scale. As has been pointed out, there are many areas that the Scottish Government must iron out.

In principle, I am willing to support the bill proceeding to stage 2, as are other members who have spoken in the debate. However, I have substantial reservations and I think that the Justice Committee will have a big job to do before we can bring the bill back to the Parliament as one that is worthy of support and of progressing into statute.

We have a job to do—there is a lot of work to be done. I do not think that we should try to keep to the timetable of the Government or of business managers. The committee needs time to deal with the next stages of consideration in a competent manner.

16:15

Stewart Maxwell (West of Scotland) (SNP):

As other members have indicated, the examination of the Legal Services (Scotland) Bill at stage 1 has been somewhat complicated by divergent views among the legal profession itself. Having said that, I believe that, alongside the evidence, opinions and genuine concerns that we have received about the bill, a number of red herrings have been thrown in.

I listened to “Good Morning Scotland” with interest this morning, as it ran a story on this debate. One of the suggestions that was made by a contributor from The Firm magazine was that there was nothing wrong with solicitors having a monopoly with regard to the ownership of legal firms, because it was the same thing as airline pilots having a monopoly on flying planes. I thought that was a strange analogy to use as an argument against the proposed changes. It is true that pilots fly the planes, but they do not own the airlines, so why is it necessary for solicitors to own the business as well as operate within it? Nobody is suggesting that non-solicitors should carry out the expert legal work, just as nobody would suggest that non-pilots should fly the planes. It is necessary that the experts carry out the expert work, but it is unnecessary for them to be the sole owners of the operation.

Other members have raised the spectre of organised crime gangs or drug barons buying up Scottish legal firms. I wish to examine that suggestion in detail. There are a number of reasons why I think it unlikely that criminals will invest in or buy legal firms.

First, there is the robust protection in the bill itself—and I believe that it is robust protection. In laying out the rules governing “Fitness for involvement”, the bill states, at section 49(1):

“An approved regulator must—

(a) before issuing a licence to a licensed legal services provider, or renewing it, satisfy itself as to the fitness of every outside investor in the licensed provider for having an interest in the licensed provider;

(b) thereafter, monitor as it considers appropriate the investor’s fitness in that regard.”
The bill goes on to state, in section 50, what the appropriate "Factors as to fitness" are. Section 50(2) states:

"The following are examples"—

and they are only examples—

"relevant as respects an outside investor's fitness for having an interest in a licensed provider—

(a) the investor's—

(i) financial position and business record," and, importantly,

(ii) probity and character (including associations)."

Concerns have been expressed in relation to not only people with a record, which is provable and clearly ascertainable, who might invest, but their associates—people who work in the same industry, if it can be called that—if the investor does not themselves have a proven criminal record. The bill uses the words "probity and character (including associations)", which we should take care not to ignore.

In section 50(3), the bill gives the reasons why a person is presumed to be unfit. Paragraph (d) states:

"the fourth condition is that the investor—

(i) has been convicted of an offence involving dishonesty, or

(ii) in respect of an offence, has been fined the equivalent amount to the maximum on level 3 of the standard scale or more (whether on summary or solemn conviction) or has been sentenced to imprisonment for a term of 2 years or more."

That means taking robust action to ensure that we do not get the kind of people we do not want investing in legal firms, whether because they have a record or because of their associations.

**Cathie Craigie:** The member, as a committee colleague, has asked questions on and taken an interest in these issues. However, what comfort can I take from the debate, given that although his Government has recently challenged the fitness of people to benefit from national health service contracts, for example, it has not been able to win its argument in court about the suitability of the people involved?

**Stewart Maxwell:** I do not quite know where Cathie Craigie is going with that argument. The argument here is about the ability to identify individuals who may—improperly—be trying to invest in legal firms, and it is clear that the bill has robust defences to ensure that we are able to do that.

Sections 51 and 52 also cover an outside investor's behaviour. Section 51(2) states:

"An outside investor in a licensed provider must not (in that capacity)—

(a) interfere in the provision of legal or other professional services by the licensed provider,

(b) in relation to any designated or other person within the licensed provider—

(i) exert undue influence,

(ii) solicit unlawful or unethical conduct, or

(iii) otherwise behave improperly".

I am not so naive as to think that just because the bill says that

"outside investors ... must not ... solicit unlawful or unethical conduct, or ... behave improperly",

a criminal will not behave in a criminal manner—that is how criminals operate. However, it takes two to tango. I think that Cathie Craigie missed that point.

That brings me to my second reason for thinking that criminal gangs are unlikely to think that investing in an ABS is desirable. Solicitors and other people who might form an ABS, such as accountants, will not be exempt from operating within the rules of their own profession. Even if an investor tried to

"solicit unlawful or unethical conduct",

the collusion of the solicitor or accountant would be required for the improper behaviour to occur. Such collusion on the part of a solicitor, for example, would have serious implications, because the individual concerned would run the risk of losing their right to carry on working as a solicitor.

My third reason for rejecting the notion that the criminal fraternity will take over legal firms can be summed up in one phrase: why would they bother? Given the sanctions and difficulties that they would face in dealing with professionals who operate under a high ethical code and who would have much to lose personally, why would people involved in organised crime choose to buy a legal firm? If a so-called Mr Big needs a solicitor they can engage one. Why would they get involved in investing in a firm, with all the extra problems that doing so could and probably would bring?

Some people have suggested that criminals would buy legal firms so that they could use them to launder drugs money, but that seems unlikely. A criminal who is deciding how best to launder their ill-gotten gains could buy private taxis, sunbed salons or security firms. They would have a number of options. I cannot see why they would try to launder their money through a legal services provider rather than choose an easier option. The risk that criminal gangs will invest in or buy legal firms is pretty small and we should not be sidetracked by that suggestion.
Despite the heat that surrounds the bill, light has been shone into areas that required to be looked at, such as the role of the Lord President and the employment of solicitors directly by citizens advice bureaux. I note that the Government is involved in discussions and I hope that solutions can be found that will garner cross-party support at stage 2. I welcome the minister’s comments on CABx.

I am concerned about sanctions against outside investors. In committee I noted that, although inappropriate behaviour on the part of an outside investor could lead to the suspension or revocation of an ABS’s licence, the bill appears to provide no sanctions against the individual. I welcome the general sanctions, but the outside investor appears to be left almost untouched. Will the minister seriously consider adding to the bill provisions for sanctions against an individual outside investor who has behaved inappropriately? It does not seem right that the only sanction against the actions of an individual would be the closing down of the entire business, which could have a devastating impact on many innocent individuals.

The bill is controversial in some people’s eyes and much work remains to be done on it. However, we must face the world as it is and not as some people would like it to be. The bill is required and I ask members to support it at stage 1.

16:23

Bill Butler (Glasgow Anniesland) (Lab): I am deputy convener of the Justice Committee and I place on record my sincere thanks to the clerking team, the Scottish Parliament information centre and the many witnesses who gave invaluable evidence to the committee at stage 1.

The bill seeks to enable the establishment of new business structures in the legal services industry in Scotland and to deliver an appropriate regulatory framework for individuals and organisations that provide legal services. The reforms in the bill have the stated aim of creating a more flexible and up-to-date regulatory framework for legal services and, consequently, achieving improved access for all to high-quality legal services.

At first sight, those policy objectives appeared to committee members to be worthy and relatively uncontroversial, not to say somewhat dry and even esoteric. However, the bill has excited a degree of passionate debate and a level of controversy within the profession, the like of which has not been seen in modern times. The result of a recent referendum that was conducted by the Electoral Reform Society on behalf of the Law Society of Scotland and the society’s special general meeting of 21 April illustrate the division of opinion within the profession on the bill.

In his letter of 26 April to members, Michael Clancy noted with admirable diplomacy:

“these expressions of democracy ... show ... there is no consensus in the profession on two important areas—external ownership; and solicitor participation in a minority role in an entity with other professional participants.”

Quite so.

In his briefing to members of 26 April, Mike Dailly of the Govan Law Centre puts it rather more robustly:

“We do not believe the Bill as presently drafted contains appropriate safeguards”.

Furthermore,

“the particular concept of Alternative Business Structures adopted in the Bill does not lend itself to acceptable safeguards for those citizens requiring access to justice or a legal service.”

Indeed, according to Mr Dailly, safeguards need to be put in place to

“protect the public interest and the independence and professional ethics of solicitors subject to ABS.”

That division within the legal profession places elected members in a very awkward position, to say the least. It is clear that there needs to be a commitment to positive dialogue both within the legal profession and between practitioners and politicians to ensure that a workable compromise can be agreed that addresses the salient concerns of a significant proportion of people who work in the legal services industry in Scotland.

As my colleague Richard Baker said, Labour members are committed to the extensive debate that is necessary at stage 2 to deliver legislation that has at its core the maintenance of access to justice. There must be no unintended consequences that restrict access to justice for any section of Scottish society. Especially with regard to the make-up of alternative business structures and external involvement in such organisations, there is need for more dialogue and for a willingness to listen to constructive proposals from those who have expressed concerns about those aspects of the bill.

I am confident that the ministerial team will listen carefully to such suggestions, as will the committee. Indeed, the minister’s formal written response to the committee’s stage 1 report shows constructive engagement with many of the concerns that the committee raised, for which he must be commended. For example, on section 36, the committee noted that a restriction on eligibility for being a licensed legal services provider may restrict

“the way in which ... not-for-profit organisations can provide legal services.”
The committee expressed its sympathy for the concerns that Citizens Advice Scotland raised in that regard. I am heartened by the minister’s promise to consider the issue further and the discussions that his officials have already had with CAS in respect of its desire simply to allow citizens advice bureaux directly to employ solicitors by way of an exemption under section 26(2) of the Solicitors (Scotland) Act 1980.

Further, I am cheered by the ministerial team’s willingness to consider the role of the Lord President. The committee shared

“the concerns expressed in much of the evidence about the extent of proposed ministerial involvement and the perceived threat to the independence of the legal profession as a consequence”.

In his written response, the minister noted that he had been

“listening to those who have called for the Lord President to have an equal role to the Scottish Ministers”,

and that the Government was

“considering an amendment at Stage 2 to give the Lord President a greater role in the process of approving approved regulators.”

That is a good thing.

I am also heartened by the assurance in the minister’s speech that the Government will introduce additional sanctions regarding the fitness-to-own test. That is only prudent.

Such a listening approach is welcome, necessary and must be adopted if our stage 2 consideration is to be successful in making the amendments that are necessary to shape a robust piece of legislation that is acceptable to the whole legal profession and which addresses the major concerns about which there is still no agreement. That lack of agreement is concerning.

In that regard I hope that the Government will consider carefully what my colleague Richard Baker described as constructive proposals, such as the one that Mike Dailly outlined for a co-ownership alternative business structure model, with a 75:25 per cent split. He made that suggestion in his fairly detailed briefing paper, which members have seen.

On that clear understanding as to how we should proceed, Labour will support the general principles of the bill at 5 o’clock tonight.

The Deputy Presiding Officer (Trish Godman): We move to wind-up speeches.

16:30

Mike Pringle (Edinburgh South) (LD): I feel perhaps a little outnumbered as someone who is not a lawyer, but it must be a positive thing that a number of ex-lawyers are so involved in the debate.

Bill Aitken: Let me clarify that I am not a lawyer and am most certainly not rich.

Mike Pringle: I was not implying that all lawyers are rich or that the convener of the Justice Committee is a lawyer. I understand that, like me, he was a magistrate at one point.

The Legal Services (Scotland) Bill, which was introduced on 30 September 2009, is intended to enable the establishment of new business structures within Scotland’s legal services industry and to deliver a suitable regulatory framework for individuals and organisations that provide such services. Currently, legal practitioners must operate within business structures that are strictly limited, both by statute and by professional practice rules, and within a regulatory framework in which the regulators both regulate and represent the legal profession.

I have had several conversations with friends—including an ex-president of the Law Society of Scotland—who probably know more about the bill than I do. They have looked closely, perhaps closer than I have, at the proposals. However, it must be said that many practitioners are not hugely supportive. Opinion on the bill among the legal profession is extremely divided. I will come back to that later.

The reforms in the bill are intended to liberalise the legal services market to 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. Some have referred to the bill one that introduces a sort of Tesco law, on the basis that it will allow organisations that are not owned by legal professionals, such as banks and supermarkets, to offer legal services to the public. Those with whom I have discussed the bill perhaps have the biggest issue with that proposal.

The Law Society of Scotland supports the bill, but it has echoed the Justice Committee’s concerns that the bill should be amended—we have heard almost every member who spoke in today’s debate say this—to ensure the independence from Government of the legal profession and the licensed legal services providers that may be created under the bill. I entirely agree with my colleague Robert Brown that multiple regulation is an idea too far that should be removed at stage 2. I know that he intends to do that.

The legal profession faces significant challenges, including competition from English firms, as it has been significantly affected by the economic downturn. Perhaps that is driving some in the legal profession down the route of
supporting the bill. One need only ask any lawyer about the economic downturn to get confirmation that the legal profession is not doing as well as it was several years ago. More and more legal businesses in Scotland that also operate outwith Scotland—in England and further afield in Europe—are using English firms to conduct their legal business both south of the border and in Europe. I understand that many of the firms that operate in Europe are now using English law, whereas in times past they would, I suspect, have used Scots law, which we all accept is better. For Scottish firms that operate outside Scotland, the current arrangements may be to their detriment. If the bill can help to address that, it must be positive.

I return to the issue that has divided the Law Society of Scotland. In April 2008, the society published a paper in which it was argued that allowing alternative business structures would be in the interests of both the legal profession and the public as long as such firms were subject to a regulatory framework that protected the profession’s core values. That policy was endorsed by the society’s annual general meeting in May 2008. The society continues to adhere to its policy on ABS as stated at that AGM and accordingly it supports the general principles of the bill.

However, as David McLetchie said, there was a very narrow majority in favour of ABS in the Law Society referendum, the results of which were announced on 7 April. Some 2,245 voted in favour of the introduction of ABS, as long as there were appropriate safeguards, and 2,221 voted against it. That is a majority of 24, or 0.53 per cent of the people who voted, which is pretty narrow. I suspect that most lawyers would have got involved and voted on the issue. The resolution that was voted on and passed at a special general meeting of the Law Society held on 16 April, in which the issues were debated again, was at complete odds with that vote. I am sure that the committee will carefully consider that matter in the run-up to stage 2.

So who will benefit—the small firms or the large firms? Of course, solicitors in small firms and individual solicitors make up the biggest percentage of lawyers practising in Scotland, and it is expected that many of those solicitors will wish to continue to operate in traditional solicitors’ practices. Nothing in the bill should prevent them from doing so. Therefore, are we passing legislation for the benefit of perhaps four, six, eight or 10 firms? I do not know. Existing forms of regulated legal practice, such as solicitors who operate as sole practitioners in partnership, will, of course, continue to be regulated by the society. Will larger Scottish firms benefit? The committee has found little, if any, evidence of alternative business structures or multidisciplinary practices working elsewhere. The minister mentioned Australia as an example, but it is the only example. It has therefore proven to be difficult to reach a conclusion on the issue.

In conclusion, I note that the committee said that the bill is permissive and that it has the support of the Law Society of Scotland—just. The committee is in no doubt that the bill may be of importance for larger Scottish firms, but its advantages for smaller Scottish firms and, indeed, most consumers are much less clear. We must continue to protect those two groups. As a result of all that has been said by the members of the Justice Committee, I am sure that they will ensure that that happens.

David McLetchie: The debate, which has been interesting, has reflected many of the divisions of view that have come to light in the wider public debate and among the legal profession in the past few months.

The Minister for Community Safety, Mr Ewing, took a characteristically robust tone in an unequivocal defence of the key principles of the bill. He was right to remind us that the bill is enabling rather than prescriptive in respect of future models for our legal profession’s business structures. He was also right to remind us of the opportunities in the alternative models, particularly for our larger legal firms, one of which I used to work for.

If the minister’s tone was robust at the start of his speech, I worried a little bit that it was verging on the uncompromising. It has emerged in the debate that the bill will need to be significantly modified at stage 2 if we are to address some of the concerns that have been expressed. I am a little concerned that some concerns that bear further examination were too casually dismissed.

Mr Aitken reminded us of the Justice Committee’s lengthy and careful scrutiny of the bill. We are grateful to that committee for the care that it has taken in examining the bill, its consideration of the oral and written evidence, and the comprehensive report that it presented.

Richard Baker made fair points about the big questions that remain to be asked. There is the important question whether a body can have a representative as well as a regulatory function. I noticed in the committee report that some had suggested that the legal profession might like to follow the medical profession. I made that analogy in my opening speech. The medical profession has a representative body in the British Medical Association and a separate and distinct regulatory body in the General Medical Council. However, having said that, we must acknowledge that
whatever divisions there may be among members of the legal profession about the merits or otherwise of the ABS provisions, there is substantial support from the profession for the view that the Law Society should be a regulator under the new regime and should have representative functions as well.

I was interested to hear Robert Brown’s critique of the unimpressive evidence that he said was presented to the committee by Which? and the Office of Fair Trading. His analogy with the banking crisis was characteristically thoughtful. He suggested that, at heart, it might have been caused by a failure of ethics and professional standards rather than by a failure of regulation. That goes to the heart of many of the concerns that have been raised in the debate on the bill. Fundamentally, people expect those who provide them with legal services to be persons who are qualified in the law. Although the monopoly on the provision of those services is reserved to qualified solicitors and advocates whose range of expertise might be quite limited, people expect providers of legal services to have the same high level of training and qualification over the whole range of legal services. They will be sadly disappointed if that is not the case.

Nigel Don made some interesting observations about the descriptions and designations that may be applied to businesses. Although his speech verged on the esoteric in some respects, it underlined the fundamental principle that by a company’s name is it known. The public need to know the nature of the business with which they are contracting at first hand and the service that they can expect from it.

Along with other members, Cathie Craigie highlighted the work that needs to be done at stage 2.

I thought that Stewart Maxwell was a little dismissive of the concerns about people who might end up owning law firms. There is a greater danger than some people think in that regard, which needs to be examined further. I am talking not just about the test that is to be applied on who can own such a firm, but the supervision and application of that test. The issue is about not just the rule, but the resourcing of the regulator and whether the regulator does a good job.

I was struck by Stewart Maxwell’s point that it is not necessary to own a business in order to provide a service. I remind him that that was precisely the point that I made in the context of general practitioner services a few months ago, on which, regrettably, I could not persuade him or his Government.

I thought that Bill Butler’s winding up on behalf of the committee struck exactly the right tone. He drew attention to the concerns that still need to be addressed and to the need for workable compromises to be arrived at that will bring together some of the disparate views that are held by members of the profession. The committee still has a great deal of work to do on the bill at stage 2, and I wish its members every success in their endeavours in squaring what I think will be an extremely difficult circle to square.

16:43

James Kelly (Glasgow Rutherglen) (Lab): I welcome the opportunity to close on behalf of the Labour Party. As a member of the Justice Committee, I thank the clerks and the team at the Scottish Parliament information centre for the amount of work that they put into assisting us during our nine evidence sessions on the bill at stage 1.

The committee’s consideration of the bill was my first outing as a member of the Justice Committee, and I was advised that it would be a relatively calm and uncontroversial journey. How wrong that proved to be. As we took evidence, it became clear that there were strong views on both sides about the benefits and the disadvantages of the bill. As many have said during the debate, there are divisions of opinion within the legal profession and the Law Society. That has made it difficult for the members of the committee to navigate their way through the bill, to understand it, to grapple with the issues around it, and to map a way forward that will ensure that the passage of the bill benefits the legal profession and the consumers and users of legal services throughout Scotland.

As I have said, there are strong arguments for and against. In favour, there are those who point to the modernisation of legal services in England and Wales, and there is a feeling that we do not want Scotland to be left behind. If we are left behind, Scottish firms could become disadvantaged. The minister pointed out that there are potential economic advantages to moving down the ABS route. We do not want to disadvantage our Scottish legal firms. If we can, we also want an opportunity to boost that sector of the Scottish economy. Consumer Focus Scotland pointed out that, if ABS is successful, the bill provides the opportunity of helping consumers by giving them better access and reducing prices.

Against those strong arguments are those who say that the independence of the legal profession is under threat, and that long-standing arrangements, such as the guarantee fund, will be in danger of being terminated. There are also fears that the bill spells the death of many small firms, and that there is a danger of unscrupulous third parties becoming involved.
The committee’s role in assessing the effectiveness of the legislation was not helped by the lack of evidence. The Law Society gave the committee some strong evidence but, as Robert Brown pointed out, some of the other evidence was not so strong. It was also difficult because we did not have strong international examples. The changes that have been introduced in England and Wales have yet to be implemented, so we cannot see the advantages or disadvantages of them yet. The minister quoted Australia, but there are no strong examples nearer to home that allow us to assess whether this is the correct route to take.

Throughout the process, we have seen divisions in the Law Society. It has gone through a number of processes and taken different views on ABS. As far back as 2008, there was a strong vote in favour. There was then a special general meeting, which was halted. In between times, a referendum voted narrowly in favour of alternative business structures, and then the reconvened special general meeting voted against. We are now awaiting the results of the Law Society’s executive’s discussions and a further AGM. I am sure that we all wish Ian Smart and the officers well in their efforts to come up with a consensus and a way forward that can be agreed by the majority of members. That will not be an easy task.

A number of important issues are still to be addressed as we move to stage 2. There are concerns that the legislation could undermine the independence of the legal profession. As Bill Butler and others said, the proposal made by Mike Dailly of Govan Law Centre for a co-ownership model with a 75:25 per cent split is one way forward. Mr Dailly has been critical of ABS structures, and his proposal gives us the opportunity to build consensus.

The issue of regulation is complex. Concerns were expressed at the committee about the power vested in ministers. I welcome the minister’s commitment to look at an enhanced role for the Lord President. That is the correct route to take. David McLetchie is right to point out that we want a level playing field, no matter how many business structures there are. The proposals give us the opportunity to build consensus.

The issue of regulation is complex. Concerns were expressed at the committee about the power vested in ministers. I welcome the minister’s commitment to look at an enhanced role for the Lord President. That is the correct route to take. David McLetchie is right to point out that we want a level playing field, no matter how many business structures there are. The proposals give us the opportunity to build consensus.

Fergus Ewing: I thank all members for their contributions, which have been extremely useful—at times thoughtful, perceptive and coming at the issue from a large number of different perspectives. As our response to the committee clearly demonstrated, we have not only listened to the committee but responded positively to most of the points that it made, many of which have been repeated in the debate.

As Mr Maxwell mentioned, it seems unreasonable that the citizens advice bureaux should not be able to directly employ solicitors. A removal of that restriction would seem to be sensible and easy to effect, and I hope that it will be done at stage 2. The committee recommended an enhanced role for the Lord President. We have given that recommendation careful consideration, and we agree with the committee and the arguments that it adduced to that end. That change, too, will be brought forward.

At the very outset, I indicated to the committee that it is imperative that the new alternative business structures should be subject to the protection of clients in exactly the same way as the principle exists at present with regard to both negligence and fraud. So far as I recollect, I made it clear in my stage 1 evidence that it will be necessary therefore to introduce provisions at stage 2 for a compensation fund, so that clients of the new licensed providers receive protection against fraud. That protection, which a number of members rightly raised, will be introduced at stage 2.
Section 35—on the step-in powers of ministers to act as regulator in the event of default of approved regulators for whatever reason—was intended only ever to be a last resort, and amendments to make that clear will be lodged.

Mr Maxwell mentioned sanctions on outside investors, as I think did Labour members. The argument is well made that there should be sanctions that can be taken on individual outside investors, and that issue will be the subject of amendments at stage 2.

In addition, I have decided that, although I have been told by the Scottish Government’s legal experts that it is not strictly necessary, because it is already implicit in the terms of section 2—in subsections (c) and (e), from memory, which could, of course, be at fault—it should be said explicitly in the bill that those who are working under the new licence providers business structure will be subject to the same duties of confidentiality that are owed by solicitors to clients in traditional solicitors’ practice. Making that clear will ensure that there is no doubt that we are aiming for the highest ethical standards to be provided by everyone who engages in alternative business structures. That is the type of business that we envisage being done, and that is the type of approach that we will require to be taken.

Nigel Don talked about the terms of sections 1 and 2. Those are the first and second sections of the bill because of the importance that we attach to their provisions. Section 1 sets out the regulatory objectives “supporting the constitutional principle of the rule of law”,

providing and promoting “the interests of consumers” and “the public interest generally” and promoting “access to justice”, which Labour members have, rightly, highlighted as a key objective. Section 2 sets out professional principles, which all solicitors hold dear, such as acting “with independence and integrity” and “in the best interests of their clients”.

In my response to the debate, I hope that I have indicated that we have listened to all members and that we have responded to their points. In most cases, we are responding to the points by doing exactly what has been asked of us.

Richard Baker quite fairly raised a point about claims management companies. We have no fixed position on the matter, and we understand the case the Richard Baker outlines. I welcome the opportunity to discuss the matter with Richard Baker, and I think that that would be useful, even in advance of stage 2.

We are aware of concerns relating to claims management companies, but we are not aware of much evidence relating to malpractice in Scotland. We know of about four or five complaints about such companies, but we do not know whether they can be substantiated. At my request, officials have made inquiries of the OFT, trading standards officers, Citizens Advice Scotland and the former Scottish Consumer Council, but we have not detected a huge amount of evidence. If Mr Baker has evidence, we would like to see it. It might be that this bill is not the correct vehicle for addressing the matter, and I do not know whether an amendment on the subject would be competent—that is for Parliament to decide, not me. Nonetheless, we wish to engage with Richard Baker on the issue and respond to those concerns.

In case of doubt, as I said in my opening remarks, I have had useful discussions with the profession. I was determined so to do when I took over responsibility for the handling in Parliament of the bill. I have had, I think, 11 meetings with various interested parties, including several representatives of the legal profession, the Scottish Law Agents Society, the Law Society, MacRoberts and individual solicitors. Even before the referendum, I had sought further meetings and will continue to seek to have them. I am to meet representatives of individual firms and will have a further meeting with SLAS. Like all members who have spoken, I think that it would be preferable if we could secure broad support in the profession for our proposals. That is what I aspire to, but I will not predict at this stage whether it is achievable—suffice it to say that, for whatever reason, the attempts that have been made in that regard have so far not been successful.

I echo the sentiment, expressed by speakers from across the chamber, that those in the Law Society who have been involved in the bill have carried a huge burden over the past year and have faced a difficult time—I think that Mr Brown referred to it as a torrid time.

I pay tribute to Ian Smart, who will soon demit office as president of the Law Society and who, I think, is present in the gallery today. Ian has worked tirelessly to support the interests of the legal profession and the public in relation to the bill and on many other matters. A sole practitioner, Ian clearly has the wellbeing of all solicitors at heart, and I have no doubt that, in his remaining time as president, he will continue to work hard on their behalf. I thank him for his extremely constructive contribution over the past few months.

I commend the principles of the bill to Parliament.
The Presiding Officer: The next question is, that motion S3M-6168, in the name of Fergus Ewing, on the Legal Services (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahaime, Christine (South of Scotland) (SNP)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Ingram, Adam (South of Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)

The Presiding Officer: The result of the division is: For 92, Against 2, Abstentions 0.

Motion agreed to,
That the Parliament agrees to the general principles of the Legal Services (Scotland) Bill.
I am writing to let you know that the Society, at its Council meeting today, agreed to promote an alternative resolution to that proposed by the Scottish Law Agents at the SGM convened on 21 April 2010.

The terms of the resolution will promote a policy allowing external ownership of solicitor firms up to 49%, the remaining 51% being owned by solicitors or solicitors with other regulated professionals.

This resolution will be debated at the Society’s Annual General Meeting on 27 May.

I attach the Society’s Press Release for your information [please see the annexe].

I will let you know the outcome of that meeting as soon as the result is available.

Michael P Clancy
Director, Law Reform
30 April 2010
Annexe

NEWS RELEASE

FAO: News Desks, Legal and Home Affairs Correspondents

Law Society’s Council adopts compromise ABS policy

The Council of the Law Society of Scotland today (Friday 30 April) voted to change its policy on alternative business structures (ABSs) to support majority ownership (51%) of law firms remaining with solicitors or solicitors with other regulated professionals.

The decision takes account of a recent referendum on ABSs and a special general meeting on the same issue, which produced contrasting results.

The Scottish Parliament’s stage 1 debate on the Legal Services (Scotland) Bill this week gave cross-party support to the introduction of ABSs in principle, while agreeing that amendments were needed at stage 2 to address a number of concerns.

Ian Smart, the Society’s President, said: “We have listened to the profession and there are strong differences of opinion about the way forward, with large and small firms on both sides of the debate. There does, however, seem to be an acceptance that ABSs are inevitable, as reflected in the parliamentary vote, and that a compromise must be found.

"With that in mind, the Society’s Council – which includes solicitors from every sector of the profession – has adopted what it believes to be fair and reasonable compromise position, which would prevent outright external ownership, for instance by supermarkets, but allow firms to compete in a changing marketplace.

“All attempts to compromise were rejected at the SGM earlier this month. However, that vote was based on proxies granted before any compromise had been proposed. The Council believes that the profession should be given the opportunity to express an informed view on whether this compromise policy is acceptable. It would be wrong for processes to prevent that happening.

“The next stage of the parliamentary process, which involves making detailed amendments, is almost upon us so the need to present a clear Council policy without further delay was uppermost in the minds of Council members.

“We remain committed to ensuring that the proposed legislation is effective, workable and in the interests of the profession and the public. To achieve that, we will remain in discussions with all interested parties and continue to welcome feedback from solicitors.

“The revised policy will be put to the Society’s membership at its annual general meeting on 27 May. We hope that others will recognise the benefits of supporting a compromise position.”
The new policy replaces the position adopted in 2008 to allow any form of ABS.

ENDS

Notes to editors:

- MSPs voted in favour of the Legal Services (Scotland) Bill at the stage 1 debate on Wednesday, 28 April, with 92 in favour and two against. The Bill contains proposals which would allow solicitors to form alternative business structures and set up in partnership with other professionals. The Bill could also allow external ownership or external funding of law firms. Currently in Scotland, solicitors can only form partnerships with other solicitors. Traditionally structured solicitors' practices will remain an option.

- Members of the Law Society of Scotland have debated the proposals in the Bill at an SGM on March 25, which was adjourned until April 21 to allow further discussions between the Law Society and other groups. The SGM vote on April 21, including proxy votes, was 1,817 in favour of a motion from the Scottish Law Agents Society (SLAS) against ABSs, with 1,290 against the motion and five abstentions.

- In a referendum earlier this month, solicitors voted to support the Society's current policy in favour of alternative business structures being introduced to Scotland (2,245 in favour, as long as there are appropriate safeguards, with 2,221 against). On a second question, 81% of votes were in favour of the Society applying to be a regulator of ABSs if they are introduced. A total of 4,466 solicitors, 43% of the Society's membership, voted in the secret ballot.

- The Society is due to publish the results of its consultation with members on the types of new business models that should be permitted and how they would be regulated next week.

- The Society’s Council has 48 members. They represent geographical areas and sectoral groups, such as in-house lawyers, new lawyers, SLAS, the Glasgow Bar Association and the WS Society. There are also four lay observers.
Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Legal Services (Scotland) Bill to the Justice Committee, as lead committee for the Bill, on 6 January 2010.

2. On 25 May 2010, Andrew MacKenzie, Head of the Legal Services (Scotland) Bill team, wrote to the Clerk of the Subordinate Legislation Committee responding to its Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with most of the Subordinate Legislation Committee’s recommendations on the delegated powers contained in the Bill.

4. The only exception to this is the Committee’s recommendations with regard to paragraph 2(2) of schedule 4 relating to the imposition of financial penalties on approved regulators. Such penalties will be specified in regulations subject to negative procedure. The Committee recommended that a ceiling on the financial penalties prescribed in regulations should be specified on the face of the Bill. If the Scottish Government did not agree to this, the Committee recommended that the regulations be subject to affirmative procedure.

5. The Scottish Government has indicated that specifying a maximum penalty on the face of the Bill would be too inflexible to adjust the amount once the regulatory framework was in place. It also indicated that the maximum penalty will be set at a reasonable level and that affirmative procedure is unnecessary.

Progress of the Bill

6. The Bill passed Stage 1 on 28 April 2010. Day 1 of Stage 2 will be held on 8 June 2010.

7. The Subordinate Legislation Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.
Recommendation

8. Members are invited to note the Scottish Government’s response to the Subordinate Legislation Committee’s report on the Legal Services (Scotland) Bill at Stage 1.

Irene Fleming
Clerk to the Committee
In its Stage 1 report on the Legal Services (Scotland) Bill ("the Bill"), the Subordinate Legislation Committee ("the Committee") raised a number of concerns about various delegated powers. As requested, we have prepared a formal response to these points in advance of Stage 2, which is expected to start in June.

This response focuses on those delegated powers about which the Committee made specific recommendations or comments. It does not cover those which the Committee determined it did not need to draw the attention of the Parliament to, which are found in the following sections: 5(6), 8(2)(c), 8(5), 9(3), 22(1), 24(9), 26(1), 29(6), 33(1), 35(1), 34(6), 39(9), 40(7), 41(5), 52(2), 55(10), 64(7), 65, 67(5), 68(6), 73(6), 75(2)(f), 83, 93, 100(1) and 102(2). In addition, the Committee stated that it is content with our explanation of the delegated powers in section 35(2) and schedule 4(11)(2), and so these are also not included in this response.

Section 6(7) - Approval of regulators

**Power conferred on:** Scottish Ministers

**Power exercisable by:** Regulations made by statutory instrument

**Parliamentary procedure:** Negative resolution of the Scottish Parliament

The Committee expressed concern that the negative procedure is to be used for this power, given that “the express inclusion of criteria for approval, and the specification of categories of bodies which may or may not be an approved regulator, demonstrated that the scope of the power goes beyond matters of detail and administration and into matters of substance”.

As stated previously, we believe that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. However, we have given further consideration to this power in light of the Committee's concern, and intend to offer an amendment at Stage 2.

Firstly, the amendment will limit the power in section 6(7)(b), which allows further provision to be made about the criteria for the approval of approved regulators, in order to address concerns that this could be used to make substantive changes. The ability to set new criteria will be narrowed by reference to criteria which relate to the applicant’s capability to act as an approved regulator. Any new criteria will therefore be linked to the functions of approved regulators, which are clearly set out in the Bill.

Secondly, the amendment will remove section 6(7)(c) entirely. This power permits provision to be made which could limit the types of bodies which may become approved regulators. As noted in our earlier response, we recognise that this power is very wide. We now consider this power to be unnecessary. The Scottish Ministers are able to exclude unsuitable applicants by reference to their application, and we do not think it likely that it would ever be desirable
to exclude an entire class of applicants without consideration on an individual basis.

Section 7(10) - Authorisation to act  
Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

As with section 6(7), the Committee suggested that the negative procedure is inappropriate for the power in section 7(10), given that it can be used to alter the criteria for authorisation (under section 7(10)(b)). On further reflection, we feel that the power in section 7(10)(b) is unnecessary, given that any further criteria which are required can be added using the power in section 6(7), and would carry through to the authorisation process under section 7(2)(b). Therefore, we intend to put forward an amendment at Stage 2 to remove this. Section 7(10)(a), which relates to the process for requests for authorisation, will remain as it is currently.

Section 27(1) – Guidance on functions  
Power conferred on: Scottish Ministers  
Power exercisable by: Guidance  
Parliamentary procedure: None – publication only

The Committee noted that some clarification is required for this provision. As stated in our previous response, we intend to introduce an amendment at Stage 2 to make clear that any guidance is to be issued to all approved regulators.

Section 37(6) - Eligibility criteria  
Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

The Committee expressed concern with the first element of this delegated power, in section 37(6)(a), which permits further provision to be made about eligibility to be a licensed provider. It suggests that this power could be used to make substantive changes to the eligibility criteria, and that adequate justification has not been given for making this power subject to the negative procedure.

Following further consideration of this provision, we intend to introduce an amendment at Stage 2. This amendment will split the power in section 37(6)(a) into two parts. The first part will consist of a power to make further provision setting out addition categories of body which may or may not be eligible to be a licensed provider. This could obviously be used to make fairly substantive changes to the eligibility criteria, and we therefore propose to make it subject to the affirmative procedure. The second part will consist of a more general power to make further provision about eligibility criteria. In contrast with the first part, this will be used within the context of the criteria
already set out in section 37, rather than to make any substantive changes. As such, this part will be subject to the negative procedure.

Section 52(2) - More about investors

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

The Committee suggested that this power, which allows further provision to be made about interests (i.e. investors) in licensed providers, should be subject to the additional scrutiny of the affirmative procedure. We acknowledge that this power is potentially very wide-ranging but, as stated in our previous response, feel that this is necessary given the importance of ensuring that the provisions around outside investors are robust. We also maintain that the negative procedure is appropriate for the majority of these powers, which apply only to a very narrow class of people. We therefore do not intend to change the parliamentary procedure to be used for the powers in section 52(2)(a)(i) to (iii) or 52(2)(b). However, we do accept the Committee’s recommendation in relation to the power in section 52(2)(a)(iv), as this involves modifying a definition in the Bill itself. We will therefore put forward an amendment at Stage 2 to make this power subject to the affirmative procedure.

Section 74(7) - Certification of bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

The power in this section is equivalent to that applying to the approval process for approved regulators in section 6(7) of the Bill. The Committee raised similar concerns about the use of the negative procedure. Following further consideration, we intend to introduce an amendment to this power at Stage 2. This will be equivalent to that offered for section 6, described above. Section 74(7)(b) will be narrowed by reference to criteria which relate to the applicant’s capability to act as an approving body, and section 74(7)(c) will be removed entirely.

Section 81(4) - Ministerial intervention

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 81(4) gives the Scottish Ministers a power to require an approving body (of confirmation agents) to carry out an annual review, and send a report to the Scottish Ministers. As indicated in our previous response, we intend to introduce an amendment at Stage 2 remove this power and insert a requirement to carry out such a review on the face of the Bill. A delegated power will still be required to make provision about these reviews, which will be similar to that in section 24(9) in relation to the assessment of licensed providers.
Section 81(5) - Ministerial intervention
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

The Committee expressed concern at the width of this power, which allows the Scottish Ministers to make further provision about approving bodies and confirmation agents. It suggested that, given the other powers in Part 3 relating to confirmation agents and approving bodies, such a wide power is unnecessary.

After further consideration, we agree that this power is unnecessarily wide at present. However, notwithstanding the other powers available in Part 3, we believe that there is a need for a power to create additional regulatory safeguards if this proves necessary once the regulatory regime is operational. Therefore, we intend to introduce an amendment at Stage 2 to link the power to this purpose, with the effect that the Scottish Ministers will only be able to make further provision relating to approving bodies or confirmation agents where this is necessary in order to safeguard the interests of clients of confirmation agents.

Schedule 4 Paragraph 2(2)
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

As set out in our previous response, we believe that this power and the parliamentary procedure selected are appropriate. Specifying a maximum penalty on the face of the Bill would take away the flexibility to adjust that amount as may be required once the regulatory framework is operational. The maximum penalty will be set at a reasonable level, and we do not believe the extra scrutiny offered by the affirmative procedure is necessary.

I hope this has been helpful.

ANDREW MACKENZIE
In my response to the Justice Committee’s Stage 1 report on the Legal Services (Scotland) Bill (“the Bill”), I committed to putting forward an amendment at Stage 2 to give clients of new licensed legal services providers (“LLSPs”) protection against fraud. As we have now given this issue further consideration, I thought it might be useful to set out our plans in more detail.

I intend to bring forward an amendment at Stage 2 to require approved regulators to make provision for a compensation fund for making good losses that clients suffer by reason of dishonesty on the part of LLSPs. This will provide equivalent protection to that afforded by the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”), which is provided for in section 43 of, and Schedule 3 to, the Solicitors (Scotland) Act 1980. There will be a choice of arrangements, so an approved regulator can either (a) set up its own fund or (b) use the Guarantee Fund.

In order to ensure that consumers receiving legal services from either traditional or new providers are protected against the effects of fraud in the same manner, I consider that one option has to be for LLSPs to be able to use the existing Guarantee Fund. No other option would allow for sufficient cover during initial implementation. The Law Society of Scotland (“the Society”) agrees.

However, its Council recently voted that such provision should only be extended to LLSPs regulated by it as an approved regulator. It claims that other approved regulator’s schemes will not be as robust as the Society’s. I do not agree. The Bill ensures that each approved regulator will operate the same rigorous inspection regime as the Society. Section 18 of the Bill makes it clear that every approved regulator’s practice rules must include provision equivalent to that applied under sections 35 to 37 of the 1980 Act (accounts rules). Therefore, LLSPs not regulated by the Society will be subject to equivalent levels of inspection, so there should be no concerns about different approaches to the policing of accounts rules.

I believe that allowing all approved regulators to utilise the Guarantee Fund is the only practical option. Creating a compensation fund from scratch is likely to be prohibitively difficult. Only allowing the Society to use the Guarantee Fund would therefore effectively result in it being the only body capable of being an approved regulator. This is contrary to our stated policy intention, which is to allow other approved regulators to exist. In order to enable other bodies to become approved regulators while maintaining the current level of consumer protection, I therefore intend to make provision in respect of the Guarantee Fund for all LLSPs, although it will be possible for approved regulators to make alternative provision, should they be willing and able to do so.
Related to provision for a compensation fund, is my consideration of a cap on payments out of the Guarantee Fund. The Society has made representations to me that, regardless of whether ABS come in, the Guarantee Fund in its current form – involving potentially unlimited liability – is unsustainable. If a multi-million pound fraud claim on the Guarantee Fund was successful, the fund would be emptied, but, more worryingly, every partner in a private law firm would be liable to pay any remainder, which could see them and their firms put out of business.

Caps are in place in the equivalent funds in England, Wales and Northern Ireland. Robust consumer protection is obviously of paramount importance, but an uncapped fund could destroy the legal profession in Scotland, so the matter is being considered in advance of Stage 2.

I hope this has been helpful.

Fergus Ewing MSP  
Minister for Community Safety  
26 May 2010
Justice Committee

Letter from the Minister for Community Safety

Legal Services (Scotland) Bill – Regulation of non-lawyer will writers

I wanted to make you aware that later today I will announce that the Scottish Government intends to regulate non-lawyer will writers. I will lodge amendments to the Legal Services (Scotland) Bill to provide for such regulation.

A number of persons and organisations have made representations to us about non-lawyer will writers, providing examples of poor practice. These include lack of skill and competence; “cold calling”; and advice based on English law. One specific example, involved an elderly client who was charged £1,000 for a straightforward will in a non inheritance tax estate. That client was driven to her bank by the will writer to withdraw the money in cash to pay the fee.

We are very concerned that some non-lawyer will writers may be exploiting the lack of regulation to the detriment of the consumer in Scotland.

The regulation will continue to allow non-lawyers to provide a will writing service, but will protect consumers by ensuring that such will writers are subject to robust regulatory rules, enforcement measures and sanctions. However, we will not regulate individuals preparing their own will, with or without a DIY pack, including “deathbed” wills, or other persons providing a free advice service.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
1 June 2010
Letter from the Scottish Government to the Convener

Following discussions on the Legal Services (Scotland) Bill, it was suggested that we ask the Office of Fair Trading (OFT) for its view on the various external ownership models, and its options should such models be adopted. We contacted the OFT on 21 May. It was also suggested that, in the event of external ownership being restricted, we should confirm whether that would breach Convention law.

We attach the response from the OFT dated 28 May for the interest of the Justice Committee. We would have provided this sooner, but we wanted to clarify why the OFT referred to specific companies in its letter. The OFT has confirmed that the references were merely examples of brands who might take an interest in alternative business structures (ABS), and made it clear that it has no information about any intentions to enter the market.

On the implications of Community law, there would be no breach of the law if full ABS was not introduced. However, as noted by the OFT, if ABS is restricted by legislation, there remains the possibility for one of the designated consumer bodies to bring a further super-complaint to the OFT.

The Secretary of State for Business, Innovation and Skills can designate certain bodies which represent consumers to make super-complaints. Super-complaints can be made to the OFT by a designated consumer body when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers.

The OFT considers the evidence submitted and undertakes whatever work is necessary to establish the extent, if any, of the alleged problems. The OFT must then publish a response within 90 days from the day after which the super-complaint was received stating what action, if any, it proposes to take in response to the complaint and giving the reasons behind its decision.

In some cases, it may be possible to resolve the concerns and propose remedies within the 90-day period but, in more complex cases, further work may be called for. This can be undertaken as part of a market study by the OFT, by referring the market to the Competition Commission for further investigation, or by any other action available to the OFT.

We hope this is helpful.

Andrew Mackenzie
4 June 2010
Letter from the Office of Fair Trading to the Scottish Government

Thank you for your email of 21 May. You asked for OFT’s views on the variants of ownership models, and on the options for OFT action.

Ownership

Issues relating to the scale of external ownership have not been the subject of particular competition action and there appears to be no clear precedent in law. The OFT’s basis for favouring the possibility of 100% external ownership is based on our knowledge of how consumers choose services in a wide range of markets and on economic argument.

We believe that permitting 100% ownership, would provide an opportunity for brands, such as the Coop, Virgin Money, other supermarkets, building societies, banks and insurance companies to enter the market for legal services with potential beneficial effects.

In our view this could bring experienced customer-focused businesses to the legal services market in Scotland which would increase consumer choice and also improve access to justice. Well known high street names will wish to maintain and build on their public reputation and this should act as a strong incentive to provide good quality legal services and meet or exceed the necessary standards and regulations.

A recent study carried out by the Ministry of Justice¹ to provide a baseline for assessing the impact of reforms introduced in England and Wales indicates that few consumers currently shop around and are likely to choose providers who are already known to them or on the basis of recommendation. So there are likely to be difficulties for new entrants to become established unless they have some recognition. Poorer consumers (with incomes below £20,800) were more likely than others to say they had not very much or no choice of provider. An offer of legal services by well known brand names may therefore increase the opportunity, in particular for poorer consumers, to access legal services.

If there is a compromise, as per the Law Society’s proposal, which would limit external ownership by non-regulated professionals to a minority, this would likely deter well known branded providers from entering the market. While such an arrangement would perhaps permit larger Scottish firms wishing to compete in the wider UK market to gain at least some external capital, it would not provide to Scottish consumers a range of choice of legal service providers equivalent to that which will soon be available to consumers in England and Wales.

The “Dailly compromise” seems to allow only limited opportunity for others to own a stake in a law firm and this would be restricted to related professionals. All the benefits associated with external capital would appear to be lost and

¹ Ministry of Justice "Baseline survey to assess the impact of legal services reform" March 2010
the potential benefits of alternative business models in terms of innovation would be significantly reduced.

The OFT’s strong preference is for ABS providers to be free to seek up to 100% external ownership if they so wish. We recognise that this is only to be permissive, and there may be many different examples that emerge, from small external shares to the significant majority ownership discussed above. Through the emergence of a variety of models we would expect to see real benefits, especially to consumers in lower income groups.

We appreciate the concerns that have been expressed regarding this provision for external ownership, but, as we have stated to the Justice Committee of the Scottish Parliament, our view is that a robust regulatory regime based on effective monitoring and strong deterrence will be capable of working safely and in the interests of consumers.

Options open to the OFT
The OFT’s powers to investigate and take action against anti-competitive behaviour come from the Competition Act 1998 (CA98). Our powers under that Act are applicable only to agreements made by economic undertakings and their conduct. The Chapter I and Chapter II prohibitions of CA98 do not apply to the extent to which agreements are made, or conduct is engaged in, in order to comply with a legal requirement.

In principle, OFT could also consider making a market investigation reference to the Competition Commission. However, this power is unlikely to be used in the context where an elected parliament has specifically chosen not to act.

Furthermore in making any decision to act, the OFT would have regard to our prioritisation principles. You may wish to look at these principles to see the factors we consider and balance in deciding on the cases that we take forward.

Beyond anything that we might plan to do ourselves, there remains the possibility for one of the designated consumer bodies to bring a super-complaint to the OFT on this, or indeed on any other outstanding aspects of the legal services market. This may be more likely to arise if, for example, there emerges a perceived disparity between the experience of consumers in different parts of the UK, with those in England and Wales enjoying benefits arising from external ownership which Scottish consumers are denied.

On the implications of EU law I would recommend that you look to your own legal advisers.

I am aware that you wish to share this response with other parties and am content that you do so.

---

Legal Services (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 29
Section 30
Sections 31 to 52
Sections 53 to 101
Section 102

Schedules 1 to 6
Schedule 7
Schedule 8
Schedule 9
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Robert Brown
Supported by: Richard Baker

219 In section 1, page 1, line 11, at end insert—

<(ai) the interests of justice,>

Robert Brown
Supported by: Richard Baker

220* In section 1, page 1, line 20, at end insert—

<(2) In the event of any conflict between any of the objectives, those mentioned in subsection (1)(a) and (b)(ai) take priority.>

Section 2

Robert Brown

221 In section 2, page 1, line 25, leave out <and integrity> and insert <in the interests of justice, ( ) act with integrity>

Richard Baker

222 In section 2, page 1, line 25, leave out <and> and insert <in the interests of justice and with>

Fergus Ewing

1 In section 2, page 2, line 1, at end insert <(and keep clients’ affairs confidential)>

James Kelly

223 In section 2, page 2, leave out line 2 and insert—
<( ) ensure standards of work of reasonable and ordinary care and skill,>

Richard Baker
224 In section 2, page 2, line 7, at end insert—
<( ) treat the affairs of their clients as confidential and act in conformity with professional ethics.>

Section 3

Richard Baker
225 In section 3, page 2, line 12, after <will> insert <, legislative instrument>

Section 4

Fergus Ewing
2 In section 4, page 2, line 27, at end insert <or arising by virtue of Part 4>

Robert Brown
Supported by: Richard Baker
226 In section 4, page 2, line 28, leave out <, so far as practicable,>

Nigel Don
97 In section 4, page 2, line 28, after <as> insert <reasonably>

After section 4

Fergus Ewing
3 After section 4, insert—
<Consultation by Ministers
(1) Subsection (2) applies in relation to the exercise by the Scottish Ministers of their functions under Parts 2 and 3 or arising by virtue of Part 4.
(2) Where (and to the extent that) the Scottish Ministers consider it appropriate to do so in the case of an individual function, they must consult such persons or bodies as appear to them to have a significant interest in the particular subject-matter to which the exercise of the function relates.
(3) The general requirement to consult under subsection (2) has effect in conjunction with, or in the absence of, any particular consultation requirement to which the Scottish Ministers are subject in a specific (and relevant) context.>
Before section 5

227 Before section 5, insert—

<Licensed legal services providers>

(1) For the purposes of this Part, a licensed legal services provider (a “licensed provider”) is a firm of solicitors or an incorporated practice which—

(a) is owned and managed to the extent of not more than 25% by a non-solicitor investor, but is otherwise owned and managed by legal professionals,

(b) provides (or offers to provide) legal services—

(i) to the general public or otherwise, and

(ii) for a fee, gain or reward, and

(c) does so under a licence issued by the Law Society in accordance with rules made by the Law Society under section 34 of the 1980 Act.

(2) In this Part—

a “non-solicitor investor” is an investor who is not entitled to practise—

(i) as a solicitor,

(ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or

(iii) as a registered European lawyer,

“investor” is any person who has—

(i) ownership or control of the licensed provider, or

(ii) any other material interest in it,

“legal professional” means—

(i) a solicitor,

(ii) a firm of solicitors which is not a licensed provider, and

(iii) an incorporated practice which is not a licensed provider.>

228 Before section 5, insert—

<Pretending to be licensed>

(1) A person commits an offence if the person—

(a) pretends to be a licensed provider or a licensed employment law services provider (or otherwise pretends to have the right to provide legal services or employment law services under this Part), or
(b) takes or uses any name, title, addition or description implying falsely that the person is a licensed provider or a licensed employment law services provider (or otherwise implying that the person has the right to provide legal services or employment law services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Bill Butler

229 Before section 5, insert—

<Consequential and ancillary amendments to the 1980 Act

(1) The 1980 Act is amended as follows.

(2) In section 34 (rules as to professional practice, conduct and discipline)—

(a) in subsection (1), after “practices” insert “and licensed legal services providers”, and

(b) in subsection (1B), after paragraph (b) insert—

“(c) prescribe the circumstances in which a licensed legal services provider may be licensed by the Council as being suitable to undertake the provision of any legal services;

d) make provision as to persons who are suitable to be non-solicitor investors in a licensed legal services provider and as to the requirements to which they are subject;

e) prescribe the conditions which (subject to any exceptions provided by the rules) must at all times be satisfied by licensed legal services providers if they are to remain so licensed;

(f) without prejudice to that generality, make it a condition on the licensed legal service provider that any reserved legal services provided by, or on behalf of, that provider are provided, or provided on behalf of that provider, only by a person or body entitled to do so under section 32;

(g) regulate the conduct of the affairs of licensed legal services providers; and

(h) make provision for—

(i) the manner and form in which applications for a licence under this section are to be made;

(ii) the payment of fees in connection with such applications;

(iii) the regulation of the names that may be used by licensed legal services providers;

(iv) the period within which any licence granted under this section shall (subject to the provisions of this Act) remain in force;

(v) the revocation of any such licence on the grounds that it was granted as a result of any error or fraud;
(vi) the keeping by the Society of a list containing the names and places of business of all licensed legal services providers and for the information contained in any such list to be available for inspection;

(vii) any enactment relating to solicitors (including this Act) and any rules made under such an enactment to have effect in relation to licensed legal services providers with such additions, omissions or other modifications as appear to the Council to be necessary or expedient;

(viii) the empowering of the Council to take such steps as they consider necessary or expedient to ascertain whether or not any rules applicable to licensed legal services providers by virtue of this section are being complied with.”

(3) In section 43 (guarantee fund)—

(a) in subsection (2), after paragraph (b) insert—

“(c) any licensed legal services provider, or any director, partner, manager, secretary or other employee of such a provider, notwithstanding that subsequent to the commission of that act, it may have ceased to be licensed under subsection (1B)(c) or have been wound up or had its estates sequestrated.”

(b) in subsection (3), after paragraph (cc) insert—

“(cca) to a legal services provider or any director, partner or member of it in respect of any loss suffered by it or him by reason of dishonesty on the part of any director, partner, manager, secretary or other employee of the provider;”.

(4) In section 44 (professional indemnity), after any reference to “incorporated practices” or “incorporated practice” (wherever it appears) insert “licensed legal services providers” or, as the case may be, “licensed legal services provider”.

(5) In section 65(1) (interpretation), insert the following definitions in the appropriate places—

“the 2010 Act” means the Legal Services (Scotland) Act 2010 (asp 00);

“investor” and “non-solicitor investor” have the same meaning as in Part 2 of the 2010 Act;

“licensed legal services provider” or “licensed provider” have the same meaning as in Part 2 of the 2010 Act; and

“reserved legal services” means the drawing or preparation of the documents mentioned in section 32(1)”.>
(i) to the general public or otherwise, and
(ii) for a fee, gain or reward, and
(b) does so under a licence issued by the Society in accordance with the rules made by the Society under section 34 of the 1980 Act.

(2) For the purposes of this Part, employment law services are services which consist of or include those of offering advice or representation or both advice and representation in relation to matters of employment law.

(3) An employment law services provider does not include—
   (a) a solicitor,
   (b) a firm of solicitors or any partner of, or person employed within, such a firm,
   (c) an incorporated practice or any director of, or person employed within, such a practice, and
   (d) a licensed legal services provider or any director or partner of, or person employed within, such a provider.

(4) In subsection (1)(a)(ii) the expression “fee, gain or reward” does not include any money or income generated from general membership fees of Trade Unions.

Richard Baker

231 Before section 5, insert—

Pretending to be licensed

(1) A person commits an offence if the person—
   (a) pretends to be a licensed employment law services provider (or otherwise pretends to have the right to provide employment law services under this Part), or
   (b) takes or uses any name, title, addition or description implying that the person is an employment law services provider (or otherwise implying that the person has the right to provide employment law services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Richard Baker

232* Before section 5, insert—

Consequential and ancillary amendments to the 1980 Act

(1) The 1980 Act is amended as follows.

(2) Section 34 (rules as to professional practice, conduct and discipline)—
   (a) in subsection (1), after “practices” insert “and licensed employment law services providers”, and
   (b) in subsection (1B), after paragraph (b) insert—

   “(i) prescribe the circumstances in which a licensed employment law services provider may be licensed by the Council as being suitable to undertake the provision of employment law services;
(j) prescribe the conditions which (subject to any exceptions provided by the rules) must at all times be satisfied by licensed employment law services providers if they are to remain so licensed;

(k) regulate the conduct of the affairs of licensed employment law services providers; and

(l) make provision for—

   (i) the manner and form in which applications for a licence under this section are to be made;
   (ii) the payment of fees in connection with such applications;
   (iii) the regulation of the names that may be used by licensed employment law services providers;
   (iv) the period within which any licence granted under this section shall (subject to the provisions of this Act) remain in force;
   (v) the revocation of any such licence on the grounds that it was granted as a result of any error or fraud;
   (vi) the keeping by the Society of a list containing the names and places of business of all licensed employment law services providers and for the information contained in any such list to be available for inspection;
   (vii) any enactment relating to solicitors (including this Act) and any rules made under such an enactment to have effect in relation to licensed employment law services providers with such additions, omissions or other modifications as appear to the Council to be necessary or expedient;
   (viii) the empowering of the Council to take such steps as it considers necessary or expedient to ascertain whether or not any rules applicable to licensed employment law services providers by virtue of this section are being complied with.”

(3) In section 43 (guarantee fund)—

   (a) in subsection (2), after paragraph (b) insert—

   “(d) any licensed employment law services providers, or any director, partner, manager, secretary or other employee of such a provider, notwithstanding that subsequent to the commission of that act, it may have ceased to be licensed under subsection (1B)(i) or have been wound up or had its estates sequestrated.”

   (b) in subsection (3), after paragraph (cc) insert—

   “(ccb) to a licensed employment law services provider or any director, partner or member of it in respect of any loss suffered by it or him by reason of dishonesty on the part of any director, partner, manager, secretary or other employee of the provider;”.

(4) In section 44 (professional indemnity), after any reference to “incorporated practices” or “incorporated practice” (wherever it appears) insert “licensed employment law services providers” or, as the case may be, “licensed employment law services provider”.

(5) In section 65(1) (interpretation), insert the following definitions in the appropriate places—
“the 2010 Act” means the Legal Services (Scotland) Act 2010 (asp 00); “investor” and “non-solicitor investor” have the same meaning as in Part 2 of the 2010 Act; “licensed employment law services provider” or “licensed provider” have the same meaning as in Part 2 of the 2010 Act; and “reserved legal services” means the drawing or preparation of the documents mentioned in section 32(1)”.

Section 5

Robert Brown
235 In section 5, page 3, line 7, leave out <or other body> and insert <body based in Scotland>

Fergus Ewing
4 In section 5, page 3, line 20, after <their> insert <(or the Lord President’s)>

Robert Brown
233 In section 5, page 3, line 26, at end insert—

<(7) But the fees charged must not exceed the cost incurred by the Scottish Ministers in determining whether an applicant should be approved under section 6 as an approved regulator or, as the case may be, whether an approved regulator should be authorised under section 7 to exercise any of the approved regulator’s regulatory functions.>

Bill Butler
234 Leave out section 5

Section 6

Robert Brown
Supported by: Bill Aitken
236 In section 6, page 3, line 28, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
5 In section 6, page 3, line 30, at beginning insert <for regulating licensed legal services providers in accordance with this Part,>

Fergus Ewing
6 In section 6, page 3, leave out line 31 and insert—

<(i) the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it),>
Robert Brown

237 In section 6, page 3, line 31, at end insert—

\(<(\ )\) a thorough knowledge and understanding of the regulatory objectives and the professional principles contained in sections 1 and 2,> 

Fergus Ewing

7 In section 6, page 3, leave out line 34

Bill Aitken

238 In section 6, page 4, line 9, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

8 In section 6, page 4, line 10, at end insert—

\<(2A) The Scottish Ministers are to impose under subsection (2) such particular conditions relating to the expertise mentioned in subsection (1)(a)(i) as are reasonably sought by the Lord President when consulted under section (Pre-approval consideration)(1).> 

Fergus Ewing

9 In section 6, page 4, line 10, at end insert—

\<(\ ) The Scottish Ministers may remove or vary any conditions imposed under subsection (2)—

(a) after consulting the approved regulator, and

(b) where the conditions arose by virtue of subsection (2A), with the Lord President’s agreement.> 

Robert Brown

239 In section 6, page 4, line 10, at end insert—

\<(\ ) Conditions under subsection (2) may, without prejudice to their generality, include conditions which may—

(a) restrict the approval of the applicant by reference to particular categories of—

(i) licensed providers,

(ii) legal services,

(b) be given either—

(i) without limit of time, or

(ii) for a fixed period of at least 3 years.> 

Bill Aitken

240* In section 6, page 4, line 10, at end insert—

\<(2B) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2).> 

9
Fergus Ewing
10 In section 6, page 4, line 11, leave out subsections (3) to (6)

Robert Brown
241 In section 6, page 4, line 11, after <regulator> insert <and what conditions, if any, to impose under subsection (2) or amend, add or delete under subsection (2B).>

Bill Aitken
242 In section 6, page 4, leave out line 13

Robert Brown
243 In section 6, page 4, line 22, at end insert—
<together with, in either case, their reason for doing so.>

Fergus Ewing
11 In section 6, page 4, line 31, at beginning insert <in relation to capability to act as an approved regulator,>

Fergus Ewing
12 In section 6, page 4, leave out line 33

Robert Brown
244 In section 6, page 4, line 33, at end insert—
<( ) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.>

Bill Butler
245 Leave out section 6

After section 6

Fergus Ewing
13 After section 6, insert—

<Pre-approval consideration>
(1) Before deciding whether or not to approve the applicant as an approved regulator under section 6, the Scottish Ministers must consult—
(a) the Lord President,
(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
(c) such other person or body as they consider appropriate.
(2) In consulting under subsection (1), the Scottish Ministers—
(a) must send a copy of the application to the consultees,
(b) may send a copy of any revised application to any (or all) of them.

(3) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
(a) refuse to approve it as an approved regulator, or
(b) impose conditions under section 6(2).

(4) If notification is given to the applicant under subsection (3), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

Fergus Ewing
14 After section 6, insert—

<Lord President’s agreement
(1) Despite section 6(1), the Scottish Ministers must not approve the applicant as an approved regulator unless the Lord President agrees to its being approved as such.
(2) For the purpose of subsection (1), that agreement may be withheld only if the Lord President is not satisfied that the applicant has the expertise mentioned in section 6(1)(a)(i).

Section 7

Fergus Ewing
15 In section 7, page 5, line 14, leave out subsections (6) to (9)

Fergus Ewing
16 In section 7, page 5, leave out line 33

Fergus Ewing
17 In section 7, page 5, line 34, leave out subsection (11)

Bill Butler
246 Leave out section 7

After section 7

Fergus Ewing
18 After section 7, insert—

<Request for authorisation
(1) A request for authorisation under section 7 may be—
(a) made at any reasonable time (including at the same time as applying for approval under section 6),
(b) withdrawn by the approved regulator (or applicant) at any time by giving the Scottish Ministers written notice to that effect.

(2) The Scottish Ministers must, with reasons, notify the approved regulator (or applicant) if they intend to—
(a) withhold their authorisation, or
(b) impose conditions under section 7(4)(b).

(3) If notification is given to the approved regulator (or applicant) under subsection (2), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(4) The approved regulator (or applicant) must provide the Scottish Ministers with such information as they may reasonably require for their consideration of its request for their authorisation.

(5) In section 7 and this section, a reference to authorisation means initial or renewed authorisation.

Section 8

Fergus Ewing

169 In section 8, page 6, line 7, at end insert—
<(  ) the compensation rules (see sections (Compensation rules: general) and (More about compensation rules)),>

Robert Brown

247 In section 8, page 6, line 8, at end insert—
<(  ) include provision to ensure that legal services provided by the licensed provider are adequately supervised to ensure that they are provided competently and effectively,
(  ) include provision to maintain a record of any disciplinary action taken against the Head of Legal Services or any designated person within the licensed provider,>

Robert Brown

248 In section 8, page 6, line 10, at end insert—
<(d) further the regulatory objectives and ensure that licensed legal services providers adhere to the professional principles,>

Robert Brown

249 In section 8, page 6, line 14, at end insert—
<(  ) include any provision authorised by regulations under subsection (5),>
Robert Brown  
Supported by: Bill Aitken

250* In section 8, page 6, line 19, leave out from <they> to <such> in line 21 and insert—
<( ) the Lord President has consented, and
( ) they have consulted such>

Bill Butler

251 Leave out section 8

Section 9

Fergus Ewing

19 In section 9, page 6, line 29, leave out <to be in the regulatory scheme by section 8(2)(b)> and insert <by section 8(2)(b) to be in the regulatory scheme>

Robert Brown  
Supported by: Bill Aitken

252 In section 9, page 7, line 1, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

20 In section 9, page 7, line 2, leave out <that> and insert <(such as>

Bill Butler

253 Leave out section 9

Section 10

Fergus Ewing

98 In section 10, page 7, line 15, leave out <outside> and insert <non-solicitor>

Fergus Ewing

21 In section 10, page 7, line 15, leave out <(including for section 49(2))>

Fergus Ewing

99 In section 10, page 7, line 22, at end insert—
<( ) See also sections 43(6)(b), 45(3A), 49(2), (Exemption from fitness test)(3) and 52(2)(b) and paragraph 3A(2) of schedule 8 (as well as sections 11 and 12).>

Robert Brown

254 In section 10, page 7, line 22, at end insert—
Rules made in pursuance of subsection (1)(c) must include provision for licences to be subject to renewal after a period of one year from the date of issue, unless previously revoked or suspended.

Section 11

In section 11, page 7, line 24, leave out made in pursuance of section 10(1)(a)

In section 11, page 7, line 34, at end insert, or ( ) reducing standards of competent service within the legal services market.

Section 12

In section 12, page 8, line 10, after other insert relevant

Section 13

Leave out section 13

Section 14

In section 14, page 8, line 33, at end insert—

avoidance of conflict of interest,

In section 14, page 8, line 34, leave out (including for section 45(4))
Robert Brown

261 In section 14, page 8, line 36, at end insert—

<(  ) compensation (see section (Compensation)).>

Robert Brown

262* In section 14, page 9, line 7, at end insert—

<(  ) Rules made in pursuance of subsection (1)(f) may allow the approved regulator to take one or more of the following measures, in relation to a licensed provider, if it considers that to be appropriate in the circumstances of the case—

(a) setting performance targets,
(b) directing that action be taken,
(c) publishing a statement of censure,
(d) imposing a financial penalty in accordance with section 15,
(e) amending the condition of its licence,
(f) revoking its licence.>

Fergus Ewing

100 In section 14, page 9, line 13, at end insert—

<(  ) See also sections 43(6)(a), 45(4) and (Ban for improper behaviour) (4) (as well as sections 15 to 19).>

Bill Butler

263 Leave out section 14

Section 15

Fergus Ewing

25 In section 15, page 9, line 21, leave out from <approved regulator> to end of line 22 and insert <Scottish Ministers (but the approved regulator may collect it on their behalf).>

Bill Butler

264 Leave out section 15

Section 16

Fergus Ewing

26 In section 16, page 9, line 36, at end insert <specified in the scheme>

Bill Butler

265 Leave out section 16
Section 17

Fergus Ewing

101 In section 17, page 10, line 9, leave out <outside> and insert <non-solicitor>

Bill Butler

266 Leave out section 17

Section 18

Bill Butler

267 Leave out section 18

Section 19

Bill Butler

269 Leave out section 19

After section 19

Fergus Ewing

170 After section 19, insert—

<Compensation arrangements

Choice of arrangements

(1) An approved regulator must proceed with either option A or option B as regards a fund (a compensation fund) for making good such relevant losses as may be suffered by reason of dishonesty on the part of its licensed legal services providers.

(2) Option A is for the approved regulator to maintain a compensation fund (of its own) in relation to its licensed providers.

(3) If option A is proceeded with, the compensation fund is to be—

(a) held by the approved regulator for such purpose as corresponds to the purpose for which the Guarantee Fund is held under section 43(2)(c) of the 1980 Act in relation to licensed providers,

(b) administered by it in such way as corresponds to the administration of the Guarantee Fund in accordance with section 43(3) to (7) of, and Part I of Schedule 3 to, the 1980 Act (so far as applicable in relation to licensed providers).

(4) Option B is for the approved regulator, by not maintaining a compensation fund as mentioned in option A, to cause the Guarantee Fund to be administered as respects its licensed providers.

(5) For the purpose of option B, see section 43(2)(c) to (8) of, and Part I of Schedule 3 to, the 1980 Act.
(6) As soon as it has decided which of options A and B to proceed with, the approved regulator must inform the Law Society of its decision.

Fergus Ewing

171 After section 19, insert—

<Compensation rules: general>

(1) For the purposes of this Part, the compensation rules are rules in pursuance of (as the case may be)—

(a) option A in section (Choice of arrangements), or

(b) option B in that section.

(2) In pursuance of option A, the rules must—

(a) state—

(i) the purpose of the approved regulator’s compensation fund,

(ii) as a minimum, the monetary amount to be contained in that fund,

(b) describe the way in which that fund is to be administered by the approved regulator,

(c) specify the criteria for qualifying for payment out of that fund,

(d) provide for the procedure for—

(i) making claims for such payment,

(ii) determining such claims,

(e) require the making of contributions to that fund by a licensed provider in accordance with the relevant scale of annual contributions fixed by virtue of section (Choice of arrangements)(3)(b),

(f) make provision for the destination (or distribution) of that fund in the event that the approved regulator ceases to operate.

(3) In pursuance of option B, the rules must require the making of contributions to the Guarantee Fund by a licensed provider in accordance with the relevant scale of annual contributions fixed under paragraph 1(3) of Schedule 3 to the 1980 Act.

Robert Brown

171A As an amendment to amendment 171, line 24, at end insert <but only if these have been approved by the Council of the Law Society after a report confirming the fairness of the arrangements has been obtained from an independent actuary.>

Fergus Ewing

172 After section 19, insert—

<More about compensation rules>

(1) Compensation rules may include such further compensation arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.
(2) The Scottish Ministers may by regulations make further provision about compensation arrangements as to licensed providers, including (in particular)—

(a) for the content of compensation rules,

(b) in connection with a compensation fund, for functions of approved regulators and licensed providers,

(c) so far as concerning the relevant scale of annual contributions to the Guarantee Fund referred to in paragraph 1(3) of Schedule 3 to the 1980 Act, for functions of the Law Society.

(3) In sections (Choice of arrangements) and (Compensation rules: general) and this section, a reference to the Guarantee Fund is to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).

Robert Brown

268 After section 19, insert—

<Compensation

Practice rules must—

(a) require licensed providers to keep in place sufficient arrangements for compensating persons who, in the opinion of the approved regulator, suffer pecuniary loss by reason of dishonesty on the part of that provider in providing legal services,

(b) include provision for ensuring that such persons may be compensated even although the licensed provider no longer provides such services or is no longer in existence.>

Section 20

Bill Butler

270 Leave out section 20

Section 21

Bill Butler

271 Leave out section 21

Section 22

Robert Brown

Supported by: Bill Aitken

272 In section 22, page 11, line 37, after <may> insert <, with the consent of the Lord President,>

Bill Butler

273 Leave out section 22
Section 23

Fergus Ewing
27 In section 23, page 12, line 10, leave out <any such functions that the approved regulator has as regards> and insert <the approved regulator’s functions of regulating>

Robert Brown
274 In section 23, page 12, line 20, leave out from <but> to the end of line 23

Bill Butler
275 Leave out section 23

Section 24

Fergus Ewing
28 In section 24, page 12, line 25, after <assess> insert <the performance of>

Fergus Ewing
29 In section 24, page 13, line 14, after <delegate> insert <any of>

Bill Butler
276 Leave out section 24

Section 25

Bill Butler
277 Leave out section 25

Section 26

Robert Brown
Supported by: Bill Aitken
278 In section 26, page 13, line 23 after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
30 In section 26, page 13, line 24, leave out <to be necessary or expedient for them to have> and insert <appropriate>

Bill Aitken
279 In section 26, page 13, leave out line 28
Section 27

Fergus Ewing

31 In section 27, page 13, line 32, leave out <to it, or>

Bill Butler

281 Leave out section 27

Before section 28

Fergus Ewing

32 Before section 28, insert—

<Review of own performance>

(1) An approved regulator must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approved regulator’s compliance with section 62,
(b) the exercise of its regulatory functions,
(c) the operation of its internal governance arrangements,
(d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) The approved regulator must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approved regulator’s annual accounts (but only so far as they are relevant in connection with its functions under this Part).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

(a) the review of approved regulators’ performance,
(b) reports on reviews of their performance.>

Section 28

Fergus Ewing

33 In section 28, page 14, line 7, leave out <its duties under>

Bill Butler

282 Leave out section 28
Section 29

Robert Brown  
Supported by: Bill Aitken

283 In section 29, page 14, line 37, at end insert—

<\( )\) The Scottish Ministers may only take the measures mentioned in subsection (4)(a), (b), (e) and (f) with the consent of the Lord President.>

Robert Brown  
Supported by: Bill Aitken

284 In section 29, page 14, line 38 after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

34 In section 29, page 15, line 4, at end insert—

<\( )\) Before making regulations under subsection (6), the Scottish Ministers must consult every approved regulator.>

Bill Butler

285 Leave out section 29

Schedule 1

Bill Butler

287 Leave out schedule 1

Schedule 2

Bill Aitken

288 In schedule 2, page 63, leave out line 38

Bill Aitken

289 In schedule 2, page 64, line 1, leave out <other>

Bill Butler

290 Leave out schedule 2

Schedule 3

Bill Aitken

291 In schedule 3, page 65, line 19, after <may> insert <, with the consent of the Lord President,>
Schedule 4

Fergus Ewing

35 In schedule 4, page 69, line 15, leave out <application is determined> and insert <Scottish Ministers notify the approved regulator of their determination of the application>

Fergus Ewing

36 In schedule 4, page 69, line 18, at end insert—
<( ) On an appeal under this paragraph—
(a) the Court may—
(i) uphold, vary or quash the decision that is the subject of the appeal,
(ii) make such further order as is necessary in the interests of justice,
(b) the Court’s determination is final.>

Fergus Ewing

37 In schedule 4, page 70, line 1, leave out <period of>
Schedule 6

Bill Aitken
298 In schedule 6, page 73, leave out line 17

Bill Aitken
299 In schedule 6, page 73, leave out lines 24 to 33

Bill Butler
300 Leave out schedule 6

After section 29

Robert Brown
286 After section 29, insert—

<Annual report to the Parliament
Scottish Ministers must make a report to the Parliament annually on the anniversary of this section coming into force as to the extent to which the regulatory activities of approved regulators have, in the view of Scottish Ministers—
(a) affected,
(b) prevented,
(c) restricted,
(d) distorted, or
(e) increased
competition and quality of service in the legal services market, with particular regard to any policy statements issued by approved regulators under section 63.>

Section 30

Bill Butler
301 Leave out section 30

Schedule 7

Bill Butler
302 Leave out schedule 7

Section 31

Bill Butler
303 Leave out section 31
Section 32

Bill Butler

304 Leave out section 32

Section 33

Bill Butler

305 Leave out section 33

Section 34

Bill Butler

306 Leave out section 34

Section 35

Fergus Ewing

38 In section 35, page 17, line 33, leave out from beginning to <expedient> in line 34 and insert <No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort,>

Robert Brown

38A As an amendment to amendment 38, line 2, after <Scottish Ministers> insert <reasonably>

Bill Aitken

307 In section 35, page 17, line 33, after <only> insert <with the consent of the Lord President and>

Bill Butler

308 Leave out section 35

Section 36

Fergus Ewing

39 In section 36, page 18, line 13, after <a> insert <valid>

Fergus Ewing

40 In section 36, page 18, line 14, leave out <as construed by reference to section 15(1)> and insert <such as may be imposed under section 15(1)(b) or 53(5)>

Bill Butler

309 Leave out section 36
Section 37

**Bill Aitken**

310* In section 37, page 18, line 24, leave out <36(2)> and insert <section (Majority ownership)(1)(c)>

**Bill Aitken**

311* In section 37, page 18, line 27, leave out <36(2)> and insert <section (Majority ownership)(1)(c)>

**Bill Aitken**

312* In section 37, page 18, leaves out lines 32 to 34

**Bill Aitken**

313* In section 37, page 18, line 35, leave out <But> and insert <Subject to section (Majority ownership)(1),>

**Fergus Ewing**

41 In section 37, page 19, leave out lines 13 and 14 and insert—

<(  ) a litigation practitioner,>

**Fergus Ewing**

173 In section 37, page 19, line 15, after <agent> insert <or will writer>

**Bill Aitken**

314* In section 37, page 19, line 17, after <make> insert <, subject to section (Majority ownership)(1),>

**Fergus Ewing**

42 In section 37, page 19, line 17, leave out <further provision about> and insert—

<(i) provision specifying other categories of entity that are, or are not, eligible to be a licensed provider,
(ii) further provision about criteria for>

**Bill Aitken**

315* In section 37, page 19, line 19, leave out <36(2)> and insert <(Majority ownership)(1)(c)>

**Fergus Ewing**

43 In section 37, page 19, line 21, at end insert—

<(  ) Before making regulations under subsection (6)(b), the Scottish Ministers must consult every approved regulator,>
Bill Butler

316 Leave out section 37

After section 37

Robert Brown

Supported by: Bill Aitken

317 After section 37, insert—

**Majority ownership**

(1) An entity is eligible to be a licensed provider only if—

(a) at least 51% of the entity is owned, managed and controlled by the persons or bodies specified in any one of more of the following sub-paragraphs—

(i) solicitors,

(ii) firms of solicitors or incorporated practices, or

(iii) members of other regulated professions,

(b) it is not wholly owned, managed and controlled by solicitors, firms of solicitors or incorporated practices, and

(c) it has within it, for the provision of legal services, at least one solicitor who holds a practising certificate that is free from conditions (as construed by reference to section 15(1) of the 1980 Act.

(2) In subsection (1)(a)(iii), a “regulated profession” means a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications.

Bill Butler

318 Leave out section 38

Section 38

Fergus Ewing

44 In section 39, page 20, line 15, after second &lt;a&gt; insert &lt;valid&gt;

Fergus Ewing

45 In section 39, page 20, line 15, leave out &lt;as construed by reference to section 15(1)&gt; and insert &lt;such as may be imposed under section 15(1)(b) or 53(5)&gt;

Fergus Ewing

46 In section 39, page 20, line 27, at end insert—

&lt;(aa) adhere to the professional principles,&gt;
Fergus Ewing

47 In section 39, page 20, line 38, leave out <as regards> and insert <for exercising>

Fergus Ewing

48 In section 39, page 21, line 4, at end insert <(in their capacity as such)>

Robert Brown

319 In section 39, page 21, line 6, at end insert—

<(  ) Before making regulations under subsection (9), the Scottish Ministers must consult the
Lord President.>

Bill Butler

320 Leave out section 39

Section 40

Fergus Ewing

49 In section 40, page 21, line 33, at end insert <(in their capacity as such)>

Robert Brown

321 In section 40, page 21, line 33, at end insert—

<(  ) Before making regulations under subsection (7), the Scottish Ministers must consult the
Lord President.>

Bill Butler

322 Leave out section 40

Section 41

Robert Brown

323 In section 41, page 22, line 14, at end insert—

<(  ) Before making regulations under subsection (5), the Scottish Ministers must consult the
Lord President.>

Bill Butler

324 Leave out section 41

Section 42

Bill Butler

325 Leave out section 42
Section 43

Fergus Ewing

50 In section 43, page 23, line 34, leave out <Rules made in pursuance of section 10(1)(b) and (c) must (additionally)> and insert <Practice and licensing rules respectively must>

Fergus Ewing

51 In section 43, page 23, line 37, at end insert—
<( ) A licensed provider which or another person who is aggrieved by a direction under subsection (4) (or both jointly) may appeal against the direction—
(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which the direction is given.>

Bill Butler

326 Leave out section 43

Section 44

Bill Butler

327 Leave out section 44

Section 45

Fergus Ewing

102 In section 45, page 25, line 12, at end insert—
<(3A) Licensing rules must provide that the licensed provider’s licence may be revoked or suspended if the licensed provider wilfully disregards a disqualification imposed under section 44.>

Bill Butler

328 Leave out section 45

Section 46

Bill Butler

329 Leave out section 46

Section 47

Fergus Ewing

52 In section 47, page 26, line 31, after <is> insert <written>
Fergus Ewing
53 In section 47, page 26, line 37, leave out <or manager>

Robert Brown
330 In section 47, page 26, line 38, leave out from <, or> to end of line 39

Fergus Ewing
54 In section 47, page 27, line 4, leave out subsection (4)

Bill Butler
331 Leave out section 47

After section 47

Fergus Ewing
55 After section 47, insert—

<Working context

(1) A Head of Legal Services is, in furtherance of section 39(5)(aa) and (b), responsible for ensuring that there is (by or under the direction of the Head) adequate supervision of the legal work carried out by the designated persons within the licensed provider.

(2) Only a designated person within a licensed provider may carry out legal work in connection with its provision of legal services.

(3) Nothing in this Part affects the operation of—

(a) section 32 of the 1980 Act or any other enactment which requires that a particular sort of legal work be carried out by an individual of a particular description (or in a particular way), or

(b) any rule of professional practice, conduct or discipline (whether for solicitors or otherwise) which properly so requires.>

Section 48

Bill Butler
332 Leave out section 48

Section 49

Fergus Ewing
103 In section 49, page 27, line 19, leave out <outside> and insert <non-solicitor>

Fergus Ewing
104 In section 49, page 27, line 22, leave out from <may> to <but> in line 23
In section 49, page 27, line 24, leave out <an outside> and insert <a non-solicitor>

In section 49, page 27, line 29, at end insert—

But the approved regulator need not act as required by licensing rules made under subsection (2)(b) if, by such time as it may reasonably appoint, the licensed provider demonstrates to it that (following disqualification as required by section Ban for improper behaviour)(1) or otherwise the investor no longer has the relevant interest.

In section 49, page 27, line 31, leave out <outside> and insert <non-solicitor>

Leave out section 49

After section 49

After section 49, insert—

Exemption from fitness test

(1) Section 49(1) is subject to this section.

(2) The approved regulator need not act as required by that section in relation to any exemptible investor in the licensed provider.

(3) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on subsection (2),

(b) any threshold below the percentage specified in subsection (4) by reference to which it proposes to rely on subsection (2),

(c) where it proposes to rely on subsection (2), its reasons.

(4) In subsection (2), an “exemptible investor” is an investor who has less than a 10% stake in the total ownership or control of the licensed provider.

In section 50, page 28, line 3, leave out <an outside> and insert <a non-solicitor>

In section 50, page 28, line 7, leave out <(including associations),> and insert—

family, business or other associations (so far as bearing on character),>

Section 50
Robert Brown

110A As an amendment to amendment 110, line 2, at end insert <and suitability to be such an investor>

Fergus Ewing

111 In section 50, page 28, line 18, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

112 In section 50, page 29, line 5, leave out subsection (4)

Fergus Ewing

113 In section 50, page 29, line 10, at end insert—

<(  ) Where a non-solicitor investor is a body, it is relevant as respects the investor’s fitness for having an interest in a licensed provider whether or not the persons controlling the body’s affairs would (if they were investors in the licensed provider in their own right) be held to be fit in that regard.>

Robert Brown

113A As an amendment to amendment 113, line 3, leave out <controlling> and insert <having control or substantial influence in>

Bill Butler

334 Leave out section 50

After section 50

Fergus Ewing

114 After section 50, insert—

<Ban for improper behaviour>

(1) Where an approved regulator determines that a non-solicitor investor in a licensed legal services provider has contravened section 51(1) or (2), the approved regulator must disqualify the investor from having an interest in the licensed provider.

(2) A disqualification under subsection (1)—

(a) may be—

(i) without limit of time, or

(ii) for a fixed period,

(b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(3) Before disqualifying an investor under subsection (1), the approved regulator must give the investor 28 days (or such longer period as it may allow) to—

(a) make representations to it,
(b) take such steps as the investor may consider expedient.

(4) Practice rules must—

(a) set procedure (which the approved regulator is to follow) for imposing a disqualification under subsection (1),

(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that subsection.

(5) A person who is disqualified under subsection (1) may appeal against the disqualification—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the disqualification is imposed.

Section 51

Fergus Ewing

115 In section 51, page 29, line 14, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

116 In section 51, page 29, line 21, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

117 In section 51, page 29, line 22, after <interfere> insert <improperly>

Bill Butler

335 Leave out section 51

Section 52

Fergus Ewing

174 In section 52, page 29, line 34, leave out from <including> to end of line 6 on page 30

Fergus Ewing

175 In section 52, page 30, line 8, at end insert—

<(2A) The Scottish Ministers may by regulations—

(a) amend the percentage specified in section (Exemption from fitness test)(4) and paragraph 3A(3) of schedule 8,

(b) amend (by addition, elaboration or exception) a definition in subsection (4).

(2B) Regulations under subsection (2)(a) may (in particular)—

(a) impose requirements to which a licensed provider, or an investor in a licensed provider, is subject,
(b) specify criteria or circumstances by reference to which a non-solicitor investor is to be presumed, or held, to be fit (or unfit),

(c) set out—

(i) what amounts (to any extent) to ownership, control or another material interest,

(ii) what interest (or type) is relevant as regards a particular percentage stake in ownership or control,

(iii) by reference to a family, business or other association, what other interest (or type) also counts towards such a stake.

Robert Brown
175A As an amendment to amendment 175, line 2, after <Scottish Ministers> insert <with the consent of the Lord President>

Fergus Ewing
118 In section 52, page 30, line 9, leave out subsection (3)

Fergus Ewing
119 In section 52, page 30, line 12, after <has> insert <(to any extent)>

Fergus Ewing
176 In section 52, page 30, leave out lines 15 to 18 and insert—

<(b) a “non-solicitor investor” in a licensed provider is an investor who is not entitled to practise—

(i) as a solicitor,

(ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or

(iii) as a registered European lawyer.>

Fergus Ewing
177 In section 52, page 30, line 18, at end insert—

<(  ) In sections 49 to 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.>

Bill Butler
336 Leave out section 52
Schedule 8

Fergus Ewing
121 In schedule 8, page 76, line 14, leave out <outside> and insert <non-solicitor>

Fergus Ewing
122 In schedule 8, page 76, line 23, leave out <outside> and insert <non-solicitor>

Fergus Ewing
123 In schedule 8, page 76, line 24, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing
124 In schedule 8, page 76, line 37, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing
125 In schedule 8, page 77, line 1, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing
126 In schedule 8, page 77, line 4, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing
127 In schedule 8, page 77, line 4, leave out <(including>

Fergus Ewing
178 In schedule 8, page 77, leave out lines 6 and 7 and insert—

<(ii) because the person, having ceased to be entitled to practise as mentioned in section 52(4)(b) (while remaining as an investor), comes within the definition there.>

Fergus Ewing
129 In schedule 8, page 77, line 12, leave out <(1)(c)> and insert <(1)(c)(i)>

Fergus Ewing
130 In schedule 8, page 77, line 14, at end insert—

<(3A) In a case falling within sub-paragraph (1)(c)(ii), the licensed provider must (as soon as practicable) notify the approved regulator of the fact.>

Fergus Ewing
131 In schedule 8, page 77, line 18, leave out <or (3)> and insert <(3) or (3A)>
Fergus Ewing

In schedule 8, page 77, line 23, at end insert—

<Exemption from notification requirements>

3A(1) An approved regulator may in relation to any exemptible investor in a licensed provider waive the requirements to give it information (or notification) under paragraphs 1 and 3.

(2) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on sub-paragraph (1),

(b) any threshold below the percentage specified in subsection (3) by reference to which it proposes to rely on sub-paragraph (1),

(c) where it proposes to rely on sub-paragraph (1), its reasons.

(3) In sub-paragraph (1), an “exemptible investor” is (as the case may be)—

(a) an investor who has less than a 10% stake in the total ownership or control of the licensed provider, or

(b) a person whose intended acquisition of an interest in the licensed provider is of less than a 10% stake in the total ownership or control of the licensed provider.>

Bill Butler

Leave out schedule 8

Section 53

Fergus Ewing

In section 53, page 30, line 23, after <reason> insert <(except revocation or suspension of its licence under this Part)>.

Bill Butler

Leave out section 53

Section 54

Fergus Ewing

In section 54, page 31, line 8, after <reason> insert <(except revocation or suspension of its licence under this Part)>.

Bill Butler

Leave out section 54
Section 55

Bill Butler

340 Leave out section 55

Section 56

Bill Butler

341 Leave out section 56

Section 57

Fergus Ewing

58 In section 57, page 33, leave out lines 30 and 31 and insert—

<( ) acting as a litigation practitioner,>

Fergus Ewing

179 In section 57, page 33, line 32, after <agent> insert <or will writer>

Fergus Ewing

59 In section 57, page 34, line 11, at end insert—

<( ) the Court’s determination is final.>

Bill Butler

342 Leave out section 57

Section 58

Fergus Ewing

60 In section 58, page 34, leave out lines 29 and 30 and insert—

<( ) acting as a litigation practitioner,>

Fergus Ewing

180 In section 58, page 34, line 31, after <agent> insert <or will writer>

Bill Butler

343 Leave out section 58
Section 59

Fergus Ewing

61 In section 59, page 35, line 9, after "implying" insert "falsely"

Bill Butler

344 Leave out section 59

Section 60

Fergus Ewing

62 In section 60, page 35, line 32, leave out "(with any necessary modifications)"

Fergus Ewing

63 In section 60, page 35, line 34, at end insert "but with any necessary modifications"

Bill Butler

345 Leave out section 60

Section 61

Bill Butler

346 Leave out section 61

Section 62

Bill Butler

347 Leave out section 62

Section 63

Bill Butler

348 Leave out section 63

Section 64

Fergus Ewing

133 In section 64, page 37, line 10, at end insert—

<(A1) Any complaint about an approved regulator is to be made to the Scottish Legal Complaints Commission.

(A2) The Commission is to determine whether or not the complaint is—
(a) one for which section 57D(1) of the 2007 Act makes provision,
(b) frivolous, vexatious or totally without merit.

(A3) And—
(a) if the Commission determines that the complaint falls within subsection (A2)(a),
the Commission is to proceed by reference to section 57D(1) of the 2007 Act,
(b) if the Commission determines that the complaint falls within subsection (A2)(b),
the Commission—
(i) must notify the complainer and the approved regulator accordingly (with reasons),
(ii) is not required to take any further action.
(c) if the Commission determines that the complaint does not fall within subsection
(A2)(a) or (b), the Commission must refer the complaint to the Scottish Ministers.

Fergus Ewing
134 In section 64, page 37, line 11, leave out <made to them about an approved regulator> and insert <about an approved regulator that is referred to them under subsection (A3)(c)>

Fergus Ewing
135 In section 64, page 37, line 13, leave out subsection (2)

Fergus Ewing
136 In section 64, page 37, leave out line 19

Fergus Ewing
137 In section 64, page 37, line 21, leave out subsection (4)

Fergus Ewing
138 In section 64, page 37, line 26, leave out <Scottish Legal Complaints>

Fergus Ewing
139 In section 64, page 37, line 27, at end insert <(and, if they so delegate their function under subsection (1), they may also waive the referral requirement under subsection (A3)(c))>

Bill Butler
349 Leave out section 64

After section 64

Fergus Ewing
140 After section 64, insert—
<Levy payable by regulators>

(1) An approved regulator must pay to the Scottish Legal Complaints Commission—
   (a) in respect of each financial year, an annual levy,
   (b) if arising, a complaints levy.

(2) The amount of the annual levy or complaints levy payable by an approved regulator—
   (a) is to be determined by the Commission,
   (b) may be—
      (i) different from any amount payable as an annual general levy or (as the case may be) a complaints levy under Part 1 of the 2007 Act,
      (ii) in either case, of different amounts (including nil) in different circumstances.

(3) The complaints levy arises as respects an approved regulator where—
   (a) the Scottish Ministers delegate to the Commission their function under section 64(1) in relation to a complaint made about the approved regulator, and
   (b) the Commission upholds the complaint.

(4) Before determining for a financial year the amount of the annual levy or complaints levy, the Commission must consult—
   (a) each approved regulator (with particular reference to the proposed amount to be payable by it),
   (b) the Scottish Ministers.>

Section 65

Fergus Ewing

141 In section 65, page 39, line 2, at end insert—

<\(1A\) Section 29 applies for the purposes of subsection (1) as it applies for the purposes of sections 27(1) and 28(1).

\(1B\) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) and (1A)—

(a) an approved regulator is to be regarded as a relevant professional organisation whose members are its licensed providers,

(b) a licensed provider is to be regarded—
   (i) in connection with the annual general levy, as an individual person falling within the relevant category,
   (ii) in connection with the complaints levy, as an individual practitioner of the relevant type.>

Fergus Ewing

142 In section 65, page 39, line 3, at beginning insert <But>
<57CA Recovery of levy

(1) An approved regulator must—

(a) secure the collection by it, from its licensed providers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as it applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57C(1)(a) (including interest) as it applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57C(1)(b) (including interest) as it applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approved regulator is to be regarded as the relevant professional organisation,

(b) each of its licensed providers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57C(1) is subject to subsection (1).>
Section 67

Fergus Ewing

145 In section 67, page 40, line 12, leave out <outside> and insert <non-solicitor>

Fergus Ewing

64 In section 67, page 40, line 23, leave out <that> and insert <on which>

Fergus Ewing

65 In section 67, page 40, line 25, leave out <that> and insert <on which>

Bill Butler

352 Leave out section 67

Section 68

Fergus Ewing

146 In section 68, page 41, line 15, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

147 In section 68, page 41, line 15, at end insert <, or

( ) disqualified under section (Ban for improper behaviour)(1) (that is, from having an interest in a licensed provider).>

Fergus Ewing

148 In section 68, page 41, line 20, at end insert <or (as the case may be) disqualification>

Fergus Ewing

149 In section 68, page 41, line 21, at end insert <or (as the case may be) disqualification>

Fergus Ewing

150 In section 68, page 41, line 21, at end insert—

<( ) A list kept under this section must not include information relating to a person in respect of whom the determination or (as the case may be) disqualification—

(a) has been reversed on appeal, or

(b) otherwise, no longer applies.>

Bill Butler

353 Leave out section 68
Section 69

Bill Butler
354 Leave out section 69

Section 70

Bill Butler
355 Leave out section 70

After section 70

Fergus Ewing
66 After section 70, insert—

<Appeal procedure>

(1) This section applies in relation to an appeal to the sheriff under this Part.
(2) The appeal is to be made by way of summary application.
(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
   (b) make such further order (including for the expenses of the parties) as is necessary
       in the interests of justice.
(4) The sheriff’s determination in the appeal is final.>

Section 71

Bill Butler
356 Leave out section 71

Section 73

Fergus Ewing
181 In section 73, page 42, line 37, leave out <Part> and insert <Chapter>

Section 74

Bill Aitken
357 In section 74, page 43, line 16, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
151 In section 74, page 43, line 27, at end insert <(any of which may be removed or varied by the
Scottish Ministers after consulting the approving body)>
Bill Aitken

358 In section 74, page 43, line 27, at end insert—

<(  ) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2)(c).>

Fergus Ewing

152 In section 74, page 43, line 38, after <must> insert <, with reasons,>

Fergus Ewing

153 In section 74, page 44, line 11, at beginning insert <in relation to capability to act as an approving body,>

Fergus Ewing

154 In section 74, page 44, leave out line 13

Section 75

Fergus Ewing

182 In section 75, page 45, line 18, leave out <Part> and insert <Chapter>

Section 76

Fergus Ewing

155 In section 76, page 45, line 26, leave out from <approving body> to end of line 27 and insert <Scottish Ministers (but the approving body may collect it on their behalf).>

After section 76

Fergus Ewing

156 After section 76, insert—

<Review of own performance>

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approving body’s compliance with section 75(5),

(b) the exercise of its functions in relation to its regulatory scheme,

(c) its compliance with any measures applying to it by virtue of section 81(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
(6) The Scottish Ministers may by regulations make further provision about—
(a) the review of approved bodies’ performance,
(b) reports on reviews of their performance.>

Section 77

Fergus Ewing
157 In section 77, page 46, line 1, after <implying> insert <falsely>

Fergus Ewing
158 In section 77, page 46, line 2, after <otherwise> insert <so>

Section 81

Fergus Ewing
183 In section 81, page 48, line 6, leave out <Part> and insert <Chapter>

Fergus Ewing
159 In section 81, page 48, line 8, leave out subsection (4) and insert—
<(4) An approving body must—
(a) review annually the performance of its confirmation agents,
(b) prepare a report on the review,
(c) send a copy of the report to the Scottish Ministers.>

Fergus Ewing
160 In section 81, page 48, line 12, leave out from <about> to <(b)> in line 14 and insert—
<(a) about the review of confirmation agents,
(b) so far as it appears to them to be necessary for safeguarding the interests of clients
of confirmation agents—
(i) concerning the functions of approving bodies,
(ii) relating to>

After section 81

Fergus Ewing
184 After section 81, insert—
CHAPTER 2
WILL WRITING SERVICES

Regulation of will writers

Will writers and services
(1) For the purposes of this Part, will writing services are services that are—
(a) described in subsection (2), and
(b) provided (or offered)—
(i) to members of the public, and
(ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing wills or other testamentary writings.

(3) For the purposes of this Part, a will writer is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide will writing services is conferred.

Fergus Ewing

After section 81, insert—

<Approving bodies
(1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section (Certification of bodies).

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—
(a) a copy of the applicant’s proposed regulatory scheme (see section (Certification of bodies)(1)(b)),
(b) a description of—
(i) the applicant’s constitution and composition (including internal structure),
(ii) its activities.

(4) The applicant—
(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,
(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

Fergus Ewing

After section 81, insert—

45
Certification of bodies

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—
   (a) the applicant is suitable to be an approving body,
   (b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section (Regulatory schemes)).

(2) The Scottish Ministers may certify the applicant as an approving body—
   (a) either—
      (i) without limit of time, or
      (ii) for a fixed period,
   (b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,
   (c) subject to conditions (any of which may be removed or varied by the Scottish Ministers after consulting the approving body).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—
   (a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
   (a) must send a copy of the application to the OFT,
   (b) may send—
      (i) to any other consultee, a copy of the application,
      (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
   (a) refuse to certify it as an approving body, or
   (b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—
   (a) the process for seeking their certification,
   (b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

Fergus Ewing

After section 81, insert—
<Regulatory schemes

(1) An approving body must—

(a) make a regulatory scheme for—

(i) conferring on any of the individual persons within its membership the right to provide will writing services, and

(ii) regulating the provision of will writing services by the persons on whom (in accordance with the scheme) that right is conferred, and

(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) describe the training requirements to be met by a prospective will writer,

(b) incorporate a code of practice to which a will writer (and anyone acting on behalf of the will writer in relation to will writing services) is subject,

(c) require that a will writer keep in place sufficient arrangements for professional indemnity,

(d) include rules about—

(i) the making and handling of any complaint about a will writer,

(ii) the measures that may be taken by the approving body, in relation to a will writer, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the will writer were a practitioner to whom that section relates)) about the will writer is upheld,

(e) allow a will writer to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),

(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by will writers (and persons acting on their behalf in relation to will writing services),

(b) except in such circumstances as the approving body considers appropriate, prohibit the drawing or preparation of a will or other testamentary writing by a will writer which provides for the writer to be a beneficiary,

(c) require a will writer who provides the service of storing wills or other testamentary writings to keep in place sufficient arrangements for the storage of such documents (including arrangements in the event of the writer ceasing to provide will writing services),

(d) make such further arrangements as to the professional practice, conduct or discipline of will writers for which provision is (in the approving body’s opinion) necessary or expedient,

(e) provide that it is a breach of the code of practice for a will writer to fail to comply with the writer’s duties under any enactment specified in the code,

(f) provide that a breach of the code of practice by a person acting on behalf of a will writer in relation to will writing services constitutes a breach of the code of practice by the writer,
(g) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a will writer to provide will writing services if the writer contravenes the code of practice,

(ii) the suspension of that right of a will writer if a complaint, suggesting that the writer is guilty of professional misconduct in relation to the provision of will writing services, is made about the writer.

(4) A will writer may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the writer’s right to provide will writing services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the writer.

(5) An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.

Fergus Ewing

After section 81, insert—

<Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section (Regulatory schemes)(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section (Certification of bodies).

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

(4) A will writer may appeal against a financial penalty (or the amount of a financial penalty) imposed on the writer by virtue of this section—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the penalty is intimated to the writer.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

Fergus Ewing

After section 81, insert—

<Review of own performance

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approving body’s compliance with section (Regulatory schemes)(5),

(b) the exercise of its functions in relation to its regulatory scheme,
(c) its compliance with any measures applying to it by virtue of section (Ministerial intervention)(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

(a) the review of approved bodies’ performance,

(b) reports on reviews of their performance.

Fergus Ewing

190 After section 81, insert—

<Pretending to be authorised

(1) A person commits an offence if the person—

(a) pretends to be a will writer (or otherwise pretends to have the right to provide will writing services under this Part), or

(b) takes or uses any name, title, addition or description implying falsely that the person is a will writer (or otherwise so implying that the person has the right to provide will writing services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Fergus Ewing

191 After section 81, insert—

<Other regulatory matters

Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section (Ministerial intervention)(3).

(2) The Scottish Ministers may—

(a) revoke the certification given to the approving body under section (Certification of bodies),

(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

Fergus Ewing

192 After section 81, insert—
<Surrender of certification>

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section *(Certification of bodies)*.

(2) The approving body must—
   (a) take all reasonable steps to mitigate such disruption to the clients of its will writers as is likely to result from the surrender,
   (b) in particular, take steps for ensuring that any relevant work is—
      (i) completed, or
      (ii) taken over by a suitably qualified person,
   before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
   (a) for the purpose of subsection (2), or
   (b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
   (a) subsection (2), and
   (b) any direction given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

Fergus Ewing

193 After section 81, insert—

<Register and list>

(1) The Scottish Ministers—
   (a) must keep and publish a register of approving bodies,
   (b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
   (a) its contact details (including its address, website and telephone number),
   (b) the date on which it was given the relevant certification under section *(Certification of bodies)*.

(3) An approving body must—
   (a) keep a list of its will writers,
   (b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its will writers as the Scottish Ministers may reasonably request.>
Ministerial Intervention

(1) An approving body must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
   (a) if directed to do so by the Scottish Ministers, must—
      (i) review its regulatory scheme (or any relevant part of it), and
      (ii) report to them its findings and (if appropriate) inform them of any proposed amendments to the scheme,
   (b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—
      (i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
      (ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—
   (a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,
   (b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(4) An approving body must—
   (a) review annually the performance of its will writers,
   (b) prepare a report on the review,
   (c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—
   (a) about the review of will writers,
   (b) so far as it appears to them to be necessary for safeguarding the interests of clients of will writers—
      (i) concerning the functions of approving bodies,
      (ii) relating to will writers.
After section 81, insert—

**<Step-in by Ministers>**

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approving body.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approving body in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Chapter to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of will writing services by will writers is regulated effectively.

Section 82

Fergus Ewing

In section 82, page 48, line 16, after <74(3)(a)> insert <or (Certification of bodies)(3)(a)>

Section 83

Fergus Ewing

In section 83, page 48, line 33, after <agents> insert <and will writers>

Fergus Ewing

In section 83, page 49, line 1, after <agent> insert <or will writer>

Fergus Ewing

In section 83, page 49, line 15, at end insert—

<(1A) A will writer must pay to the Commission—

(a) the annual general levy, and

(b) the complaints levy (if arising),

in accordance with Part 1.>

Fergus Ewing

In section 83, page 49, line 15, at end insert—

<(1B) Section 29 applies for the purposes of subsections (1) and (1A) as it applies for the purposes of sections 27(1) and 28(1).>

(1C) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) to (1B)—
(a) an approving body is to be regarded as a relevant professional organisation whose members are its licensed providers,

(b) a confirmation agent or (as the case may be) will writer is to be regarded—

(i) in connection with the annual general levy, as an individual person falling within the relevant category,

(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

Fergus Ewing

In section 83, page 49, line 15, at end insert—


57I Recovery of levy

(1) An approving body must—

(a) secure the collection by it, from its confirmation agents or (as the case may be) will writers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as its applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57H(1)(a) and (1A)(a) (including interest) as its applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57H(1)(b) and (1A)(b) (including interest) as its applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approving body is to be regarded as the relevant professional organisation,

(b) each of its confirmation agents or (as the case may be) will writers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57H(1) and (1A) is subject to subsection (1).

57J Interpretation of Part 2B

Fergus Ewing

In section 83, page 49, leave out line 19
Fergus Ewing

202 In section 83, page 49, line 19, at end insert—

“will writer”,

After section 84

Fergus Ewing

162 After section 84, insert—

Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.
(2) The appeal is to be made by way of summary application.
(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
   (b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.
(4) The sheriff’s determination in the appeal is final.

Section 85

Fergus Ewing

163 In section 85, page 49, line 33, leave out “of the 1980 Act”

Fergus Ewing

203 In section 85, page 49, line 34, after “Act” insert —

( ) in subsection (1), after paragraph (c) insert “or
(d) any will or other testamentary writing,”,
( ) in subsection (2)(a), for “or papers” substitute “, papers, will or testamentary writing”,
( )

Fergus Ewing

164 In section 85, page 49, line 35, leave out “Legal Services (Scotland) Act 2010” and insert “2010 Act”

Fergus Ewing

204 In section 85, page 49, line 35, at end insert—

“(2D) Subsection (1)(d) does not apply to a will writer within the meaning of Part 3 of the 2010 Act.”,
Fergus Ewing
205 In section 85, page 50, line 1, after <agents> insert <or will writers>

Fergus Ewing
165 In section 85, page 50, line 1, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

Fergus Ewing
206 In section 85, page 50, line 5, after <agent> insert <or will writer>

Fergus Ewing
207 In section 85, page 50, line 9, after <agents> insert <or will writers>

Section 86

Fergus Ewing
67 In section 86, page 50, line 27, leave out <practices> and insert <practitioners>

Fergus Ewing
68 In section 86, page 50, line 30, leave out <practices> and insert <practitioners>

Fergus Ewing
69 In section 86, page 50, line 32, leave out <practices> and insert <practitioners>

Fergus Ewing
70 In section 86, page 50, line 33, leave out <practices> and insert <practitioners>

Fergus Ewing
71 In section 86, page 51, leave out lines 1 and 2 and insert—
<(  ) litigation practitioners.>

Section 90

Fergus Ewing
72 In section 90, page 52, line 32, leave out <or a licensed legal services provider> and insert—
<(2B) This section does not apply in relation to the taking or using by a licensed legal services provider of a name, title, addition or description if the licensed provider has the Society’s written authority for using it.

(2C) For the purpose of subsection (2B), the Council are to make rules which—
(a) set the procedure for getting the Society’s authority (and specify the conditions that the Society may impose if it gives that authority),

55
(b) specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority).>

Fergus Ewing

73 In section 90, page 53, line 6, leave out from second <in> to end of line 8 and insert—

<(a) after the entry for “the 2007 Act” insert—

“the 2010 Act” means the Legal Services (Scotland) Act 2010;”,

(b) at the appropriate alphabetical place insert—

“licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the 2010 Act;”.

Section 91

Bill Aitken

359 In section 91, page 53, line 14, at end insert—

<( ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (e) insert—

“(f) a solicitor has been convicted by any court of an act involving dishonesty or has been sentenced to a term of imprisonment;”>

Bill Aitken

360* In section 91, page 53, line 14, at end insert—

<( ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (f) insert—

“(g) a disqualification order under the Company Directors Disqualification Act 1986 (c.46) is made against a solicitor;”>

Bill Aitken

361 In section 91, page 53, line 14, at end insert—

<( ) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“( ) A practising certificate which has ceased to have effect by virtue of section 18(1)(g) shall again have effect when the disqualification ceases to have effect.”>

Fergus Ewing

74 In section 91, page 53, leave out lines 29 to 31

Bill Aitken

362 In section 91, page 53, line 34, at end insert—
<\(\text{ai} \) subsection (1A)(e)(ii) is repealed,
\(\text{bi} \) after subsection (1A)(e)(ii), insert—

“(iia) that any recognition granted under this section shall have effect from the date it bears, but shall expire on the 31st October next after it is issued;”>

Bill Aitken

363 In section 91, page 53, line 37, at end insert—

<\(\text{ia} \) after section 34(1A), insert—

“(1AA)Rules under this section may make provision requiring firms of solicitors to register with the Council and providing for their regulation and subsection (1A) shall apply for the purpose of regulating and registering such firms as it applies for the purpose of regulating and recognising incorporated practices, subject to any necessary modifications (and firms of solicitors when registered and for as long as they are registered are in this Act referred to as “registered firms of solicitors”).

(1AB) In subsection (1AA), a “firm of solicitors” includes—

(a) a single solicitor practising under the solicitor’s own name; and

(b) a solicitor otherwise practising as a sole practitioner.”>

After section 91

Fergus Ewing

75 After section 91, insert—

<\text{Citizens advice bodies}

(1) In section 26 of the 1980 Act, in subsection (2), after “law centre” insert “or a citizens advice body”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““citizens advice body” means an association which is formed (and operates)—

(a) otherwise than for the purpose of making a profit, and

(b) with the sole or primary objective of providing legal and other advice (including information) to the public for no fee, gain or reward;”.

(3) The Scottish Ministers may by regulations modify the definition of “citizens advice body” in section 65(1) of the 1980 Act.

(4) Before making regulations under subsection (3), the Scottish Ministers must consult—

(a) the Lord President,

(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate.”>
After section 91, insert—

Court of Session rules

In the Court of Session Act 1988—

(a) in section 5 (power to regulate procedure), after paragraph (ee) insert—

“(ef) to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf.”,

(b) after section 5 insert—

“5A Rules for lay representation

(1) Rules under section 5(ef)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 5(ef) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 5(ef) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or

(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Sheriff court rules

In the Sheriff Courts (Scotland) Act 1971—

(a) in section 32 (power of Court of Session to regulate civil procedure), in subsection (1), after paragraph (m) insert—

“(n) permitting a lay representative, when appearing at a hearing in any category of civil proceedings along with a party to the proceedings, to make oral submissions to the sheriff on the party’s behalf.”,

(b) after section 32 insert—

“32A Rules for lay representation

(1) Rules under section 32(1)(n)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.
(2) Section 32(1)(n) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 32(1)(n) and this section, a “lay representative” is a person who is not—
   (a) a solicitor,
   (b) an advocate, or
   (c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Fergus Ewing

210 After section 91, insert—

<Guarantee Fund

Use of Guarantee Fund

In section 43 (Guarantee Fund) of the 1980 Act—
   (a) in subsection (2)—
      (i) the word “or” immediately preceding paragraph (b) is repealed,
      (ii) after paragraph (b) insert “; or
   (c) any licensed legal services provider or any person within it, even if—
      (i) the Society is not its approved regulator, or
      (ii) subsequent to the act concerned it has ceased to operate.”,
   (b) in subsection (3), after paragraph (cc) insert—
      “(cd) to a licensed provider or an investor therein in respect of a loss suffered by reason of dishonesty to which subsection (2)(c) relates in connection with the licensed provider’s provision of legal services (with the same meaning as for Part 2 of the 2010 Act);”,
   (c) in subsection (7)(c), after “incorporated practice” insert “or a licensed provider”,
   (d) after subsection (7) insert—
      “(8) In the case of licensed providers, this section and Part I of Schedule 3 apply in relation to (and only to) such licensed providers as are regulated by an approved regulator that in furtherance of section (Choice of arrangements)(4) of the 2010 Act does not maintain a compensation fund as referred to in that section.

(9) In this section and paragraph 1 of Schedule 3—
   “approved regulator”,
   “investor”,
   are to be construed in accordance with Part 2 of the 2010 Act.”.

Fergus Ewing

211 After section 91, insert—
Contributions to the Fund

(1) In Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act, in paragraph 1—
   (a) in sub-paragraph (2A)—
      (i) the words “directors of incorporated practices” become head (a),
      (ii) after that head (as so numbered) insert “, or
            (b) investors in licensed legal services providers.”,
   (b) in sub-paragraph (2B)—
      (i) the words from “by every” to the end become head (a),
      (ii) in that head (as so numbered), for “scale of such” substitute “relevant scale of annual corporate”,
      (iii) after that head (as so numbered) insert “, and
            (b) by every licensed provider in respect of each year during which or part of which it operates as such under the licence issued by its approved regulator a contribution (also an “annual corporate contribution”) in accordance with the relevant scale of annual corporate contributions referred to in sub-paragraph (3).”,
   (c) in sub-paragraph (3)—
      (i) for “scale” in the first place where it occurs substitute “scales”,
      (ii) the words from “, which scale” to the end are repealed,
   (d) after sub-paragraph (3) insert—
      “(3A) The scales of annual corporate contributions—
         (a) are to be fixed under sub-paragraph (3) by reference to all relevant factors, including—
            (i) in the case of incorporated practices, the number of solicitors that they have as directors or employees,
            (ii) in the case of licensed providers, the number of solicitors that they have as investors or employees,
         (b) may otherwise make different provision as between incorporated practices and licensed providers.”,
   (e) in sub-paragraph (4), after “incorporated practice” insert “or a licensed provider”,
   (f) in sub-paragraph (5), after “incorporated practice” insert “and licensed provider”,
   (g) in sub-paragraph (8), after “incorporated practice” insert “or a licensed provider”.

(2) In Schedule 3 to the 1980 Act, in paragraph 3(2)—
   (a) for “and incorporated practices” substitute “, incorporated practices and licensed providers”,
   (b) for “or incorporated practice or practices” substitute “, incorporated practice or practices or licensed provider or providers”.

60
Fergus Ewing

212 After section 91, insert—

<Cap on individual claims
In Schedule 3 to the 1980 Act—

(a) in paragraph 4, after sub-paragraph (3) insert—

“(3A) The amount of an individual grant from the Guarantee Fund may not exceed £1.25 million.”;

(b) after paragraph 4 insert—

“(1) The Scottish Ministers may by regulations amend the sum specified in paragraph 4(3A).

(2) Before making regulations under sub-paragraph (1), the Scottish Ministers must consult the Council (and take account of sections 4 and (Consultation by Ministers) of the 2010 Act).

(3) The power to make regulations under sub-paragraph (1) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.>

Robert Brown

365 After section 91, insert—

<Protection of branding of firm description
(1) The Scottish Ministers may, after consulting—

(a) the Law Society,
(b) the Faculty of Advocates,
(c) any approved regulator,
(d) any approving body, and
(e) any other person or body considered appropriate by the Scottish Ministers,

designate such terms as it considers appropriate as being restricted in use to firms of solicitors or licensed providers or specified categories of the same.

(2) The Scottish Ministers may by regulations require approved regulators to include provision in their practice rules as to the use of terms designated under subsection (1).>

Before section 92

Fergus Ewing

76 Before section 92, insert—

<Acting as approved regulator
After section 1 of the 1980 Act insert—

“1A Power to act as statutory regulator

The Society may—
(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,
(b) do anything that is necessary or expedient for the purposes of doing so.”.

Robert Brown

76A As an amendment to amendment 76, line 7, at end insert—

<( ) act as an approving body within the meaning of Part 3 of the 2010 Act,>.

Bill Aitken

364* Before section 92, insert—

<Scottish solicitors guarantee fund

In paragraph 1 of Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act—

(a) in sub-paragraph (2A) after “are” insert “(a)” and after “practices” insert—

“(b) partners in a registered firm of solicitors;
(c) in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practicing under the solicitors own name or a solicitor otherwise practicing as a sole practitioner.”

(b) after sub-paragraph (2B) insert—

“(2BB) Subject to the provisions of this Act, there shall be paid to the Society on behalf of the Guarantee Fund by every registered firm of solicitors in respect of each year during which, or part of which, it is registered under section 34(1AA) a contribution (hereafter referred to as an “annual practice contribution”) in accordance with the scale of such contributions referred to in sub-paragraph (3).”.

(c) in sub-paragraph (3)—

(i) after “corporate contributions” insert “and the annual practice contribution”
(ii) after “directors” insert “partners”,
(iii) after “practices” insert “or registered firms of solicitors”, and
(iv) in paragraph (4), after “practice” insert “and no annual practice contribution by a registered firm of solicitors”,

(d) in sub-paragraph (5)—

(i) after “corporate contribution”)” insert “and upon every registered firm of solicitors a contribution (hereinafter referred to as a “special practice contribution”)”,
(ii) after “corporate contribution” (where it appears for the second time) insert “and a special practice contribution”,

(e) in sub-paragraph (8), after “incorporated practice” insert “or of a registered firm of solicitors”.>
Section 92

Fergus Ewing
77 In section 92, page 55, line 3, leave out <objectives> and insert <functions>

Fergus Ewing
78 In section 92, page 55, leave out lines 4 to 27

After section 92

Bill Aitken
366* After section 92, insert—

<Guarantee Fund

In section 43 (guarantee fund) of the 1980 Act—

(a) in subsection (2) for “the Guarantee Fund shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of” substitute “where the Council are satisfied that a person has suffered or is likely to suffer loss in consequence of dishonesty on the part of any person or body mentioned in subsection (2A), the Council may make a grant or loan out of the Guarantee Fund for the purpose of relieving that loss on such terms and conditions as the Council may determine.

(2A) The persons or bodies mentioned in this subsection are—”,

(b) in subsections (3), (4) and (5), after “grant” wherever appearing, insert “or loan”,

(c) after subsection (3) insert—

“(3A) Where an application for a grant or loan is made in any case which does not fall within subsection (3), the Council may, as it thinks fit, grant or refuse that application but, where it refuses the application, the Council shall give reasons to the applicant for doing so.

(3B) Where the Council grant that application, the Council shall determine the amount of the grant or loan and the terms and conditions upon which it is made.”>

Bill Aitken
367* After section 92, insert—

<Safeguarding interests of clients in certain other cases

In section 46(3A) (safeguarding interests of clients in certain other cases) of the 1980 Act—

(a) for “apply to the court” substitute “make”,

(b) from “leave” to the end substitute “the approval of the Council”.”>
After section 92, insert—

**Subscription to the Law Society**

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 6A insert—

“6B(1) Every practice shall, for each year, pay to the Society such subscription as may be fixed from time to time by the Society in general meeting and different subscriptions may be fixed for different kinds of practices.

(2) The subscription shall be payable by the practice at the time of its application for registration or recognition.

(3) If a practice is first registered or recognised after the beginning of any year, the subscription payable by it shall be calculated by reference to the number of months remaining in that year after it is registered or recognised.

(4) In this paragraph and in paragraph 6C—

“practice” means a registered firm of solicitors or an incorporated practice; and

“year” means the period of 12 months commencing on 1 November or such other day as may be fixed by the Council.

6C(1) The Society may, in addition to the subscription imposed paragraph 6C(1), impose in respect of any year a special subscription on all practices of such amount and payable at such time and for such specified purposes as the Society may determine in general meeting.

(2) The Society may determine in general meeting that different special subscriptions may be imposed under subparagraph (1) in respect of different kinds of practices or that the special subscription shall not be payable by a kind of practice.

(3) No imposition may be made under subparagraph (1) unless a majority of members voting at the general meeting at which it is proposed has, whether by proxy or otherwise, voted in favour of its being made.”

**Charging for services by the Law Society**

In Schedule 1 (the Law Society of Scotland) of the 1980 Act, after paragraph 10 insert—

“10A(1) The Society may, in accordance with a scheme of charges fixed from time to time by the Council—

(a) charge for any services which it provides in the course of carrying out its functions; and

(b) demand and recover those charges from any person to whom it provides those services.

(2) The Council may fix charges in a scheme under subparagraph (1) by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to it to be appropriate.”
Bill Aitken

370*  After section 92, insert—

<Loans from the guarantee fund

In Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act, after paragraph 4 insert—

“4A The Council may make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council.”.>

Section 93

Fergus Ewing

79  In section 93, page 56, line 2, at end insert—

<( ) Accordingly, the Council (acting in any other capacity) must not interfere unduly in the regulatory committee’s business.>

Fergus Ewing

80  In section 93, page 56, line 3, at end insert—

<( ) the committee’s membership may include persons who are not members of the Council,>

Fergus Ewing

81  In section 93, page 56, line 4, at end insert—

<( ) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1),>

James Kelly

371  In section 93, page 56, line 4, at end insert—

<( ) two members of the committee shall be licensed employment law services providers,>

Fergus Ewing

82  In section 93, page 56, line 7, at end insert—

<( ) a sub-committee—

(i) is also subject to those rules,
(ii) may be formed without the Council’s approval.>
Fergus Ewing  
83 In section 93, page 56, line 8, after <committee> insert <(or a sub-committee of it)>

Fergus Ewing  
84 In section 93, page 56, line 10, at end insert—
<(  ) prescribe a maximum number of members that the regulatory committee may have,>

Fergus Ewing  
85 In section 93, page 56, line 17, at end insert <(and take account of sections 4 and (Consultation by Ministers) of the 2010 Act)>

Fergus Ewing  
213 In section 93, page 56, line 29, after <agents> insert <or will writers>

Fergus Ewing  
86 In section 93, page 56, line 29, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

James Kelly  
372 In section 93, page 56, line 30, at end insert—
<(f) licensed legal services providers, or
(g) licensed employment law services providers.>

Fergus Ewing  
87 In section 93, page 56, line 35, after <of> insert—
<(  ) setting standards of qualification, education and training,
(  ) keeping the roll,
(  ) administering the Guarantee Fund,
(  )>

After section 93

Fergus Ewing  
88 After section 93, insert—

<The 1980 Act: further modification

Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—
“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.

Fergus Ewing

89 After section 93, insert—

<Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—

(a) the existing text becomes subsection (1),

(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,

(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and

(b) it is otherwise appropriate to do so.”.

(2) In section 12C (removal of name from register on request) of the 1980 Act—

(a) the existing text becomes subsection (1),

(b) in subsection (1) (as so numbered), the words from “, on” to “hand,” are repealed,

(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and

(b) it is otherwise appropriate to do so.”.

James Kelly

373 After section 93, insert—

<Representative functions of the Law Society

(1) The 1980 Act is amended as follows.

(2) In section 3(1) (establishment and functions of Council of the Law Society), at the beginning insert “Subject to section 3C,”.

(3) In section 3A (discharge of functions of Council of the Law Society), in subsection (11), after “section 3B” insert “and section 3C”.

(4) After section 3B (regulatory committee) insert—
“3C The representative functions of the Society

(1) The representative functions of the Society shall not vest in, or be exercised by, the Council but shall be exercised on behalf of the Society by a Representative Council.

(2) Membership of the Representative Council shall be elected in accordance with the provisions of the scheme made under paragraph 2(a) of Schedule 1.

(3) Only solicitors may be elected to the Representative Council.

(4) The Chair of the Representative Council shall be the General Secretary of the Society who shall be elected in accordance with the provisions of the scheme made under paragraph 2(a) of Schedule 1.

(5) The General Secretary of the Society may not, while holding that office, serve as President of the Society.

(6) The Representative Council may arrange for any of its functions (other than excepted functions) to be discharged on their behalf by—

(a) a committee of the Representative Council;

(b) a sub committee of such a committee; or

(c) an individual (whether or not a member of the Society’s staff).

(7) The Representative Council may, in exercise of the power conferred by subsection (6), impose restrictions or conditions on the body or person by whom the function is to be discharged.

(8) An arrangement made under this section may identify an individual by name, or by reference to an office or post which the individual holds.

(9) An arrangement under this section for the discharge of any of the functions of the Representative Council may extend to any of the functions of the Society which is exercisable by the Representative Council.

(10) For the purposes of this section, “the representative functions of the Society” means the functions of the Society in carrying out the objects of the Society in promoting the interests of the solicitors’ profession in Scotland under section 1(2)(a).”

(5) In schedule 1 (The Law Society of Scotland)—

(a) in paragraph 2(a), after “the Council” insert “and the Representative Council”;

(b) in paragraph 2(d), after “sub-committees” insert “of the Council and of the Representative Council”; and

(c) in paragraph 3 after “Council” (wherever it appears) insert “or Representative Council”.

After section 94

Fergus Ewing

After section 94, insert—
Notification if suspension lifted

(1) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“(5B) On the occurrence of any of the circumstances mentioned in subsections (4) to (5A), the solicitor concerned must notify the Council in writing (and without delay).”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of the 1980 Act, after subsection (4) insert—

“(4A) On the occurrence of any of the circumstances mentioned in subsections (2) to (4), the lawyer concerned must notify the Council in writing (and without delay).”.

Bill Aitken

374 After section 94, insert—

Complaints to Tribunal

(1) Section 51 of the 1980 Act (complaints to Tribunal) is amended as follows.

(2) In subsection (1A) for “in respect of” to the end substitute “made the Council (whether or not on behalf of any other person) against—

(a) a solicitor, whether or not the solicitor had a practising certificate in force at the time the conduct complained of occurred and notwithstanding that subsequent to that time the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice;

(b) a firm of solicitors, whether or not since the time of the conduct complained of there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;

(c) an incorporated practice, whether or not since the time of the conduct complained of there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) or has been wound up;

(d) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 and includes any such person, whether or not the person had acquired the right at the time of the conduct complained of and notwithstanding that subsequent to that time the person no longer has the right;

(e) a conveyancing practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

(f) an executry practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;
and any reference in Part IV to any of those persons or practices mentioned in paragraphs (a) to (f) shall be construed accordingly.”

(3) In subsection (2), after “that” insert—

“(a) a solicitor may have been guilty of professional misconduct or unsatisfactory professional conduct;

(b) a solicitor or”.

Bill Aitken

375 After section 94, insert—

<Procedure on complaints and appeals to Tribunal

(1) The 1980 Act is amended as follows.

(2) In section 52 (procedure on complaints and appeals to Tribunal), after subsection (3) insert—

“(4) For the avoidance of doubt, rules made by the Tribunal under subsection (2) may provide for the functions of the Tribunal to be exercised on behalf of the Tribunal, in relation to a particular case or part of a case—

(a) by any particular tribunal constituted in accordance with paragraph 5 of Schedule 4 to deal with that case or part;

(b) by the chairman or vice chairman of the Tribunal other than the functions of hearing and determining the merits of any case.”

Section 97

Fergus Ewing

91 Leave out section 97 and insert—

<Information about legal services

After section 35A of the 1986 Act insert—

“35AA Information about legal services

(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—

(a) each of the bodies mentioned in subsection (3)(a) and (b) must—

(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and

(ii) give the Board a summary of the relevant facts.

(b) the body mentioned in subsection (3)(d) must—

(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and

(ii) give the Board a summary of the relevant facts.

(3) The bodies are—
(a) the Law Society,
(b) the Faculty of Advocates,
(c) the Scottish Court Service,
(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—
(a) section 1(2A),
(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.”.>

Section 98

Fergus Ewing

92 In section 98, page 58, line 13, leave out <29(9),> and insert <29—
( ) in subsection (4), after “members” insert “, and the Scottish Ministers,”,
( ) in subsection (9),>

After section 98

Fergus Ewing

93 After section 98, insert—

<The 2007 Act: further provision

(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—
“(1A) The Scottish Ministers may make such further provision as, having regard to the effect of the Legal Services Act 2007 so far as concerning the subject matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider necessary or expedient in connection with this Act or any related provisions of the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after “section 78(1)” insert “or (1A)”.

Section 99

Bill Butler

376* In section 99, page 58, line 33, leave out from beginning to end of line 1 on page 59

Fergus Ewing

94 In section 99, page 58, line 36, at end insert—

<( ) section 37(6)(a)(i),>
214 In section 99, page 58, line 36, at end insert—

<(  ) section 52(2A).>

215 In section 99, page 59, line 3, at end insert—

<(  ) section (Regulatory schemes)(2)(f),
   (  ) section (Ministerial intervention)(5)(b),
   (  ) section (Step-in by Ministers)(1).>

378 After section 99, insert—

<Further modification>

(1) The Scottish Ministers may by regulations made by statutory instrument—

   (a) amend the percentage specified in section (Majority ownership)(1)(a), or
   (b) repeal section (Majority ownership).

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe that the effect of the amendment or (as the case may be) repeal would be—

   (a) compatible with the regulatory objectives, and
   (b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

   (a) the Lord President,
   (b) the Law Society,
   (c) every approved regulator,
   (d) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.>
Section 101

Fergus Ewing

95 In section 101, page 60, line 7, at end insert—

<( ) a reference to a litigation practitioner is to a person having a right to conduct
litigation, or a right of audience, by virtue of section 27 of the 1990 Act.>

Schedule 9

Fergus Ewing

96 In schedule 9, page 79, line 17, at end insert—

<litigation practitioner>

Bill Butler

377* In schedule 9, page 80, leave out lines 1 to 14

Fergus Ewing

167 In schedule 9, page 80, line 9, leave out <outside> and insert <non-solicitor>

Fergus Ewing

216 In schedule 9, page 80, line 16, at end insert—

<approving body (of will writer) section (Approving bodies)>

Fergus Ewing

168 In schedule 9, page 80, line 17, after <and> insert <confirmation>

Fergus Ewing

217 In schedule 9, page 80, line 18, leave out <section 75> and insert <sections 75 and (Regulatory
schemes)>

Fergus Ewing

218 In schedule 9, page 80, line 18, at end insert—

<will writer and will writing services section (Will writers and services)>
1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

**Groupings of amendments**

**Regulatory objectives etc.**
219, 220, 221, 222, 1, 223, 224, 225, 2, 226, 97

*Notes on amendments in this group*
Amendment 221 pre-empts amendment 222

**Consultation by Scottish Ministers**
3

**Licensed legal services providers**

**Employment law services providers**
230, 231, 232

**Approval of regulators**
235, 233, 237, 239, 10, 241, 242, 243, 11, 12, 13

*Notes on amendments in group*
Amendment 10 pre-empts amendments 241, 242 and 243

**Role of the Lord President in approval of regulators**
4, 236, 5, 6, 7, 238, 8, 9, 240, 244, 14

**Authorisation to act**
15, 16, 17, 18
Compensation
169, 261, 170, 171, 171A, 172, 268, 210, 211

Regulatory schemes
247, 248, 249, 250

Regulatory conflicts
19, 252, 20

Definitional reference to non-solicitor investors
98, 101, 115, 116, 176, 121, 122, 123, 124, 125, 126

Exemption from fitness test
21, 99, 108, 132

Licensing rules
254, 22, 256, 23

Practice rules
260, 24, 262, 25, 26

Ban for improper behaviour
100, 114, 117

Internal governance
272

Regulatory functions
27, 274, 28, 29, 278, 30, 279, 31

Performance
32, 33, 283, 284, 34, 286, 288, 289, 291, 292, 293, 35, 36, 37, 296, 298, 299

Ceasing to regulate
38, 38A, 307

Notes on amendments in group
Amendment 38 pre-empts amendment 307

Licensed providers
39, 40, 41, 42, 43, 94, 95, 96

Ownership of licensed providers
310, 311, 312, 313, 314, 315, 317, 378

Will writers
173, 179, 180

Operational positions
44, 45, 46, 47, 48, 319, 49, 321, 323, 50, 51, 102
Designated persons
52, 53, 330, 54, 55

Outside investors
103, 104, 105, 106, 107, 109, 110, 110A, 111, 112, 113, 113A

More about investors
174, 175, 175A, 118, 119, 177, 127, 178, 129, 130, 131

Discontinuance of services
56, 57

Professional practice
58, 179, 59, 60, 180, 61, 62, 63

Complaints about approved regulators
133, 134, 135, 136, 137, 138, 139

Levy payable by approved regulators
140

Complaints about providers
141, 142, 143, 144

Register of licensed providers
145, 64, 65

Disqualified persons
146, 147, 148, 149, 150

Appeal procedure
66, 162

Confirmation and certification
181, 357, 151, 358, 152, 153, 154, 182, 155, 156, 157, 158, 183, 159, 160

Notes on amendments in group
Amendment 357 is a direct alternative to amendment 151

Will writing services
184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201, 199, 161, 202, 163, 203, 164, 204, 205, 165, 206, 207, 213, 218

Applying the regulatory objectives
67, 68, 69, 70, 71

Qualified persons
72, 73

Changes to practice rules
359, 360, 361, 74, 362, 363, 365
Citizens advice bodies
75

Lay representation
208, 209

Cap on individual claims
212

Acting as an approved regulator
76, 76A

Guarantee Fund
364, 366, 370

Council membership
77, 78

Safeguarding interests of clients
367

Law society – finance
368, 369

Regulatory committee
79, 80, 81, 371, 82, 83, 84, 85, 86, 372, 87

Representative functions of the Law Society
373

1980 Act - further modification
88, 89, 90

Complaints to tribunal
374, 375

Information about legal services
91

2007 Act – minor amendments
92, 93

Regulations
376, 166, 214, 215

Notes on amendments in group
Amendment 376 pre-empts amendments 94 and 214

Expressions used
377, 167, 216, 168, 217
Notes on amendments in group
Amendment 377 pre-empts amendment 167
Amendment 364

This amendment would allow the Society to receive contributions to the Guarantee Fund on the basis that the firm would pay the contribution rather than the individual solicitors within the firm. The creation of licensed legal service providers creates administrative arrangements for the collection of corporate contributions as provided for in amendment 211. If licensed providers come into being, they will have an administrative facility which will be denied to traditional firms. This would result in an imbalance of treatment between traditional firms and licensed providers which would result in:-

- additional administrative costs to traditional firms; and
- additional administrative costs to the Society which would of course have to be recouped from the practising certificate fee.

The lack of a level playing field in these circumstances clearly puts licensed providers and their approved regulators at an administrative and cost advantage when viewed in comparison to traditional firms and the Society.

The Society has striven throughout the process of the bill to highlight areas where a level playing field should be created and maintained. This is a key area. In addition, allowing amendment 364 to proceed would result in a simplified process of collection to the advantage of traditional firms and the Society and would be more cost-efficient and effective.

There has been no prior consultation with the profession on this proposal. However, the key to amendment 364 lies in amendments 362 and 363 where it was proposed that the Society could, by way of rules under section 34, require firms of solicitors to register with the Council. Framing the amendment by using section 34 would require the Council under section 34(2) to send each member a draft of the rules, submit the draft to a general meeting and take into consideration any resolution passed at that meeting. The rules would also not have effect unless the Lord President approved them. This process would give the profession the opportunity to voice any concerns which it had in relation to any implementing rules.

This amendment builds on the already established provisions in relation to incorporated practices. Accordingly, this technique of recovering contributions to the Guarantee Fund is not entirely novel in terms of the solicitors’ profession in Scotland. The Council firmly believes that it is to the benefit of traditional firms and would not intrude on the regulation of those firms.
Amendment 368

A key component in proposing registration of firms and to gain proper benefit in terms of administrative and cost savings would be to have firms pay a subscription to meet the cost of regulating them. Again, this is linked to amendments 362 and 363 and would allow a level playing field, consistency of approach in respect of levies which relate to all practice units and allow the Society to create a more tailored approach to the services it offers and how practices could pay for them.

This amendment would allow flexibility to match the size or type of entity (taking into account, e.g. income and risk profile) to the cost of the regulation provided to it. Not only would this amendment provide for a level playing field between traditional firms and licensed providers but it would allow the Society to examine and address what might be seen as an existing iniquity between traditional firms. For example, a firm with 5 solicitors will have to pay more to be able to exist as an entity than a firm with two solicitors and 15 paralegals, which could potentially cost the Society more to regulate.

Amendment 369

This amendment would allow the Society greater flexibility to charge fees for the services it renders. Currently, the Society's principal revenue is collected by way of a blanket practising certificate subscription, which all members have to pay (as provided by Schedule 1 paragraph 6 of the 1980 Act).

This results in a single income stream and does not allow for the possibility of recognising that solicitors may have different service requirements depending on the type of work they carry out. A number of solicitors who are not client-facing may question whether the benefits they receive from the Society are enough to justify maintaining a practising certificate. The ability of the Society to charge differential fees would be in both the individual solicitor's and the Society's interests. The Society would be able to tailor the services it offers to better reflect the diversity of the profession. It would be more transparent and potentially more equitable to those who do not require the same level of service as other members.

Another specific example of where this would be beneficial is that it would permit the Society to charge for its Guarantee Fund inspection regime. It would also bring the Society’s system of collecting revenue more into line with the SLCC, which is able to collect different levies from practitioners dependant on the sector in which they are employed.

It has been suggested that the Society could use existing provisions contained in paragraphs 7A-D of Schedule 1 to the 1980 Act (providing for a “special subscription” to be levied) in conjunction with a reduction in the practising certificate to achieve this aim, however we do not think that this is a workable solution. The special subscription provision is a way for charging for extraordinary or unbudgeted costs. Since paragraph 7A was added in 1985 there have only been a few occasions on which it has been used (in relation
to marketing levies). Furthermore, not only does the special sub and who is to pay it have to be decided on in general meeting (with proxies counting), it has to be voted on each year, which would not allow for the kind of flexibility that the Society would hope to have to be able to develop a system of allocating and recovering costs in a more targeted way.

It has also been suggested that the Society might instead wish to consider an amendment to allow practising certificates to be charged differently, depending on solicitor-type. While this would be simpler, again it would not allow for the kind of flexibility that the Society would hope to have. There are other potential considerations that we might wish to take into account when developing a more tailored system of charging for services to members.

Amendment 374

The amendment made to section 51(1) of the 1980 Act by Amendment 374 has two purposes:

a) to make it clear that the Council can make a complaint to the Tribunal against a solicitor on behalf of another person. This is consequential upon the fact that the amendments made by the 2007 Act imply that a complaint made be made by a complainer on behalf of another person (see the definition of "complainer" in section 42ZA and 53(2)(bb)). It is understood that when a member of the public writes to the Law Society about a solicitor, the Law Society may sometimes make the complaint on behalf of that person. Prior to the 2007 Act, a distinction did not need to be drawn between a complaint made by a complainer on his/her own behalf and on behalf of another person. In such a case the Council would simply be the complainer. However, compensation can only be awarded under section 53(2)(bb) where the complainer was directly affected by the misconduct and, if the Council was simply the complainer, no compensation could be awarded. By clarifying that the Council can bring a complaint on behalf of another person, this brings its powers into line with the new definition of complainer and ensures that, when the Council does so, that other person could be awarded compensation;

b) to make it clear that the practitioners against whom a complaint can be made to the Tribunal are the same as the practitioners against whom a complaint may be made to the Legal Services Commission under section 1 of 2007 Act. This needs to be the same because the Commission must refer conduct complaints against a practitioner to the Council under section 6 of the 2007 Act and they in turn may refer it to the Tribunal. At present, although there is no express indication in section 51 as to the persons against whom a complaint can be made, it is reasonably implicit that it would be against a solicitor and section 51(1A) extends this to cover conveyancing and executy practitioners. However, there is no indication that a complaint could be made against the other practitioners and particularly former practitioners etc mentioned in the definition of "practitioner" in section 46 of the 2007 Act. This means that if the Council were to make a complaint to the Tribunal against one of those
other practitioners, they could be successfully judicially reviewed as having exceeded their powers.

The purpose of the amendment made to subsection 51(2) by Amendment 374 is to rectify what appears to be a mistake. The persons mentioned in section 51(3), such as the Lord Advocate or a Court of Session judge, should clearly continue to be able to make a complaint to the Tribunal against a solicitor and not simply against an incorporated practice.

**Amendment 375**

The purpose of this amendment is to clarify the extent to which the Tribunal rules may provide that the functions conferred upon the Tribunal may be exercised on its behalf.

It makes it clear that the Tribunal rules may provide for the Tribunal’s functions in relation to a particular case or part of a case to be exercised by a part of the Tribunal (called a “particular tribunal”) constituted in accordance with paragraph 5 of Schedule 4 to the 1980 Act. This removes any doubt as to whether the rules can make the kind of provision made by Rule 54 of the Tribunal Rules 2008 and, in particular, enables the rules to provide:

that the particular tribunal dealing with one part of a case (e.g. whether there has been professional misconduct) does not have to deal with another part of the case (e.g. the question of compensation) – see Rule 54(3); and

that the particular tribunal dealing with one part of a case can come to a decision on that part (e.g. whether there has been professional misconduct) before a particular tribunal is constituted to deal with a later part of the case (e.g. the question of compensation). This means that an appeal can be made against the earlier finding without waiting until the completion of the whole case – see Rule 54(4).

The amendment also makes it clear that the Tribunal rules can provide that certain of its functions, other than its functions of hearing and determining the merits of any case, can be exercised on its behalf by the Chairman or vice-chairman. This amendment would enable the rules to provide that the chairman can exercise the preliminary functions of the Tribunal prior to any hearing as in Rule 56 of the Tribunal Rules 2008. Previously, this was the practice but it was not authorised by any Rule. The Tribunal Rules 2008 remedy this on the basis that this must be necessarily implied. However, as this is a form of sub-delegation, it would be preferable to have an express authorisation in order to prevent any judicial challenge on this ground. This amendment provides this authorisation. This is similar to the position with regard to the Council of the Law Society Act 2003.
Legal Services (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

Amendments 2 and 3 were agreed to (without division).

The following amendments were agreed to (by division):

- 219 (For 5, Against 3, Abstentions 0)
- 221 (For 5, Against 3, Abstentions 0)
- 224 (For 5, Against 3, Abstentions 0).

The following amendments were disagreed to (by division):

- 1 (For 3, Against 5, Abstentions 0)
- 223 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
- 225 (For 3, Against 5, Abstentions 0)
- 226 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
- 227 (For 3, Against 5, Abstentions 0)
- 230 (For 3, Against 5, Abstentions 0)
- 235 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote).

Amendment 222 was pre-empted.

The following amendments were not moved: 220, 97, 228, 229, 231 and 232.

Section 3 was agreed to without amendment.

Sections 1, 2 and 4 were agreed to as amended.

The Committee ended consideration of the Bill for the day, amendment 235 having been disposed of.
Legal Services (Scotland) Bill: Stage 2

The Convener: The major business of the morning is stage 2 of the Legal Services (Scotland) Bill. This is the first day of stage 2 proceedings on the bill, and the committee will not proceed beyond section 60 today. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by various officials who will assist him in the course of this morning's considerations. I welcome also Richard Baker MSP, a non-committee member who has a particular interest in some of the amendments. Members should have their copies of the bill, the revised marshalled list and the revised groupings of amendments for today's consideration.

Section 1—Regulatory objectives

The Convener: We start, appropriately, at section 1. Amendment 219, in the name of Robert Brown, is grouped with amendments 220 to 222, 1, 223 to 225, 2, 226 and 97. I refer members to the pre-emption information on the groupings paper, and point out a further pre-emption that is not noted, namely that amendment 226 pre-empts amendment 97.

Robert Brown (Glasgow) (LD): It is worth while giving a context to the bill and to the substantial number of amendments taken from suggestions by the Law Society of Scotland. This is a difficult and controversial bill. I admit that I have struggled, as I think the rest of the committee has, to comprehend fully the practical implications, the potential unintended consequences, and the balance of advantages and disadvantages of the changes for the public, the legal profession and the independence of the legal system.

One of the main reasons for the difficulties is that the regulatory framework and the potential for outside control of legal firms of the kind permitted by the bill does not appear to exist anywhere else in the world, with the exception of England, although the provision has not yet come into effect there. There is a dearth of evidence, and even of credible suggestion, about how it will operate in practice.

Secondly, the untrammelled virtues of open competition took something of a knock with the banking crisis. We are perhaps a bit more sceptical about the claimed advantages of opening up other markets. I am unenthusiastic anyway about regarding the law of Scotland as just another commodity that is sold in a market. While there are rogues and villains in legal practice, as in all walks of life, it is the underpinning of legal
ethics built into training and practice that distinguishes the practice of law as a profession.

The first set of amendments is designed to strengthen the ethical content of the regulatory objectives and the professional principles in sections 1 and 2 of the bill. Amendment 219 adds the objective of protecting and promoting "the interests of justice". I am rather surprised that that is not in the bill already, because it is potentially the objective that should have precedence over most other aims. Amendment 220 gives it that priority, along with the constitutional principle of the rule of law.

The argument has been presented to me that it is not helpful to provide a hierarchy of objectives. While I do not accept that objection, I am happy to listen to the minister's view on that. The other objectives, such as access to justice or competition, are ultimately a means to those greater ends.

The Law Society of Scotland takes the view that the protection and promotion of the interests of justice is one of the fundamental objectives of the provision of legal services and is ahead of the protection and promotion of the interests of consumers and the public interest. I agree. The protection and promotion of the interests of consumers and the public interest and the promotion of access to justice and competition are appropriate regulatory objectives, but they are not as fundamental to the provision of legal services as supporting the rule of law and protecting and promoting the interests of justice.

My amendment 221 is more technical, but it puts the interests of justice at the heart of the professional principles as well as the regulatory objectives. The only difference between it and Richard Baker's amendment 222 is that my amendment separates out "act with integrity" as a separate principle. Arguably, it is.

I am happy to support the minister's amendment 1 and James Kelly's amendment 223 seems to be a distinct improvement of section 2.

The spelling out of the obligation of professional confidence and to "act in conformity with professional ethics"

in Richard Baker's amendment 224 is helpful, although it might be questioned which professional ethics are imposed. I am interested in the argument on that. I also want to hear the case for amendment 225.

Amendment 226 removes the qualification of practicability from the duties on the Scottish ministers in regard to the regulatory objectives. I have difficulty in seeing how the Scottish ministers could or should ever be excused from the application of those objectives to them, or indeed in conceiving circumstances in which that would be desirable.

Nigel Don's amendment 97 would be a modest improvement to the bill as drafted, but unless the minister can make a case to the contrary, the phrase "so far as practicable" should be got rid of altogether in this context.

I move amendment 219.

Richard Baker (North East Scotland) (Lab): I support Robert Brown's amendments on the regulatory objectives and his comments on them. I do not have a strong view on whether his amendment 221 or my amendment 222 is preferable in clarifying the principle of acting with independence and referring to acting with integrity. I am happy simply to support his amendment.

I lodged amendments 224 and 225 following discussions with the Law Society of Scotland. I know that the Law Society has been in dialogue with the Scottish Government on referring to the matter of confidentiality in the professional principles that the regulatory objectives are to promote. That dialogue resulted in the minister's amendment 1. Amendment 224 is broader in scope than amendment 1, as it includes reference to professional ethics. The legal profession is defined by its requirement to act ethically in the interests of justice and in the best interests of clients. In particular, the Law Society is concerned that the bill does not place enough importance on client confidentiality; it believes that that requires to be explicitly mentioned among the professional principles. I lodged amendment 224 on that basis. I lodged amendment 225 because, as currently drafted, section 3(1)(a)(i) appears not to include documents such as parliamentary bills, for example. Legal activities such as the drafting of bills or amendments to bills would therefore be excluded. Committee members will be keenly aware of the importance of such activities, particularly the consideration of complex bills such as the Legal Services (Scotland) Bill. I hope that committee members agree that the definition of legal services should be broad enough to include legislative work.

The Minister for Community Safety (Fergus Ewing): In their evidence to the committee, the Law Society of Scotland, the Scottish Law Agents Society and Professor Alan Paterson raised the issue of whether the professional principles should specifically mention client confidentiality. It may be recalled that I specifically alluded to that in my speech at stage 1. We consider that such confidentiality is, arguably, included in the professional principles in the bill as currently drafted, particularly in section 2(c). However, I informed the committee that we would consider the issue further. In view of the concerns that existed and in order to remove all doubt,
amendment 1 was lodged. It inserts into section 2(c), which refers to the professional principle of acting

"in the best interests of ... clients",
a specific reference to keeping clients' affairs confidential.

Amendment 224, in the name of Richard Baker, would insert a similar requirement for confidentiality, with the addition of the words:

“act in conformity with professional ethics.”

I consider the reference to professional ethics to be unnecessary. Professional ethics are professional principles, for which there is already provision in section 2 of the bill.

10:45

A number of provisions in part 4 provide the Scottish ministers with regulation-making powers. For example, proposed new section 3B(5) of the Solicitors (Scotland) Act 1980 gives the Scottish ministers a power to make regulations to make further provision about the council of the Law Society of Scotland's regulatory functions. Amendment 2 ensures that there is consistency by specifying that, in making such regulations, the Scottish ministers must act in a way that is compatible with the oversight requirements that are set out in sections 4(2) and 4(3).

Robert Brown's amendments 219 and 220, which are supported by Richard Baker, insert a new regulatory objective of protecting and promoting the interests of justice and insert into section 1 a new subsection that provides for a prioritisation of objectives in the case of regulatory conflict. Robert Brown's amendment 221 and Richard Baker's amendment 222 amend the professional principles to refer to the interests of justice. I do not support those amendments because, in my view, they are unnecessary. Section 1, on the regulatory objectives, already refers to the constitutional principle of the rule of law. It also refers to the interests of consumers, the public interest in general, and other objectives, all of which serve the interests of justice.

The section on professional principles already ensures that persons who provide legal services

“support the proper administration of justice”,

which is in section 2(a),

“act with independence and integrity”,

which is in section 2(b), and, when conducting or exercising litigation,

“comply with such duties as are normally owed to the court by such persons.”

Given the objectives and principles that are already set out in the bill, my view is that separate references to the interests of justice would be redundant.

I entirely understand the arguments that Robert Brown and Richard Baker make and I entirely support the spirit in which they are made. We are all at one in that regard. Our argument is that, because of the comprehensive nature of the bill as set out in sections 1 and 2, where the regulatory objectives and professional principles are clearly spelled out, the amendments that my two colleagues have lodged are unnecessary and, in fact, redundant.

We have given the regulatory objectives and professional principles careful consideration and we consulted the bill reference group on them. The members of the group, including the Law Society of Scotland, generally felt that section 1 is acceptable as it stands and there was a consensus that further amendments such as those that have been lodged should not be pursued. The bill reference group also agreed that ranking the regulatory objectives could be misleading. I would go further. To prioritise certain objectives would inevitably downgrade the others. The regulatory objectives should be considered as a package, one being as important as the next.

James Kelly's amendment 223 would omit

"maintain good standards of work"

from section 2(d) and substitute:

“ensure standards of work of reasonable and ordinary care and skill”.

I have not yet had the opportunity to hear James Kelly discuss his amendment. Plainly, I will listen to him with interest and respect. On the face of it, however, we do not support the amendment as the change in wording would water down the professional principle of maintaining good standards of work.

Richard Baker's amendment 225 extends the definition of legal services in section 3 by specifically including the provision of legal advice or assistance in connection with legislative instruments. I listened carefully to Richard Baker's exposition of the arguments for his amendment. However, we do not support the amendment because we take the view that it is unnecessary. Legislative instruments are already covered by the wording "other legal document". Furthermore, to include specific examples of legal documents would create uncertainty about whether other documents that were not specifically mentioned were covered.

Robert Brown's amendment 226, which is supported by Richard Baker, removes the phrase "so far as practicable" from section 4(2). The result would be that the Scottish ministers must, regardless of how impracticable it might be, act in
a way that was compatible with the regulatory objectives. I do not support the amendment. The phrase “so far as practicable” is necessary because the duties are broad and it might not be possible objectively to measure compliance. In particular, there might be tensions between objectives and a reasonable balance will need to be struck between them. Indeed, amendment 97, in the name of Nigel Don, recognises the requirement for the wording “so far as practicable”, which amendment 226 seeks to remove. Amendment 97 seeks to insert “reasonably” into that wording. As you know, convener, the Scottish ministers should always act in a reasonable way; therefore, I hope that members will accept that the word is implied. Although I welcome the support for the current wording, I do not consider that further clarification is necessary.

I invite the committee to agree to amendments 1 and 2; I respectfully invite Robert Brown to withdraw amendment 219; and I invite members not to move amendments 220 to 226 and 97.

James Kelly (Glasgow Rutherglen) (Lab): I will be brief. Amendment 223 seeks to remove from section 2(d) the words “maintain good standards of work” and replace them with “ensure standards of work of reasonable and ordinary care and skill”.

I am not comfortable with the current wording, as I feel that the use of the word “good” is a bit vague and loose. I do not agree with the minister that the proposed wording waters the provision down; I think that it is more specific in that it uses the term “reasonable”, which is well known in legal circles. It also refers to the standards of work being of “ordinary care and skill”. I submit that the proposed wording is more comprehensive and specific about the professional standards that we want to see adopted.

I also support Robert Brown’s and Richard Baker’s amendments.

Nigel Don (North East Scotland) (SNP): Amendment 97 was lodged to clarify the meaning of section 4(2), which lays out some ministerial duties. Ministers could not be expected to do something that was impracticable; therefore, I feel that the word “practicable” is redundant. Nevertheless, if it is to be in there, my understanding of statutory interpretation is that that which is practicable is anything that can be done, regardless of cost, whereas that which is reasonably practicable requires the court, if necessary—hopefully, the courts will go nowhere near this—to take the cost into account. That is why the amendment proposes to introduce the word “reasonably”; however, I am happy to take the minister’s assurance that that is unnecessary.

The Convener: There being no further comments, I make one of my own. The amendments in the group are largely predicated on concerns that arose in the committee’s taking of evidence, and the Government has responded to what was seen as a particular difficulty regarding client confidentiality. In general terms, those who practise law have very clear fundamental duties, one of which is to act in the interests of justice. Lawyers are officers of the court and in many instances, also have a clear duty to their clients. That is a special duty, but all such matters are subsumed by the need to ensure that the interests of justice are protected and promoted. In that respect, Robert Brown’s amendment 219 is worthy of support.

Client confidentiality is an important feature of the operation of any legal practitioner. If those who seek the assistance of lawyers cannot be certain that the information that they will provide will be dealt with confidentially, the very principles of the legal system are undermined and in profound difficulty. Amendment 1, in the name of the minister, clearly recognises that and I congratulate him on responding by lodging that essential amendment. I am, however, of the view that other amendments that go a little bit further are preferable. Amendment 224 refers to professional ethics and underlines the fact that the legal profession must act ethically and in the best interests of its clients as well as in the interests of justice. That is an interesting amendment. Although I have grounds for assuming that, in the vast majority of cases, legal practitioners accord with those ethics, it is perhaps arguable that that should be included in the bill.

Amendment 226 relates to ministerial oversight and seeks to remove the phrase “so far as practicable”. I listened with interest to what Robert Brown said, and I foresee difficulties in the definition of what is “practicable”. However, one must assume that Governments of whatever hue or complexion will act in a reasonable manner. Although I have frequently disagreed with the actions of the current and previous Governments, I have not considered that they have ever acted unreasonably. Therefore, amendment 97 may not be necessary.

There is a considerable consensus around the table, which the Government recognises, that the existing section 1 needs improvement; the argument is about what constitutes the best procedure for that improvement.

Fergus Ewing: This has been a useful debate. I do not think that any of us are at loggerheads on these matters; we are simply trying to identify the most appropriate framework that sets out the objectives and principles to which all lawyers—whether in licensed legal services providers or
Robert Brown: It has been a useful and important, if somewhat theoretical, debate. I will run through what I think has been said about the different amendments. There is beginning to be consensus around amendment 219, on the interests of justice, and I will press the amendment.

I accept the minister’s caution on amendment 220 and, with the committee’s permission, I will not move that amendment. The matter might be worth looking at in further discussion, but it is perhaps not worth pressing at the moment.

We discussed amendments 221 and 222 earlier and Richard Baker has kindly indicated that he is prepared to back amendment 221. I think that amendment 224 on client confidentiality is preferable to amendment 1. James Kelly made a good case for amendment 223.

I am not entirely persuaded of the need for the phrase “so far as reasonably practicable”.

It is not an area in which there would be a huge financial requirement on the Government that could not be met in certain situations; it is a relatively technical matter of the framework that surrounds the protocols, regulatory principles and so forth that apply to the regulator. I cannot, frankly, conceive of a situation in which the practicability of the matter would come under discussion. If there were genuinely a situation in which it was totally impracticable to follow the rules—although I cannot foresee where that might be the case—that would probably be implied in the law already, although I may be mistaken about that. I will, therefore, move amendment 226 in that context. If the amendment is not agreed to, amendment 97 is a reasonable adaptation of the phrase.
The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 1 disagreed to.

Amendment 223 moved—[James Kelly].

The Convener: The question is, that amendment 223 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote against the amendment, because I think that it is unnecessary, that the standards to which the amendment refers can be assumed and that, where they are not present, there is a remedy.

Amendment 223 disagreed to.

Amendment 224 moved—[Richard Baker].

The Convener: The question is, that amendment 224 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 224 agreed to.

Section 2, as amended, agreed to.

Section 3—Legal services

Amendment 225 moved—[Richard Baker].

The Convener: The question is, that amendment 225 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 225 disagreed to.

Section 3 agreed to.

Section 4—Ministerial oversight

Amendment 2 moved—[Fergus Ewing]—and agreed to.

Amendment 226 moved—[Robert Brown].

The Convener: I point out that if amendment 226 is agreed to, amendment 97 will be pre-empted.

The question is, that amendment 226 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote against amendment 226, because I do not think that it is necessary.

Amendment 226 disagreed to.

Amendment 97 not moved.
Section 4, as amended, agreed to.

After section 4

The Convener: Amendment 3, in the name of the minister, is in a group on its own.

Fergus Ewing: During stage 1, the Law Society of Scotland suggested that further provision be inserted throughout the bill to require the Scottish ministers to consult before exercising their functions. I agree that consultation is desirable in relation to many of the functions of the Scottish ministers. However, rather than insert numerous specific consultation requirements, I thought that it would be preferable to have a freestanding section that requires the Scottish ministers, in addition to any specific requirement, to consult, where appropriate, persons or bodies on relevant matters.

Amendment 3 will therefore insert a new section that makes provision for consultation by the Scottish ministers in relation to the exercise of their functions under parts 2 to 4. Proposed new subsection (2) provides:

“Where ... the Scottish Ministers consider it appropriate to do so in the case of an individual function, they must consult such persons or bodies as appear to them to have a significant interest in the particular subject-matter to which the exercise of the function relates.”

Proposed new subsection (3) provides:

“The general requirement to consult under subsection (2) has effect in conjunction with, or in the absence of, any particular consultation requirement”.

I am grateful to the Law Society for its suggestions on the matter.

I move amendment 3.

The Convener: If there are no comments from members, I will assume that the minister does not want to wind up and I will move straight to the question.

Amendment 3 agreed to.

Before section 5

The Convener: Amendment 227, in the name of Bill Butler, is grouped with amendments 228, 229, 234, 245, 246, 251, 253, 255, 257 to 259, 263 to 267, 269 to 271, 273, 275 to 277, 280 to 282, 285, 287, 290, 294, 295, 297, 300 to 306, 308, 309, 316, 318, 320, 322, 324 to 329, and 331 to 356.

Bill Butler (Glasgow Anniesland) (Lab): I will speak to amendments 227, 228 and 229. Members will be relieved to hear that I will not speak to the 75 consequential amendments in the group.

It is fair to say that the issue of ownership has been thorny and has excited great passion outwith the Parliament. The Parliament must reflect and try to make sense of the strongly held views that have been expressed. In lodging the amendments, I am arguing not that no change is an option—it is not—but that any change in the law must serve to promote access to justice or, at the very least, must not damage access to justice. The question is whether the bill fosters or potentially damages access to justice.

Competing goals and interests must be considered and balanced against each other. On one hand, there is the desire to allow law firms to grow, remodel and introduce new capital, whether internal or external, which might well bring public benefits. On the other hand, there is a need to ensure that the public are protected, through preserving privilege and independence while maintaining the Scottish solicitors guarantee fund and the master insurance policy. It is obvious that a balance must be struck and that the approach must be proportionate.

There are key considerations in the decision on where the balance is to be struck. The risk that is associated with getting things wrong and going too far is enormous, because there will be no going back after the changes have been made. Thus, if firms were allowed to have 75 per cent external ownership and the approach was subsequently found to be a disaster, it would be virtually impossible to reduce the level of external ownership.

In contrast, it would be easy to go further with future legislation to increase the percentage of non-solicitor ownership if, ultimately, it was thought that the legislation ought to go further. I therefore believe that there is a strong case for not being too aggressive or too adventurous. As I said, the approach must be proportionate and ought to be restrained in light of the fact that the percentage of non-solicitor ownership could be increased in the future.

Taking all that into account, I propose in the amendments that the appropriate split be that a maximum of 25 per cent non-solicitor ownership be permitted at present. My information is that that percentage constitutes what is called negative control in terms of company law and is therefore considered to be an appropriate place to start the process. I believe that it also represents the current position in England, where legal disciplinary practices, or alternative business structures, will not be seen until the end of 2011. On the worst-case scenario for those who are pushing for greater change, it can be viewed as a first step in a process.

The non-solicitor ownership may be external or internal, but there will require to be additional controls on non-external ownership. I believe that with a 75:25 per cent split, the entity will remain a
legal practice or law firm. There is accordingly, in my view, no need to come up with new names such as “licensed legal services providers” or the like. I refer colleagues to the phrase in amendment 227: “licensed legal services providers” is seen as the equivalent of “a firm of solicitors or an incorporated practice”.

I believe that there is no need to force complicated structures upon the profession with this split. I believe that a limited liability partnership or incorporated practice—that is, a limited company—will be more than robust enough to deal with these matters if 75 per cent of the business is owned by solicitors. Similarly, if 75 per cent of the practice is owned by solicitors and it is accepted that that means that the entity remains a law practice, there is surely no basis upon which any other entity should be permitted to be a regulator. That is why the Law Society of Scotland would be the preferred regulator in that case.

In conclusion, I am not saying that this group of amendments is an argument for no change. I accept that law firms ought to be able to introduce outside and non-solicitor capital, but that can surely be done in a proportionate way only if providers of legal services continue to be law firms in the sense that a large enough proportion of their capital is held by solicitors and they continue to be tightly regulated by the Law Society of Scotland. I believe that the amendments provide the best way to achieve that by fixing the maximum figure for non-solicitor ownership at 25 per cent.

I move amendment 227.

Stewart Maxwell (West of Scotland) (SNP): I oppose amendment 227, in particular, for a number of reasons. I would like to ask a couple of questions about Bill Butler’s comments in asking us to support amendment 227. He started off by explaining that there is a risk that we could “damage access to justice”. I find that to be a curious line of argument, given that it was the Labour Party that introduced exactly the same measure in England. Does he believe that the Labour Party has damaged access to justice in England by doing so? I do not believe that it has, so I find it curious that a member of the Labour Party here is making that argument.

Secondly, Bill Butler also said that the bill would—I hope that I quote him correctly—“force complicated structures upon the profession.”

Of course, that is completely untrue because the bill is permissive; its provisions are entirely voluntary and organisations and individuals can become part of ABSs if they so desire and they meet the standards that are set down by an approved regulator. Nothing is being forced on the profession in the way that has been suggested.

I have two other points to make. On the balance between ownership or investment from outside and from inside the profession, it is clear—as we on the committee are only too aware—that a regulator can decide on that balance if it so wishes. If, hypothetically speaking, the Law Society of Scotland became an approved regulator and decided that it wished to regulate only the firms that met a particular standard—25 per cent outside ownership, a ratio of 51:49 per cent, which we will discuss soon, or any other standard that it wished to put in place—it could do so. It would therefore be much more appropriate to leave the approved regulator to decide on that issue rather than to set it out in the bill.

My final point concerns the super-complaint that was investigated by the Office of Fair Trading, which started the whole process, particularly with regard to the rule in England and Wales. If we instigate a fixed maximum for outside investment and ownership, we will fail to deal with the issue of the super-complaint—in other words, we leave the way open for another super-complaint that would oppose the very thing that Bill Butler is trying to insert in the bill.

For those reasons, I am afraid that I cannot support the amendments in Bill Butler’s name.

Robert Brown: I also oppose amendment 227, although on slightly more lukewarm terms than Stewart Maxwell. It is important that we debate the issue, but I am not persuaded by the argument.

I have one minor question for Bill Butler. Amendment 227 mentions licensed providers being licensed in certain circumstances, but it is not clear whether other people beyond that would be forbidden to operate in the field. I am not sure what the answer to that is, because the amendment meshes the Solicitors (Scotland) Act 1980 with the bill.

It seems that amendment 227 is, in effect, a wrecking proposition with regard to the concept of the bill. The bill’s purpose, when push comes to shove, is to enable the larger corporate firms that currently practise as Scottish solicitors to compete on a level playing field with legal entities in England, not least in respect of the importance of English law internationally. We went into that in some detail during our discussions on the bill to find out how it would work vis-à-vis the continent and countries such as Germany. Most of the larger firms support the bill on that basis, and we must take their position seriously because of their importance to the Scottish economy and to the legal services market, in particular. However, we must also ensure that the unintended consequences of the bill do not include Scottish firms being easily taken over by their competitors
elsewhere. The issue concerns the safeguards that we should put in place.

I said that my view was more lukewarm than that of Stewart Maxwell. The super-complaint that was inquired into by the OFT has been waved over the bill left, right and centre from the beginning, and I accept that there exists that potential. However, the ability to raise a super-complaint is one thing; to have it accepted and regarded as valid is something else. I am not altogether persuaded that a super-complaint that is investigated by the OFT is as valid as it has been made out to be.

On whether we leave it to the regulators to decide the balance, that is fine—we will further debate the 51:49 per cent ratio later. Such things are always arbitrary to some degree, and Bill Butler makes an important point about the influence of minority owners. We must bear that in mind as we examine the issue. It is a question of striking a balance between acting in the interests of the larger firms and the Scottish economy while not damaging the interests of the smaller firms.

I do not altogether accept the argument that the bill is permissive. One might say that it was entirely permitted that the supermarkets came to ordinary high streets and pinched all the business from the little shops, but the effect, nevertheless, was that the business of the little shops vanished like snow off a dyke.

There is an element of that in this situation. Permissive though the bill is, the effects on the profession will go beyond what is suggested by the people who support it. I am against amendment 227, but there is a further debate to be had on the subject.

James Kelly: Amendment 227, which has been lodged by Bill Butler, is important. As members of the committee are well aware from listening to the evidence, at stage 2, there have been arguments for and against the proposal for 100 per cent ABS.

There is an onus on us as MSPs to look at that evidence and to try to come up with a solution that navigates a way forward and takes account of the different strands of evidence that we have taken, and to produce a comprehensive proposal that has as much support as possible from the legal profession and the consumer bodies.

With regard to 100 per cent ABS, strong arguments have been made for opening things up, in particular the boost that that would give the Scottish economy. On the other hand, the legal profession, in particular, has raised real concerns about such a step and has argued that it would undermine the profession’s independence and threaten access to justice. There have been heated arguments on both sides.

Although it recognises that there is a job to be done in opening up firms and allowing them to attract external capital and to set up their businesses to exploit the economic opportunities that will be afforded by new legal structures, Bill Butler’s proposal also seeks to ensure that the solicitors remain the majority owners of the firm. It therefore protects Scots law and the legal profession’s independence. As a result, it addresses some of the very real concerns that have been expressed by experts in the field, such as Professor Alan Paterson.

As far as regulation is concerned, Bill Butler very competently made it clear that the logical follow-on from this proposal is that only one regulator—the Law Society of Scotland—would be required. I have to say that I have always been a bit uncomfortable about the bill’s lack of clarity around regulatory processes, how many regulators there would be and what parts of the industry would be regulated. In this proposal, it is clear that the only regulator would be the Law Society and therefore some of the complex and complicated structures that Bill Butler referred to in his remarks would be done away with.

In summary, I support Bill Butler’s whole proposal. I do not think that these are wrecking amendments; rather, I believe that the proposition is very reasonable as it takes on board the different arguments that we have heard and seeks to put forward a compromise that will give legal firms the chance to have a competitive advantage, and it will boost the Scottish economy while protecting the independence of Scots law and the legal profession.

Nigel Don: We have been round the houses many times on this very interesting subject. I must confess that I find myself reflecting on the views of those who are concerned about the legal profession’s independence, who I believe have made an enormously important and very persuasive case. Clearly there is something to be said for ensuring that lawyers remain totally independent. After all, as has been very well articulated and persuasively argued, they are—and should stay—the public’s interface with the courts.

The alternative argument is that the existing structures, although historically fine, prevent the development of the business in the public interest. It seems to me that, if you take on that argument, you have to see where it leads. Robert Brown said that supermarkets have displaced high street shops. That is undoubtedly the case; we shop in supermarkets and they have hugely benefited the general public by increasing enormously the availability of many foodstuffs—at the very least—and other supplies, and by reducing the cost of the weekly shop. That trend will not be reversed, and
our grandchildren might be very surprised to learn how reluctant we were to allow those organisations to provide us with legal services. They could probably do so more cheaply and very effectively, and therefore could widen access to justice.

We have an opportunity here that needs to be explored—we have explored it—that could be effective and in the general public interest. However, the new arrangements would need to be well regulated. Although I accept that Bill Butler’s 25 per cent suggestion is not an arbitrary number but one of the break points, it seems that any number is perhaps unnecessary. If we simply allow the legal profession to develop unfettered, it will use its skills and judgment, and businessmen and women will use theirs, to provide good services. The bill is about ensuring that such practitioners are properly and professionally regulated, so we should allow them an opportunity to get on with doing that. Although 25 per cent is not an arbitrary number, it is one that we do not need. I am absolutely sure that the vast majority of lawyers in Scotland will not make use of the legislation that the bill will become, even if it is permissive, and the public should be given the opportunity to see what the legal profession can come up with in the general interest.

The Convener: If there are no other contributions, I will make one. Bill Butler moved in a typically considered and eloquent manner principal amendment 227. There will be some relief around the table that he has undertaken not to debate at length the other 75 consequential amendments.

It is perhaps appropriate at this stage to say that the committee and individual members have been confronted with a real difficulty insofar as part 2 of the bill is concerned, because the legal profession has been unable to come to a clear and settled view on its wishes. Indeed, 50 per cent of the 10,000-odd solicitors in Scotland have expressed no view on the matter and the remaining are split roughly 50:50 as to what will be the best way forward. In the most recent test of legal opinion by the Law Society, motions have been passed that are mutually contradictory. Clearly, that is causing legislators serious difficulty.

I am aware of, and generally respect, the fact that there are some deeply held views about the legislation. As members will know, lobbying has been relentless, but it is important to stress that at no time has it been other than proportionate. It has made manifest the extent to which the legal profession is divided on this vital issue. We have listened as carefully as possible to all sides of the argument and it is unfortunate that the legal profession has been unable to achieve a settled view. As such, the committee and the Parliament must deal with the bill in recognition of that fact.

Amendment 227 is not a wrecking amendment. Bill Butler has moved this morning an amendment that represents one side of the argument: it is entirely appropriate that the argument should be reflected in an amendment at stage 2. Where I have some difficulty is that, were the amendment to be agreed to, it would impede members of the legal profession who seek to avail themselves of the advantages that the bill would advance to them. An amendment that will be debated later in the bill’s proceedings seeks to allow 49 per cent external ownership of a practice. I will listen to that debate with particular interest because it might offer a better advised way forward.

Nigel Don dealt with the permissiveness of the bill. Like Mr Don and many others, I think that it will be interesting to reflect in the years ahead on precisely how many people avail themselves of the opportunities that the bill will provide. One of our main considerations has to be the independence of the legal profession, which has to be jealously guarded, not only by those in the profession but by the body politic, the Parliament and the courts. I have had to consider that in deciding the attitude that I take to the bill. That is why I am convinced that, for the moment, ownership should involve a majority of legally qualified individuals.

Amendment 227 has merit, but I regret that I cannot support it.

11:30

Fergus Ewing: In December 2007, the Scottish Government published a policy statement in which it committed itself to four main aims for the Scottish legal system. The first was to compete internationally and be more attractive to major businesses. The second was to have regulation and business structures that support the availability of competitive legal services in communities. The third was the retention of an independent referral bar and the fourth was the protection of the legal profession’s core values to protect the interests of justice and consumers.

I restate that simply because members have pitched the debate to point to the high-level values and expectations that we are right to have of our legal profession and of lawyers. I welcome the debate and congratulate Bill Butler on the moderate and balanced way in which he pitched it. I always kind of thought that he was a fighting radical by nature—perhaps he is that, too—but he presented the arguments moderately, as the convener said. It is also good that the opportunity to debate the matter further will arise later.
It is good that we are having the debate because it is plain that the issues that members have raised have greatly concerned many solicitors in Scotland’s legal profession. I have had 14 or 15 meetings with various solicitors who have taken a leading part in the debate. Although 50 per cent of the legal profession has not participated and although the referendum of the whole profession registered support for ABS, divisions exist. We would all like those divisions to be healed. As the convener said, the outcome of the Law Society’s recent annual general meeting appeared to show that the position differed and that the divisions have not yet healed. It is therefore right that we in the Parliament have a debate in which we consider all the issues fully and dispassionately. For that reason, I very much welcome Bill Butler’s amendment 227.

Of course, we are all concerned about promoting the legal profession’s independence. That is why section 1(d) says that the regulatory objectives include

“promoting an independent, strong, varied and effective legal profession”.

The current debate is about how we implement that objective.

Amendment 227, which is in Bill Butler’s name, stipulates that a firm is eligible to be a licensed provider if it

“is owned and managed to the extent of not more than 25% by a non-solicitor investor”.

That model is restrictive and I do not believe that it is compatible with the policy intention behind the bill, which was supported at stage 1. If the amendment were agreed to, limited forms of multidisciplinary practice would be possible, but many potentially viable business models would be ruled out.

I have spoken before about the opportunities for smaller practices, for example, many of which are struggling to survive in towns and rural areas. As the committee heard at stage 1, the bill would allow them to offer a variety of professional services—legal, accountancy, surveying, estate agency and other professional services—in one-stop shops in many towns and rural areas. Such firms would have the benefits of lower overheads and the combination of business experience and expertise. That might be a distinct advantage in many smaller towns. We should be able to allow that important type of business in the decades ahead. However, the restrictive model that the amendment proposes would make such arrangements impossible for many small firms.

For example, a two-partner practice would not be able to go into business with the accountant across the street, because of the 25 per cent rule. Even with the clear majority of ownership residing with the legal professionals, such a business structure would be unacceptable. In fact, the amendment would result in only larger legal practices being able to take advantage, to any real extent, of the ability to form multidisciplinary practices offering a variety of services, as many firms are simply too small to be able to use the 25 per cent external ownership allowance. Bill Butler has not mentioned that argument, but I would be interested to hear his response to it. I do not think that it is his intention to exclude a one-person practice from merging with an accountant, but the 25 per cent rule seems to be an insurmountable obstacle to that taking place. I await his comments on that.

Amendment 227 would therefore remove a potential lifeline for small businesses, which might not otherwise find it easy to survive in a difficult business climate, because they would not be able to avail themselves of the opportunity to join up with fellow professionals to reduce overheads, to operate more efficiently and to survive and, hopefully, thrive.

The amendment would also be unacceptable to the larger firms. As I have stated, the long-term sustainability of the legal profession will be threatened unless Scottish firms are able to operate on a level playing field in England. That was recognised at stage 1, notably by Richard Keen, the dean of the Faculty of Advocates, who is quoted in paragraph 59 of the committee’s stage 1 report as saying:

“My greater fear is that if a business model is available in England but not in Scotland there will be a temptation for some larger firms to go down and join the English Law Society and leave the Law Society of Scotland.”—[Official Report, Justice Committee, 8 December 2009; c 2471.]

The committee considered that point carefully at stage 1. Although it found difficult the issue of the risk of large Scottish firms feeling impelled to register in England because of the lack of opportunity to avail themselves of ABS measures, which, as Bill Butler said, are expected to be available in England in October next year, it concluded in its report, at paragraph 102:

“Without this Bill, and recognising that the legislation for England and Wales has already been enacted and will come into force over the next year or so, Scottish law firms may be less able than their competitors to take advantage of the opportunities arising in areas of law not reserved to Scottish solicitors.”

I agreed with the committee then and I agree with its arguments now. I hope that they commend themselves to members.

Amendment 227 would have the effect of allowing only one regulator—the Law Society of Scotland. We believe strongly that allowing multiple approved regulators is the correct approach. Although it is unlikely that there will be
any huge consumer benefit in having more than one, there is a potential advantage for licensed providers, which may consider the published schemes of any regulator and choose the one that is best for their business model. For example, if a firm of accountants joins with solicitors but the accountants form the large majority, it may well be more appropriate that, should the Institute of Chartered Accountants of Scotland emerge as a regulator, the firm would wish to continue to use it as the regulator, as it would use it for its chartered accountancy regulation. Surely that would be an advantage. To remove that possibility would surely serve no purpose.

The remaining amendments in the group would make changes to the bill that are largely consequential on the fundamental change that would be made by amendment 227. I will not dwell, as I have perhaps been encouraged to do, on some of those matters.

We do not believe that amendment 227 should be supported, for the reasons that Mr Brown and other MSPs have suggested. We think that it would perpetuate unnecessary restrictions on the business models, would fail to increase competition in the legal services market and would be to the detriment of the legal profession, consumers and the Scottish economy.

Bill Butler: I express my thanks to colleagues for what has been a detailed and reasonable debate. When I have said what I will say in summation, I hope that the debate will still seem reasonable and worthy of the time that we have spent on it. The debate is necessary—on that I agree with the convener and the minister, but that does not make us a holy trinity. It is necessary because there is such uncertainty on the matter outwith the Parliament that we have to explore the issues. I know that, later on in our proceedings, there is to be an exploration of another split or percentage.

I believe that I have made a reasoned argument—some may see it as radical and others may see it as moderate, but I hope that it is seen as reasonable. Amendment 227 is not a wrecking amendment. As Nigel Don rightly said, 25 per cent is not an arbitrary figure. As I tried to indicate, it constitutes what I am informed is, under company law, negative control. The figure is therefore an appropriate place at which to start the process.

The minister said that, if the amendments in the group were agreed to, there would be only one regulator. I do not view that with any apprehension at all. I take the point, but I do not view it as a main obstacle. I did not fully follow the argument about the exclusion of the merger of a one-person practice with an accountant. We are talking about the percentage the business, not the number of persons involved. Perhaps I misunderstood the minister, but I did not follow his argument.

I turn to detailed comments and criticisms of the amendments. Both Robert Brown and Mr Ewing talked about the danger of our not passing the bill being that the big four will move down south—if I can put it in that popular way. The big four are already registered in England but have large numbers of clients in Scotland, so it would be economic suicide for them to fail to be registered in Scotland. Firms that were registered in Scotland would gladly take up that work and would grow to service those clients. Even if the big four chose to have their headquarters in England, they would still have to employ the same number of Scottish solicitors and trainees to service their Scottish work, or they would lose that work to a firm registered in Scotland that was ready to take their place. Therefore, although I admit that the argument has force, I do not accept it.

I turn to Stewart Maxwell’s points, one of which was that my proposal in amendment 227 does not chime with what my party moved south of the border. I could say, “That is devolution,” but let me be a wee bit more precise. I think that Mr Maxwell is mistaken. The Legal Services Act 2007 in England allows law firms with more than 25 per cent external ownership to practise only if they are licensed by a licensing authority. No firm has been granted that status yet. A recent article in The Times suggested that no body will be given that status, which effectively puts the whole process at least on hold. Interestingly, the 2007 act also provided for legal disciplinary practices, which may have external ownership but only to a maximum of 25 per cent. I could go on, but I will not. As usual, I am chiming with the leadership of my party. The point is a subordinate one, because the main point should be that this should be beyond party-political consideration. We are dealing with what is best for the system of law in Scotland. That should be our paramount concern. I agree with Stewart Maxwell that the bill is permissive. That is the case. However, the small shops example to which Robert Brown referred is a good one that I think deals with Mr Maxwell’s point.

Mr Maxwell also said that a percentage should not be set down in a bill. Why ever not? We can do so if we feel that that is the correct thing to do. Perhaps the amendments in the group will not meet with the agreement of committee members—I feel that that is what will happen—but the time may come when we agree to put a percentage in the bill. It would be within our powers and responsibilities to do that.

11:45

On Robert Brown’s point about the super-complaint, I agree that another super-complaint
may come along—just as buses come along when you least expect them. That is a possibility, but we have to deal with what is before us and not get overexcited about super-complaints. I can exclusively reveal that I never get overexcited by super-complaints—no sensible person should.

Robert Brown also made a point about the 1980 act. He has me there. I will have to take it under advisement, as they say in the States. I do not have an absolute answer to his point. I accept that, if the amendments in the group are agreed to—which they may not be—we will have to look again at the point at stage 3.

I am grateful to members for their participation in what I believe is an important debate on part of this putative bill. There are strong views on the matter outwith the Parliament. As the minister rightly said, we have to engage in a healing process to come to some kind of resolution of the differences.

I started out on the basis that this is about access to justice. That is the most important thing. Taken together, the amendments in the group would ensure access to justice and the independence of the Scottish legal profession. On that basis, I press amendment 227.

The Convener: Thank you for putting the argument in such a lucid manner.

The question is, that amendment 227, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 227 disagreed to.

Amendments 228 and 229 not moved.

11:47
Meeting suspended.
or limiting the number of hours that would be worked, capping the bill or requiring regular updates on the hours being worked. As a result, my constituent had paid more than £20,000 to the representative before the tribunal was heard. After the unsuccessful tribunal, he demanded a further £20,000. The representative had advised my constituent to resign and seek constructive dismissal despite the fact that, as I understand it, such cases are extremely difficult to win. He lost her tribunal and the employment judge was highly critical of his conduct.

Regulation would help to avoid such situations in the future. Having spoken with the minister about the matter, I understand that the Scottish Government is not opposed in principle to such regulation but believes that it has not yet found sufficient evidence of malpractice to justify a regulatory regime. I will certainly forward to the minister the details of the cases that I mentioned. I have not yet done that, but they will not be the only examples. I am keen to have further dialogue with the minister on the matter, even if he does not agree with the amendments in this group, and I welcome the fact that he previously indicated that he is open to such discussions.

I point out that the regulatory regime that Westminster introduced has been assessed as having been effective. For example, 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 removed almost entirely and rules that require websites to give a physical address are being complied with. I believe that similar benefits could be had in Scotland, and I hope that members will give these amendments due consideration.

I move amendment 230.

12:00

Robert Brown: I have some sympathy with Richard Baker’s proposal although, as he rightly points out, it is restricted to employment law services providers and does not relate to claims management more widely. It crosses my mind that the way forward might be to give ministers some sort of power to regulate such matters, which could be subject to affirmative resolution by Parliament.

There are a number of other issues at stake. We will come on to deal with will writers, who are an important group. It is undoubtedly the case that there are issues with claims management. It is important to point out that, as well as trade unions, which are mentioned in subsection (4) of the new section that amendment 230 proposes, the automobile association and the RAC are insurers that operate in areas to do with claims. There are certainly a number of issues with claims management more generally.

At the moment, I am not persuaded to back amendment 230 because there are issues that need to be looked into. We have not consulted on the proposal or gone into it. However, Richard Baker raises a valid point, to which he has given credence from his own experience. Perhaps we could consider a stage 3 amendment that would provide residual powers for dealing with the issue without the need for full legislation. If something like a will-writing situation that needed to be addressed came along again, we might want to take reasonably swift action without having to go through a separate parliamentary process to provide a full legislative framework.

Stewart Maxwell: I am extremely distressed and have great sympathy for Richard Baker’s constituents in the cases that he mentioned. It is clear that there is an issue although, as Robert Brown has made clear, we did not take any evidence on it or examine it at stage 1, which leaves us in a difficult position with regard to the extent and seriousness of the problem. We all know that individual cases often make bad law.

At this stage, I am not prepared to support amendment 230, but it deals with an extremely serious issue that requires to be looked at. I do not know whether it would be possible to do that before stage 3; if it is, all well and good. I am pleased that Richard Baker has brought his proposal to the committee, because it raises an issue that requires to be examined.

James Kelly: I would like to speak in support of the amendments, which present us with an opportunity to legislate in an area in which there is a gap and there is cause for concern. I note what other members have said about the fact that we did not take evidence on the issue at stage 1, but I believe that, as proposed, the amendments are proportionate in that they focus on employment law.

Richard Baker has given some chilling examples of cases in which his constituents have had an adverse experience when they have dealt with a claims company. There has been a lot of discussion about access to justice, and I think that we would all agree that we must ensure that we have a system to which people who feel that they have been adversely treated and have a claim to make against a body or company have access, and in which their claim is treated competently and fairly.
It is clear that there are concerns about the way in which the field of claims management companies operates, which, as it could put some people off taking a legitimate case through the courts, undermines access to justice. We must always look carefully at any proposal to introduce additional regulation. We do not want to introduce a system that is too cumbersome, but we are talking about an area in which regulation would provide more fairness and would, in the long run, improve access to justice and provide greater transparency. The issue that the amendments addresses is well worth looking at.

The Convener: The amendments raise some interesting matters, but I do not think that they will get terribly further forward at this stage. First, the proposals have not been consulted on. Secondly, we have been given no evidence to back up what Richard Baker said, although I personally have little doubt that the arguments have considerable merit. I am also inhibited from supporting them by the fact that, as members will have heard me say time and again, hard cases make bad law. We need to know where we are going and ensure that the matter is properly researched.

However, I am attracted by the possible solution that Robert Brown advanced, so I will listen with interest to the minister’s response.

Fergus Ewing: Amendments 230 to 232, in the name of Richard Baker, would create a new type of entity, in the form of a licensed employment law services provider that would be regulated by the Law Society of Scotland.

Convener, I was somewhat taken aback when I heard Richard Baker’s arguments in support of the amendments. Being taken aback is not something that Government ministers are particularly fond of—

The Convener: Perhaps it should happen more often, Mr Ewing.

Fergus Ewing: You may well say so, but I could not possibly comment.

The reason why I was taken aback is that amendments 230 to 232 clearly relate to employment law services providers, whereas Richard Baker’s remarks related to claims management companies. I was aware that Richard Baker intended to pursue the issue of how claims management companies operate. Indeed, I invited him to do so in the course of my speech in the stage 1 debate, when I said that we would happily consider with him the wider issue as well as any evidence of cases. However, as the convener has said, we have not heard any evidence today and I have not received any examples from Richard Baker on the particular cases to which he has again alluded today. As has been rightly pointed out, we need to consider what evidence there is first. I am of course willing to consider such evidence—I suspect that there are, or have been, cases that would cause concern—but neither the Government nor the committee has yet received any evidence from Mr Baker on the matter.

As I understand it, claims management companies deal mainly with insurance claims, whereas amendments 230 to 232 relate entirely to employment law. Insurance claims may relate to personal injuries. It is fair to point out that, although claims management need not involve lawyers at the outset, if such matters are to be pursued in a civil action, given that civil litigation is reserved to solicitors, a solicitor will then need to become involved.

There may be an issue as to whether the ambit of the bill, which relates to legal services, is wide enough to be extended to claims management, which might be considered to happen prior to, and perhaps need not incorporate, legal services. I just put forward that point, but I did not come here this morning specifically equipped, or preadvised, on the issue of claims management. We expected that claims management would be raised in an amendment, but we have been taken somewhat unawares, as I had thought that the intention of amendments 230 to 232 was to deal purely with employment law. The amendments are not about claims management.

That said, having made some initial inquiries with the Tribunals Service, I am aware of concerns about non-lawyers at employment tribunals overcharging for representation. However, given the lack of consultation on the matter, I submit that it would be premature to legislate on what would be a significant change in approach without further discussion and examination of evidence. I do not support amendments 230 to 232, but I am happy to look further at the specific issue in relation to employment law. I am also happy to look further—as I indicated at stage 1 and do so again today—at specific cases of injustice, as and when those cases are presented to me.

I respectfully invite Richard Baker to withdraw amendment 230 and not to move amendments 231 and 232.

The Convener: We revert to Richard Baker, who should perhaps clarify the position in winding up and indicate whether he will press or withdraw amendment 230.

Richard Baker: I am happy to clarify the position, convener. Ministers are often take aback by what I say, but I am a bit surprised on this occasion. I was perhaps a bit fast and loose in using the phrase “claims management businesses”. The first example that I gave was about claims management in terms of damages
and personal injury. I made it clear that I understood that such business would not be affected by the amendments but that I wanted to make progress on the issue and was restricting the provision to employment law. The other two examples that I gave were clearly about employment law, which is why I am a bit surprised that the minister did not understand the case that I was making. Those were clearly issues of employment law, and he rightly says that that is what the amendments are about. I am sorry about the confusion, but I am slightly puzzled as to why the minister was confused. He has said that he is happy to have further dialogue on the issues, which I very much welcome.

I am heartened by the comments from other committee members. I appreciate Robert Brown’s comments, which may, in time, offer a way forward and should be considered more fully. Perhaps a power for ministers to establish a regime by affirmative instrument may be a way forward. Robert Brown highlights a number of complexities, which I readily acknowledge. I appreciate the crucial point that evidence is key, which the minister pointed out and Stewart Maxwell rightly referred to.

To summarise, I do not think that there is a great division of opinion as to whether, if there is a problem, there is a good case for regulation. What I am left to do is persuade others that there is a case and provide compelling evidence that there have been problems and that regulation is required. Convener, I understand your position that that case needs to be presented and that research into the issue must carried out.

I will press my amendments. Although I do not think that they will be successful, I am heartened by the committee’s comments. I undertake to get further evidence of the problem, which I will supply to committee members and the minister. I accept his point that the examples that I gave—which I got only recently—were not available to him before today’s meeting. I will supply those to him along with any further evidence that I can obtain over the summer. I do not think that it is a matter of great division or debate; it is simply a matter of achieving clarity on the extent of the problem and the requirement for regulation.

The Convener: The question is, that amendment 230 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Butler, Bill (Glasgow Anniesland) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 230 disagreed to.

Amendments 231 and 232 not moved.

Section 5—Approved regulators

The Convener: Amendment 235, in the name of Robert Brown, is grouped with amendments 233, 237, 239, 10, 241 to 243 and 11 to 13. I draw members’ attention to the pre-emption that are detailed on the groupings list.

Robert Brown: The amendments relate to arrangements for the approval of regulators and raise the issue of what is meant by regulatory competition in practice and who possible regulators might be. Like James Kelly, I am not wildly impressed by the principle of regulatory competition. In practice, I see in that small profession of regulation the potential for a market only for the Law Society of Scotland and perhaps ICAS on the accountancy side. Also, it seems to me that the regulators should at least be based in Scotland; it should not be open to bodies from elsewhere that have no particular link to Scotland and no feel for our system to offer themselves as regulators, albeit that they are not so empowered at present under the legislation. I would not, for example, want the English solicitors regulatory body entering that field. The purpose of amendment 235 is to prevent that.

Amendment 233 relates to the fees that are charged by the Scottish Government for considering applications to be a regulator. The basis of those fees is not specified at present and should certainly be limited to no more than cost recovery. The basis for charging and what it is appropriate to charge for should be clarified, and I would appreciate knowing the minister’s intentions in that regard.

12:15

Amendment 237 relates to section 6(1)(a), which seems inadequate as it stands and clumsy in the amended version that the minister has proffered in amendment 6, in the next group. Amendment 6 should have been considered in this group, as an alternative to amendment 237; it is not clear to me why it has been placed in another group. Amendment 237 is intended to add to the objective of competence in the law, however phrased, the more central requirement of having a proper feel.
“and understanding of the regulatory objectives and the
professional principles”

that are the key to good regulation.

Amendment 239 is designed to tighten the conditions that it would be relevant to impose on a regulator. Currently, section 6(2) is too broad and its terms are unclear, and the amendment seeks to bring some clarity to it. Introducing the concept of a time limit for the approval of an applicant as an approved regulator would bring the provision into line with section 7(4), which provides that an approved regulator may be authorised “without limit of time, or ... for a fixed period of at least 3 years”.

Amendment 241 is consequential and requires ministers to consult on conditions, as well as on approval of a regulator. That is right.

Amendment 243 imposes the elementary requirement of transparency by providing that ministers must give reasons for their actions under section 6. Amendments 241, 242 and 243 may be pre-empted by amendment 10. If amendment 10 is agreed to, I will seek an undertaking from the minister to consider reinserting the effects of amendments 241 and 243 in the proper place at stage 3, as both make a valid point.

This group of amendments also addresses the role of the Lord President in approving a regulator. I understand that, currently, the Lord President has a substantial role in most of the regulatory rules relating to solicitors. It is wrong for ministers to be directly and solely responsible for approving a regulator, on the important constitutional ground that that erodes the constitutional independence of the legal profession. The series of amendments that Bill Aitken and I have lodged to require the Lord President’s approval for various things are in line with section 7(4), which provides that an approved regulator may be authorised “without limit of time, or ... for a fixed period of at least 3 years”.

Amendment 241 is consequent and requires ministers to consult on conditions, as well as on approval of a regulator. That is right.

Amendment 243 imposes the elementary requirement of transparency by providing that ministers must give reasons for their actions under section 6. Amendments 241, 242 and 243 may be pre-empted by amendment 10. If amendment 10 is agreed to, I will seek an undertaking from the minister to consider reinserting the effects of amendments 241 and 243 in the proper place at stage 3, as both make a valid point.

This group of amendments also addresses the role of the Lord President in approving a regulator. I understand that, currently, the Lord President has a substantial role in most of the regulatory rules relating to solicitors. It is wrong for ministers to be directly and solely responsible for approving a regulator, on the important constitutional ground that that erodes the constitutional independence of the legal profession. The series of amendments that Bill Aitken and I have lodged to require the Lord President’s approval for various things are preferable to provision for the Lord President just to be consulted. Scottish Government amendment 13 is okay, but I am not particularly attracted to Government amendment 8, in the next group.

I move amendment 235.

**Fergus Ewing:** In its stage 1 report, the Subordinate Legislation Committee expressed concern that negative procedure is to be used for regulations under the power that is given to the Scottish ministers in section 6(7). In light of the committee’s concerns, I have given further consideration to the power and have lodged amendments 11 and 12.

Amendment 11 narrows the scope of the Scottish ministers’ power to make further provision relating to the criteria in section 6(7)(b) for the approval of regulators of licensed providers and will ensure that any regulations that are made using the power relate to the applicant’s capability to act as an approved regulator.

Amendment 12 removes section 6(7)(c), with the effect that the Scottish ministers will no longer be able to make regulations about the categories of bodies that may or may not be approved regulators. I accept the concerns that have been expressed about the width of the power and now consider it to be unnecessary. The Scottish ministers are able to exclude unsuitable applicants by reference to their applications. It is unlikely that it would ever be desirable to exclude an entire class of applicant without consideration on an individual basis.

Amendment 10 removes sections 6(3) to 6(6). Amendment 13 reinstates the provisions in a new section, to improve the drafting. The new section requires that, where the Scottish ministers inform an applicant that they intend to refuse to approve the applicant as an approved regulator, or to impose conditions under section 6(2), they must give reasons for the decision. The Law Society of Scotland requested that provision. Although it is unlikely that the Scottish ministers would ever take such action without explanation, it is entirely reasonable to ensure that an explanation is given.

Amendment 243, in the name of Robert Brown, seeks to do the same thing, so I ask him not to move it in favour of amendment 13.

Amendment 235, in the name of Robert Brown, restricts the definition of approved regulators to professional bodies that are based in Scotland. First, I do not want to restrict the definition of approved regulators to professional bodies, because other bodies, such as new bodies that are created for the purpose, may be just as able to be regulators. As long as a body meets the approval criteria, it should be able to be approved. A restriction that would prevent new types of bodies from being established to act as approved regulators would be a clear departure from the original intention behind the bill.

Secondly, I do not consider a geographical restriction on the bodies that could act as approved regulators to be necessary or desirable. Whether such bodies have the competence under their constitution or statutory authority to make an application under the bill is a matter on which those bodies must be satisfied.

The bill provides in detail for the criteria for the approval of bodies as approved regulators. As long as a body meets those criteria, it should be approved. It might be unlikely that a body that is based outside Scotland would be able to satisfy the Scottish ministers that it had the necessary expertise or the capability to regulate licensed legal services providers in Scotland. However, if it were able to do so, I see no reason why it should not be approved. I certainly do not think that we should exclude bodies because they are not Scottish.
I remind members that the legislative approach of the bill is based on a decision to take a uniquely Scottish approach, to avoid setting up a quango, to avoid having a Scottish legal services board and, most specifically, to avoid incurring, over time, the cost of tens of millions of pounds that we believe would be associated with such a quango. Our regulatory solution is not only particularly Scottish but will be far less of a drain on the public purse in the difficult times ahead.

For those reasons, I cannot accept amendment 235.

Robert Brown’s amendment 233 inserts new subsection 5(7), to limit the fees that can be imposed on approved regulators by the Scottish ministers. As a result, the fees will be limited to the cost to the Scottish ministers of considering an application for approval or authorisation, as Robert Brown has made clear. It is not the intention of the Scottish ministers to charge such fees. However, the provision was included in case, at some point in the future, the Scottish ministers deemed it necessary to levy an appropriate and proportionate charge. As the Scottish ministers must act reasonably, my view is that, with respect, the amendment is unnecessary. Although I entirely understand the rationale behind Robert Brown’s proposal, I hope that the provisions, as set, will be acceptable, as they allow a degree of flexibility that is important in the current financial climate.

Robert Brown’s amendment 237 adds a new criterion to be considered by the Scottish ministers with respect to applications to be an approved regulator. It provides that the Scottish ministers must be satisfied about the applicant’s knowledge of the regulatory objectives and professional principles. Again, I consider the amendment to be unnecessary. Amendment 6 makes it clear that applicants must satisfy the Scottish ministers that they have the necessary expertise as regards the provision of legal services. That would include knowledge and understanding of the legal regulatory objectives and professional principles. That is clearly implied.

Robert Brown’s amendment 239 inserts examples of conditions that the Scottish ministers can impose on approved regulators. On the basis that the Scottish ministers must impose reasonable conditions, the amendment is, with respect, unnecessary.

Robert Brown’s amendment 241 provides for a specific requirement on the Scottish ministers to consult on the conditions that are to be imposed on approved regulators and on any removal or variation of those conditions. I consider that to be unnecessary, given that the general requirement to consult, in relation to approval, includes consideration of any conditions that should be imposed. Amendment 9, in my name, makes provision for consultation in relation to the removal or variation of conditions.

Bill Aitken’s amendment 242 appears to have been lodged in consequence of Robert Brown’s amendment 236, which was supported by Bill Aitken, and amendments 238 and 240, which are both in the name of Bill Aitken and provide the Lord President with an approval role. Those amendments will be discussed later but, in brief, I cannot support amendments to provide the Lord President with the same broad role in relation to approving regulators as the Scottish ministers have, for reasons that I suspect we will turn to in the next grouping. Therefore, I cannot support amendment 242, which appears to be consequential.

I therefore invite the committee to approve amendments 10 to 13, and I respectfully invite Robert Brown to withdraw amendment 235 and members not to move amendments 233, 237, 239 and 241 to 243.

Robert Brown: I am grateful to the minister for his detailed reply on the issues and I will take on board some of his points. I will press amendment 235, as the point is still valid. We can have an argument about the phrase “professional or other body”. I accept that there is an issue about what a professional body is in that context. However, any body would be unsuitable and inappropriate if it did not have a professional attitude and approach. The central point—that the body should be based in Scotland—remains one that I wish to push, for the reasons that I explained. I did not fully understand the minister’s comments about the costs if we had taken a different approach and had a super-regulator. That certainly is not what I have suggested and is not implied by amendment 235.

I will not move amendment 233, which is on costs, as I am satisfied by what the minister said about it. I will move amendment 237, but I will probably not move amendment 239. I accept that my other amendments in the group overlap with existing provisions.

The issue about the Lord President is an important point of principle. It is a bit funny that we are having a debate on that at the tail end of the beginning of the process. We must go into the matter in more detail. The Lord President’s role is much more central than the role that ministers appear to be going for. Unless I am persuaded to the contrary, I will seek to push that issue in later debates.

The Convener: The question is, that amendment 235 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The casting vote goes against the amendment. I will give reasons for that. We are talking in a vacuum to an extent, but the likely outcome is that there will be only one regulator. That has already been said during the meeting. In theory, the bill would be unnecessarily proscriptive if we agreed to amendment 235, which is why I voted against it.

Amendment 235 disagreed to.

The Convener: The sheer mechanics of getting through the next group of amendments will take some time, so I propose to end the public part of the meeting now. There is an administrative item to be dealt with in private. I thank the minister and his team for attending. I now bring the public part of the meeting to a close.

12:27

Meeting continued in private until 12:31.
Legal Services (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 29  Schedules 1 to 6
Section 30  Schedule 7
Sections 31 to 52  Schedule 8
Sections 53 to 101  Schedule 9
Section 102  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 5

Fergus Ewing

4 In section 5, page 3, line 20, after <their> insert <(or the Lord President’s)>

Robert Brown

233 In section 5, page 3, line 26, at end insert—

<(7) But the fees charged must not exceed the cost incurred by the Scottish Ministers in determining whether an applicant should be approved under section 6 as an approved regulator or, as the case may be, whether an approved regulator should be authorised under section 7 to exercise any of the approved regulator’s regulatory functions.>

Section 6

Robert Brown

Supported by: Bill Aitken

236 In section 6, page 3, line 28, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

5 In section 6, page 3, line 30, at beginning insert <for regulating licensed legal services providers in accordance with this Part,>

Fergus Ewing

6 In section 6, page 3, leave out line 31 and insert—

<(i) the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it),>
Robert Brown
237 In section 6, page 3, line 31, at end insert—

<(  ) a thorough knowledge and understanding of the regulatory objectives and the professional principles contained in sections 1 and 2,>

Fergus Ewing
7 In section 6, page 3, leave out line 34

Bill Aitken
238 In section 6, page 4, line 9, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
8 In section 6, page 4, line 10, at end insert—

<(2A) The Scottish Ministers are to impose under subsection (2) such particular conditions relating to the expertise mentioned in subsection (1)(a)(i) as are reasonably sought by the Lord President when consulted under section (Pre-approval consideration)(1).>

Fergus Ewing
9 In section 6, page 4, line 10, at end insert—

<(  ) The Scottish Ministers may remove or vary any conditions imposed under subsection (2)—

(a) after consulting the approved regulator, and

(b) where the conditions arose by virtue of subsection (2A), with the Lord President’s agreement.>

Robert Brown
239 In section 6, page 4, line 10, at end insert—

<(  ) Conditions under subsection (2) may, without prejudice to their generality, include conditions which may—

(a) restrict the approval of the applicant by reference to particular categories of—

(i) licensed providers,

(ii) legal services,

(b) be given either—

(i) without limit of time, or

(ii) for a fixed period of at least 3 years.>

Bill Aitken
240 In section 6, page 4, line 10, at end insert—
<(2B) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2).>

Fergus Ewing
10 In section 6, page 4, line 11, leave out subsections (3) to (6)

Robert Brown
241 In section 6, page 4, line 11, after <regulator> insert <and what conditions, if any, to impose under subsection (2) or amend, add or delete under subsection (2B).>

Bill Aitken
242 In section 6, page 4, leave out line 13

Robert Brown
243 In section 6, page 4, line 22, at end insert—
<together with, in either case, their reason for doing so.>

Fergus Ewing
11 In section 6, page 4, line 31, at beginning insert <in relation to capability to act as an approved regulator,>

Fergus Ewing
12 In section 6, page 4, leave out line 33

Robert Brown
244 In section 6, page 4, line 33, at end insert—
<( ) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.>

After section 6

Fergus Ewing
13 After section 6, insert—

<Pre-approval consideration
(1) Before deciding whether or not to approve the applicant as an approved regulator under section 6, the Scottish Ministers must consult—
(a) the Lord President,
(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
(c) such other person or body as they consider appropriate.
(2) In consulting under subsection (1), the Scottish Ministers—>
(a) must send a copy of the application to the consultees,
(b) may send a copy of any revised application to any (or all) of them.

(3) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
(a) refuse to approve it as an approved regulator, or
(b) impose conditions under section 6(2).

(4) If notification is given to the applicant under subsection (3), it has 28 days beginning
with the date of the notification (or such longer period as the Scottish Ministers may
allow) to—
(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

Fergus Ewing

14 After section 6, insert—

<Lord President’s agreement

(1) Despite section 6(1), the Scottish Ministers must not approve the applicant as an
approved regulator unless the Lord President agrees to its being approved as such.

(2) For the purpose of subsection (1), that agreement may be withheld only if the Lord
President is not satisfied that the applicant has the expertise mentioned in section
6(1)(a)(i).
>

Section 7

Fergus Ewing

15 In section 7, page 5, line 14, leave out subsections (6) to (9)

Fergus Ewing

16 In section 7, page 5, leave out line 33

Fergus Ewing

17 In section 7, page 5, line 34, leave out subsection (11)

After section 7

Fergus Ewing

18 After section 7, insert—

<Request for authorisation

(1) A request for authorisation under section 7 may be—
(a) made at any reasonable time (including at the same time as applying for approval
under section 6),
(b) withdrawn by the approved regulator (or applicant) at any time by giving the
Scottish Ministers written notice to that effect.
(2) The Scottish Ministers must, with reasons, notify the approved regulator (or applicant) if they intend to—
   (a) withhold their authorisation, or
   (b) impose conditions under section 7(4)(b).

(3) If notification is given to the approved regulator (or applicant) under subsection (2), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(4) The approved regulator (or applicant) must provide the Scottish Ministers with such information as they may reasonably require for their consideration of its request for their authorisation.

(5) In section 7 and this section, a reference to authorisation means initial or renewed authorisation.

Section 8

Fergus Ewing

In section 8, page 6, line 7, at end insert—

<(  ) the compensation rules (see sections (Compensation rules: general) and (More about compensation rules)),>

Robert Brown

In section 8, page 6, line 8, at end insert—

<(  ) include provision to ensure that legal services provided by the licensed provider are adequately supervised to ensure that they are provided competently and effectively,

(  ) include provision to maintain a record of any disciplinary action taken against the Head of Legal Services or any designated person within the licensed provider,>

Robert Brown

In section 8, page 6, line 10, at end insert—

<(d) further the regulatory objectives and ensure that licensed legal services providers adhere to the professional principles,>

Robert Brown

In section 8, page 6, line 14, at end insert—

<(  ) include any provision authorised by regulations under subsection (5),>
In section 8, page 6, line 19, leave out from <they> to <such> in line 20 and insert—

<(  ) the Lord President has consented, and
(  ) they have consulted such>

Section 9

Fergus Ewing
19 In section 9, page 6, line 29, leave out <to be in the regulatory scheme by section 8(2)(b)> and insert <by section 8(2)(b) to be in the regulatory scheme>

Robert Brown
Supported by: Bill Aitken
252 In section 9, page 7, line 1, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
20 In section 9, page 7, line 2, leave out <that> and insert <(such as>

Section 10

Fergus Ewing
98 In section 10, page 7, line 15, leave out <outside> and insert <non-solicitor>

Fergus Ewing
21 In section 10, page 7, line 15, leave out <(including for section 49(2))>

Fergus Ewing
99 In section 10, page 7, line 22, at end insert—

<(  ) See also sections 43(6)(b), 45(3A), 49(2), (Exemption from fitness test) (3) and 52(2)(b) and paragraph 3A(2) of schedule 8 (as well as sections 11 and 12).>

Robert Brown
254 In section 10, page 7, line 22, at end insert—

<(  ) Rules made in pursuance of subsection (1)(c) must include provision for licences to be subject to renewal after a period of one year from the date of issue, unless previously revoked or suspended.>

Section 11

Fergus Ewing
22 In section 11, page 7, line 24, leave out <made in pursuance of section 10(1)(a)>
In section 11, page 7, line 34, at end insert—<, or

( ) reducing standards of competent service within the legal services market,>

Section 12

In section 12, page 8, line 10, after <other> insert <relevant>

Section 14

In section 14, page 8, line 33, at end insert—

<( ) avoidance of conflict of interest,>

In section 14, page 8, line 34, leave out <(including for section 45(4))>

In section 14, page 8, line 36, at end insert—

<( ) compensation (see section (compensation)),>

In section 14, page 9, line 7, at end insert—

<( ) Rules made in pursuance of subsection (1)(f) may allow the approved regulator to take one or more of the following measures, in relation to a licensed provider, if it considers that to be appropriate in the circumstances of the case—

(a) setting performance targets,
(b) directing that action be taken,
(c) publishing a statement of censure,
(d) imposing a financial penalty in accordance with section 15,
(e) amending the condition of its license,
(f) revoking its licence.>

In section 14, page 9, line 13, at end insert—

<( ) See also sections 43(6)(a), 45(4) and (Ban for improper behaviour)(4) (as well as sections 15 to 19).>
Section 15

Fergus Ewing

25 In section 15, page 9, line 21, leave out from <approved regulator> to end of line 22 and insert <Scottish Ministers (but the approved regulator may collect it on their behalf).>

Section 16

Fergus Ewing

26 In section 16, page 9, line 36, at end insert <specified in the scheme>

Section 17

Fergus Ewing

101 In section 17, page 10, line 9, leave out <outside> and insert <non-solicitor>

After section 19

Fergus Ewing

170 After section 19, insert—

<Compensation arrangements

Choice of arrangements

(1) An approved regulator must proceed with either option A or option B as regards a fund (a compensation fund) for making good such relevant losses as may be suffered by reason of dishonesty on the part of its licensed legal services providers.

(2) Option A is for the approved regulator to maintain a compensation fund (of its own) in relation to its licensed providers.

(3) If option A is proceeded with, the compensation fund is to be—

   (a) held by the approved regulator for such purpose as corresponds to the purpose for which the Guarantee Fund is held under section 43(2)(c) of the 1980 Act in relation to licensed providers,

   (b) administered by it in such way as corresponds to the administration of the Guarantee Fund in accordance with section 43(3) to (7) of, and Part I of Schedule 3 to, the 1980 Act (so far as applicable in relation to licensed providers).

(4) Option B is for the approved regulator, by not maintaining a compensation fund as mentioned in option A, to cause the Guarantee Fund to be administered as respects its licensed providers.

(5) For the purpose of option B, see section 43(2)(c) to (8) of, and Part I of Schedule 3 to, the 1980 Act.

(6) As soon as it has decided which of options A and B to proceed with, the approved regulator must inform the Law Society of its decision.>
Fergus Ewing

171 After section 19, insert—

<Compensation rules: general

(1) For the purposes of this Part, the compensation rules are rules in pursuance of (as the case may be)—

(a) option A in section (Choice of arrangements), or

(b) option B in that section.

(2) In pursuance of option A, the rules must—

(a) state—

(i) the purpose of the approved regulator’s compensation fund,

(ii) as a minimum, the monetary amount to be contained in that fund,

(b) describe the way in which that fund is to be administered by the approved regulator,

(c) specify the criteria for qualifying for payment out of that fund,

(d) provide for the procedure for—

(i) making claims for such payment,

(ii) determining such claims,

(e) require the making of contributions to that fund by a licensed provider in accordance with the relevant scale of annual contributions fixed by virtue of section (Choice of arrangements)(3)(b),

(f) make provision for the destination (or distribution) of that fund in the event that the approved regulator ceases to operate.

(3) In pursuance of option B, the rules must require the making of contributions to the Guarantee Fund by a licensed provider in accordance with the relevant scale of annual contributions fixed under paragraph 1(3) of Schedule 3 to the 1980 Act.>

Robert Brown

171A As an amendment to amendment 171, line 24, at end insert <but only if these have been approved by the Council of the Law Society after a report confirming the fairness of the arrangements has been obtained from an independent actuary.>

Fergus Ewing

172 After section 19, insert—

<More about compensation rules

(1) Compensation rules may include such further compensation arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(2) The Scottish Ministers may by regulations make further provision about compensation arrangements as to licensed providers, including (in particular)—
(a) for the content of compensation rules,
(b) in connection with a compensation fund, for functions of approved regulators and licensed providers,
(c) so far as concerning the relevant scale of annual contributions to the Guarantee Fund referred to in paragraph 1(3) of Schedule 3 to the 1980 Act, for functions of the Law Society.

(3) In sections (Choice of arrangements) and (Compensation rules: general) and this section, a reference to the Guarantee Fund is to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).>

**Robert Brown**

268 After section 19, insert—

<Compensation

Practice rules must—

(a) require licensed providers to keep in place sufficient arrangements for compensating persons who, in the opinion of the approved regulator, suffer pecuniary loss by reason of dishonesty on the part of that provider in providing legal services,
(b) include provision for ensuring that such persons may be compensated even although the licensed provider no longer provides such services or is no longer in existence.>

**Section 22**

**Robert Brown**

Supported by: Bill Aitken

272 In section 22, page 11, line 37, after <may> insert <, with the consent of the Lord President.>

**Section 23**

**Fergus Ewing**

27 In section 23, page 12, line 10, leave out <any such functions that the approved regulator has as regards> and insert <the approved regulator’s functions of regulating>

**Robert Brown**

274 In section 23, page 12, line 20, leave out from <but> to the end of line 23

**Section 24**

**Fergus Ewing**

28 In section 24, page 12, line 25, after <assess> insert <the performance of>
Fergus Ewing
29 In section 24, page 13, line 14, after <delegate> insert <any of>

Section 26

Robert Brown
Supported by: Bill Aitken
278 In section 26, page 13, line 23 after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
30 In section 26, page 13, line 24, leave out <to be necessary or expedient for them to have> and insert <appropriate>

Bill Aitken
279 In section 26, page 13, leave out line 28

Section 27

Fergus Ewing
31 In section 27, page 13, line 32, leave out <to it, or>

Before section 28

Fergus Ewing
32 Before section 28, insert—

<Review of own performance>
(1) An approved regulator must review annually its performance.
(2) In particular, a review is to cover the following matters—
   (a) the approved regulator’s compliance with section 62,
   (b) the exercise of its regulatory functions,
   (c) the operation of its internal governance arrangements,
   (d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).
(3) The approved regulator must send a report on the review to the Scottish Ministers.
(4) The report must contain a copy of the approved regulator’s annual accounts (but only so far as they are relevant in connection with its functions under this Part).
(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved regulators’ performance,
   (b) reports on reviews of their performance.>
Section 28

Fergus Ewing
33 In section 28, page 14, line 7, leave out <its duties under>

Section 29

Robert Brown
Supported by: Bill Aitken
283 In section 29, page 14, line 37, at end insert—

<(  ) The Scottish Ministers may only take the measures mentioned in subsection (4)(a), (b),
(e) and (f) with the consent of the Lord President.>

Robert Brown
Supported by: Bill Aitken
284 In section 29, page 14, line 38 after <may> insert <, with the consent of the Lord President,>

Fergus Ewing
34 In section 29, page 15, line 4, at end insert—

<(  ) Before making regulations under subsection (6), the Scottish Ministers must consult
every approved regulator.>

Schedule 2

Bill Aitken
288 In schedule 2, page 63, leave out line 38

Bill Aitken
289 In schedule 2, page 64, line 1, leave out <other>

Schedule 3

Bill Aitken
291 In schedule 3, page 65, line 19, after <may> insert <, with the consent of the Lord President,>

Bill Aitken
292 In schedule 3, page 65, leave out line 25

Bill Aitken
293 In schedule 3, page 65, line 26, leave out <other>
Schedule 4

Fergus Ewing
35 In schedule 4, page 69, line 15, leave out <application is determined> and insert <Scottish Ministers notify the approved regulator of their determination of the application>

Fergus Ewing
36 In schedule 4, page 69, line 18, at end insert—
<( ) On an appeal under this paragraph—
(a) the Court may—
   (i) uphold, vary or quash the decision that is the subject of the appeal,
   (ii) make such further order as is necessary in the interests of justice,
(b) the Court’s determination is final.>

Fergus Ewing
37 In schedule 4, page 70, line 1, leave out <period of>

Schedule 5

Bill Aitken
296 In schedule 5, page 71, leave out line 22

Schedule 6

Bill Aitken
298 In schedule 6, page 73, leave out line 17

Bill Aitken
299 In schedule 6, page 73, leave out lines 24 to 33

After section 29

Robert Brown
286 After section 29, insert—
<Annual report to the Parliament

Scottish Ministers must make a report to the Parliament annually on the anniversary of this section coming into force as to the extent to which the regulatory activities of approved regulators have, in the view of Scottish Ministers—
(a) affected,
(b) prevented,
(c) restricted,
(d) distorted, or
(e) increased

competition and quality of service in the legal services market, with particular regard to
any policy statements issued by approved regulators under section 63.

Section 35

Fergus Ewing

38 In section 35, page 17, line 33, leave out from beginning to <expedient> in line 34 and insert <No
regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that
their intervention under this section is necessary, as a last resort,>

Robert Brown

38A As an amendment to amendment 38, line 2, after <Scottish Ministers> insert <reasonably>

Bill Aitken

307 In section 35, page 17, line 33, after <only> insert <with the consent of the Lord President and>

Section 36

Fergus Ewing

39 In section 36, page 18, line 13, after <a> insert <valid>

Fergus Ewing

40 In section 36, page 18, line 14, leave out <as construed by reference to section 15(1)> and insert <such as may be imposed under section 15(1)(b) or 53(5)>

Section 37

Bill Aitken

310 In section 37, page 18, line 24, leave out <36(2)> and insert <section (majority ownership)(1)(c)>

Bill Aitken

311 In section 37, page 18, line 27, leave out <36(2)> and insert <section (majority ownership)(1)(c)>

Bill Aitken

312 In section 37, page 18, leaves out lines 32 to 34

Bill Aitken

313 In section 37, page 18, line 35, leave out <But> and insert <Subject to section (majority
ownership)(1),>
Fergus Ewing

41 In section 37, page 19, leave out lines 13 and 14 and insert—

<( ) a litigation practitioner,>

Fergus Ewing

173 In section 37, page 19, line 15, after <agent> insert <or will writer>

Bill Aitken

314 In section 37, page 19, line 17, after <make> insert <, subject to section (majority ownership)(1),>

Fergus Ewing

42 In section 37, page 19, line 17, leave out <further provision about> and insert—

<(i) provision specifying other categories of entity that are, or are not, eligible to be a licensed provider,>

(ii) further provision about criteria for>

Bill Aitken

315 In section 37, page 19, line 19, leave out <36(2)> and insert <(majority ownership)(1)(c)>

Fergus Ewing

43 In section 37, page 19, line 21, at end insert—

<( ) Before making regulations under subsection (6)(b), the Scottish Ministers must consult every approved regulator.>

After section 37

Robert Brown

Supported by: Bill Aitken

317 After section 37, insert—

<Majority ownership>

(1) An entity is eligible to be a licensed provider only if—

(a) at least 51% of the entity is owned, managed and controlled by the persons or bodies specified in any one of more of the following sub-paragraphs—

(i) solicitors,

(ii) firms of solicitors or incorporated practices, or

(iii) members of other regulated professions,

(b) it is not wholly owned, managed and controlled by solicitors, firms of solicitors or incorporated practices, and
(c) it has within it, for the provision of legal services, at least one solicitor who holds a practising certificate that is free from conditions (as construed by reference to section 15(1) of the 1980 Act).

(2) In subsection (1)(a)(iii), a “regulated profession” means a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications.>

Section 39

Fergus Ewing

44 In section 39, page 20, line 15, after second <a> insert <valid>

Fergus Ewing

45 In section 39, page 20, line 15, leave out <as construed by reference to section 15(1)> and insert <such as may be imposed under section 15(1)(b) or 53(5)>

Fergus Ewing

46 In section 39, page 20, line 27, at end insert—

< (aa) adhere to the professional principles,>

Fergus Ewing

47 In section 39, page 20, line 38, leave out <as regards> and insert <for exercising>

Fergus Ewing

48 In section 39, page 21, line 4, at end insert <(in their capacity as such)>

Robert Brown

319 In section 39, page 21, line 6, at end insert—

< ( ) Before making regulations under subsection (9), the Scottish Ministers must consult the Lord President.>

Section 40

Fergus Ewing

49 In section 40, page 21, line 33, at end insert <(in their capacity as such)>

Robert Brown

321 In section 40, page 21, line 33, at end insert—

< ( ) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.>
Section 41

Robert Brown

In section 41, page 22, line 14, at end insert—

\(<( )> \text{Before making regulations under subsection (5), the Scottish Ministers must consult the Lord President.}\rangle

Section 43

Fergus Ewing

In section 43, page 23, line 34, leave out \(<\text{Rules made in pursuance of section 10(1)(b) and (c) must (additionally)}\rangle \text{and insert } \langle\text{Practice and licensing rules respectively must}\rangle

Fergus Ewing

In section 43, page 23, line 37, at end insert—

\(<( )> \text{A licensed provider which or another person who is aggrieved by a direction under subsection (4) (or both jointly) may appeal against the direction—}\rangle

(a) \text{to the sheriff,}\rangle

(b) \text{within the period of 3 months beginning with the date on which the direction is given.}\rangle

Section 45

Fergus Ewing

In section 45, page 25, line 12, at end insert—

\(<(3A)> \text{Licensing rules must provide that the licensed provider’s licence may be revoked or suspended if the licensed provider wilfully disregards a disqualification imposed under section 44.}\rangle

Section 47

Fergus Ewing

In section 47, page 26, line 31, after \(<\text{is}\rangle \text{insert } \langle\text{written}\rangle

Fergus Ewing

In section 47, page 26, line 37, leave out \(<\text{or manager}\rangle

Robert Brown

In section 47, page 26, line 38, leave out from \(<,\text{or}\rangle \text{to end of line 39}

Fergus Ewing

In section 47, page 27, line 4, leave out subsection (4)
After section 47

Fergus Ewing

55 After section 47, insert—

<Working context

(1) A Head of Legal Services is, in furtherance of section 39(5)(aa) and (b), responsible for ensuring that there is (by or under the direction of the Head) adequate supervision of the legal work carried out by the designated persons within the licensed provider.

(2) Only a designated person within a licensed provider may carry out legal work in connection with its provision of legal services.

(3) Nothing in this Part affects the operation of—

(a) section 32 of the 1980 Act or any other enactment which requires that a particular sort of legal work be carried out by an individual of a particular description (or in a particular way), or

(b) any rule of professional practice, conduct or discipline (whether for solicitors or otherwise) which properly so requires.>

Section 49

Fergus Ewing

103 In section 49, page 27, line 19, leave out <outside> and insert <non-solicitor>

Fergus Ewing

104 In section 49, page 27, line 22, leave out from <may> to <but> in line 23

Fergus Ewing

105 In section 49, page 27, line 24, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

106 In section 49, page 27, line 29, at end insert—

<( ) But the approved regulator need not act as required by licensing rules made under subsection (2)(b) if, by such time as it may reasonably appoint, the licensed provider demonstrates to it that (following disqualification as required by section (Ban for improper behaviour)(1) or otherwise) the investor no longer has the relevant interest.>

Fergus Ewing

107 In section 49, page 27, line 31, leave out <outside> and insert <non-solicitor>

After section 49

Fergus Ewing

108 After section 49, insert—
<Exemption from fitness test>

(1) Section 49(1) is subject to this section.

(2) The approved regulator need not act as required by that section in relation to any exemptible investor in the licensed provider.

(3) Licensing rules must explain—
   (a) any circumstances in which the approved regulator proposes to rely on subsection (2),
   (b) any threshold below the percentage specified in subsection (4) by reference to which it proposes to rely on subsection (2),
   (c) where it proposes to rely on subsection (2), its reasons.

(4) In subsection (2), an “exemptible investor” is an investor who has less than a 10% stake in the total ownership or control of the licensed provider.>

Section 50

Fergus Ewing

109 In section 50, page 28, line 3, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

110 In section 50, page 28, line 7, leave out <(including associations),> and insert—
   <( ) family, business or other associations (so far as bearing on character),>

Robert Brown

110A As an amendment to amendment 110, line 2, at end insert <and suitability to be such an investor>

Fergus Ewing

111 In section 50, page 28, line 18, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

112 In section 50, page 29, line 5, leave out subsection (4)

Fergus Ewing

113 In section 50, page 29, line 10, at end insert—
   <( ) Where a non-solicitor investor is a body, it is relevant as respects the investor’s fitness for having an interest in a licensed provider whether or not the persons controlling the body’s affairs would (if they were investors in the licensed provider in their own right) be held to be fit in that regard.>
Robert Brown

113A As an amendment to amendment 113, line 3, leave out <controlling> and insert <having control or substantial influence in>

After section 50

Fergus Ewing

114 After section 50, insert—

<Ban for improper behaviour>

(1) Where an approved regulator determines that a non-solicitor investor in a licensed legal services provider has contravened section 51(1) or (2), the approved regulator must disqualify the investor from having an interest in the licensed provider.

(2) A disqualification under subsection (1)—

(a) may be—

(i) without limit of time, or

(ii) for a fixed period,

(b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(3) Before disqualifying an investor under subsection (1), the approved regulator must give the investor 28 days (or such longer period as it may allow) to—

(a) make representations to it,

(b) take such steps as the investor may consider expedient.

(4) Practice rules must—

(a) set procedure (which the approved regulator is to follow) for imposing a disqualification under subsection (1),

(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that subsection.

(5) A person who is disqualified under subsection (1) may appeal against the disqualification—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the disqualification is imposed.>

Section 51

Fergus Ewing

115 In section 51, page 29, line 14, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

116 In section 51, page 29, line 21, leave out <An outside> and insert <A non-solicitor>
Fergus Ewing

117 In section 51, page 29, line 22, after <interfere> insert <improperly>

Section 52

Fergus Ewing

174 In section 52, page 29, line 34, leave out from <including> to end of line 6 on page 30

Fergus Ewing

175 In section 52, page 30, line 8, at end insert—

<(2A) The Scottish Ministers may by regulations—

(a) amend the percentage specified in section (Exemption from fitness test)(4) and paragraph 3A(3) of schedule 8,

(b) amend (by addition, elaboration or exception) a definition in subsection (4).

(2B) Regulations under subsection (2)(a) may (in particular)—

(a) impose requirements to which a licensed provider, or an investor in a licensed provider, is subject,

(b) specify criteria or circumstances by reference to which a non-solicitor investor is to be presumed, or held, to be fit (or unfit),

(c) set out—

(i) what amounts (to any extent) to ownership, control or another material interest,

(ii) what interest (or type) is relevant as regards a particular percentage stake in ownership or control,

(iii) by reference to a family, business or other association, what other interest (or type) also counts towards such a stake.>

Robert Brown

175A As an amendment to amendment 175, line 2, after <Scottish Ministers> insert <with the consent of the Lord President>

Fergus Ewing

118 In section 52, page 30, line 9, leave out subsection (3)

Fergus Ewing

119 In section 52, page 30, line 12, after <has> insert <(to any extent)>

Fergus Ewing

176 In section 52, page 30, leave out lines 15 to 18 and insert—
(b) a “non-solicitor investor” in a licensed provider is an investor who is not entitled to practise—

(i) as a solicitor,
(ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or
(iii) as a registered European lawyer.

Fergus Ewing

177 In section 52, page 30, line 18, at end insert—

<In sections 49 to 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.>

Schedule 8

Fergus Ewing

121 In schedule 8, page 76, line 14, leave out <outside> and insert <non-solicitor>

Fergus Ewing

122 In schedule 8, page 76, line 23, leave out <outside> and insert <non-solicitor>

Fergus Ewing

123 In schedule 8, page 76, line 24, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

124 In schedule 8, page 76, line 37, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

125 In schedule 8, page 77, line 1, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

126 In schedule 8, page 77, line 4, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

127 In schedule 8, page 77, line 4, leave out <(including>

Fergus Ewing

178 In schedule 8, page 77, leave out lines 6 and 7 and insert—

<(ii) because the person, having ceased to be entitled to practise as mentioned in section 52(4)(b) (while remaining as an investor), comes within the definition there.>
Fergus Ewing

129 In schedule 8, page 77, line 12, leave out <(1)(c)> and insert <(1)(c)(i)>

Fergus Ewing

130 In schedule 8, page 77, line 14, at end insert—

<(3A) In a case falling within sub-paragraph (1)(c)(ii), the licensed provider must (as soon as practicable) notify the approved regulator of the fact.>

Fergus Ewing

131 In schedule 8, page 77, line 18, leave out <or (3)> and insert <, (3) or (3A)>

Fergus Ewing

132 In schedule 8, page 77, line 23, at end insert—

<Exemption from notification requirements>

3A(1) An approved regulator may in relation to any exemptible investor in a licensed provider waive the requirements to give it information (or notification) under paragraphs 1 and 3.

(2) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on sub-paragraph (1),

(b) any threshold below the percentage specified in subsection (3) by reference to which it proposes to rely on sub-paragraph (1),

(c) where it proposes to rely on sub-paragraph (1), its reasons.

(3) In sub-paragraph (1), an “exemptible investor” is (as the case may be)—

(a) an investor who has less than a 10% stake in the total ownership or control of the licensed provider, or

(b) a person whose intended acquisition of an interest in the licensed provider is of less than a 10% stake in the total ownership or control of the licensed provider.>

Section 53

Fergus Ewing

56 In section 53, page 30, line 23, after <reason> insert <(except revocation or suspension of its licence under this Part)>

Section 54

Fergus Ewing

57 In section 54, page 31, line 8, after <reason> insert <(except revocation or suspension of its licence under this Part)>
Section 57

Fergus Ewing

58 In section 57, page 33, leave out lines 30 and 31 and insert—
<( ) acting as a litigation practitioner,>

Fergus Ewing

179 In section 57, page 33, line 32, after <agent> insert <or will writer>

Fergus Ewing

59 In section 57, page 34, line 11, at end insert—
<( ) the Court’s determination is final.>

Section 58

Fergus Ewing

60 In section 58, page 34, leave out lines 29 and 30 and insert—
<( ) acting as a litigation practitioner,>

Fergus Ewing

180 In section 58, page 34, line 31, after <agent> insert <or will writer>

Section 59

Fergus Ewing

61 In section 59, page 35, line 9, after <implying> insert <falsely>

Section 60

Fergus Ewing

62 In section 60, page 35, line 32, leave out <(with any necessary modifications)>

Fergus Ewing

63 In section 60, page 35, line 34, at end insert <but with any necessary modifications>

Section 64

Fergus Ewing

133 In section 64, page 37, line 10, at end insert—
<(A1) Any complaint about an approved regulator is to be made to the Scottish Legal
Complaints Commission.>
(A2) The Commission is to determine whether or not the complaint is—
(a) one for which section 57D(1) of the 2007 Act makes provision,
(b) frivolous, vexatious or totally without merit.

(A3) And—
(a) if the Commission determines that the complaint falls within subsection (A2)(a),
the Commission is to proceed by reference to section 57D(1) of the 2007 Act,
(b) if the Commission determines that the complaint falls within subsection (A2)(b),
the Commission—
   (i) must notify the complainer and the approved regulator accordingly (with reasons),
   (ii) is not required to take any further action.
(c) if the Commission determines that the complaint does not fall within subsection
   (A2)(a) or (b), the Commission must refer the complaint to the Scottish Ministers.

Fergus Ewing
134 In section 64, page 37, line 11, leave out <made to them about an approved regulator> and insert <about an approved regulator that is referred to them under subsection (A3)(c)>

Fergus Ewing
135 In section 64, page 37, line 13, leave out subsection (2)

Fergus Ewing
136 In section 64, page 37, leave out line 19

Fergus Ewing
137 In section 64, page 37, line 21, leave out subsection (4)

Fergus Ewing
138 In section 64, page 37, line 26, leave out <Scottish Legal Complaints>

Fergus Ewing
139 In section 64, page 37, line 27, at end insert <(and, if they so delegate their function under subsection (1), they may also waive the referral requirement under subsection (A3)(c))>

After section 64

Fergus Ewing
140 After section 64, insert—

<Levy payable by regulators>
(1) An approved regulator must pay to the Scottish Legal Complaints Commission—
(a) in respect of each financial year, an annual levy,
(b) if arising, a complaints levy.

(2) The amount of the annual levy or complaints levy payable by an approved regulator—
(a) is to be determined by the Commission,
(b) may be—
   (i) different from any amount payable as an annual general levy or (as the case may be) a complaints levy under Part 1 of the 2007 Act,
   (ii) in either case, of different amounts (including nil) in different circumstances.

(3) The complaints levy arises as respects an approved regulator where—
(a) the Scottish Ministers delegate to the Commission their function under section 64(1) in relation to a complaint made about the approved regulator, and
(b) the Commission upholds the complaint.

(4) Before determining for a financial year the amount of the annual levy or complaints levy, the Commission must consult—
(a) each approved regulator (with particular reference to the proposed amount to be payable by it),
(b) the Scottish Ministers.

Section 65

Fergus Ewing

141 In section 65, page 39, line 2, at end insert—
<(1A) Section 29 applies for the purposes of subsection (1) as it applies for the purposes of sections 27(1) and 28(1).
(1B) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) and (1A)—
   (a) an approved regulator is to be regarded as a relevant professional organisation whose members are its licensed providers,
   (b) a licensed provider is to be regarded—
      (i) in connection with the annual general levy, as an individual person falling within the relevant category,
      (ii) in connection with the complaints levy, as an individual practitioner of the relevant type.>

Fergus Ewing

142 In section 65, page 39, line 3, at beginning insert <But>
In section 65, page 39, line 12, at end insert—

\(<57\text{CA} \quad \text{Recovery of levy}\)

1. An approved regulator must—
   a. secure the collection by it, from its licensed providers, of the annual general levy due by them, and
   b. pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

2. Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as it applies in relation to any sum due under subsection (2)(b) of section 27.

3. Subsection (4) of section 27 applies in relation to any sum due under section 57C(1)(a) (including interest) as it applies in relation to any sum due under subsection (1) of section 27.

4. Subsection (3) of section 28 applies in relation to any sum due under section 57C(1)(b) (including interest) as it applies in relation to any sum due under subsection (1) of section 28.

5. For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—
   a. the approved regulator is to be regarded as the relevant professional organisation,
   b. each of its licensed providers is to be regarded—
      i. in relation to section 27(4), as an individual person falling within the relevant category,
      ii. in relation to section 28(3), as an individual practitioner of the relevant type.

6. Section 57C(1) is subject to subsection (1).

In section 65, page 39, line 24, at end insert—

\(<\text{“professional principles”},\>

\(<\text{“regulatory objectives”}>\)

In section 67, page 40, line 12, leave out <outside> and insert <non-solicitor>

In section 67, page 40, line 23, leave out <that> and insert <on which>
Fergus Ewing

65 In section 67, page 40, line 25, leave out <that> and insert <on which>

Section 68

Fergus Ewing

146 In section 68, page 41, line 15, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

147 In section 68, page 41, line 15, at end insert <, or

   ( ) disqualified under section (Ban for improper behaviour)(1) (that is, from having
   an interest in a licensed provider).>

Fergus Ewing

148 In section 68, page 41, line 20, at end insert <or (as the case may be) disqualification>

Fergus Ewing

149 In section 68, page 41, line 21, at end insert <or (as the case may be) disqualification>

Fergus Ewing

150 In section 68, page 41, line 21, at end insert—

   <( ) A list kept under this section must not include information relating to a person in respect
   of whom the determination or (as the case may be) disqualification—

   (a) has been reversed on appeal, or
   (b) otherwise, no longer applies.>

After section 70

Fergus Ewing

66 After section 70, insert—

   <Appeal procedure

   (1) This section applies in relation to an appeal to the sheriff under this Part.

   (2) The appeal is to be made by way of summary application.

   (3) In the appeal, the sheriff may—

      (a) uphold, vary or quash the decision that is the subject of the appeal,

      (b) make such further order (including for the expenses of the parties) as is necessary
           in the interests of justice.

   (4) The sheriff’s determination in the appeal is final.>
Section 73

Fergus Ewing

181 In section 73, page 42, line 37, leave out <Part> and insert <Chapter>

Section 74

Bill Aitken
Supported by: James Kelly

357 In section 74, page 43, line 16, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

151 In section 74, page 43, line 27, at end insert <(any of which may be removed or varied by the Scottish Ministers after consulting the approving body)>

Bill Aitken
Supported by: James Kelly

358 In section 74, page 43, line 27, at end insert—

<(2A) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2)(c).>

James Kelly

380 In section 74, page 43, line 28, after <body> insert <and what conditions, if any, to impose under subsection (2) or amend, add or delete under subsection (2A)>

Fergus Ewing

152 In section 74, page 43, line 38, after <must> insert <, with reasons,>

James Kelly

381 In section 74, page 44, line 2, at end insert—

<together with, in either case, their reasons for doing so.>

James Kelly

382 In section 74, page 44, line 7, at end insert—

<(6A) After considering any representations made under subsection (6), the Scottish Ministers must—

(a) make a decision as to whether or not to approve the applicant as an approving body and what conditions, if any, to impose under subsection (2) or amend, add or delete under subsection (2A),

(b) notify the applicant accordingly, together with their reasons for their decision.>
(6B) If notification of the Scottish Ministers’ decision is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification to appeal to the sheriff against that notification.

**Fergus Ewing**

153 In section 74, page 44, line 11, at beginning insert <in relation to capability to act as an approving body,>

**Fergus Ewing**

154 In section 74, page 44, leave out line 13

**James Kelly**

383 In section 74, page 44, line 13, at end insert—

<(  ) what conditions may be imposed, and the procedure for imposing, amending, adding or removing any condition.>

**Section 75**

**James Kelly**

384 In section 75, page 44, line 17, after <membership> insert <who have the appropriate qualifications and experience>

**James Kelly**

385 In section 75, page 44, line 23, after <the> insert <qualifications and>

**James Kelly**

386 In section 75, page 44, line 24, at end insert—

<(ab) require that a confirmation agent keep in place a certificate granted annually by the approving body on the anniversary of the certificate being first granted, conferring the right to provide confirmation services,>

**James Kelly**

387 In section 75, page 44, line 26, at end insert—

<(  ) require that a confirmation agent keep in place sufficient arrangements for compensating persons who, in the opinion of the approving body, suffer pecuniary loss by reason of dishonesty on the part of that agent in providing confirmation services,

(  ) include provision for ensuring that such persons may be compensated even although the confirmation agent no longer provides such services or is no longer in existence.>
Fergus Ewing

182 In section 75, page 45, line 18, leave out <Part> and insert <Chapter>

Section 76

Fergus Ewing

155 In section 76, page 45, line 26, leave out from <approving body> to end of line 27 and insert <Scottish Ministers (but the approving body may collect it on their behalf).>

After section 76

Fergus Ewing

156 After section 76, insert—

<Review of own performance>

(1) An approving body must review annually its performance.
(2) In particular, a review is to cover the following matters—
   (a) the approving body’s compliance with section 75(5),
   (b) the exercise of its functions in relation to its regulatory scheme,
   (c) its compliance with any measures applying to it by virtue of section 81(3).
(3) The approving body must send a report on the review to the Scottish Ministers.
(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).
(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved bodies’ performance,
   (b) reports on reviews of their performance.>

Section 77

Fergus Ewing

157 In section 77, page 46, line 1, after <implying> insert <falsely>

Fergus Ewing

158 In section 77, page 46, line 2, after <otherwise> insert <so>

Section 81

Fergus Ewing

183 In section 81, page 48, line 6, leave out <Part> and insert <Chapter>
Fergus Ewing

159  In section 81, page 48, line 8, leave out subsection (4) and insert—

<(4) An approving body must—
   (a) review annually the performance of its confirmation agents,
   (b) prepare a report on the review,
   (c) send a copy of the report to the Scottish Ministers.>

Fergus Ewing

160  In section 81, page 48, line 12, leave out from <about> to <(b)> in line 14 and insert—

<(a) about the review of confirmation agents,
   (b) so far as it appears to them to be necessary for safeguarding the interests of clients
   of confirmation agents—
      (i) concerning the functions of approving bodies,
      (ii) relating to>

After section 81

Fergus Ewing

184  After section 81, insert—

<CHAPTER 2

WILL WRITING SERVICES

Regulation of will writers

Will writers and services

(1) For the purposes of this Part, will writing services are services that are—
   (a) described in subsection (2), and
   (b) provided (or offered)—
      (i) to members of the public, and
      (ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing wills or other testamentary writings.

(3) For the purposes of this Part, a will writer is a person on whom, in accordance with an
    approving body’s regulatory scheme, the right to provide will writing services is
    conferred.>

Fergus Ewing

185  After section 81, insert—

<Approving bodies

(1) For the purposes of this Chapter, an approving body is a professional or other body
    which is certified as such by the Scottish Ministers under section (Certification of
    bodies).>
(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section (Certification of bodies)(1)(b)),

(b) a description of—

(i) the applicant’s constitution and composition (including internal structure),

(ii) its activities.

(4) The applicant—

(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,

(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

Fergus Ewing

186 After section 81, insert—

<Certification of bodies>

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—

(a) the applicant is suitable to be an approving body,

(b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section (Regulatory schemes)).

(2) The Scottish Ministers may certify the applicant as an approving body—

(a) either—

(i) without limit of time, or

(ii) for a fixed period,

(b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,

(c) subject to conditions (any of which may be removed or varied by the Scottish Ministers after consulting the approving body).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—

(a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—

(a) must send a copy of the application to the OFT,

(b) may send—
(i) to any other consultee, a copy of the application,
(ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—

(a) refuse to certify it as an approving body, or
(b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—

(a) the process for seeking their certification,
(b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

Fergus Ewing

187 After section 81, insert—

<Regulatory schemes

(1) An approving body must—

(a) make a regulatory scheme for—

(i) conferring on any of the individual persons within its membership the right to provide will writing services, and
(ii) regulating the provision of will writing services by the persons on whom (in accordance with the scheme) that right is conferred, and

(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) describe the training requirements to be met by a prospective will writer,
(b) incorporate a code of practice to which a will writer (and anyone acting on behalf of the will writer in relation to will writing services) is subject,
(c) require that a will writer keep in place sufficient arrangements for professional indemnity,
(d) include rules about—

(i) the making and handling of any complaint about a will writer,
(ii) the measures that may be taken by the approving body, in relation to a will writer, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the will writer were a practitioner to whom that section relates)) about the will writer is upheld,
(c) allow a will writer to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),
(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by will writers (and persons acting on their behalf in relation to will writing services),

(b) except in such circumstances as the approving body considers appropriate, prohibit the drawing or preparation of a will or other testamentary writing by a will writer which provides for the writer to be a beneficiary,

(c) require a will writer who provides the service of storing wills or other testamentary writings to keep in place sufficient arrangements for the storage of such documents (including arrangements in the event of the writer ceasing to provide will writing services),

(d) make such further arrangements as to the professional practice, conduct or discipline of will writers for which provision is (in the approving body’s opinion) necessary or expedient,

(e) provide that it is a breach of the code of practice for a will writer to fail to comply with the writer’s duties under any enactment specified in the code,

(f) provide that a breach of the code of practice by a person acting on behalf of a will writer in relation to will writing services constitutes a breach of the code of practice by the writer,

(g) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a will writer to provide will writing services if the writer contravenes the code of practice,

(ii) the suspension of that right of a will writer if a complaint, suggesting that the writer is guilty of professional misconduct in relation to the provision of will writing services, is made about the writer.

(4) A will writer may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the writer’s right to provide will writing services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the writer.

(5) An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.

Fergus Ewing

188 After section 81, insert—

<Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section (Regulatory schemes)(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section (Certification of bodies).
A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

A will writer may appeal against a financial penalty (or the amount of a financial penalty) imposed on the writer by virtue of this section—
(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which the penalty is intimated to the writer.

Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

Fergus Ewing

After section 81, insert—

<Review of own performance
(1) An approving body must review annually its performance.
(2) In particular, a review is to cover the following matters—
(a) the approving body’s compliance with section (Regulatory schemes)(5),
(b) the exercise of its functions in relation to its regulatory scheme,
(c) its compliance with any measures applying to it by virtue of section (Ministerial intervention)(3).
(3) The approving body must send a report on the review to the Scottish Ministers.
(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).
(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
(6) The Scottish Ministers may by regulations make further provision about—
(a) the review of approved bodies’ performance,
(b) reports on reviews of their performance.>

Fergus Ewing

After section 81, insert—

<Pretending to be authorised
(1) A person commits an offence if the person—
(a) pretends to be a will writer (or otherwise pretends to have the right to provide will writing services under this Part), or
(b) takes or uses any name, title, addition or description implying falsely that the person is a will writer (or otherwise so implying that the person has the right to provide will writing services under this Part).
(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.>
After section 81, insert—

<Other regulatory matters

Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section (Ministerial intervention)(3).

(2) The Scottish Ministers may—
   (a) revoke the certification given to the approving body under section (Certification of bodies),
   (b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

Surrender of certification

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section (Certification of bodies).

(2) The approving body must—
   (a) take all reasonable steps to mitigate such disruption to the clients of its will writers as is likely to result from the surrender,
   (b) in particular, take steps for ensuring that any relevant work is—
      (i) completed, or
      (ii) taken over by a suitably qualified person,
   before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
   (a) for the purpose of subsection (2), or
   (b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
   (a) subsection (2), and
   (b) any direction given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).>
After section 81, insert—

<Register and list

(1) The Scottish Ministers—
   (a) must keep and publish a register of approving bodies,
   (b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
   (a) its contact details (including its address, website and telephone number),
   (b) the date on which it was given the relevant certification under section (Certification of bodies).

(3) An approving body must—
   (a) keep a list of its will writers,
   (b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its will writers as the Scottish Ministers may reasonably request.>

Ministerial functions

(1) An approving body must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
   (a) if directed to do so by the Scottish Ministers, must—
      (i) review its regulatory scheme (or any relevant part of it), and
      (ii) report to them its findings and (if appropriate) inform them of any proposed amendments to the scheme,
   (b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—
      (i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
      (ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—
(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,

(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(4) An approving body must—

(a) review annually the performance of its will writers,

(b) prepare a report on the review,

(c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—

(a) about the review of will writers,

(b) so far as it appears to them to be necessary for safeguarding the interests of clients of will writers—

(i) concerning the functions of approving bodies,

(ii) relating to will writers.

Fergus Ewing

195 After section 81, insert—

<Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approving body.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approving body in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Chapter to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of will writing services by will writers is regulated effectively.>

Section 82

Fergus Ewing

196 In section 82, page 48, line 16, after <74(3)(a)> insert <or (Certification of bodies)(3)(a)>

Section 83

Fergus Ewing

197 In section 83, page 48, line 33, after <agents> insert <and will writers>
In section 83, page 49, line 1, after <agent> insert <or will writer>

In section 83, page 49, line 15, at end insert—

<(1A) A will writer must pay to the Commission—
    (a) the annual general levy, and
    (b) the complaints levy (if arising),
    in accordance with Part 1.>

In section 83, page 49, line 15, at end insert—

<(1B) Section 29 applies for the purposes of subsections (1) and (1A) as it applies for the purposes of sections 27(1) and 28(1).

(1C) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) to (1B)—
    (a) an approving body is to be regarded as a relevant professional organisation whose members are its licensed providers,
    (b) a confirmation agent or (as the case may be) will writer is to be regarded—
        (i) in connection with the annual general levy, as an individual person falling within the relevant category,
        (ii) in connection with the complaints levy, as an individual practitioner of the relevant type.>

In section 83, page 49, line 15, at end insert—

<57I Recovery of levy

(1) An approving body must—
    (a) secure the collection by it, from its confirmation agents or (as the case may be) will writers, of the annual general levy due by them, and
    (b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as its applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57H(1)(a) and (1A)(a) (including interest) as its applies in relation to any sum due under subsection (1) of section 27.
(4) Subsection (3) of section 28 applies in relation to any sum due under section 57H(1)(b) and (1A)(b) (including interest) as its applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approving body is to be regarded as the relevant professional organisation,

(b) each of its confirmation agents or (as the case may be) will writers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57H(1) and (1A) is subject to subsection (1).

**57J Interpretation of Part 2B>**

Fergus Ewing

161 In section 83, page 49, leave out line 19

Fergus Ewing

202 In section 83, page 49, line 19, at end insert—

<“will writer”,>

After section 84

Fergus Ewing

162 After section 84, insert—

Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.

(2) The appeal is to be made by way of summary application.

(3) In the appeal, the sheriff may—

(a) uphold, vary or quash the decision that is the subject of the appeal,

(b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.>

Section 85

Fergus Ewing

163 In section 85, page 49, line 33, leave out <of the 1980 Act>
Fergus Ewing

203 In section 85, page 49, line 34, after <Act> insert —
   ( ) in subsection (1), after paragraph (c) insert “or
   (d) any will or other testamentary writing,”,
   ( ) in subsection (2)(a), for “or papers” substitute “, papers, will or
   testamentary writing”,
   ( )>

Fergus Ewing

164 In section 85, page 49, line 35, leave out <Legal Services (Scotland) Act 2010> and insert <2010
   Act>

Fergus Ewing

204 In section 85, page 49, line 35, at end insert—
   <( ) after subsection (2C) insert—
   “(2D) Subsection (1)(d) does not apply to a will writer within the meaning of Part 3
   of the 2010 Act.”,>

Fergus Ewing

205 In section 85, page 50, line 1, after <agents> insert <or will writers>

Fergus Ewing

165 In section 85, page 50, line 1, leave out <Legal Services (Scotland) Act 2010> and insert <2010
   Act>

Fergus Ewing

206 In section 85, page 50, line 5, after <agent> insert <or will writer>

Fergus Ewing

207 In section 85, page 50, line 9, after <agents> insert <or will writers>

Section 86

Fergus Ewing

67 In section 86, page 50, line 27, leave out <practices> and insert <practitioners>

Fergus Ewing

68 In section 86, page 50, line 30, leave out <practices> and insert <practitioners>

Fergus Ewing

69 In section 86, page 50, line 32, leave out <practices> and insert <practitioners>
Fergus Ewing

70 In section 86, page 50, line 33, leave out <practices> and insert <practitioners>

Fergus Ewing

71 In section 86, page 51, leave out lines 1 and 2 and insert—

<( ) litigation practitioners.>

Section 90

Fergus Ewing

72 In section 90, page 52, line 32, leave out <or a licensed legal services provider> and insert—

<(2B) This section does not apply in relation to the taking or using by a licensed legal services provider of a name, title, addition or description if the licensed provider has the Society’s written authority for using it. (2C) For the purpose of subsection (2B), the Council are to make rules which—

(a) set the procedure for getting the Society’s authority (and specify the conditions that the Society may impose if it gives that authority),

(b) specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority)>

Fergus Ewing

73 In section 90, page 53, line 6, leave out from second <in> to end of line 8 and insert—

<(a) after the entry for “the 2007 Act” insert—

“the 2010 Act” means the Legal Services (Scotland) Act 2010;”,

(b) at the appropriate alphabetical place insert—

“licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the 2010 Act;”.

Section 91

Bill Aitken

359 In section 91, page 53, line 14, at end insert—

<( ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (e) insert—

“(f) a solicitor has been convicted by any court of an act involving dishonesty or has been sentenced to a term of imprisonment;”>

Bill Aitken

360 In section 91, page 53, line 14, at end insert—
<( ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (f) insert—
“(g) a disqualification order under the Company Directors Disqualification Act 1986 (c.46) is made against a solicitor;”>

Bill Aitken

361 In section 91, page 53, line 14, at end insert—

< ( ) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“( ) A practising certificate which has ceased to have effect by virtue of section 18(1)(g) shall again have effect when the disqualification ceases to have effect.”>

Fergus Ewing

74 In section 91, page 53, leave out lines 29 to 31

Bill Aitken

362 In section 91, page 53, line 34, at end insert—

< (ai) subsection (1A)(e)(ii) is repealed,

(bi) after subsection (1A)(e)(ii), insert—

“(iia) that any recognition granted under this section shall have effect from the date it bears, but shall expire on the 31st October next after it is issued;”>

Bill Aitken

363 In section 91, page 53, line 37, at end insert—

< (a) after subsection (1A), insert—

“(1AA) Rules under this section may make provision requiring firms of solicitors to register with the Council and providing for their regulation and subsection (1A) shall apply for the purpose of regulating and registering such firms as it applies for the purpose of regulating and recognising incorporated practices, subject to any necessary modifications (and firms of solicitors when registered and for as long as they are registered are in this Act referred to as “registered firms of solicitors”).

(1AB) In subsection (1AA), a “firm of solicitors” includes—

(a) a single solicitor practising under the solicitor’s own name; and

(b) a solicitor otherwise practising as a sole practitioner.”>
After section 91

Fergus Ewing

75 After section 91, insert—

<Citizens advice bodies

(1) In section 26 of the 1980 Act, in subsection (2), after “law centre” insert “or a citizens advice body”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““citizens advice body” means an association which is formed (and operates)—

(a) otherwise than for the purpose of making a profit, and

(b) with the sole or primary objective of providing legal and other advice (including information) to the public for no fee, gain or reward;”.

(3) The Scottish Ministers may by regulations modify the definition of “citizens advice body” in section 65(1) of the 1980 Act.

(4) Before making regulations under subsection (3), the Scottish Ministers must consult—

(a) the Lord President,

(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate.>

Fergus Ewing

208 After section 91, insert—

<Lay representation

Court of Session rules

In the Court of Session Act 1988—

(a) in section 5 (power to regulate procedure), after paragraph (ee) insert—

“(ef) to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf.,”;

(b) after section 5 insert—

“5A Rules for lay representation

(1) Rules under section 5(ef)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 5(ef) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 5(ef) and this section, a “lay representative” is a person who is not—
(a) a solicitor,
(b) an advocate, or
(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Fergus Ewing

388 After section 91, insert—

>Sheriff court rules
In the Sheriff’s Courts (Scotland) Act 1971—

(a) in section 32 (power of Court of Session to regulate civil procedure), in subsection (1), after paragraph (m) insert—

“(n) permitting a lay representative, when appearing at a hearing in any category of civil proceedings along with a party to the proceedings, to make oral submissions to the sheriff on the party’s behalf.”,

(b) after section 32 insert—

“32A Rules for lay representation

(1) Rules under section 32(1)(n)—

(a) are to apply to situations in which the party is not otherwise represented,
(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 32(1)(n)—

(a) does not restrict the operation of section 36(1),
(b) is subject to any enactment (apart from section 36(1)) under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 32(1)(n) and this section, a “lay representative” is a person who is not—

(a) a solicitor,
(b) an advocate, or
(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Fergus Ewing

210 After section 91, insert—

>Guarantee Fund

Use of Guarantee Fund

In section 43 (Guarantee Fund) of the 1980 Act—

(a) in subsection (2)—
(i) the word “or” immediately preceding paragraph (b) is repealed,
(ii) after paragraph (b) insert “; or
(c) any licensed legal services provider or any person within it, even if—
   (i) the Society is not its approved regulator, or
   (ii) subsequent to the act concerned it has ceased to operate.”,
(b) in subsection (3), after paragraph (cc) insert—
   “(cd) to a licensed provider or an investor therein in respect of a loss suffered
   by reason of dishonesty to which subsection (2)(c) relates in connection
   with the licensed provider’s provision of legal services (with the same
   meaning as for Part 2 of the 2010 Act);”,
(c) in subsection (7)(c), after “incorporated practice” insert “or a licensed provider”,
(d) after subsection (7) insert—
   “(8) In the case of licensed providers, this section and Part I of Schedule 3 apply in
   relation to (and only to) such licensed providers as are regulated by an
   approved regulator that in furtherance of section (Choice of arrangements)(4)
   of the 2010 Act does not maintain a compensation fund as referred to in that
   section.
   (9) In this section and paragraph 1 of Schedule 3—
       “approved regulator”,
       “investor”,
   are to be construed in accordance with Part 2 of the 2010 Act.”.

Fergus Ewing

After section 91, insert—

<Contributions to the Fund

(1) In Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act, in paragraph 1—
   (a) in sub-paragraph (2A)—
      (i) the words “directors of incorporated practices” become head (a),
      (ii) after that head (as so numbered) insert “, or
            (b) investors in licensed legal services providers.”,
   (b) in sub-paragraph (2B)—
      (i) the words from “by every” to the end become head (a),
      (ii) in that head (as so numbered), for “scale of such” substitute “relevant scale
           of annual corporate”,
      (iii) after that head (as so numbered) insert “, and
            (b) by every licensed provider in respect of each year during which or part
                of which it operates as such under the licence issued by its approved
                regulator a contribution (also an “annual corporate contribution”) in
                accordance with the relevant scale of annual corporate contributions
                referred to in sub-paragraph (3).”,

Fergus Ewing
(c) in sub-paragraph (3)—
   (i) for “scale” in the first place where it occurs substitute “scales”,
   (ii) the words from “, which scale” to the end are repealed,
(d) after sub-paragraph (3) insert—
“(3A) The scales of annual corporate contributions—
   (a) are to be fixed under sub-paragraph (3) by reference to all relevant factors, including—
      (i) in the case of incorporated practices, the number of solicitors that they have as directors or employees,
      (ii) in the case of licensed providers, the number of solicitors that they have as investors or employees,
   (b) may otherwise make different provision as between incorporated practices and licensed providers.”,
(e) in sub-paragraph (4), after “incorporated practice” insert “or a licensed provider”,
(f) in sub-paragraph (5), after “incorporated practice” insert “and licensed provider”,
(g) in sub-paragraph (8), after “incorporated practice” insert “or a licensed provider”.

(2) In Schedule 3 to the 1980 Act, in paragraph 3(2)—
   (a) for “and incorporated practices” substitute “, incorporated practices and licensed providers”,
   (b) for “or incorporated practice or practices” substitute “, incorporated practice or practices or licensed provider or providers”.

Fergus Ewing

212 After section 91, insert—

 Cap on individual claims
In Schedule 3 to the 1980 Act—
   (a) in paragraph 4, after sub-paragraph (3) insert—
       “(3A) The amount of an individual grant from the Guarantee Fund may not exceed £1.25 million.”,
   (b) after paragraph 4 insert—
       “5(1) The Scottish Ministers may by regulations amend the sum specified in paragraph 4(3A).

       (2) Before making regulations under sub-paragraph (1), the Scottish Ministers must consult the Council (and take account of sections 4 and (Consultation by Ministers) of the 2010 Act).

       (3) The power to make regulations under sub-paragraph (1) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.
Robert Brown

365 After section 91, insert—

<Protection of branding of firm description

(1) The Scottish Ministers may, after consulting—
(a) the Law Society,
(b) the Faculty of Advocates,
(c) any approved regulator,
(d) any approving body, and
(e) any other person or body considered appropriate by the Scottish Ministers,
designate such terms as it considers appropriate as being restricted in use to firms of
solicitors or licensed providers or specified categories of the same.

(2) The Scottish Ministers may by regulations require approved regulators to include
provision in their practice rules as to the use of terms designated under subsection (1).>

Before section 92

Fergus Ewing

76 Before section 92, insert—

<Acting as approved regulator

After section 1 of the 1980 Act insert—

“1A Power to act as statutory regulator

5 The Society may—
(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,
(b) do anything that is necessary or expedient for the purposes of doing
so.”>

Robert Brown

76A As an amendment to amendment 76, line 7, at end insert—

<( ) act as an approving body within the meaning of Part 3 of the 2010 Act,>

Bill Aitken

364 Before section 92, insert—

<Scottish solicitors guarantee fund

In paragraph 1 of Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the
1980 Act—

(a) in sub-paragraph (2A) after “are” insert “(a)” and after “practices” insert—

“(b) partners in a registered firm of solicitors;
(c) in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practicing under the solicitors own name or a solicitor otherwise practicing as a sole practitioner.”

(b) after sub-paragraph (2B) insert—

“(2BB) Subject to the provisions of this Act, there shall be paid to the Society on behalf of the Guarantee Fund by every registered firm of solicitors in respect of each year during which, or part of which, it is registered under section 34(1AA) a contribution (hereafter referred to as an “annual practice contribution”) in accordance with the scale of such contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) after “corporate contributions” insert “and the annual practice contribution”

(ii) after “directors” insert “partners”,

(iii) after “practices” insert “or registered firms of solicitors”, and

(iv) in paragraph (4), after “practice” insert “and no annual practice contribution by a registered firm of solicitors”,

(d) in sub-paragraph (5)—

(i) after “corporate contribution”)” insert “and upon every registered firm of solicitors a contribution (hereinafter referred to as a “special practice contribution”),

(ii) after “corporate contribution” (where it appears for the second time) insert “and a special practice contribution”,

(e) in sub-paragraph (8), after “incorporated practice” insert “or of a registered firm of solicitors”,>

Section 92

Fergus Ewing

77 In section 92, page 55, line 3, leave out <objectives> and insert <functions>

Fergus Ewing

78 In section 92, page 55, leave out lines 4 to 27
After section 92

Bill Aitken

366 After section 92, insert—

<Guarantee Fund

In section 43 (guarantee fund) of the 1980 Act—

(a) in subsection (2) for “the Guarantee Fund shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of” substitute “where the Council are satisfied that a person has suffered or is likely to suffer loss in consequence of dishonesty on the part of any person or body mentioned in subsection (2A), the Council may make a grant or loan out of the Guarantee Fund for the purpose of relieving that loss on such terms and conditions as the Council may determine.

(2A) The persons or bodies mentioned in this subsection are—”,

(b) in subsections (3), (4) and (5), after “grant” wherever appearing, insert “or loan”,

(c) after subsection (3) insert—

“(3A) Where an application for a grant or loan is made in any case which does not fall within subsection (3), the Council may, as it thinks fit, grant or refuse that application but, where it refuses the application, the Council shall give reasons to the applicant for doing so.

(3B) Where the Council grant that application, the Council shall determine the amount of the grant or loan and the terms and conditions upon which it is made.”>

Bill Aitken

367 After section 92, insert—

<Safeguarding interests of clients in certain other cases

In section 46(3A) (safeguarding interests of clients in certain other cases) of the 1980 Act—

(a) for “apply to the court” substitute “make”,

(b) from “leave” to the end substitute “the approval of the Council”.

Bill Aitken

368 After section 92, insert—

<Subscription to the Law Society

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 6A insert—
“6B(1) Every practice shall, for each year, pay to the Society such subscription as may be fixed from time to time by the Society in general meeting and different subscriptions may be fixed for different kinds of practices.

(2) The subscription shall be payable by the practice at the time of its application for registration or recognition.

(3) If a practice is first registered or recognised after the beginning of any year, the subscription payable by it shall be calculated by reference to the number of months remaining in that year after it is registered or recognised.

(4) In this paragraph and in paragraph 6C—
“practice” means a registered firm of solicitors or an incorporated practice; and
“year” means the period of 12 months commencing on 1 November or such other day as may be fixed by the Council.

6C(1) The Society may, in addition to the subscription imposed paragraph 6C(1), impose in respect of any year a special subscription on all practices of such amount and payable at such time and for such specified purposes as the Society may determine in general meeting.

(2) The Society may determine in general meeting that different special subscriptions may be imposed under subparagraph (1) in respect of different kinds of practices or that the special subscription shall not be payable by a kind of practice.

(3) No imposition may be made under subparagraph (1) unless a majority of members voting at the general meeting at which it is proposed has, whether by proxy or otherwise, voted in favour of its being made.”>
In Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act, after paragraph 4 insert—

“4A The Council may make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council.”

Section 93

Fergus Ewing

79 In section 93, page 56, line 2, at end insert—

<( ) Accordingly, the Council (acting in any other capacity) must not interfere unduly in the regulatory committee’s business.>

Fergus Ewing

80 In section 93, page 56, line 3, at end insert—

<( ) the committee’s membership may include persons who are not members of the Council,>

Fergus Ewing

81 In section 93, page 56, line 4, at end insert—

<( ) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1),>

James Kelly

371 In section 93, page 56, line 4, at end insert—

<( ) two members of the committee shall be licensed employment law services providers,>

Fergus Ewing

82 In section 93, page 56, line 7, at end insert—

<( ) a sub-committee—

(i) is also subject to those rules,

(ii) may be formed without the Council’s approval.>

Fergus Ewing

83 In section 93, page 56, line 8, after <committee> insert <(or a sub-committee of it)>

Fergus Ewing

84 In section 93, page 56, line 10, at end insert—
<( ) prescribe a maximum number of members that the regulatory committee may have.>

**Fergus Ewing**

85 In section 93, page 56, line 17, at end insert <(and take account of sections 4 and (Consultation by Ministers) of the 2010 Act)>

**Fergus Ewing**

213 In section 93, page 56, line 29, after <agents> insert <or will writers>

**Fergus Ewing**

86 In section 93, page 56, line 29, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

**James Kelly**

372 In section 93, page 56, line 30, at end insert—

<(<f) licensed legal services providers, or
 (g) licensed employment law services providers.> 

**Fergus Ewing**

87 In section 93, page 56, line 35, after <of> insert—

<(< ) setting standards of qualification, education and training,
 ( ) keeping the roll,
 ( ) administering the Guarantee Fund,
 ( )>

**After section 93**

**Fergus Ewing**

88 After section 93, insert—

<The 1980 Act: further modification

Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—

“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.
Fergus Ewing

After section 93, insert—

<Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—
   (a) the existing text becomes subsection (1),
   (b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
   (c) after subsection (1) (as so numbered) insert—
   “(2) But the Council are required to remove the name or annotation only if they are
        satisfied that—
        (a) the solicitor has made adequate arrangements with respect to the
            business which the solicitor then has in hand, and
        (b) it is otherwise appropriate to do so.”.

(2) In section 12C (removal of name from register on request) of the 1980 Act—
   (a) the existing text becomes subsection (1),
   (b) in subsection (1) (as so numbered), the words from “, on” to “hand,” are repealed,
   (c) after subsection (1) (as so numbered) insert—
   “(2) But the Council are required to remove the name or annotation only if they are
        satisfied that—
        (a) the solicitor has made adequate arrangements with respect to the
            business which the solicitor then has in hand, and
        (b) it is otherwise appropriate to do so.”.

James Kelly

After section 93, insert—

<Representative functions of the Law Society

(1) The 1980 Act is amended as follows.
(2) In section 3(1) (establishment and functions of Council of the Law Society), at the
    beginning insert “Subject to section 3C,”.
(3) In section 3A (discharge of functions of Council of the Law Society), in subsection (11),
    after “section 3B” insert “and section 3C”.
(4) After section 3B (regulatory committee) insert—
    “3C The representative functions of the Society
        (1) The representative functions of the Society shall not vest in, or be exercised by,
            the Council but shall be exercised on behalf of the Society by a Representative
            Council.
        (2) Membership of the Representative Council shall be elected in accordance with
            the provisions of the scheme made under paragraph 2(a) of Schedule 1.
        (3) Only solicitors may be elected to the Representative Council.
(4) The Chair of the Representative Council shall be the General Secretary of the Society who shall be elected in accordance with the provisions of the scheme made under paragraph 2(a) of Schedule 1.

(5) The General Secretary of the Society may not, while holding that office, serve as President of the Society.

(6) The Representative Council may arrange for any of its functions (other than excepted functions) to be discharged on their behalf by—
   (a) a committee of the Representative Council;
   (b) a sub committee of such a committee; or
   (c) an individual (whether or not a member of the Society’s staff).

(7) The Representative Council may, in exercise of the power conferred by subsection (6), impose restrictions or conditions on the body or person by whom the function is to be discharged.

(8) An arrangement made under this section may identify an individual by name, or by reference to an office or post which the individual holds.

(9) An arrangement under this section for the discharge of any of the functions of the Representative Council may extend to any of the functions of the Society which is exercisable by the Representative Council.

(10) For the purposes of this section, “the representative functions of the Society” means the functions of the Society in carrying out the objects of the Society in promoting the interests of the solicitors’ profession in Scotland under section 1(2)(a).”

(5) In Schedule 1 (the Law Society of Scotland)—
   (a) in paragraph 2(a), after “the Council” insert “and the Representative Council”;
   (b) in paragraph 2(d), after “sub-committees” insert “of the Council and of the Representative Council”; and
   (c) in paragraph 3 after “Council” (wherever it appears) insert “or Representative Council”.

After section 94

Fergus Ewing

90 After section 94, insert—

<Notification if suspension lifted>

(1) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“(5B) On the occurrence of any of the circumstances mentioned in subsections (4) to (5A), the solicitor concerned must notify the Council in writing (and without delay).”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of the 1980 Act, after subsection (4) insert—
“(4A) On the occurrence of any of the circumstances mentioned in subsections (2) to (4), the lawyer concerned must notify the Council in writing (and without delay).”.

Bill Aitken

374 After section 94, insert—

<Complaints to Tribunal

(1) Section 51 of the 1980 Act (complaints to Tribunal), is amended as follows.

(2) In subsection (1A) for “in respect of” to the end substitute “made the Council (whether or not on behalf of any other person) against—

(a) a solicitor, whether or not the solicitor had a practising certificate in force at the time the conduct complained of occurred and notwithstanding that subsequent to that time the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice;

(b) a firm of solicitors, whether or not since the time of the conduct complained of there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;

(c) an incorporated practice, whether or not since the time of the conduct complained of there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) or has been wound up;

(d) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 and includes any such person, whether or not the person had acquired the right at the time of the conduct complained of and notwithstanding that subsequent to that time the person no longer has the right;

(e) a conveyancing practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

(f) an executry practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

and any reference in Part IV to any of those persons or practices mentioned in paragraphs (a) to (f) shall be construed accordingly.”

(3) In subsection (2), after “that” insert—

“(a) a solicitor may have been guilty of professional misconduct or unsatisfactory professional conduct;

(b) a solicitor or”.>
<Procedure on complaints and appeals to Tribunal

(1) The 1980 Act is amended as follows.

(2) In section 52 (procedure on complaints and appeals to Tribunal), after subsection (3) insert—

“(4) For the avoidance of doubt, rules made by the Tribunal under subsection (2) may provide for the functions of the Tribunal to be exercised on behalf of the Tribunal, in relation to a particular case or part of a case—

(a) by any particular tribunal constituted in accordance with paragraph 5 of Schedule 4 to deal with that case or part;

(b) by the chairman or vice chairman of the Tribunal other than the functions of hearing and determining the merits of any case.”>

Section 96

Fergus Ewing

379 In section 96, page 57, line 27, after <Scotland> insert <(including by reference to any relevant factor relating particularly to rural or urban areas)>

Section 97

Fergus Ewing

91 Leave out section 97 and insert—

<Information about legal services

After section 35A of the 1986 Act insert—

“35AA Information about legal services

(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—

(a) each of the bodies mentioned in subsection (3)(a) and (b) must—

(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and

(ii) give the Board a summary of the relevant facts.

(b) the body mentioned in subsection (3)(d) must—

(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and

(ii) give the Board a summary of the relevant facts.

(3) The bodies are—

(a) the Law Society,

(b) the Faculty of Advocates,

(c) the Scottish Court Service,
(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—
(a) section 1(2A),
(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.”.

Section 98

Fergus Ewing
92 In section 98, page 58, line 13, leave out <29(9),> and insert <29—
( ) in subsection (4), after “members” insert “, and the Scottish Ministers,”,
( ) in subsection (9),>

After section 98

Fergus Ewing
93 After section 98, insert—

<The 2007 Act: further provision>
(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—
“(1A) The Scottish Ministers may make such further provision as, having regard to the effect of the Legal Services Act 2007 so far as concerning the subject matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider necessary or expedient in connection with this Act or any related provisions of the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after “section 78(1)” insert “or (1A)”.>

Section 99

Fergus Ewing
94 In section 99, page 58, line 36, at end insert—

<( ) section 37(6)(a)(i),>

Fergus Ewing
214 In section 99, page 58, line 36, at end insert—

<( ) section 52(2A),>

Fergus Ewing
166 In section 99, page 59, line 3, leave out <81(5)> and insert <81(5)(b)>
After section 99

Fergus Ewing

<Further modification

(1) The Scottish Ministers may by regulations made by statutory instrument—

(a) amend the percentage specified in section (Majority ownership)(1)(a), or

(b) repeal section (Majority ownership).

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe that the effect of the amendment or (as the case may be) repeal would be—

(a) compatible with the regulatory objectives, and

(b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the Lord President,

(b) the Law Society,

(c) every approved regulator,

(d) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.>

Section 101

Fergus Ewing

In section 101, page 60, line 7, at end insert—

<(  ) a reference to a litigation practitioner is to a person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act.>

Schedule 9

Fergus Ewing

In schedule 9, page 79, line 17, at end insert—
<litigation practitioner>

**Fergus Ewing**

167 In schedule 9, page 80, line 9, leave out <outside> and insert <non-solicitor>

**Fergus Ewing**

216 In schedule 9, page 80, line 16, at end insert—

<approving body (of will writer) section (Approving bodies)>

**Fergus Ewing**

168 In schedule 9, page 80, line 17, after <and> insert <confirmation>

**Fergus Ewing**

217 In schedule 9, page 80, line 18, leave out <section 75> and insert <sections 75 and (Regulatory schemes)>

**Fergus Ewing**

218 In schedule 9, page 80, line 18, at end insert—

<will writer and will writing services section (Will writers and services)>
Legal Services (Scotland) Bill

2nd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the second day of Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

**Groupings of amendments**

**Role of the Lord President**
4, 236, 5, 6, 7, 238, 8, 9, 240, 244, 14, 272

**Authorisation to act**
15, 16, 17, 18

**Compensation**
169, 261, 170, 171, 171A, 172, 268, 210, 211

**Regulatory schemes**
247, 248, 249, 250

**Regulatory conflicts**
19, 252, 20

**Reference to non-solicitor investors**

**Exemption from fitness test**
21, 99, 108, 132

**Licensing rules**
254, 22, 256, 23

**Practice rules**
260, 24, 262, 25, 26

**Ban for improper behaviour**
100, 106, 114, 117, 147, 148, 149, 150
Regulatory functions
27, 274, 28, 29, 278, 30, 279, 31

Performance of approved regulators
32, 33, 283, 284, 34, 288, 289, 291, 292, 293, 35, 36, 37, 296, 298, 299, 286

Ceasing to regulate
38, 38A, 307

Notes on amendments in group
Amendment 38 pre-empts amendment 307

Licensed providers
39, 40, 41, 42, 43, 94, 95, 96

Ownership of licensed providers
310, 311, 312, 313, 314, 315, 317, 318

Will writers
173, 179, 180

Operational positions and appointment to such positions
44, 45, 46, 47, 48, 319, 49, 321, 323, 50, 51, 102

Designated persons
52, 53, 330, 54, 55

Outside investors
104, 110, 110A, 113, 113A

More about investors
174, 175, 175A 118, 119, 177, 214

Discontinuance of services
56, 57

Professional practice
58, 59, 60, 61, 62, 63, 64, 65

Complaints about and levy payable by approved regulators
133, 134, 135, 136, 137, 138, 139, 140

Complaints about providers
141, 142, 143, 144

Appeal procedure
66, 162

Confirmation services – further requirements
181, 357, 151, 358, 380, 152, 381, 382, 153, 154, 383, 384, 385, 386, 387, 182, 155, 156, 157, 158, 183, 159, 160, 166, 168
Notes on amendments in group
Amendment 357 is a direct alternative to amendment 151

Will writing services
184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201, 199, 161, 202, 163, 203, 164, 204, 205, 165, 206, 207, 213, 215, 216, 217, 218

Applying the regulatory objectives
67, 68, 69, 70, 71

Description of licensed legal services providers
72, 365

Practising rules
73, 359, 360, 361, 74

Rules for registration of firms
362, 363

Citizens advice bodies
75

Lay representation
208, 388

Cap on individual claims
212

Acting as an approved regulator
76, 76A

Guarantee Fund
364, 366, 370

Council membership
77, 78

Safeguarding interests of clients
367

Law society – finance
368, 369

Regulatory committee
79, 80, 81, 371, 82, 83, 84, 85, 86, 372, 87

1980 Act - further modification
88, 89, 90

Representative functions of the Law Society
373
Complaints to tribunal
374, 375

Information about legal services
379, 91

2007 Act – minor amendments
92, 93

Amendments already debated

Approval of regulators
With 235 – 233, 237, 239, 10, 241, 242, 243, 11, 12, 13

Notes on amendments in group
Amendment 10 pre-empts amendments 241, 242 and 243
Present:
Bill Aitken (Convener) Robert Brown
Bill Butler (Deputy Convener) Cathie Craigie
Nigel Don James Kelly
Stewart Maxwell Dr Richard Simpson (Committee Substitute)
Maureen Watt (Committee Substitute) (for item 4)

Apologies were received from Dave Thompson.

Legal Services (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 4, 7, 8, 9, 11, 12, 15, 16, 17, 18, 19, 20, 98, 21, 99, 22, 23, 24, 100, 25, 26, 101, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 173, 42 and 43.

The following amendments were agreed to (by division):

236 (For 5, Against 3, Abstentions 0)
5 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote)
6 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote)
237 (For 5, Against 3, Abstentions 0)
238 (For 5, Against 3, Abstentions 0)
239 (For 5, Against 3, Abstentions 0)
240 (For 5, Against 3, Abstentions 0)
242 (For 5, Against 3, Abstentions 0)
244 (For 5, Against 3, Abstentions 0)
250 (For 5, Against 3, Abstentions 0)
252 (For 5, Against 3, Abstentions 0)
261 (For 5, Against 3, Abstentions 0)
272 (For 5, Against 3, Abstentions 0)
278 (For 5, Against 3, Abstentions 0)
279 (For 5, Against 3, Abstentions 0)
283 (For 5, Against 3, Abstentions 0)
284 (For 5, Against 3, Abstentions 0)
288 (For 5, Against 3, Abstentions 0)
289 (For 5, Against 3, Abstentions 0)
291 (For 5, Against 3, Abstentions 0)
292 (For 5, Against 3, Abstentions 0)
293 (For 5, Against 3, Abstentions 0)
296 (For 5, Against 3, Abstentions 0)
298 (For 5, Against 3, Abstentions 0)
299 (For 5, Against 3, Abstentions 0)
38 (For 5, Against 3, Abstentions 0)
317 (For 5, Against 3, Abstentions 0).

The following amendments were disagreed to (by division):

10 (For 3, Against 5, Abstentions 0)
241 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
243 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
169 (For 3, Against 5, Abstentions 0)
248 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
254 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
256 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
260 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
170 (For 3, Against 5, Abstentions 0)
171 (For 3, Against 5, Abstentions 0)
172 (For 3, Against 5, Abstentions 0)
268 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
38A (For 1, Against 7, Abstentions 0).

Amendment 307 was pre-empted.

Amendments 247 and 310 were moved and, with the agreement of the Committee, withdrawn.

The following amendments were not moved: 233, 13, 14, 249, 262, 171A, 274, 286, 311, 312, 313, 314 and 315.

Sections 13, 18, 19, 20, 21 and 25, schedule 1, section 30, schedule 7, and sections 31, 32, 33, 34 and 38 were agreed to without amendment.

Sections 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 22, 23, 24, 26, 27, 28, 29, schedules 2, 3, 4, 5 and 6, and sections 35, 36 and 37 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 38 having been agreed to.
Legal Services (Scotland) Bill: Stage 2

10:09

The Convener: We now turn to our principal item of business, which is the second day of stage 2 proceedings on the Legal Services (Scotland) Bill. The committee’s consideration today will not proceed beyond the end of part 2. I welcome Fergus Ewing, the Minister for Community Safety, who, in accordance with usual practice, is accompanied by various Government officials who might alternate throughout this morning’s proceedings.

For today’s consideration, members should have with them their copies of the bill, the second marshalled list and the second groupings of amendments. I intend to proceed until about 11.30, when there will be a short break, and then to proceed until approximately 12.45 or 1 o’clock.

Section 5—Approved regulators

The Convener: The first group of amendments deals with the role of the Lord President. Amendment 4, in the name of the minister, is grouped with amendments 236, 5 to 7, 238, 8, 9, 240, 244, 14 and 272.

The Minister for Community Safety (Fergus Ewing): Good morning. Given that the Lord President already has an array of powers in respect of individuals having rights of audience in the Scottish courts, it was initially concluded that it would not be necessary for the bill to require the Lord President’s approval of the regulatory regimes applicable to the alternative business structures that will employ such individual solicitors. Therefore, section 6 of the bill as introduced simply required the Scottish ministers to consult the Lord President, alongside others, in relation to an application from a body for a licence to be an approved regulator.

The Law Society of Scotland has advocated that the Lord President should be given a role that is equal to that of the Scottish ministers in approving applicants as approved regulators under section 6. Opposing views have been voiced by the consumer groups that want a more limited role for the Lord President, similar to that which he is given by the bill as introduced.

Following various representations made by those who gave evidence, the Justice Committee asked that further consideration be given to an enhanced role for the Lord President in the consideration of applications to be approved regulators. Given the concerns raised by various parties, I lodged amendments to section 6, which, if supported, will provide for such an enhanced role, so that the Scottish ministers cannot approve an application to be an approved regulator without the agreement of the Lord President. Effectively, that would give the Lord President a veto over who can become an approved regulator. The veto is appropriately limited to section 6(1)(a)(i), which relates to the matter of the applicant’s expertise in the provision of legal services. That means that the Lord President would not have the power to veto an application from a prospective approved regulator under the grounds set out in section 6(1)(a)(ii) or (iii). That is sensible, given that those grounds cover, for example, a prospective approved regulator’s financial viability, which, with the greatest respect to the Lord President, is not part of his remit.

Robert Brown’s amendment 236 proposes to insert into section 6(1) an approval role for the Lord President equal to that of the Scottish ministers in determining who should be an approved regulator. The convener’s amendment 238 proposes to insert into section 6(2) an approval role for the Lord President equal to that of the Scottish ministers in determining whether the approved regulator should be subject to conditions. Amendment 240, also in the convener’s name, proposes to insert a new subsection after section 6(2) to provide an approval role for the Lord President equal to that of the Scottish ministers in determining whether to amend, add or delete any conditions imposed on an approved regulator. I do not support those amendments because I do not consider it appropriate for the Lord President to have the same broad approval role in relation to approving regulators.

The Scottish ministers are administrators in relation to the approval of regulators. Although the Lord President has an important role in the legal profession in Scotland, he is not simply an administrative functionary. In addition, the Scottish ministers, unlike the Lord President, are subject to the provisions in section 4 and so must act in a way that is “compatible with the regulatory objectives” set out in section 1 when exercising their functions under section 6.

In contrast, my amendments reflect the appropriate constitutional role of the Lord President and his important function in overseeing the legal profession. Those provisions will reduce the risk of duplicated effort and unnecessary work for the Lord President, given that he will not have decision-making authority in areas in which he has no current remit, such as consideration of a body’s financial resources. However, given that section 6(3) gives the Lord President a wider consultation role in relation to the whole approval process, he
is bound to be consulted on such matters and proper account will be taken by the Scottish ministers of any comments made by him.

10:15

Amendment 244, in the name of Robert Brown, would insert a new subsection at the end of section 6 that would require the Scottish ministers to consult the Lord President before making regulations under section 6(7). I do not believe that that is required. Section 6(7) allows the Scottish ministers to make further provision about approval, which is properly an administrative matter for them. Furthermore, amendment 3, which has been accepted, provides that, where the Scottish ministers consider it appropriate, “they must consult such persons or bodies as appear to ... have a significant interest”.

Amendment 272, in the name of Robert Brown, would prevent the Scottish ministers from making regulations about the internal governance of approved regulators without the consent of the Lord President. As I said, I consider that the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator’s expertise as regards the provision of legal services. I do not consider that matters regarding an approved regulator’s internal governance arrangements form part of such expertise. Of course, it should be noted that, in accordance with section 22(3), the Scottish ministers must consult approved regulators before making such regulations.

My amendment 4 will add to section 5(4) a reference to the Lord President’s consideration of an application to become an approved regulator. The effect will be that an applicant to be an approved regulator must provide the Scottish ministers with any additional information that is required for the Lord President’s consideration of the application.

Amendments 5 and 7 are drafting amendments. Amendment 6 deletes the words “the legal competence necessary” from section 6(1)(a)(i) and replaces them with the words “the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it)”.

The effect is to set out more clearly that applicants must satisfy the Scottish ministers that they have the appropriate legal knowledge and skill to function as approved regulators.

Amendment 8 will add to section 6 a new subsection—(2A)—which will require the Scottish ministers to impose on approved regulators conditions relating to expertise as regards the provision of legal services, “as are reasonably sought by the Lord President”.

Amendment 9 will insert into section 6 a new subsection that sets out when the Scottish ministers can remove or vary conditions that they impose on approved regulators. Amendment 14 will add a new section to enhance the Lord President’s role in relation to the approval of approved regulators. The effect is that the agreement of the Lord President is needed before the Scottish ministers approve an applicant as an approved regulator. However, that will be limited by subsection (2) of the new section, which provides that “that agreement may be withheld only if the Lord President is not satisfied that the applicant has” the necessary expertise as regards the provision of legal services, as set out in section 6(1)(a)(i).

We listened carefully to what the committee said in its stage 1 report and we have produced a compromise. We believe that it is the right one and we recommend it to the committee. Accordingly, I invite members not to move their amendments in the group.

I move amendment 4.

Robert Brown: The debate is a legitimate one—there are no two ways about it—but, frankly, I do not accept the Government’s position or its explanation of the Lord President’s constitutional position. The amendments are important and relate to the independence of the legal profession. One reason why the role of the Lord President has come under such scrutiny and why such importance has been attached to it in the debate is that it provides an independent judicial barrier between Government and the legal profession. In the context of the bill, that is important.

Amendment 236 is the central amendment and is simply phrased. It requires the consent of the Lord President to the approval of regulators. That is right, and the involvement of the Lord President should not be limited in the way that the Government suggests. First, the Lord President’s involvement with regulations that the Law Society of Scotland produces in similar situations is not limited in that way. Secondly, it is wrong to try artificially to put a limit on the Lord President’s rights in the matter. No doubt, in 99 cases out of 100, the Lord President will follow the advice of the Scottish Government on such matters and will take account of the evidence that the Scottish Government provides. It is not necessary or contemplated that there should be duplication of work. However, the Lord President is entitled to have an overriding role in such matters.

The convener’s amendment 238 extends the Lord President’s role to the approval of the conditions that are to be imposed on a regulator. That falls into the same category, so I support
amendment 238. These amendments are essential if the Lord President is to become a constitutional buffer between ministers and approved regulators.

Last week, I touched on the Scottish Government’s amendments 5 to 7, which add confusion and clumsiness to the definition of the expertise required, and I am opposed to them. How on earth is amendment 6 different from the bill as drafted? Instead of a relatively straightforward expression about legal expertise, amendment 6 talks about

“the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it)”.

Some interpretation is required to understand what the Government is getting at in that amendment. The phraseology of the bill as it stands is superior.

The convener’s amendment 240 and my amendment 244 seek to involve the Lord President in the approval of regulations. I am not as fussy about the Lord President approving them as I am about his being consulted on them, especially in relation to the more minor powers in section 6(7). However, it is necessary for the Lord President to approve conditions under section 6(2). For the reasons I gave earlier, I oppose amendment 14, which would limit the Lord President’s involvement to one area only.

This is an important debate, and the Scottish Government has not got the balance quite right.

The Convener: I will speak to amendment 238 and to other amendments in the group in what is likely to be this morning’s principal debate.

The minister is to be congratulated on realising that there was a difficulty with the issue, and I accept that he has attempted to find a constructive solution. Having said that, I believe that the minister’s proposals do not go far enough. We probably all agree that there is an important issue around the separation of powers, which the minister has sought to remedy through his amendments. However, my arguments are largely the same as Mr Brown’s: the minister has not gone far enough.

It is important to have a bulwark in the system, giving the Lord President some control over what happens under this very important heading. At last week’s meeting, I took issue with the minister when he said that these amendments would mean that the Lord President would have the power of veto and, effectively, the same powers as Scottish Government ministers. That is not quite correct because any appointments, for example, would be at the instance of the Scottish Government, and it would bring forward nominees for such appointments. The Lord President would therefore require to make a determination on the individual application, not the generality. That covers that point.

There is not a great deal that divides us this morning. However, these are important issues, and I submit that the amendments in my name and in the name of Robert Brown seek to address them.

James Kelly: As the convener said, this is an important debate. I support the amendments lodged by Robert Brown and the convener. As drafted, the bill vests too much power in the hands of the Scottish ministers. It is important to reflect the split between the judiciary and ministers, and the amendments vest a correct amount of authority and power in the Lord President with regard to matters that are to be determined under the bill.

I listened carefully to the arguments of the minister and Robert Brown around amendments 5 to 7, and I am more persuaded by Mr Brown’s argument that the amendments are unnecessary.

Fergus Ewing: I welcome the debate, which, as Mr Brown said, is a legitimate one. I am pleased that we are having it, given the concerns that have been expressed whithin this place, notably within the profession. It is appropriate that we should debate these important matters at stage 2. Our approach was to listen to what the committee said. Although the committee did not, in recommending that the Lord President should have a greater role, specify what that should be, nonetheless we considered the matter extremely carefully and liaised with the Lord President’s office.

It is fair to say that one of the arguments that I advanced earlier is that there would be an element of duplication. Work that the Scottish ministers did in assessing the financial viability and financial robustness of applicants to become approved regulators would be duplicated by the Lord President. In these difficult times, I hope that we all agree that the Government does not wish to create laws that require the same work to be carried out twice if we can possibly avoid that. It was partly because we had in mind the avoidance of such duplication that we limited the Lord President’s role. We did that also partly because the Lord President’s role as the head of the legal profession in Scotland seems to be principally to regulate legal services and lawyers in Scotland. That is his job; it is not his job to be an accounts analyst. That is why we decided on the compromise that we reached.

Having said that, convener, I respect the views that have been put forward by colleagues and I understand entirely where you and your colleagues are coming from. I agree that it is perhaps not accurate to say that the Lord President and the Scottish Government will have
precisely the same powers. Of course, we will not propose individual regulators, as they will propose themselves, but the Government and the Lord President will, in effect, jointly dispose of those applications. The Lord President will have a veto in that respect, either in relation to matters relating to legal services only if our amendments are agreed to, or in relation to all matters if the other amendments in the group are agreed to. I am sure that we can live with whichever outcome. I wanted to make that clear to committee members.

The Convener: That is very helpful.

Amendment 4 agreed to.

Amendment 233 not moved.

Section 5, as amended, agreed to.

Section 6—Approval of regulators

Amendment 236 moved—[Robert Brown.]

The Convener: The question is, that amendment 236 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 236 agreed to.

Amendment 5 moved—[Fergus Ewing.]

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The casting vote goes with Mr Ewing’s amendment, on the basis that it clarifies the wording.

Amendment 6 agreed to.

Amendment 237 moved—[Robert Brown.]

The Convener: The question is, that amendment 237 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 237 agreed to.

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Amendment 238 moved—[Bill Aitken].

The Convener: The question is, that amendment 238 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 238 agreed to.

Amendments 8 and 9 moved—[Fergus Ewing]—and agreed to.

Amendment 239 moved—[Robert Brown].

10:30
The Convener: The question is, that amendment 239 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 239 agreed to.

Amendment 240 moved—[Bill Aitken].

The Convener: The question is, that amendment 240 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The question is, that amendment 240 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

As there is an equality of votes for and against the amendment, I use my casting vote against it, on the basis that I do not consider it necessary.

Amendment 241 disagreed to.

Amendment 242 moved—[Bill Aitken].

The Convener: The question is, that amendment 242 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Craige, Cathie (Cumbernauld and Kirkcaldy) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 242 agreed to.

Amendment 243 moved—[Robert Brown].

The Convener: The question is, that amendment 243 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craige, Cathie (Cumbernauld and Kirkcaldy) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

As there is an equality of votes for and against the amendment, I use my casting vote against it, on the ground that I do not consider it necessary.

Amendment 243 disagreed to.

Amendments 11 and 12 moved—[Fergus Ewing]—and agreed to.

Amendment 244 moved—[Robert Brown].

The Convener: The question is, that amendment 244 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craige, Cathie (Cumbernauld and Kirkcaldy) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 244 agreed to.

Section 6, as amended, agreed to.

After section 6

The Convener: I invite the minister to move amendment 13, which has already been debated with amendment 235.

Fergus Ewing: In the light of the decision on amendment 236, I will not move amendments 13 or 14. However, I may need to consider the Government’s position as far as stage 3 is concerned.

The Convener: That is respected.

Amendments 13 and 14 not moved.

Section 7—Authorisation to act

The Convener: Amendment 15, in the name of the minister, is grouped with amendments 16 to 18.

Fergus Ewing: Amendments 15, 17 and 18 are principally drafting amendments. In discussion with the Scottish Government, the Law Society of Scotland argued that the Scottish ministers should be required to set out their reasoning when refusing to authorise an approved regulator or applicant or when imposing conditions on authorisations. Although it is unlikely that the Scottish ministers would take such action without giving an explanation, amendment 18 will ensure that such an explanation will be given.

Amendment 16 relates to the power in section 7(10)(b). In its stage 1 report, the Subordinate Legislation Committee raised concerns about the extent of the power, given that it could be used to alter the criteria for authorisation. On further reflection, I feel that the power is unnecessary. Amendment 16 will therefore remove the relevant paragraph from the bill.

I move amendment 15.

Amendment 15 agreed to.

Amendments 16 and 17 moved—[Fergus Ewing]—and agreed to.

Section 7, as amended, agreed to.

After section 7

Section 8—Regulatory schemes

The Convener: Amendment 169, in the name of the minister, is grouped with amendments 261, 170, 171, 171A, 172, 268, 210 and 211.

Fergus Ewing: There have been calls from all quarters, including the committee, for the bill to contain compensation arrangements for those who receive legal services from a licensed provider and who suffer loss because of dishonesty within that
provider. The consensus is that a person who suffers such loss should have recourse to the same level of compensation arrangements as are provided for by the guarantee fund. I agree that there should be such equality of protection for clients of licensed providers. As I recall, I said that when I gave evidence at stage 1.

In the Legal Services Act 2007—the equivalent legislation in England and Wales—approved regulators must have a compensation arrangement whereby grants or other payments are to be provided in cases of fraud. However, I understand that it is not yet clear whether implementation of that will provide clients of licensed bodies there with equivalent protection to that of clients of traditional firms.

I considered a number of options, including insurance cover and loans. However, it is not possible to take out insurance cover against one’s own fraud, and it might be difficult for approved regulators to afford loans equivalent to the amount in the guarantee fund, especially if they regulate only a small number of licensed providers. Nevertheless, approved regulators will be able to set up their own funds if they choose to do so. Amendments 261 and 268, in the name of Robert Brown, provide for practice rules to ensure that licensed providers are responsible for compensation arrangements.

Given the difficulties that approved regulators are likely to face in finding resources to set up equivalents to the guarantee fund, I consider that it would be almost impossible for a single entity to do so. Therefore, it is clear to me that in order to ensure that consumers who use licensed providers have the same protection as those who use traditional firms, provision must be made to ensure that they can also be covered by the existing guarantee fund.

The guarantee fund is a statutory fund that stands alone and does not form part of the administrative costs of the Law Society of Scotland. Persons providing legal services, such as incorporated practices and principals in solicitor firms, must pay into it. It is administered by the Law Society—that will not change.

I consider that allowing licensed providers to use the guarantee fund will reinforce the fund. It will increase payments to the fund by entities that, in my view, pose little risk. It may even lead to reduced payments for incorporated practices and principals in solicitor firms, although that is obviously a matter for the Law Society.

A call has been made for equality of protection. Using the same fund and the same rules for claims and grants will ensure parity of protection in a way that no other option can. Having considered the matter, I have lodged amendments that will ensure that those who suffer loss owing to fraud in a licensed provider will have parity of protection with those who suffer loss owing to fraud in a traditional solicitor practice or an incorporated practice.

I turn now to the individual amendments. Amendment 169 requires approved regulators’ regulatory schemes to contain compensation rules. Amendment 170 requires all approved regulators to have arrangements in place to compensate the clients of licensed providers in the event of fraud. There is a choice for approved regulators in how they achieve that. If an approved regulator is able to set up its own fund, it may do so. Such a fund must be held for the same purpose and must be administered on the same basis as the guarantee fund. Alternatively, the approved regulator may cause the guarantee fund to be administered as respects its licensed providers.

Amendment 171 provides that the compensation rules for an approved regulator that chooses to administer its own fund must state the purpose of the fund and the minimum monetary amount to be contained within it. The compensation rules must also set out how the fund is to be administered, the criteria for qualifying for payment out of the fund, the procedure for making such payments and determining claims, the scale of the contributions into the fund and provision for its destination or distribution, should the approved regulator cease to act.

An approved regulator that decides to use the guarantee fund must make rules about contributions to the fund, which must be consistent with the scale of contributions for incorporated practices as is referred to in schedule 3 to the Solicitors (Scotland) Act 1980.

Amendment 171A, in the name of Robert Brown, amends amendment 171 in respect of an approved regulator that decides to use the guarantee fund. It provides that, in such a case, the compensation rules that are made by the approved regulator relating to the contributions that are to be made by the licensed providers to the guarantee fund must be approved by the council of the Law Society of Scotland, after the fairness of the arrangements is confirmed by an actuary. I do not support that amendment.

As I have mentioned, amendment 171 provides that compensation rules must require the making of contributions into the fund, which must be consistent with the scale for incorporated practices, as set by the council of the Law Society. Approved regulators would be bound by that amount, so there is no need for the Law Society to approve the compensation rules. It should be remembered that the compensation rules that will
form part of the approved regulator’s application will be subject to approval by the Scottish ministers following consultation with, among others, the Lord President.

Amendment 172 has the effect of, first, allowing approved regulators to make further compensation arrangements should that be considered necessary or expedient; and, secondly, allowing the Scottish ministers to make further provision by regulations, should that be considered necessary.

Amendment 210 amends section 43 of the 1980 act, which makes provision for the guarantee fund. The amendment allows the guarantee fund to be used in respect of the clients of licensed providers where the approved regulator has chosen not to maintain a compensation fund of its own, and regardless of whether or not it is regulated by the Law Society.

Amendment 211 amends schedule 3 to the 1980 act, which makes further provision for the guarantee fund. The amendment will ensure that licensed providers who are covered by the guarantee fund contribute to the fund according to the same entity-based model as applies to incorporated practices.

I move amendment 169, and I invite Robert Brown not to move his amendments.

Robert Brown: It is in the public interest for there to be a guarantee fund-type of arrangement to safeguard clients against fraud by their legal advisers. I pay tribute to the minister for his efforts in that regard. The Scottish Government proposes that a regulator can choose to set up its own fund or latch on to the Law Society’s one. I have strong concerns about the idea that other regulators should be entitled to tap into the Law Society guarantee fund—which I think has accumulated about £3 million or £4 million—not least in a situation in which the Law Society itself neither regulates the entity concerned nor has any form of regulatory control over the risk. It seems a totally bizarre arrangement, for which I struggle to think of a parallel.

There is much talk about the need for a level playing field, but we have a level playing field. If the proposed regulator does not have the resource to support a guarantee fund, perhaps the proper conclusion is that it ought not to be a regulator. Last week, I expressed my strong reservations about the idea of regulatory competition in any event, and I think that some of my concerns about that are shared around the committee table.

10:45

The minister said that the statutory fund stands alone. He is obviously right to say that, but the contributions come from members of the Law Society against a risk base that has been established over a number of years. He also said that the proposed entities would pose little risk, but, to be frank, I do not know how he knows that. The committee has had great difficulty in understanding what sort of entities they would be, in what situations they would operate and what the background to their arrangements would be. There is also an issue about who the regulators are to be. The only suggestions that we have had are regulation by the Law Society or regulation by the Institute of Chartered Accountants of Scotland, which presumably has some resource in that regard.

In short, it seems that, if somebody wants to be a regulator, they ought to establish their own guarantee fund or the equivalent, and my amendments 268 and 269 propose just that. I ask the committee to support them. If, despite my views, the committee is attracted to the idea of using the Law Society guarantee fund, it will be necessary to tighten the circumstances. Amendment 171A therefore gives the Law Society an option as to whether to offer the arrangement to entities that it does not regulate and in relation to which it does not have control over the risk, and it seeks to provide a mechanism for checking its actuarial fairness. I am open to more expert views than mine on whether an actuarial valuation or some other procedure would be appropriate, but I believe that my proposal is an important safeguard.

It is also important to recognise that, under the current arrangements, extended protection is provided by the professional indemnity insurance scheme—under the master policy—along with the guarantee fund. That point was made to me by a number of senior solicitors in discussions about the bill. The two things work together. I think that I am right to say that there is no such protection in the accountancy profession or, indeed, anywhere else.

On the detail, although the Scottish Government’s amendment 169 amends a different section, it does the same job as my amendment 261. However, if members otherwise support my proposition, they should vote against amendment 169, which contains the Government’s proposal, and against the other Government amendments in the group. The implications of the Government’s approach to this important matter have not yet been teased out. I hope that the committee will support my principled amendments on it.

The Convener: There being no other contributions on the matter, I will make one myself.

This is indeed an important debate. The minister is correct to identify the fact that, when he gave evidence, he stressed the vital importance of ensuring that an appropriate compensation system
is in force in case things go wrong. Fortunately, things do not go wrong often—it is important to stress that. That said, we have to give some thought to what the best scheme would be. On the basis of what Robert Brown has said, there is an arguable case that, if the existing Law Society scheme, which is in significant surplus, is incorporated, we cannot expect the Law Society to be in a position where it has limited or no control over what happens.

I pay tribute to the minister for, once again, recognising that there is a problem and seeking to deal with it. There are real merits in his arguments. On balance, however, I am persuaded at this stage that Robert Brown’s proposal is the best way forward. However, in inviting the minister to wind up, I indicate to him that I am still open to persuasion on the matter.

Fergus Ewing: Thank you, convener. I listened to what Mr Brown said. I think that we all recognise that it is essential that, whatever other changes are made to the bill, it contains proper provision to protect the public. It is not about lawyers, accountants, the Law Society or ICAS; it is about protecting the public—clients and consumers—from the possibility of fraud. I am pleased to say that, across the professions, fraud has occurred in Scotland relatively rarely, but nonetheless it does occur.

I think that we all accept that that principle is fundamental. I opined to that effect at my first meeting on the bill with my officials and made that principle clear at stage 1 when I gave evidence to this committee. That said, turning that objective into practice has not been easy, as I think all members recognise. We searched long and hard and looked very closely at alternatives. We looked extremely closely at the possibility of loans, fidelity insurance and other types of insurance and other provision, but we concluded that such proposals would simply be unworkable. Either we have the protection of the guarantee fund or we do not have protection of the public—frankly, it is as simple as that.

I welcome debate on Mr Brown’s amendments, because it is important that a debate takes place. However, the guarantee fund and the indemnity fund are entirely separate things. The indemnity fund is for professional negligence, mistakes and blunders—errors that we can all make—that are made through a lack of sufficiently high standards of legal service, whereas the guarantee fund is for fraud and dishonesty, such as dipping into the client’s account. The indemnity fund and the guarantee fund are therefore entirely separate and should be considered separately.

Equally, Mr Brown referred to tapping into the Law Society’s fund, but it is not the Law Society’s fund: the guarantee fund is a statutory fund that the Law Society administers. The Law Society does not own the fund, which exists because a previous Parliament recognised that there had to be a fund to protect the public against fraud for the very reasons, I imagine, that I have sought to outline briefly today. With great respect to Mr Brown, to view the fund as a Law Society fund is a misconception; it is a statutory fund that was set up by the 1980 act to protect the public, and it is the 1980 act that we are now amending.

Mr Brown also said that he was not aware of why I opined that the contributions that ABS providers would make to the fund might have a beneficial effect. I made that point for a very simple reason. I have not made a professional study of all the claims that have ever been made on the fund, but the proposition that is put to me by those who have studied the matter is quite simple. Sadly, it is the small practitioners, principally sole practitioners, who have had claims made against them to the guarantee fund. Perhaps they have succumbed, for whatever reason, to the temptation to dip into their clients’ funds when, for example, hundreds of thousands of pounds of mortgage funds have been provided. A solicitor commits a fraudulent, criminal act by dipping into such funds. The record shows that that has occurred far more frequently and is far more likely to occur in single-partner practices or small practices than in large firms. I make that point as a former sole practitioner myself and with no pride. Sadly, it is simply a matter of fact that it has been small firms that have abused the system and committed what are very serious crimes.

I think that we all accept that, although we do not have mathematical certainty about how ABS will develop, it is nonetheless likely that the big four—the larger firms—will most avail themselves of the opportunities. However, it must be said in favour of the larger firms that there has been hardly any instance of their resorting to the guarantee fund, perhaps for a number of reasons that it would not be helpful of me to opine on too readily. Indeed, some may say that I have already opined too widely and too long on this matter. However, it is clear to me that, if large firms take advantage of the provision, they will contribute more money to the fund through creating new business structures. If the future replicates the past, there will be fewer claims from those firms, therefore there will be more money in the fund and the potential for a significant benefit to the fund from those contributions, without a consequential reduction from the fund, given the lower likelihood of claims. For those reasons, and having considered the matter long and hard, I strongly recommend to the committee the amendments in my name.

The Convener: The question is, that amendment 169 be agreed to. Are we agreed?
Members: No.

The Convener: There will be a division.

For
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 169 disagreed to.

The Convener: The next group is on regulatory schemes. Amendment 247, in the name of Robert Brown, is grouped with amendments 248 to 250.

Robert Brown: Amendment 247 relates to supervision of licensed providers and to record keeping. In my view, it is important to ensure that approved regulators maintain a comprehensive record of the performance of the legal services providers that they regulate. Given that designated persons might not be members of professional bodies and so might not otherwise be monitored individually, in order to avoid the possibility of a designated person who has been disciplined by one legal services provider moving to another without their new employer being able to check his or her disciplinary background, it is important that a record is maintained. Although heads of legal services will be members of the Law Society of Scotland and will therefore be regulated on a personal basis, amendment 247 will ensure that the performance of heads of legal services is monitored both at an individual and at an entity level.

Amendment 248 essentially sets out that the primary duty on the regulator is to ensure adherence to the professional principles and the furtherance of the regulatory objectives. It seems a little odd that the duty is not already referred to, although I appreciate that, in what is a complex bill, I might have missed a reference to that in some other provision further down the line.

Amendment 249 relates to the regulatory scheme. Section 8(3) provides that

"The regulatory scheme may ... relate to ... one or more categories of licensed provider"

and

"some or all legal services".

Section 8(5) empowers the Scottish ministers to make regulations to enable regulatory schemes to deal with the provision by their licensed providers of non-legal services. However, it is not clear what that is intended to achieve. If it is necessary to authorise the inclusion of such matters in a scheme, such a power should surely be included in section 8(3).

Amendment 250 relates to the Lord President's consent to amendments to the regulatory scheme.

Amendments 247 to 250 are all relatively technical and mostly come from the Law Society, to which I am grateful for suggesting them. However, the amendments raise some not insignificant issues.

I move amendment 247.

The Convener: If no members wish to speak to the amendments, I will briefly say that amendment 250, which is in my name, is based on a principle that has already been established. I will simply adopt Robert Brown's arguments to avoid taking up too much time.

Fergus Ewing: Amendment 247, in the name of Robert Brown, would require that the regulatory schemes for approved regulators

"include provision to ensure that legal services provided by the licensed provider are adequately supervised".

Amendment 55, which is in my name, does something similar, but goes even further, by making the head of legal services responsible for ensuring that designated persons who carry out legal work are adequately supervised and by ensuring that only designated persons can carry out legal work within a licensed provider. Robert Brown's amendment 247 would also require that the regulatory schemes

"include provision to maintain a record of any disciplinary action taken against the Head of Legal Services or any designated person within the licensed provider".

I do not consider that provision necessary. All good regulators will already be expected to keep such records without specific provision being required in the bill.

Amendment 248, in the name of Robert Brown, would require that regulatory schemes of approved regulators

"further the regulatory objectives and ensure that licensed legal services providers adhere to the professional principles."

However, section 62(4) already provides that

"The approved regulator must seek to ensure that its licensed legal services providers have regard to the regulatory objectives."

Under section 38, on key duties, subsections (1)(a) and (1)(b) provide that a licensed legal services provider must

"have regard to the regulatory objectives" and
“adhere to the professional principles”.
Amendment 248 is therefore unnecessary.

Amendment 249, in the name of Robert Brown, would allow the regulatory scheme to
“include any provision authorised by regulations under subsection (5)”.
Those regulations can confer authority for the regulatory schemes of approved regulators to deal
with the provision of services other than legal services. Therefore, amendment 249 is
unnecessary, as authority contained in regulations under section 8(5) would be sufficient to enable an
approved regulator to make any necessary changes to its scheme.

Amendment 250, in the name of Robert Brown and supported by Bill Aitken, seeks to amend
section 8(4)(b) by omitting the reference to the Scottish ministers consulting the Lord President
and replacing it with the requirement that
“the Lord President has consented”
to what is being suggested. As I have already
made clear, the Lord President should be consulted on such matters, so I hope that the bill
already strikes the right balance.

I invite Robert Brown to withdraw amendment 247 and not to move his other amendments.

11:00
Robert Brown: I accept the minister’s comments on the first part of amendment 247. On
the issue of disciplinary action and the maintenance of a record, it is important that a
record be maintained. However, if the minister is prepared to nod to the effect that that might be
covered by the rules, I will be happy to seek to withdraw amendment 247.

On amendment 248, while I appreciate that there is a slightly different provision later in the bill,
it is fair to say that the amendment relates particularly to regulatory schemes. It is quite
important that there is a requirement up front that regulatory schemes adhere to the regulatory
objectives. Amendment 248 goes further, and in a slightly different context, than the section that the
minister mentioned.

I am prepared to accept the minister’s assurances on amendment 249. We debated
amendment 250 with respect to the Lord President, so I have nothing further to say about it.
I seek to withdraw amendment 247.

The Convener: For the sake of clarity, Mr Ewing, can the committee assume that you
nodded in that direction?

Fergus Ewing: I said in my opening remarks
that is already the case, so I am happy to nod
in that direction.

Amendment 247, by agreement, withdrawn.

Amendment 248 moved—[Robert Brown].

The Convener: The question is, that amendment 248 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For
4, Against 4, Abstentions 0.

Although amendment 248 has merit, I do not
think that it is necessary, so I use my casting vote
against it.

Amendment 248 disagreed to.

Amendment 249 not moved.

The Convener: We come to amendment 250,
for which I claimed credit but which is in the name
of Robert Brown. Do you wish to move the
amendment, Mr Brown?

Robert Brown: I am happy to give you the
credit and to move the amendment.

Amendment 250 moved—[Robert Brown].

The Convener: The question is, that amendment 250 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For
5, Against 3, Abstentions 0.

Amendment 250 agreed to.

Section 8, as amended, agreed to.
Section 9—Reconciling different rules

The Convener: Amendment 19, in the name of the minister, is grouped with amendments 252 and 20.

Fergus Ewing: Amendments 19 and 20 are minor drafting amendments that improve the clarity of the bill. Amendment 252, in the name of Robert Brown, and supported by the convener, seeks to prevent the Scottish ministers from making regulations under section 9(3) without the consent of the Lord President. I do not consider that necessary. Amendment 3 has already provided for consultation where appropriate. In addition, that is essentially a fallback provision, with the general approach being that it is for the approved regulator to resolve regulatory conflict. However, if the use of the power becomes necessary due to unforeseen regulatory problems, it is likely that the Scottish ministers will have to act quickly and decisively to resolve the issue. It may not be possible to obtain consent from the Lord President as quickly as may be necessary. In that respect, and for that reason, amendment 252 is impractical, and I invite Robert Brown not to move it.

I move amendment 19.

Robert Brown: I have no objection to amendments 19 and 20, but I am not sure that the minister's submission about acting speedily and how that would be prevented by requiring the Lord President to consent stands up. We are talking about matters for which regulations would have to come before the Parliament, and therefore the kind of principled, relatively high-level issues for which the consent of the Lord President would be appropriate.

Amendment 19 agreed to.

Amendment 252 moved—[Robert Brown].

The Convener: The question is, that amendment 252 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 252 agreed to.

Section 9, as amended, agreed to.

Section 10—Licensing rules: general

The Convener: The next group is entitled “Reference to non-solicitor investors”. Amendment 98, in the minister's name, is grouped with amendments 101, 103, 105, 107, 109, 111, 112, 115, 116, 176, 121 to 127, 178, 129 to 131, 145, 146 and 167.

Fergus Ewing: In stage 1 evidence sessions, committee members and witnesses asked questions about the potential for criminals or other inappropriate individuals to gain control of licensed providers. Organisations that include the Law Society of Scotland and the Scottish Law Agents Society acknowledged that the fitness-for-involvement test in the bill appeared to be suitable, but the committee stressed the importance of the test being as robust as possible and asked the Scottish Government to consider the matter further, which we were happy to do.

As a result of the definition of an outside investor in section 52, individuals who are designated to undertake legal work in a licensed provider are not subject to the fitness-for-involvement test. That is a concern in relation not to solicitors, who can already own law firms, but to non-solicitors such as paralegals, who can also be designated to do legal work. Individuals who might otherwise be found to be unfit might attempt to avoid the fitness test by being designated under section 47. I therefore decided to lodge an amendment to ensure that all non-solicitor investors in a licensed provider are subject to the fitness test, whether or not they are also designated persons.

Amendment 176 will replace the term “outside investor” in section 52(4)(b) with the term “non-solicitor investor”, which will cover individuals who are not qualified to practise as solicitors in Scotland, England and Wales or Northern Ireland or as registered European lawyers. In conjunction with the relevant consequential amendments, that will make non-solicitor investors subject to all the provisions, such as the fitness-for-involvement test, to which outside investors are subject.

I move amendment 98.

The Convener: The Government has done well to respond to a clear concern.

Amendment 98 agreed to.

The Convener: The next group is on exemption from the fitness test. Amendment 21, in the minister's name, is grouped with amendments 99, 108 and 132.
**Fergus Ewing:** Amendments 21 and 99 deal with drafting. Amendments 108 and 132 relate to the fitness-for-involvement test for investors in licensed providers that sections 49 to 52 deal with. The bill currently imposes the fitness test on every outside investor, regardless of their share of the business. Paragraph 1(2) of schedule 8 also requires that an applicant to be a licensed provider give standard information to the approved regulator, which includes the name and other details of every outside investor or prospective outside investor.

However, the imposition of the fitness test and the supply of the standard information might be impractical if a licensed provider floated on the stock exchange, for example, as it might have an extremely large number of investors. In theory, some investors might have only one of millions of shares. Such small investors would not have control or anything that approached control of the licensed provider.

It is not appropriate or practicable to make such small investors subject to the same fitness-for-involvement test as are investors with larger stakes in the licensed provider. Amendment 108 will therefore insert a new section after section 49 to provide for some exemptions from the fitness-for-involvement test that section 49 sets out. The amendment provides that an approved regulator is not required to satisfy itself as to the fitness of any exemptible investor to have an interest in a licensed provider and is not required to monitor that fitness under section 49(1).

Investors are exemptible if they have less than a 10 per cent stake in the ownership or control of a licensed provider, although the amendment gives the approved regulator the power to apply a threshold below 10 per cent, if it wishes. Licensing rules created by the approved regulator must explain the circumstances in which the approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator may apply that is lower than 10 per cent.

Amendment 132 makes changes to the notification requirements in schedule 8, allowing the approved regulator to waive the requirements for licensed providers to give it standard information in relation to exemptible investors. The approved regulator’s ability to impose the fitness-for-involvement test on investors with less than a 10 per cent stake is important. That flexibility may be required, as different approaches may be required in relation to different types of licensed provider. For example, large licensed providers that float on the stock exchange could have an extremely high number of investors, each with a very small stake in the business. The risk of criminal influence on such providers is small, so the 10 per cent threshold may be appropriate for them. It is arguable that smaller licensed providers could be more at risk of control by questionable investors, so the approved regulator may believe that it is appropriate to set a lower threshold for them and to apply the fitness-for-involvement test to those with less than 10 per cent ownership or control.

In summary, we have set a threshold of 10 per cent ownership or control but have allowed the approved regulator to set a lower threshold for exemption in its licensing rules. The approved regulator has the discretion to require any outside investor to be subject to the fitness test.

There may be some concerns about the potential for investors of ill repute to use such a threshold to bypass the fitness test. For example, a group of criminals might attempt to control a licensed provider collectively, while individually holding a share of less than 10 per cent. That scenario may not be unfamiliar to the convener and other members.

To address such concerns, I refer first to the approved regulator’s ability to use discretion in relation to the application of the threshold. If it believes that it is necessary to apply the fitness-for-involvement test to all investors, regardless of their individual share, it can do so. Secondly, amendment 175 will allow the Scottish ministers to set out what interests are relevant with regard to a particular percentage of ownership or control, and what interests count towards such a stake, including family, business or other associations. The amendment provides the Scottish ministers with the ability to amend, by regulation, the percentage relating to exemptible investors. That will give us the flexibility to deal with the potential situation that I have described—for example, by setting out that criminals who try collectively to control a firm are to be subject to the fitness test by virtue of their associations with one another.

I move amendment 21.

**Amendment 21 agreed to.**

Amendment 99 moved—[Fergus Ewing]—and agreed to.

**The Convener:** Amendment 254, in the name of Robert Brown, is grouped with amendments 22, 256 and 23.

**Robert Brown:** Amendment 254 relates to the provisions that deal with licensing rules. The rationale for the amendment is simple. Licences to providers should normally last a year, as do practising certificates for solicitors—at least, they did when I had one. That arrangement provides a routine check on the set-up, the situation of outside investors and whether their stake has increased. Although there is an obligation to report
such changes, general experience is that that does not necessarily happen, so the annual review and renewal provides a useful opportunity to catch up.

Amendment 256 widens the circumstances in which the regulator should have concerns about the effect on the provision of legal services of approving an entity, and requires the regulator to bring in the Office of Fair Trading. Section 11(2) refers to competition being reduced or distorted. My amendment adds the issue of reduced standards of competent service to that consideration and raises the bar with regard to service quality, which is highly appropriate. That is the nub of a lot of the concerns about the bill, and it is important that we have a robust and substantial requirement on the regulators in that regard.

I move amendment 254.

11:15

Fergus Ewing: Amendment 254, in the name of Robert Brown, relates to section 10, which sets out that licensing rules made by approved regulators are rules about, among other things, the renewal of licences. As the licensing rules are part of the regulatory scheme, the Scottish ministers would review them as part of the process of approving regulators and would not approve the scheme if they felt that the rules on the renewal of licences, including the interval at which renewal should take place, were inappropriate. That is in keeping with the general approach of the bill, whereby approved regulators are free to develop their own rules and procedures within the strict framework that is set out in the bill and subject to the oversight of the Scottish ministers. The amendment would provide that licensed providers’ licences would be subject to renewal on an annual basis. Setting that out in the bill would remove any flexibility on the part of the approved regulator to set the renewal interval at a period that it considered to be appropriate, subject to the approval of the Scottish ministers. I therefore do not support amendment 254.

In response to Mr Brown’s remarks, I add that it will remain the case that any solicitor who is licensed to conduct legal services by the Law Society of Scotland will continue to apply for his or her practising certificate from the Law Society of Scotland each year as an individual solicitor; we are talking about renewal of the licence of the licensed provider, not of the individual solicitors within it.

Amendment 256, in the name of Robert Brown, relates to section 11, which states that licensing rules made by the approved regulator under section 10

"must provide for ... consultation with the OFT"

when it believes that the granting of a licence application

"may have the effect of ... preventing competition within the legal services market, or ... significantly restricting or distorting such competition.”

The amendment would add to the circumstances in which the approved regulator should consult the OFT when it believed that the granting of an application would have the effect of “reducing standards of competent service within the legal services market”.

I have two main issues with the amendment. First, it is unclear what “reducing standards of competent service within the legal services market” means. I suspect that the aim is to capture a situation in which the granting of a licence to a body would result in the provision of significantly substandard legal services. However, I would welcome some clarification on that point from Mr Brown, as I do not think that he addressed that in his opening remarks. Secondly, assuming that the intent is roughly as I have suggested, I would argue that the OFT is not an appropriate body to consult. Section 11 relates specifically to issues of competition and the availability of supply, both of which are within the OFT’s remit. It is, however, ill-suited as a regulatory body to assess whether standards within the legal services market are likely to drop as a result of the granting of a licence to a particular body. In addition, I suggest that, if an approved regulator felt that a potential licensed provider would provide such a poor service, it would simply refuse to issue a licence. I therefore do not support amendment 256.

My amendment 22 is a drafting amendment.

My amendment 23 adds the word “relevant” to section 12(1)(b)(ii), which clarifies the fact that licensing rules may allow for the full effect of a provisional licence to be conditional only on relevant and not unrelated matters in addition to being conditional on the licensed provider transferring to the regulation of the approved regulator. I assume that that is clear.

I invite the committee to agree to amendments 22 and 23, and I invite Robert Brown to withdraw amendment 254 and not to move amendment 256.

Robert Brown: On amendment 254, the minister talked about the removal of flexibility. That is entirely the point—flexibility should be removed and that should be done in the bill. We are introducing new procedures and new circumstances and are going into uncharted territory in many regards. I accept the distinction between entity licensing and individual solicitor licensing, but nevertheless yearly renewals would
be a useful check. I therefore intend to press amendment 254.

On amendment 256, I do not think that the phrase "reducing standards of competent service" is particularly obscure or opaque, but I can give an example. The situation in a rural town might well be adversely affected by a provider coming in in a particular way. In those circumstances, that is a competition issue that the Office of Fair Trading and others, including the regulator, not only should be entitled to have regard to, but should have regard to. One fear that has been expressed about the bill has been about the effect of competition on standards in rural parts of Scotland, so we need a fairly high bar. The phrase "reducing standards of competent service" is a fairly obvious and straightforward statement about what ought to be considered.

The Convener: The question is, that amendment 254 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

My casting vote goes against the amendment, as I have difficulties with the definition of the term "competent service". I consider that the amendment is not entirely necessary, albeit that the point is arguable.

Amendment 256 disagreed to.

Section 11, as amended, agreed to.

Section 12—Other licensing rules

Amendment 23 moved—[Fergus Ewing]—and agreed to.

Section 12, as amended, agreed to.

Section 13 agreed to.

Section 14—Practice rules: general

The Convener: We turn to practice rules. Amendment 260, in the name of Robert Brown, is grouped with amendments 24, 262, 25 and 26.

Robert Brown: Beginning at section 14, the bill deals with practice rules. My amendment 260 raises the matter of conflict of interest, which is a challenge that the Law Society has tackled over the years in the solicitor profession. It is not an easy challenge—actually, it is fairly complex—but it is much enhanced when different professionals are joined together. For example, a surveyor in partnership with a conveyancing solicitor might reasonably be said to have a conflict of interest if he is asked to produce a single seller survey for a house sale in which the solicitor is acting for the seller. It seems obvious that the practice rules, as well as covering accounting practices, professional indemnity and standards, should be required to cover conflicts of interest and to regulate them accordingly.

Amendment 262 would enable an approved regulator to apply sanctions in appropriate cases in which a licensed provider fails to meet its obligations under the practice rules. The bill lacks adequate provisions for sanctions to be imposed when a licensed provider fails to meet its obligations. Amendment 262 would address that by providing for performance targets, directions,
censures, fines and amendment or revocation of a licence.

I move amendment 260.

**Fergus Ewing:** Amendment 260, in the name of Robert Brown, provides that practice rules should also contain material about the avoidance of conflicts of interest. I am sure that, like me, Mr Brown recollects that that issue is already dealt with in the rules and codes of practice of all professional bodies. The professional principle in section 2(f), which requires that providers of legal services “meet their obligations under any relevant professional rules”, is sufficient to deal with the issue. Furthermore, section 8(2)(b) and section 9 make provision for reconciling different sets of regulatory rules. Therefore, although I understand the importance of dealing with conflicts of interest, I respectfully suggest that they are already dealt with substantially and in principle by the provisions to which I have alluded.

Robert Brown’s amendment 262 specifies the measures that may be taken by an approved regulator in relation to a licensed provider if there is a breach of the regulator’s scheme or a complaint is upheld. It would have the effect of restricting the types of measure that could be taken by an approved regulator to those that are set out in the amendment. I consider that such provision should not be set out in the bill, so that an approved regulator may consider other measures, so I do not support amendment 262.

In addition, it is not clear under paragraph (a) of the new subsection of section 14 that amendment 262 proposes, which envisages “setting performance targets”, what “performance” refers to or what targets might be set. The proposed provision seems vague.

I turn to my amendments. Amendment 24 is a drafting amendment. Amendment 25 relates to the financial penalties that can be imposed on licensed providers.

Section 15(3)(a) provides that a financial penalty that is imposed under section 15 “is payable to the approved regulator”.

In its stage 1 submission to the Justice Committee, the Law Society of Scotland raised concerns that that provision allowed an approved regulator to impose and to retain a fine. Further consideration was given to the appropriateness of allowing approved regulators to impose and to retain a fine, and to whether that might encourage regulators to impose fines, by giving them a perverse financial incentive to do so, because they could keep the money. I have decided that it would be more appropriate for a financial penalty that is imposed under section 15 to be paid to the Scottish ministers than to the approved regulator. Amendment 25 provides for that, and will allow the approved regulator to collect the money on behalf of the Scottish ministers.

I turn to amendment 26. The Law Society raised concerns that the provision in section 16(1)(b)(ii) is too broad. It provides that practice rules “must include provision that it is a breach of the regulatory scheme for a licensed provider to ... fail to comply with its ... duties under any other enactment.”

Such a failure by a licensed provider could lead to the imposition of a financial penalty by virtue of section 15.

As the Law Society pointed out, such failures could include failures under companies or health and safety legislation, which might already provide for financial penalties for failure to comply. It does not seem right that the licensed provider could also be subject to a penalty from the approved regulator, which would be additional to those penalties that are envisaged under laws such as health and safety legislation, which, as members know, rightly provide for appropriate penalties to be issued where there is contravention.

Therefore, amendment 26 seeks to qualify the phrase “any other enactment” so that it refers only to enactments that are specified in the regulatory scheme. It would allow the approved regulator to specify relevant enactments, which the Scottish ministers would consider after consulting, among others, the Lord President, when they decided whether to approve an applicant as an approved regulator under section 6.

Accordingly, I invite the committee to approve amendments 24 to 26, and I invite Robert Brown to withdraw amendment 260 and not to move amendment 262.

**Robert Brown:** I will press amendment 260. The minister is right to say that there are general references to avoiding conflicts of interest elsewhere in the bill, but section 14 includes provision on professional indemnity, accounting and auditing and complaint handing, which could be said to be covered by professional standards elsewhere. The issue is the importance of conflict of interest rules. It seems to me that conflict of interest rules are important and, as I said, they are super-important when different professions are being mixed up. It is therefore appropriate for that to be recognised in the bill in section 14.

I take the minister’s point about amendment 262. I intended to broaden it the scope of section 14, but the minister’s point, that amendment 262 would narrow it down slightly, is valid. Also, I see a horrendous misspelling of the word “licence” in
paragraph (e) of amendment 262. I will not move it.

11:30

The Convener: That shows a refreshing degree of honesty, Mr Brown, if I may say so.

The question is, that amendment 260 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

There being parity of votes, I use my casting vote against the amendment, because I consider the avoidance of conflict of interest to be inherent in legal or any other professional practice.

Amendment 260 disagreed to.

Amendment 24 moved—[Fergus Ewing]—and agreed to.

Amendment 261 moved—[Robert Brown].

The Convener: The question is, that amendment 261 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 261 agreed to.

Amendment 262 not moved.

The Convener: That brings us to the end of that grouping and an appropriate point at which to suspend for five minutes.

11:31

Meeting suspended.

11:40

On resuming—

The Convener: The next group is on a ban for improper behaviour. Amendment 100, in the name of the minister, is grouped with amendments 106, 114, 117 and 147 to 150.

Fergus Ewing: Amendment 100 is a drafting amendment. Amendment 114, which will introduce a section with the encouraging title “Ban for improper behaviour”, relates to sanctions on investors.

As you know, the regulation relating to licensed providers in the bill is essentially at entity level. Most of the sanctions that are available are also aimed at entities rather than individuals. Practice rules that are created by approved regulators must set out sanctions that can be imposed at entity level, should the licensed provider breach the regulatory scheme, including by virtue of the actions of connected individuals such as investors. In addition, licensing rules must set out among other things the circumstances in which licences may be revoked or suspended. Therefore, the ultimate sanction for which the bill provides is suspension or revocation of a licensed provider’s licence, which has the effect of preventing an entity from operating as a licensed provider.

At present, section 49(2)(b) requires that licensing rules must provide that, where an approved regulator determines an investor to be unfit for involvement in a licensed provider, it must not issue a licence to the provider and must revoke or suspend the licensed provider’s licence if that has already been issued. In its stage 1 report, the committee expressed some concern about that requirement and the lack of sanctions that can be used against individual investors. The committee suggested that we consider a more targeted approach to sanctions relating to outside investors, which in some circumstances might involve sanctions against the offending individual rather than the entity.

Therefore, as part of my series of amendments to provide even more robust safeguards in respect of external ownership, I have lodged amendments to disqualify investors who have behaved improperly. I am grateful to the committee for making the suggestions that it did at stage 1, which we have acted on.

Amendment 114 will introduce a new section entitled “Ban for improper behaviour” following section 50. That will have the effect of requiring the approved regulator to disqualify a non-solicitor investor from acting in that capacity in relation to
every licensed provider should they contravene section 51(1) or 51(2), which prohibit improper behaviour by investors, who will therefore be banned from involvement in any licensed provider should they be banned from one. Amendment 114 sets out that such disqualification can be permanent or for a fixed period; that the approved regulator must allow the investor in question to make representations to it; that the approved regulator must make certain practice rules relating to disqualification; and that a person who has been disqualified can appeal to the sheriff.

Amendment 114 is part of a package, so certain other amendments should be noted. Amendment 106 will add a new subsection to section 49, which will have the effect of allowing the approved regulator not to act as required by rules that are made under section 49(2)(b) if the licensed provider demonstrates that an investor who has been disqualified no longer has an interest in the business. As I have explained, the rules that are made under section 49(2)(b) require that the approved regulator, on determining that an investor is unfit for involvement, must not issue a licence to be a licensed provider or must revoke or suspend such a licence if it has already been issued. Amendment 106 will not remove the approved regulator’s ability to do that but will give it the discretion to decide, having disqualified the misbehaving investor, whether it is appropriate also to revoke or suspend the relevant licensed provider’s licence. The amendment can be seen as an extra tool that may be used alongside or instead of those that already exist in the bill.

Amendment 147 will insert a new paragraph into section 68(3), which will have the effect of requiring the approved regulator to keep a list of persons whom it has disqualified as investors under the new section that is introduced by amendment 114. Amendments 148 and 149 are consequential on amendment 147.

In summary, this package of amendments will require the approved regulator to disqualify non-solicitor investors when they contravene section 51(1) or 51(2) and will give it the discretion to choose not to revoke or suspend a licensed provider’s licence once the disqualification has taken place. That means that there are powers to punish the right person and not the wrong one.

11:45

Amendment 117 is consequential on amendment 176, which introduces a new category of “non-solicitor investor” to replace “outside investor” in section 52. Amendment 117 inserts the word “improperly” into section 51(2)(a), which prohibits outside investors from interfering with the provision of legal services by a licensed provider. The amendment has the effect of ensuring that investors are prohibited only from interfering improperly in the provision of legal services. Designated persons could otherwise be inadvertently prohibited from carrying out legitimate legal work with the licensed provider that could potentially be classed as interference.

Amendment 150 provides that individuals who have had their disqualification or determination as an unfit person reversed on appeal, or to whom the relevant categories no longer apply for any other reason, are not kept on the list specified under section 68.

I move amendment 100.

Stewart Maxwell: I welcome amendment 100 and the rest of the amendments in the group. I raised this matter when we were discussing our stage 1 report. In effect, the bill contains only the “nuclear option”, as I think we described it. In other words, the entire licence would be revoked, rather than the individual outside investor who was causing the problem being targeted. I am delighted that the minister has lodged these amendments, which provide a much more appropriate approach. The bill contains much more flexibility as a result, and I am more than happy to support the amendments.

The Convener: I am grateful to the minister for having addressed a number of the concerns that various members raised previously. It is important to stress that Mr Maxwell was probably in the vanguard in that respect.

Amendment 100 agreed to.

Section 14, as amended, agreed to.

Section 15—Financial sanctions
Amendment 25 moved—[Fergus Ewing]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Enforcement of duties
Amendment 26 moved—[Fergus Ewing]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Performance report
Amendment 101 moved—[Fergus Ewing]—and agreed to.

Section 17, as amended, agreed to.

Sections 18 and 19 agreed to.

After section 19
Amendment 170 moved—[Fergus Ewing].
The Convener: The question is, that amendment 170 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 170 disagreed to.

Amendment 171 moved—[Fergus Ewing].

Amendment 171A not moved.

The Convener: The question is, that amendment 171 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 171 disagreed to.

Amendment 172 moved—[Fergus Ewing].

The Convener: The question is, that amendment 172 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 172 disagreed to.

Amendment 268 moved—[Robert Brown].

The Convener: The question is, that amendment 268 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

There being equality in votes, my casting vote goes against the amendment.

Amendment 268 disagreed to.

Sections 20 and 21 agreed to.

Section 22—More about governance

Amendment 272 moved—[Robert Brown].

The Convener: The question is, that amendment 272 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 272 agreed to.

Section 22, as amended, agreed to.

Section 23—Regulatory and representative functions

The Convener: Amendment 27, in the name of the minister, is grouped with amendments 274, 28, 29, 278, 30, 279 and 31.
Fergus Ewing: Amendment 274, in the name of Robert Brown, would leave out the wording in brackets in section 23(3). The effect would be that, if the regulatory functions of an approved regulator were prejudiced by its representative functions, the Scottish ministers would be powerless to act. The bill provides that the Scottish ministers cannot interfere with an approved regulator’s representative functions unless there is a risk that such functions will prejudice its regulatory functions. Were such prejudice to occur, the Scottish ministers must be allowed to interfere to protect the robust regulation for which the bill provides. Furthermore, they would be under a duty to do so in accordance with the regulatory principles. Therefore, I oppose amendment 274.

Amendment 278, in the name of Robert Brown and supported by the convener, requires that the Scottish ministers must have the consent of the Lord President before making provision by regulation to confer additional functions on approved regulators. As I said earlier, I consider that the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator’s expertise in the provision of legal services. I do not consider that conferring additional functions on an approved regulator forms part of that expertise. If it did, the Scottish ministers would consult the Lord President in accordance with section 26(2)(b). Therefore, I cannot support amendment 278. Amendment 279, in the name of Bill Aitken, is consequential on amendment 278.

Amendment 31, in my name, leaves out words in section 27(1) to ensure that guidance on functions that is issued by the Scottish ministers under that section is issued to all approved regulators and may not be issued to individual approved regulators. It appeared to the Subordinate Legislation Committee from the manner in which section 27(1) is expressed that guidance could be issued to a particular approved regulator or to approved regulators generally. The Scottish Government does not intend that guidance should be issued to a particular approved regulator—it should always be issued to every approved regulator. Amendment 31 clarifies that issue. Amendments 27 to 30 are drafting amendments.

I move amendment 27 and invite members not to move the amendments in their names.

Robert Brown: As the minister said, section 23(3) provides a safeguard to prevent the Scottish ministers from interfering in an approved regulator’s representative functions, but it is qualified by the bit in brackets at the end. The minister says that there is already a duty under the regulatory objectives at the beginning of the bill but, if our positions were reversed, he might be telling me that the bit in brackets is therefore unnecessary. However, the more substantial point is that there is not much clarification of or information about the grounds under which interference by ministers in the regulatory function might arise or be permitted. Although I appreciate that there is always a desire to have a last reserved power in that regard, the minister should be under a duty to give us some information about the circumstances in which he thinks the need to use such a power might arise. It seems that two separate things are proposed, but I cannot quite see how one will affect the other, particularly if, as he says, the situation is already covered by the duty in the first part of the bill.

The Convener: I see no need to reiterate my previous arguments on amendment 279. I adopt those that I advanced earlier.

Amendment 27 agreed to.

Amendment 274 not moved.

Section 23, as amended, agreed to.

Section 24—Assessment of licensed providers

Amendments 28 and 29 moved—[Fergus Ewing] and agreed to.

Section 24, as amended, agreed to.

Section 25 agreed to.

Section 26—Additional powers and duties

Amendment 278 moved—[Robert Brown].

The Convener: The question is, that amendment 278 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 278 agreed to.

Amendment 30 moved—[Fergus Ewing] and agreed to.

Amendment 279 moved—[Bill Aitken].

The Convener: The question is, that amendment 279 be agreed to. Are we agreed?
The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 279 agreed to.

Section 26, as amended, agreed to.

Section 27—Guidance on functions
Amendment 31 moved—[Fergus Ewing]—and agreed to.

Section 27, as amended, agreed to.

Before section 28
The Convener: The next group is on the performance of approved regulators. Amendment 32, in the name of the minister, is grouped with amendments 33, 283, 284, 34, 288, 289, 291 to 293, 35 to 37, 296, 298, 299 and 286.

Fergus Ewing: In order to support the oversight role of the Scottish ministers in the regulatory framework and to ensure that approved regulators are operating effectively, it will be useful for approved regulators to be required to undertake an annual internal review of their operation as such and to send a report to the Scottish ministers along with their annual accounts. I have therefore lodged amendment 32 to insert a new section before section 28 in which the Scottish ministers require an approved regulator to “review annually its performance”. Amendment 32 requires that a report on the review be submitted to the Scottish ministers, and it allows the Scottish ministers to make further provision by regulation about both the review and the report.

Amendment 33 is a drafting amendment. Amendment 34 amends section 29(6), which allows the Scottish ministers to make further provision about the measures that they may take in relation to approved regulators that ministers feel are not performing adequately. Given the potential impact of the regulations, the Law Society of Scotland expressed concern that such regulations could be made without approved regulators being consulted. I agree that consultation is appropriate. Amendment 34 therefore requires that Scottish ministers “must consult every approved regulator” before making regulations under section 29(6). I am grateful to the Law Society for the suggestion.

Amendment 35 is a minor change, but it will ensure that the approved regulator is not liable for a penalty that is imposed under schedule 4 before being informed that a determination has been made.

Amendment 36 relates to the appeals process. Following the introduction of the bill, the Sheriff Court Rules Council made representations to the Scottish Government in which it suggested that the Government should specify exactly what a sheriff can do with regard to the various rights of appeal. That has been set out for appeals to a sheriff in amendments 66 and 162 and, for consistency, amendment 36 sets out the position for an appeal to the Court of Session under schedule 4. Furthermore, we consider it appropriate that the court’s decision should be final and that no further appeal should be possible. I am grateful to the Sheriff Court Rules Council for those suggestions. Amendment 37 is a drafting amendment.

12:00
I turn to the non-Government amendments. Amendments 283 and 284, in the name of Robert Brown, and amendment 291, in the name of Bill Aitken, prevent the Scottish ministers from acting under paragraphs (a), (b), (e) or (f) of section 29(4) or section 29(6) without the Lord President’s consent. Amendments 288, 289, 292, 293, 296, 298 and 299 make changes that are consequential on amendments 283 and 284.

As I have stated, the appropriate constitutional role of the Lord President lies in his consideration of an approved regulator’s expertise as regards the provision of legal services. I do not consider it appropriate for the Lord President to have the same role as the Scottish ministers, as that would require his office to go through the same thorough decision-making process as the Scottish ministers, with consequent resource issues and duplication of work. I think that I mentioned that earlier. On amendment 284, amendment 34, in my name, provides for consultation with every approved regulator before regulations are made under section 29(6). That might go some way to address concerns about the matter. I therefore do not support the non-Government amendments.

Amendment 286, in the name of Robert Brown, would require the Scottish ministers to report annually to the Scottish Parliament any influence that the existence of approved regulators and
licensed providers was having on competition and
the quality of legal services in the market. I
suspect that that has been proposed to allow
some monitoring of how the regulatory framework
is operating and what effect it has had on the legal
services market. I believe that the amendment is
unnecessary. Amendment 32, in my name,
requires approved regulators to review their
performance annually in relation to, among other
things, the exercise of their regulatory functions. A
report must be submitted to the Scottish ministers,
who must then lay it before the Parliament.
Although the report does not explicitly cover the
areas that are mentioned in amendment 286, it will
give an excellent idea of how the regulatory
framework and alternative business structures as
a whole are operating.

On the competition aspect, it should be noted
that the Scottish Legal Aid Board is given a duty
under section 96 to monitor the availability and
accessibility of legal services in Scotland and to
give the Scottish ministers advice on that. The
provision was drafted to ensure that the Scottish
ministers are made aware of any negative impact
on access to justice and to allow them to take
action if necessary. Therefore, I do not support
amendment 286.

I move amendment 32 and invite members not
to move the amendments in their names.

The Convener: I call Robert Brown to speak to
amendment 283 and the other amendments in the
group. He will, no doubt, bear it in mind that some
of the arguments on the matter have been well
rehearsed this morning.

Robert Brown: Yes. I was not going to repeat
any points on the Lord President’s powers. We
have been there before. I will simply make a
couple of observations on amendment 286.

I am grateful to the minister for his comments.
There are two differences between amendment
286 and amendment 32. One is that I put the
obligation on the Scottish ministers to report to the
Parliament, and the other is that amendment 286
specifically refers to effects on
“competition and quality of service in the legal services
market”.

I do not propose to press amendment 286, but I
would be grateful if the minister would confirm that
he is happy to have further discussions on the
detailed operation of the system. With that
assurance, I will be satisfied with the minister’s
amendment.

The Convener: Again, in respect of amendment
288, I am simply going to adopt previous
terms. The same arguments apply in respect of other amendments in the group.

As no other member wishes to contribute, I
invite Mr Ewing to sum up and address the point
that Mr Brown made.

Fergus Ewing: I simply say that I am happy to
have further discussions with Mr Brown should he
feel that we need to consider lodging further
amendments at stage 3. I am grateful to him for
his comments.

Amendment 32 agreed to.

Section 28—Monitoring performance
Amendment 33 moved—[Fergus Ewing]—and
agreed to.

Section 28, as amended, agreed to.

Section 29—Measures open to Ministers
Amendment 283 moved—[Robert Brown].

The Convener: The question is, that
amendment 283 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For
5, Against 3, Abstentions 0.

Amendment 283 agreed to.

Amendment 284 moved—[Robert Brown].

The Convener: The question is, that
amendment 284 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For
5, Against 3, Abstentions 0.

Amendment 284 agreed to.
Amendment 34 moved—[Fergus Ewing]—and agreed to.

Section 29, as amended, agreed to.

Schedule 1 agreed to.

Schedule 2—Directions

Amendment 288 moved—[Bill Aitken].

The Convener: The question is, that amendment 288 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 288 agreed to.

Amendment 289 moved—[Bill Aitken].

The Convener: The question is, that amendment 289 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 289 agreed to.

Schedule 2, as amended, agreed to.

Schedule 3—Censure

Amendment 291 moved—[Bill Aitken].

The Convener: The question is, that amendment 291 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 291 agreed to.

Amendment 292 moved—[Bill Aitken].

The Convener: The question is, that amendment 292 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 292 agreed to.

Amendment 293 moved—[Bill Aitken].

The Convener: The question is, that amendment 293 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 293 agreed to.

Schedule 3, as amended, agreed to.

Schedule 4—Financial penalties
Amendments 35 to 37 moved—[Fergus Ewing]—and agreed to.

Schedule 4, as amended, agreed to.

Schedule 5—Amendment of authorisation

Amendment 296 moved—[Bill Aitken].

The Convener: The question is, that amendment 296 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 296 agreed to.

Schedule 5, as amended, agreed to.

Schedule 6—Rescission of authorisation

Amendment 298 moved—[Bill Aitken].

The Convener: The question is, that amendment 298 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 298 agreed to.

Amendment 299 moved—[Bill Aitken].

The Convener: The question is, that amendment 299 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 299 agreed to.

Schedule 6, as amended, agreed to.

After section 29

Amendment 286 not moved.

Section 30 agreed to.

Schedule 7 agreed to.

Sections 31 to 34 agreed to.

Section 35—Step-in by Ministers

The Convener: Amendment 38, in the name of the minister, is grouped with amendments 38A and 307. If amendment 38 is agreed to, amendment 307 is pre-empted.

Fergus Ewing: Section 35 provides for the unlikely event in which no approved regulator is able to regulate some or all of the licensed providers. In such a case, I consider it important that regulation does not cease, so a step-in process is essential. However, the Scottish ministers would step in only if it was necessary to ensure the continued regulation of licensed providers, either by ministers acting as a regulator themselves or by ministers establishing a new body with the intention of it becoming an approved regulator.

The committee and the Law Society raised concerns about Scottish ministers’ step-in powers. The committee wrote in its report:

“The Committee notes that the step-in power is only intended to be used as a last resort but agrees with the Law Society that the Bill should detail when this provision might be used.”

Consequently, amendment 38 amends section 35(4) to make it clear that no regulations are to be made unless the Scottish ministers believe that their intervention is necessary as a last resort.

Amendment 38A, in the name of Robert Brown, would amend amendment 38 so that the Scottish ministers could intervene only if they reasonably believed that their intervention was necessary as a last resort. The amendment is unnecessary. The Scottish ministers must act reasonably.

Amendment 307, in the name of the convener, requires that the Scottish ministers must have the
consent of the Lord President before making regulations about stepping in if an approved regulator ceases to regulate. Stepping in must be necessary and the last resort in accordance with the regulatory principles, and may require to be done quickly in an emergency situation. Therefore, I do not consider it appropriate for the consent of the Lord President to be required; furthermore, that may lead to delay, which would not be acceptable in an emergency.

I move amendment 38 and invite members not to move amendments 38A and 307.

**Robert Brown:** Amendment 38A is a minor amendment, which is designed to qualify ministers’ powers slightly more objectively. People are concerned about not going too far in that respect. While it is important that the consent of the Lord President be required in this matter, I am aware of the pre-emption, which probably requires us to deal with amendment 38 and come back later to the matter of the Lord President. I would be interested in other members’ views on that.

I move amendment 38A.

**The Convener:** In speaking to amendment 307, I see no need to rehearse the previous arguments, which have been debated ad nauseam.

**Nigel Don (North East Scotland) (SNP):** If I have this right, amendment 38 is a fallback, last-resort, emergency power. On that basis, I disagree with the convener. It does not help any minister to have to consult or get permission from anyone else. As I understand it, the amendment is the nuclear option.

**Fergus Ewing:** I agree with Mr Don, who has succinctly set out the basis for supporting amendment 38, but I remind members that we are talking about a highly unlikely scenario. Nonetheless, for the reasons that Mr Don has just articulated, I urge members to support amendment 38.

**The Convener:** The question is, that amendment 38A be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
- Aitken, Bill (Glasgow) (Con)
- Brown, Robert (Glasgow) (LD)
- Don, Nigel (North East Scotland) (SNP)
- Maxwell, Stewart (West of Scotland) (SNP)
- Watt, Maureen (North East Scotland) (SNP)

**Against**
- Butler, Bill (Glasgow Anniesland) (Lab)
- Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
- Kelly, James (Glasgow Rutherglen) (Lab)

**The Convener:** The result of the division is: For 5, Against 3, Abstentions 0.

**Amendment 38 agreed to.**

**Section 35, as amended, agreed to.**

---

**Section 36—Licensed providers**

**The Convener:** Amendment 39, in the name of the minister, is grouped with amendments 40 to 43 and 94 to 96.

12:15

**Fergus Ewing:** Amendment 39 adds the important qualification “valid” to “practising certificate” in section 36(2). The effect is that the licensed provider must have within it at least one solicitor who holds a valid practising certificate. Amendment 40 makes changes to section 36(2) to ensure that a practising certificate must not be subject to conditions imposed by the Scottish Solicitors Discipline Tribunal under section 53(5) of the Solicitors (Scotland) Act 1980. The Law Society suggested the amendment.

Amendments 95 and 96 are drafting amendments, and amendment 41 is consequential to those.

Amendment 42 makes changes to section 37(6). It follows comments from the Subordinate Legislation Committee, which expressed concerns with the first element of the delegated power in section 37(6)(a), which permits further provision to be made about eligibility to be a licensed provider. The amendment splits into two parts the power in section 37(6)(a). The first part will consist of a power to make further provisions setting out additional categories of body that might or might not be eligible to be a licensed provider. That could be used to make fairly substantive changes to the eligibility criteria, so amendment 94 ensures that regulations that are made under it will be subject to affirmative procedure. The second part will consist of a more general power to make
further provision about eligibility criteria. In contrast with the first part, the second part will be used within the context of the criteria that are already set out in section 37 rather than to make any substantive changes. As such, regulations made under the second part of the power will remain subject to negative procedure.

Amendment 43 adds a requirement that the Scottish ministers must consult every approved regulator before making regulations under section 37(6)(b).

I move amendment 39.
Amendment 39 agreed to.
Amendment 40 moved—[Fergus Ewing]—and agreed to.
Section 36, as amended, agreed to.

Section 37—Eligibility criteria

The Convener: Amendment 310, in my name, is grouped with amendments 311 to 315, 317 and 378.

Amendment 310 concerns one of the principal issues in the bill, which has attracted considerable controversy, as we are all aware. It has been necessary for the committee to give the fullest consideration to the matter on the basis that the legal profession is clearly divided about the best route forward.

We have had a choice of options. The option as outlined by the Government in the bill as introduced is the one that is on the table today. Some have taken the view that there is no place for alternative business structures in the Scottish legal profession. One amendment was disposed of last week, after being lodged by Mr Kelly. Another amendment, which is before us today, represents one view that has been given by the legal profession and which is encapsulated in the amendments in the group.

We have to listen to the arguments carefully. One of the principal arguments that has been advanced throughout the bill process surrounds outside investment and the degree of independence, and how they might impinge on the Scottish legal profession. On that basis, after the fullest consideration, I think that amendment 310, as it might be augmented later, would enable the Scottish legal profession if not whole-heartedly to support it, at least to recognise that it allows a way forward.

It must be remembered that the bill is permissive. There is no compulsion on any practitioner or group of practitioners to avail themselves of the powers that the bill confers on them. It will be interesting to see, some years down the road, how many have availed themselves of those opportunities. I suspect that, at the end of the day, not all that many will do so. However, it is important that those who wish to make use of such opportunities should have them. At the same time, I recognise that it is essential that the majority control and ownership of any legal entity or any entity that puts itself forward as a provider of legal services should be vested in legal practitioners. That is the basis on which I lodged the amendment.

I move amendment 310.

Robert Brown: With great respect, convener, I dissent from your suggestion that the bill is permissive. In technical terms, it is, but in practical terms, it is likely to alter substantially the environment in which the legal profession operates. It is, therefore, slightly tautological to say that the bill is permissive. Otherwise, I agree with your comments.

Amendment 317 is designed to ensure that there is a majority holding in the hands of solicitors or other regulated professionals. It is the compromise position that was debated and supported by the Law Society of Scotland. I hope that it has the merit both of being reasonable and, as the convener indicated, of being common ground on which the profession can regroup, to some extent.

I do not pretend that it is the perfect solution—there are issues with all the potential solutions—but it provides further protection against outside control, which is, rightly, of concern to many solicitors. Last week we debated issues relating to the rights of minority investors. It is certainly the case that influence is as relevant as control. Nevertheless, amendment 317 would put a brake on the extent to which law firms can be taken over by outside interests. The committee should apply that brake.

A useful distinction that the Government may believe has merit in this context is that between professional ownership, whether of solicitors or of other professionals, about which there is less controversy, and ownership by outside commercial interests. Broadly, there is support for the concept of multidisciplinary practices, but there is far less support for the idea of outsiders—Mr Big Money or Mr Mega Corporation—taking control of legal firms. That is not the basis for amendment 317, but it may be worth exploring further the proposal that commercial as opposed to professional interests be allowed a smaller stake, at least in the beginning.

Government amendment 378 is relevant in that context, because it allows the Scottish ministers to amend by statutory instrument the percentage that is specified in the section on majority ownership, assuming that the amendments are passed, or to
repeal the section. Regulations to make such amendments can be made only if they are “compatible with the regulatory objectives, and ... appropriate in any other relevant respect.”

Scottish ministers are required to consult the Lord President, the Law Society, other approved regulators, the OFT and “such other person or body as they consider appropriate.”

I am minded to support amendment 378, but the provision should be seen as a long stop rather than something to be rushed into too quickly. The Scottish ministers have free rein to alter the percentages, subject to approval of the regulations by Parliament. In the view of the Law Society, that could act as a disincentive to investors in licensed providers. It reduces the confidence that those investors might have and introduces a measure of uncertainty. More important, it is not clear under what circumstances the powers would be exercised and what the criteria would be. That is not specified in the bill or in any of the minister’s amendments. I invite the minister, when he replies, to satisfy the committee on those points, which apply regardless of whether the amendments are agreed to.

The Convener: This is an important issue in the bill.

Stewart Maxwell: We discussed the issue at length last week, although with a different percentage figure in mind. I accept that the figure that is proposed is better than that of 25 per cent, but I continue to hold the view that it is wrong for us to go down this road, for a number of reasons.

First, as members are aware, the bill is permissive. It allows those who wish to enter a structure of the type that is proposed to do so, but it forces no one to do anything. I disagree with Robert Brown on that point.

Secondly, as we discussed last week and at previous committee meetings, there is a fundamental point here about the ability of the regulator—for example, the Law Society—to regulate the profession. It seems rather perverse to impose a cap of any sort on the percentage of an ABS that non-solicitors could own. It would be for the regulator to decide whether 49 per cent was appropriate or whether it should be a different figure. That is a matter for the profession. We often talk about the independence of the legal profession but, in this case, we seem to be interfering with that independence in a rather odd way.

However, my main objection to amendment 317—although I am also talking about amendments 310 to 315—is that, if it were passed, that would eliminate the opportunity for small firms and sole practitioners in particular to become ABSs because of the requirement for a 51:49 split. I will give an example. If two individuals—an accountant and a solicitor—wished to go into practice together in an ABS, they could not have an equal partnership because the solicitor would need to have a 51 per cent share. Equally, if three accountants and a solicitor wished to join together, they could not form such a practice, as the solicitor would need to have a 51 per cent share—there would be no equality in the ownership of the firm. That is why I cannot support the amendments.

James Kelly: The central issues that the committee and the Parliament have grappled with in considering the bill are the independence of the legal profession and how we can modernise that profession in order to gain the boost to the Scottish economy that might result from new business structures. In examining the issues, we have considered the 25:75 ownership split that was suggested by my colleague, Bill Butler, last week, although that proposal was defeated. We have another proposal on the table today for a 51:49 ownership split, the merits of which I recognise. I am not whole-heartedly behind it, as I have some reservations about it, particularly given that the 51 per cent share could be held by members of other regulated professions. However, I recognise that it is an improvement on the 100 per cent ABS position that was put forward by the Government. As I outlined last week, the desire is to protect the independence of the Scottish legal profession while opening up economic opportunity to legal firms. Therefore, I support the amendment at this stage although I will seek to amend the provision at stage 3.

I do not think that Stewart Maxwell’s point about small businesses being unable to be ABSs is valid. He said that the amendment would not allow an accountant and a lawyer to join together. However, when businesses were formed, that could be done on the basis of share ownership. As I understand it, under company law, a business could be set up in which the lawyer had the majority share of ownership under the terms of the amendment and that would still allow small businesses of accountants and lawyers to come together, which is one of the bill’s objectives.

I support amendment 378, in the name of the minister. There has been an element of our feeling our way through the subject. We have argued for and against different percentages, but the reality is that there has been a lack of evidence to demonstrate substantially how either of the suggested percentages would work in practice. Therefore, it is correct that there should be a stipulation to allow an appropriate SSI to be produced at a future date if it is felt that the percentage that is set is inappropriate. Nevertheless, I agree with Robert Brown that that
should be a last option and that ministers in any future Administration should not propose it lightly.

12:30

**Fergus Ewing:** The amendments in the group are at the heart of stage 2 consideration of the bill. I welcome the debate and the tone in which all members have conducted it. I particularly welcome the clarification that the bill is permissive—it is not compulsory and does not require solicitors to take advantage of ABS. Many members have made that important point.

I emphasise that the bill contains a particularly Scottish solution. We have devoted much time today to the small print of the regulatory regime—at times, members might have felt that watching paint dry would have been a diverting alternative for interest. It is important that we have a robust regulatory regime. I can recall having been involved in debating no more robust regulatory regime as a member of the Parliament for the past decade.

That regime will also be obtained at virtually no expense to the taxpayer. That contrasts with the position down south, where the Legal Services Board’s implementation costs to 31 December 2009 were £4.58 million and its budget for running costs in its first full year, which began in April 2010, is £4.74 million. Similar costs here would not be as high as that, but would be comparable. I hope that the Chancellor of the Exchequer is listening. He might be urged to borrow the Scottish system in considering how measures operate down south. Who knows?

Press reports about the bill have almost invariably dubbed it “Tesco law”. However, as far as I am aware, Tesco has expressed no interest in undertaking Scottish legal work, perhaps because it is probably much easier for Tesco to continue to make huge profits by selling vast quantities of food and drink. “Tesco law” is a misnomer for the bill. That misnomer has fostered misunderstanding and engendered a misapprehension that might cause Scotland to miss out on an unparalleled opportunity to create jobs and to grow the economy at virtually no cost to the Scottish taxpayer.

Some of the wilder arguments that have been made against the bill have more to do with superstition than with supermarkets. It would be more accurate to call the bill the Scottish legal enterprise and jobs bill or SLEJ, if members wish. Even if Tesco and its rivals were interested in taking on Scottish legal work, should Scottish solicitors be afraid? Absolutely not. Lawyers provide services; supermarkets sell goods. If lawyers provide a good service, as I believe they do in the main in Scotland, they have nothing to fear from any supermarket or from anything else.

I firmly believe that the model of external ownership in the bill offers significant benefits to legal professionals and consumers. The full ABS system, with the possibility of 100 per cent ownership by external investors, will allow firms to develop innovative new business models, to go into partnership with other professionals and to raise external capital to support their development and expansion. Consumers will have access to the new business models and will benefit from an increasingly competitive legal services market that is populated by traditional firms, law firms that operate under the new business models and new entrants.

I understand the concerns about such an increase in competition, but I am confident in Scottish firms’ ability to innovate and thrive in such an environment, and to take full advantage of the new flexibility that the bill will offer. That approach was endorsed, albeit narrowly, by the legal profession in a recent referendum of the entire membership. It was also supported at stage 1 by the Justice Committee, which acknowledged in its report that “the likely detriment to the larger Scottish law firms is real. Without this bill, recognising that the legislation for England and Wales has already been enacted and will come into force over the next year or so, Scottish law firms may be less able than their competitors to take advantage of the opportunities arising in areas of law that are not reserved to Scottish solicitors.”

I respectfully agree with that conclusion, which was reached by the committee and is set out in its stage 1 report.

Amendment 317, in the name of Robert Brown, would impose a cap on the percentage of ownership or control that an external investor could have over a licensed provider. Only solicitors or members of other regulated professions would be able to own a majority share of such a firm. Amendments 310 to 315 are consequential on amendment 317.

Although amendment 317 would maintain some of the benefits of the bill—for the reasons that the convener and Mr Brown have set out—I respectfully suggest that there are some significant downsides to it. Significant restrictions on the type of business model that legal services could adopt would remain, thereby limiting the flexibility that the current provisions allow. Solicitors would continue to hold an unnecessary monopoly of the ownership of firms that provide legal services, which would undermine one of the key concepts behind the bill—that one should not have to be a solicitor to own a firm that provides legal services. As Mr Maxwell pointed out in the stage 1 debate, one does not have to be a pilot to own an airline, nor should one have to be. The
ability of firms to access external capital would be restricted, which could affect their ability to compete with firms in England.

There would be fewer new entrants to the legal services market, because few—if any—non-legal firms would meet the ownership criteria. That would largely remove the potential increase in competition in the legal services market, with the resulting impact on the benefits to consumers. The 51 per cent solicitor-ownership requirement would prevent a solicitor from entering a partnership with, for example, an estate agent or paralegal, and would restrict options for sole practitioners. Those are arguments that I have advanced and which Mr Maxwell has repeated today.

Finally, the proposed compromise—which was, in large part, designed to reunite the legal profession, which is a worthy objective and something that we all want to see, as far as it is possible—may, unfortunately, fail. It must be recognised that that has been demonstrated in the numerous votes and meetings that have taken place over the past few months. Many solicitors feel strongly that the bill should not be passed and are unlikely to be won over by the compromise.

For those reasons, I am unable to support amendment 317 and the related consequential amendments as they stand. Nevertheless, I recognise the breadth of opinion on the issue and respect the views of those who have argued for a more restrictive model of external ownership. I have met many of the people who have concerns about the external ownership aspects of the bill, including individual solicitors such as Walter Semple and Craig Bennet. I respect them and others whom I have met for their sincerity and their commitment to the protection of both the profession and the consumer: that commitment is in no doubt whatever.

Over the past few months, we have tried to maintain a listening approach, which has resulted in a great many of the amendments that we have lodged and discussed this morning and last Tuesday. Those have included the enhancement of the role of the Lord President and the introduction of regulation for non-lawyer will writers—an issue that we will come on to consider.

Therefore, although I maintain that the bill as drafted represents the best approach, I place on record that I understand the concerns of those who disagree, including the convener and other committee members. I feel that it is important that we continue to work together to find a way forward that is acceptable to all concerned. It is crucial that all parties be able to have their say, and that the legal profession is given the opportunity to reflect fully on the various arguments that have been put forth. There will be a long period for reflection over the summer, when that reflection will, no doubt, take place. If amendment 317 is agreed to, I will need to consider in detail whether there are any issues regarding how it will affect the bill as a whole, and whether amendments will be required at stage 3 to ensure that everything will operate as it should. I suspect that such amendments may be technical in nature.

Amendment 378 seeks to add to the bill a section that would allow the Scottish ministers, after consultation of relevant bodies, to make secondary legislation—which would be subject to the affirmative procedure—to alter the percentage that is specified in subsection 1(a) of the new section that amendment 317 proposes, or to remove that proposed new section altogether.

I will say a bit more about that, in response to the points of Mr Brown and Mr Kelly. First, I stress that amendment 378 is not an attempt to negate amendment 317, should it be agreed to. Rather, it is a measure to ensure that we retain flexibility, the need for which Mr Kelly emphasised and to which Mr Brown alluded. An unforeseen change in circumstances may require an increase or decrease in the percentage that is stated in amendment 317. We simply cannot predict the future with certainty.

Similarly, if the protection that is offered by a cap on external ownership becomes an obstacle instead of an aid, we may well need the ability to revisit it or to remove it altogether, if necessary. The large firms have stressed that although they could live with such a compromise, it is crucial that we maintain flexibility. If full ABS—which will soon be possible in England—is a success, the proposed compromise may at some point hinder the ability of Scottish firms to compete on a level playing field. Were that to happen, we would need to be able to consider the situation and, if there was sufficient evidence, to take action. If we could not do so, we could be returned to the position in which such firms threaten to leave Scotland in order to take advantage of the business structures that are available south of the border. Ian Smart, a former president of the Law Society of Scotland, estimated that such a move might cost the Scottish economy £500 million and would seriously imperil the viability of the guarantee fund.

As there has been some discussion around the issue, I should add that no one is suggesting that the firms in question would physically move to England; the suggestion is that they would register their solicitors there and that those solicitors would continue to work in Scotland, but as foreign lawyers.

As I said, regulations that were made under amendment 378 would be subject to the affirmative procedure and could be made only following consultation of various bodies if it was believed that such action was
I feel that amendment 378 will be crucial if amendment 317 is agreed to; otherwise, amendment 317 would lock us into an unproven business model and would give us little ability to change it at short notice should problems arise.

In conclusion, I was encouraged to hear Mr Brown, the convener and Mr Kelly express their support for amendment 378. That is appreciated, as is the tone and substance of the debate, which has been extremely useful and which I hope will be read carefully by all the people outwith the Parliament who have taken a close interest in the bill's proceedings. I invite the convener to seek to withdraw amendment 310 and not to move amendments 311 to 315, and I ask Robert Brown not to move amendment 317. If, however, those amendments are agreed to, I invite the committee to agree to amendment 378.

The Convener: Thank you very much indeed.

Despite the minister's occasional lapse into hyperbole, there was much in what he said with which we could all empathise. It is important to stress that, in my view, the Government has done everything possible to achieve a reasonable outcome on this aspect of the bill, which is clearly the part of it that has attracted the greatest degree of controversy and concern.

As I see it, there are three principal arguments at stake, the first of which is economic. Our not introducing some form of ABS in Scotland would present clear risks. The second argument is about the independence of the legal profession, which I hope we can address through the amendments in this group and the various changes in regulation that we have sought to implement. The third is about the regulatory steps that we have taken in themselves, which I think are constructive.

It has been unfortunate that we have not been given a clear lead by the legal profession. I could comment that we would require the wisdom of Solomon to make a determination. We do not have that wisdom, so we can simply do our best. We have listened to the arguments with great care and have debated the matter as thoroughly as we can.

Accordingly, given the offer that is on the table, I will seek the committee's permission to withdraw amendment 310 and, in deference to Robert Brown's amendment 317, I will not move amendments 311 to 315.

12:45

I have also listened carefully to, and have been persuaded by, the arguments that have been put forward by the minister in respect of amendment 378. If we are to proceed with this matter—I think that the view will be that we should—we must do so with caution. We must leave open various options for the future, in case such options require to be implemented.

I thank everyone around the committee table for the civilised way in which this fairly fraught debate has been conducted; it has been conducted in a professional manner. On that basis, I seek the committee's approval to withdraw amendment 310.

Amendment 310, by agreement, withdrawn.
Amendments 311 to 313 not moved.
Amendment 41 moved—[Fergus Ewing]—and agreed to.

The Convener: We now turn to the issue of will writers, which I think will be fairly straightforward. Amendment 173, in the name of the minister, is grouped with amendments 179 and 180.

Fergus Ewing: The regulatory model for non-lawyer will writers, which will be debated later, is based on the model that has been proposed for confirmation agents in part 3 of the bill. Although some provisions are replicated in appropriately modified form for the purposes of regulating will writers, the sections to which the amendments relate will simply be modified to apply to both confirmation agents and will writers.

Amendments 173, 179 and 180 will add references to will writers in addition to confirmation agents in various sections of the bill. The effect will be to make the provisions in sections 37, 57 and 58, relating to confirmation agents, also applicable to will writers.

Amendment 173 will add "will writer" to the definition of "individual practitioner", which is contained in section 37(5) of the bill, and will mean that an entity is eligible to be a licensed provider if it has a solicitor and will writer within it.

Amendment 179 will prevent licensed providers from employing as a designated person an individual who has been prohibited from acting as a will writer.

Amendment 180 will make it an offence for an individual who has been prohibited from acting as a will writer to seek or to accept employment by a licensed provider without informing that employer of the debarment. The amendments are all consequential on the new provisions relating to regulation of non-lawyer will writers in part 3 of the bill.

I move amendment 173.
Amendment 173 agreed to.
Amendment 314 not moved.
Amendment 42 moved—[Fergus Ewing]—and agreed to.

Amendment 315 not moved.

Amendment 43 moved—[Fergus Ewing]—and agreed to.

Section 37, as amended, agreed to.

After section 37

Amendment 317 moved—[Robert Brown.]

The Convener: The question is, that amendment 317 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division:

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Amendments 0.

Amendment 317 agreed to.

Section 38 agreed to.
3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 29  Schedules 1 to 6  
Section 30  Schedule 7  
Sections 31 to 52  Schedule 8  
Sections 53 to 101  Schedule 9  
Section 102  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 39

Fergus Ewing

44 In section 39, page 20, line 15, after second <a> insert <valid>

Fergus Ewing

45 In section 39, page 20, line 15, leave out <as construed by reference to section 15(1)> and insert <such as may be imposed under section 15(1)(b) or 53(5)>

Fergus Ewing

46 In section 39, page 20, line 27, at end insert—

<(aa) adhere to the professional principles,>

Fergus Ewing

47 In section 39, page 20, line 38, leave out <as regards> and insert <for exercising>

Fergus Ewing

48 In section 39, page 21, line 4, at end insert <(in their capacity as such)>

Robert Brown

319 In section 39, page 21, line 6, at end insert—

<( ) Before making regulations under subsection (9), the Scottish Ministers must consult the Lord President.>
Section 40

Fergus Ewing

49 In section 40, page 21, line 33, at end insert <(in their capacity as such)>

Robert Brown

321 In section 40, page 21, line 33, at end insert—

<( ) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.>

Section 41

Robert Brown

323 In section 41, page 22, line 14, at end insert—

<( ) Before making regulations under subsection (5), the Scottish Ministers must consult the Lord President.>

Section 43

Fergus Ewing

50 In section 43, page 23, line 34, leave out <Rules made in pursuance of section 10(1)(b) and (c) must (additionally)> and insert <Practice and licensing rules respectively must>

Fergus Ewing

51 In section 43, page 23, line 37, at end insert—

<( ) A licensed provider which or another person who is aggrieved by a direction under subsection (4) (or both jointly) may appeal against the direction—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the direction is given.>

Section 45

Fergus Ewing

102 In section 45, page 25, line 12, at end insert—

<(3A) Licensing rules must provide that the licensed provider’s licence may be revoked or suspended if the licensed provider wilfully disregards a disqualification imposed under section 44.>
Section 47

Fergus Ewing
52 In section 47, page 26, line 31, after <is> insert <written>

Fergus Ewing
53 In section 47, page 26, line 37, leave out <or manager>

Robert Brown
330 In section 47, page 26, line 38, leave out from <, or> to end of line 39

Fergus Ewing
54 In section 47, page 27, line 4, leave out subsection (4)

After section 47

Fergus Ewing
55 After section 47, insert—

<Working context
(1) A Head of Legal Services is, in furtherance of section 39(5)(aa) and (b), responsible for ensuring that there is (by or under the direction of the Head) adequate supervision of the legal work carried out by the designated persons within the licensed provider.
(2) Only a designated person within a licensed provider may carry out legal work in connection with its provision of legal services.
(3) Nothing in this Part affects the operation of—
   (a) section 32 of the 1980 Act or any other enactment which requires that a particular sort of legal work be carried out by an individual of a particular description (or in a particular way), or
   (b) any rule of professional practice, conduct or discipline (whether for solicitors or otherwise) which properly so requires.>

Section 49

Fergus Ewing
103 In section 49, page 27, line 19, leave out <outside> and insert <non-solicitor>

Fergus Ewing
104 In section 49, page 27, line 22, leave out from <may> to <but> in line 23

Fergus Ewing
105 In section 49, page 27, line 24, leave out <an outside> and insert <a non-solicitor>
In section 49, page 27, line 29, at end insert—

<(  ) But the approved regulator need not act as required by licensing rules made under subsection (2)(b) if, by such time as it may reasonably appoint, the licensed provider demonstrates to it that (following disqualification as required by section (Ban for improper behaviour)(1) or otherwise) the investor no longer has the relevant interest.>

In section 49, page 27, line 31, leave out <outside> and insert <non-solicitor>

After section 49

After section 49, insert—

<Exemption from fitness test
(1) Section 49(1) is subject to this section.
(2) The approved regulator need not act as required by that section in relation to any exemptible investor in the licensed provider.
(3) Licensing rules must explain—
   (a) any circumstances in which the approved regulator proposes to rely on subsection (2),
   (b) any threshold below the percentage specified in subsection (4) by reference to which it proposes to rely on subsection (2),
   (c) where it proposes to rely on subsection (2), its reasons.
(4) In subsection (2), an “exemptible investor” is an investor who has less than a 10% stake in the total ownership or control of the licensed provider.>

Section 50

In section 50, page 28, line 3, leave out <an outside> and insert <a non-solicitor>

In section 50, page 28, line 7, leave out <(including associations),> and insert—

<(  ) family, business or other associations (so far as bearing on character),>

As an amendment to amendment 110, line 2, at end insert <and suitability to be such an investor>

In section 50, page 28, line 18, leave out <An outside> and insert <A non-solicitor>
Fergus Ewing
112 In section 50, page 29, line 5, leave out subsection (4)

Fergus Ewing
113 In section 50, page 29, line 10, at end insert—

<( ) Where a non-solicitor investor is a body, it is relevant as respects the investor’s fitness for having an interest in a licensed provider whether or not the persons controlling the body’s affairs would (if they were investors in the licensed provider in their own right) be held to be fit in that regard.>

Robert Brown
113A As an amendment to amendment 113, line 3, leave out <controlling> and insert <having control or substantial influence in>

After section 50

Fergus Ewing
114 After section 50, insert—

<Ban for improper behaviour>

(1) Where an approved regulator determines that a non-solicitor investor in a licensed legal services provider has contravened section 51(1) or (2), the approved regulator must disqualify the investor from having an interest in the licensed provider.

(2) A disqualification under subsection (1)—

(a) may be—

(i) without limit of time, or

(ii) for a fixed period,

(b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(3) Before disqualifying an investor under subsection (1), the approved regulator must give the investor 28 days (or such longer period as it may allow) to—

(a) make representations to it,

(b) take such steps as the investor may consider expedient.

(4) Practice rules must—

(a) set procedure (which the approved regulator is to follow) for imposing a disqualification under subsection (1),

(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that subsection.

(5) A person who is disqualified under subsection (1) may appeal against the disqualification—

(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which the disqualification is imposed.>

Section 51

Fergus Ewing

115 In section 51, page 29, line 14, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

116 In section 51, page 29, line 21, leave out <An outside> and insert <A non-solicitor>

Fergus Ewing

117 In section 51, page 29, line 22, after <interfere> insert <improperly>

Section 52

Fergus Ewing

174 In section 52, page 29, line 34, leave out from <including> to end of line 6 on page 30

Fergus Ewing

175 In section 52, page 30, line 8, at end insert—

<(2A) The Scottish Ministers may by regulations—

(a) amend the percentage specified in section (Exemption from fitness test)(4) and paragraph 3A(3) of schedule 8,

(b) amend (by addition, elaboration or exception) a definition in subsection (4).

(2B) Regulations under subsection (2)(a) may (in particular)—

(a) impose requirements to which a licensed provider, or an investor in a licensed provider, is subject,

(b) specify criteria or circumstances by reference to which a non-solicitor investor is to be presumed, or held, to be fit (or unfit),

(c) set out—

(i) what amounts (to any extent) to ownership, control or another material interest,

(ii) what interest (or type) is relevant as regards a particular percentage stake in ownership or control,

(iii) by reference to a family, business or other association, what other interest (or type) also counts towards such a stake.>
Robert Brown

175A As an amendment to amendment 175, line 2, after <Scottish Ministers> insert <with the consent of the Lord President>

Fergus Ewing

118 In section 52, page 30, line 9, leave out subsection (3)

Fergus Ewing

119 In section 52, page 30, line 12, after <has> insert <(to any extent)>

Fergus Ewing

176 In section 52, page 30, leave out lines 15 to 18 and insert—

<(b) a “non-solicitor investor” in a licensed provider is an investor who is not entitled to practise—

(i) as a solicitor,

(ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or

(iii) as a registered European lawyer.>

Fergus Ewing

177 In section 52, page 30, line 18, at end insert—

<( ) In sections 49 to 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.>

Schedule 8

Fergus Ewing

121 In schedule 8, page 76, line 14, leave out <outside> and insert <non-solicitor>

Fergus Ewing

122 In schedule 8, page 76, line 23, leave out <outside> and insert <non-solicitor>

Fergus Ewing

123 In schedule 8, page 76, line 24, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

124 In schedule 8, page 76, line 37, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing

125 In schedule 8, page 77, line 1, leave out <an outside> and insert <a non-solicitor>
In schedule 8, page 77, line 4, leave out <an outside> and insert <a non-solicitor>.

In schedule 8, page 77, line 4, leave out <including>.

In schedule 8, page 77, leave out lines 6 and 7 and insert—

(ii) because the person, having ceased to be entitled to practise as mentioned in section 52(4)(b) (while remaining as an investor), comes within the definition there.

In schedule 8, page 77, line 12, leave out <(1)(c)> and insert <(1)(c)(i)>

In schedule 8, page 77, line 14, at end insert—

(3A) In a case falling within sub-paragraph (1)(c)(ii), the licensed provider must (as soon as practicable) notify the approved regulator of the fact.

In schedule 8, page 77, line 18, leave out <or (3)> and insert <, (3) or (3A)>

In schedule 8, page 77, line 23, at end insert—

Exemption from notification requirements

3A(1) An approved regulator may in relation to any exemptible investor in a licensed provider waive the requirements to give it information (or notification) under paragraphs 1 and 3.

(2) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on sub-paragraph (1),

(b) any threshold below the percentage specified in subsection (3) by reference to which it proposes to rely on sub-paragraph (1),

(c) where it proposes to rely on sub-paragraph (1), its reasons.

(3) In sub-paragraph (1), an “exemptible investor” is (as the case may be)—

(a) an investor who has less than a 10% stake in the total ownership or control of the licensed provider, or

(b) a person whose intended acquisition of an interest in the licensed provider is of less than a 10% stake in the total ownership or control of the licensed provider.
Section 53

Fergus Ewing

56 In section 53, page 30, line 23, after <reason> insert <(except revocation or suspension of its licence under this Part)>.

Section 54

Fergus Ewing

57 In section 54, page 31, line 8, after <reason> insert <(except revocation or suspension of its licence under this Part)>.

Section 57

Fergus Ewing

58 In section 57, page 33, leave out lines 30 and 31 and insert—

<(  ) acting as a litigation practitioner,>.

Fergus Ewing

179 In section 57, page 33, line 32, after <agent> insert <or will writer>.

Fergus Ewing

59 In section 57, page 34, line 11, at end insert—

<(  ) the Court’s determination is final.>.

Section 58

Fergus Ewing

60 In section 58, page 34, leave out lines 29 and 30 and insert—

<(  ) acting as a litigation practitioner,>.

Fergus Ewing

180 In section 58, page 34, line 31, after <agent> insert <or will writer>.

Section 59

Fergus Ewing

61 In section 59, page 35, line 9, after <implying> insert <falsely>.
Section 60

Fergus Ewing
62 In section 60, page 35, line 32, leave out <(with any necessary modifications)>

Fergus Ewing
63 In section 60, page 35, line 34, at end insert <but with any necessary modifications>

Section 64

Fergus Ewing
133 In section 64, page 37, line 10, at end insert—

<(A1) Any complaint about an approved regulator is to be made to the Scottish Legal Complaints Commission.

(A2) The Commission is to determine whether or not the complaint is—

(a) one for which section 57D(1) of the 2007 Act makes provision,

(b) frivolous, vexatious or totally without merit.

(A3) And—

(a) if the Commission determines that the complaint falls within subsection (A2)(a), the Commission is to proceed by reference to section 57D(1) of the 2007 Act,

(b) if the Commission determines that the complaint falls within subsection (A2)(b), the Commission—

(i) must notify the complainer and the approved regulator accordingly (with reasons),

(ii) is not required to take any further action.

(c) if the Commission determines that the complaint does not fall within subsection (A2)(a) or (b), the Commission must refer the complaint to the Scottish Ministers.>

Fergus Ewing
134 In section 64, page 37, line 11, leave out <made to them about an approved regulator> and insert <about an approved regulator that is referred to them under subsection (A3)(c)>

Fergus Ewing
135 In section 64, page 37, line 13, leave out subsection (2)

Fergus Ewing
136 In section 64, page 37, leave out line 19

Fergus Ewing
137 In section 64, page 37, line 21, leave out subsection (4)
Fergus Ewing

138 In section 64, page 37, line 26, leave out <Scottish Legal Complaints>

Fergus Ewing

139 In section 64, page 37, line 27, at end insert <(and, if they so delegate their function under subsection (1), they may also waive the referral requirement under subsection (A3)(c))>

After section 64

Fergus Ewing

140 After section 64, insert—

<Levy payable by regulators

(1) An approved regulator must pay to the Scottish Legal Complaints Commission—
   (a) in respect of each financial year, an annual levy,
   (b) if arising, a complaints levy.

(2) The amount of the annual levy or complaints levy payable by an approved regulator—
   (a) is to be determined by the Commission,
   (b) may be—
      (i) different from any amount payable as an annual general levy or (as the case may be) a complaints levy under Part 1 of the 2007 Act,
      (ii) in either case, of different amounts (including nil) in different circumstances.

(3) The complaints levy arises as respects an approved regulator where—
   (a) the Scottish Ministers delegate to the Commission their function under section 64(1) in relation to a complaint made about the approved regulator, and
   (b) the Commission upholds the complaint.

(4) Before determining for a financial year the amount of the annual levy or complaints levy, the Commission must consult—
   (a) each approved regulator (with particular reference to the proposed amount to be payable by it),
   (b) the Scottish Ministers.>

Section 65

Fergus Ewing

141 In section 65, page 39, line 2, at end insert—

<(1A) Section 29 applies for the purposes of subsection (1) as it applies for the purposes of sections 27(1) and 28(1).

(1B) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) and (1A)—
an approved regulator is to be regarded as a relevant professional organisation whose members are its licensed providers,

(b) a licensed provider is to be regarded—

(i) in connection with the annual general levy, as an individual person falling within the relevant category,

(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

Fergus Ewing

142 In section 65, page 39, line 3, at beginning insert <But>

Fergus Ewing

143 In section 65, page 39, line 12, at end insert—

57CA Recovery of levy

(1) An approved regulator must—

(a) secure the collection by it, from its licensed providers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as it applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57C(1)(a) (including interest) as it applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57C(1)(b) (including interest) as it applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approved regulator is to be regarded as the relevant professional organisation,

(b) each of its licensed providers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57C(1) is subject to subsection (1).>

Fergus Ewing

144 In section 65, page 39, line 24, at end insert—

<“professional principles”,
“regulatory objectives”,>

Section 67

Fergus Ewing
145 In section 67, page 40, line 12, leave out <outside> and insert <non-solicitor>

Fergus Ewing
64 In section 67, page 40, line 23, leave out <that> and insert <on which>

Fergus Ewing
65 In section 67, page 40, line 25, leave out <that> and insert <on which>

Section 68

Fergus Ewing
146 In section 68, page 41, line 15, leave out <an outside> and insert <a non-solicitor>

Fergus Ewing
147 In section 68, page 41, line 15, at end insert <, or

( ) disqualified under section (Ban for improper behaviour)(1) (that is, from having an interest in a licensed provider).>

Fergus Ewing
148 In section 68, page 41, line 20, at end insert <or (as the case may be) disqualification>

Fergus Ewing
149 In section 68, page 41, line 21, at end insert <or (as the case may be) disqualification>

Fergus Ewing
150 In section 68, page 41, line 21, at end insert—

<( ) A list kept under this section must not include information relating to a person in respect of whom the determination or (as the case may be) disqualification—

(a) has been reversed on appeal, or

(b) otherwise, no longer applies.>
After section 70

Fergus Ewing

After section 70, insert—

<Appeal procedure
(1) This section applies in relation to an appeal to the sheriff under this Part.
(2) The appeal is to be made by way of summary application.
(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
   (b) make such further order (including for the expenses of the parties) as is necessary
       in the interests of justice.
(4) The sheriff’s determination in the appeal is final.>

Section 73

Fergus Ewing

In section 73, page 42, line 37, leave out <Part> and insert <Chapter>

Section 74

Bill Aitken
Supported by: James Kelly

In section 74, page 43, line 16, after <may> insert <, with the consent of the Lord President,>

Fergus Ewing

In section 74, page 43, line 27, at end insert <(any of which may be removed or varied by the
Scottish Ministers after consulting the approving body)>

Bill Aitken
Supported by: James Kelly

In section 74, page 43, line 27, at end insert—

<(2A) The Scottish Ministers may, with the consent of the Lord President, amend, add or
delete any conditions imposed under subsection (2)(c).>

James Kelly

In section 74, page 43, line 28, after <body> insert <and what conditions, if any, to impose under
subsection (2) or amend, add or delete under subsection (2A)>

Fergus Ewing

In section 74, page 43, line 38, after <must> insert <, with reasons,>
In section 74, page 44, line 2, at end insert—
<together with, in either case, their reasons for doing so.>
In section 75, page 44, line 26, at end insert—

\<(  ) require that a confirmation agent keep in place sufficient arrangements for compensating persons who, in the opinion of the approving body, suffer pecuniary loss by reason of dishonesty on the part of that agent in providing confirmation services,

(  ) include provision for ensuring that such persons may be compensated even although the confirmation agent no longer provides such services or is no longer in existence.\>

In section 75, page 45, line 18, leave out <Part> and insert <Chapter>

Section 76

In section 76, page 45, line 26, leave out from <approving body> to end of line 27 and insert <Scottish Ministers (but the approving body may collect it on their behalf).>

After section 76

After section 76, insert—

<Review of own performance>

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approving body’s compliance with section 75(5),

(b) the exercise of its functions in relation to its regulatory scheme,

(c) its compliance with any measures applying to it by virtue of section 81(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

(a) the review of approved bodies’ performance,

(b) reports on reviews of their performance.>

Section 77

In section 77, page 46, line 1, after <implying> insert <falsely>
Fergus Ewing
158 In section 77, page 46, line 2, after <otherwise> insert <so>

Section 81

Fergus Ewing
183 In section 81, page 48, line 6, leave out <Part> and insert <Chapter>

Fergus Ewing
159 In section 81, page 48, line 8, leave out subsection (4) and insert—

<(4) An approving body must—
(a) review annually the performance of its confirmation agents,
(b) prepare a report on the review,
(c) send a copy of the report to the Scottish Ministers.>

Fergus Ewing
160 In section 81, page 48, line 12, leave out from <about> to <(b)> in line 14 and insert—

<(a) about the review of confirmation agents,
(b) so far as it appears to them to be necessary for safeguarding the interests of clients
of confirmation agents—
(i) concerning the functions of approving bodies,
(ii) relating to>

After section 81

Fergus Ewing
184 After section 81, insert—

<Chapter 2
Will writing services
Regulation of will writers

Will writers and services
(1) For the purposes of this Part, will writing services are services that are—
(a) described in subsection (2), and
(b) provided (or offered)—
(i) to members of the public, and
(ii) for a fee, gain or reward.
(2) The services are those of drawing or preparing wills or other testamentary writings.
(3) For the purposes of this Part, a will writer is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide will writing services is conferred.

Fergus Ewing

185 After section 81, insert—

<Approving bodies

(1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section (Certification of bodies).

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section (Certification of bodies)(1)(b)),

(b) a description of—

(i) the applicant’s constitution and composition (including internal structure),

(ii) its activities.

(4) The applicant—

(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,

(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

Fergus Ewing

186 After section 81, insert—

<Certification of bodies

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—

(a) the applicant is suitable to be an approving body,

(b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section (Regulatory schemes)).

(2) The Scottish Ministers may certify the applicant as an approving body—

(a) either—

(i) without limit of time, or

(ii) for a fixed period,

(b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,
(c) subject to conditions (any of which may be removed or varied by the Scottish Ministers after consulting the approving body).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—
   (a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
   (a) must send a copy of the application to the OFT,
   (b) may send—
      (i) to any other consultee, a copy of the application,
      (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
   (a) refuse to certify it as an approving body, or
   (b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—
   (a) the process for seeking their certification,
   (b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

Fergus Ewing

187 After section 81, insert—

<Regulatory schemes

(1) An approving body must—
   (a) make a regulatory scheme for—
      (i) conferring on any of the individual persons within its membership the right to provide will writing services, and
      (ii) regulating the provision of will writing services by the persons on whom (in accordance with the scheme) that right is conferred, and
   (b) apply the scheme in relation to them.

(2) The regulatory scheme is to—
   (a) describe the training requirements to be met by a prospective will writer,
   (b) incorporate a code of practice to which a will writer (and anyone acting on behalf of the will writer in relation to will writing services) is subject,
(c) require that a will writer keep in place sufficient arrangements for professional indemnity,

(d) include rules about—
   (i) the making and handling of any complaint about a will writer,
   (ii) the measures that may be taken by the approving body, in relation to a will writer, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the will writer were a practitioner to whom that section relates)) about the will writer is upheld,

(e) allow a will writer to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),

(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by will writers (and persons acting on their behalf in relation to will writing services),

(b) except in such circumstances as the approving body considers appropriate, prohibit the drawing or preparation of a will or other testamentary writing by a will writer which provides for the writer to be a beneficiary,

(c) require a will writer who provides the service of storing wills or other testamentary writings to keep in place sufficient arrangements for the storage of such documents (including arrangements in the event of the writer ceasing to provide will writing services),

(d) make such further arrangements as to the professional practice, conduct or discipline of will writers for which provision is (in the approving body’s opinion) necessary or expedient,

(e) provide that it is a breach of the code of practice for a will writer to fail to comply with the writer’s duties under any enactment specified in the code,

(f) provide that a breach of the code of practice by a person acting on behalf of a will writer in relation to will writing services constitutes a breach of the code of practice by the writer,

(g) allow for—
   (i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a will writer to provide will writing services if the writer contravenes the code of practice,
   (ii) the suspension of that right of a will writer if a complaint, suggesting that the writer is guilty of professional misconduct in relation to the provision of will writing services, is made about the writer.

(4) A will writer may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the writer’s right to provide will writing services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the writer.
An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.

Fergus Ewing

After section 81, insert—

<Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section (Regulatory schemes)(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section (Certification of bodies).

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

(4) A will writer may appeal against a financial penalty (or the amount of a financial penalty) imposed on the writer by virtue of this section—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the penalty is intimated to the writer.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

Fergus Ewing

After section 81, insert—

<Review of own performance

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—
   (a) the approving body’s compliance with section (Regulatory schemes)(5),
   (b) the exercise of its functions in relation to its regulatory scheme,
   (c) its compliance with any measures applying to it by virtue of section (Ministerial intervention)(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved bodies’ performance,
   (b) reports on reviews of their performance.
After section 81, insert—

**Pretending to be authorised**

(1) A person commits an offence if the person—

(a) pretends to be a will writer (or otherwise pretends to have the right to provide will writing services under this Part), or

(b) takes or uses any name, title, addition or description implying falsely that the person is a will writer (or otherwise so implying that the person has the right to provide will writing services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

After section 81, insert—

**Other regulatory matters**

Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section (Ministerial intervention)(3).

(2) The Scottish Ministers may—

(a) revoke the certification given to the approving body under section (Certification of bodies),

(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

After section 81, insert—

**Surrender of certification**

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section (Certification of bodies).

(2) The approving body must—

(a) take all reasonable steps to mitigate such disruption to the clients of its will writers as is likely to result from the surrender,

(b) in particular, take steps for ensuring that any relevant work is—

(i) completed, or

(ii) taken over by a suitably qualified person,

before the date from which subsection (5) is operative.
(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
   (a) for the purpose of subsection (2), or
   (b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
   (a) subsection (2), and
   (b) any direction given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

Fergus Ewing

193 After section 81, insert—

<Register and list

(1) The Scottish Ministers—
   (a) must keep and publish a register of approving bodies,
   (b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
   (a) its contact details (including its address, website and telephone number),
   (b) the date on which it was given the relevant certification under section (Certification of bodies).

(3) An approving body must—
   (a) keep a list of its will writers,
   (b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its will writers as the Scottish Ministers may reasonably request.

Fergus Ewing

194 After section 81, insert—

<Ministerial functions

Ministerial intervention

(1) An approving body must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
   (a) if directed to do so by the Scottish Ministers, must—
(i) review its regulatory scheme (or any relevant part of it), and
(ii) report to them its findings and (if appropriate) inform them of any proposed amendments to the scheme,

(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—

(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—

(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,
(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(4) An approving body must—

(a) review annually the performance of its will writers,
(b) prepare a report on the review,
(c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—

(a) about the review of will writers,
(b) so far as it appears to them to be necessary for safeguarding the interests of clients of will writers—

(i) concerning the functions of approving bodies,
(ii) relating to will writers.

Fergus Ewing

195 After section 81, insert—

<Step-in by Ministers>

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approving body.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approving body in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Chapter to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of will writing services by will writers is regulated effectively.>
Section 82

Fergus Ewing

196 In section 82, page 48, line 16, after <74(3)(a)> insert <or (Certification of bodies)(3)(a)>

Section 83

Fergus Ewing

197 In section 83, page 48, line 33, after <agents> insert <and will writers>

Fergus Ewing

198 In section 83, page 49, line 1, after <agent> insert <or will writer>

Fergus Ewing

200 In section 83, page 49, line 15, at end insert—

<(1A) A will writer must pay to the Commission—
(a) the annual general levy, and
(b) the complaints levy (if arising),
in accordance with Part 1.>

Fergus Ewing

201 In section 83, page 49, line 15, at end insert—

<(1B) Section 29 applies for the purposes of subsections (1) and (1A) as it applies for the purposes of sections 27(1) and 28(1).
(1C) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) to (1B)—
(a) an approving body is to be regarded as a relevant professional organisation whose members are its licensed providers,
(b) a confirmation agent or (as the case may be) will writer is to be regarded—
(i) in connection with the annual general levy, as an individual person falling within the relevant category,
(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.>

Fergus Ewing

199 In section 83, page 49, line 15, at end insert—

<57I Recovery of levy
(1) An approving body must—
(a) secure the collection by it, from its confirmation agents or (as the case may be) will writers, of the annual general levy due by them, and
(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as its applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57H(1)(a) and (1A)(a) (including interest) as its applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57H(1)(b) and (1A)(b) (including interest) as its applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—
   (a) the approving body is to be regarded as the relevant professional organisation,
   (b) each of its confirmation agents or (as the case may be) will writers is to be regarded—
      (i) in relation to section 27(4), as an individual person falling within the relevant category,
      (ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57H(1) and (1A) is subject to subsection (1).

57J Interpretation of Part 2B

Fergus Ewing
161 In section 83, page 49, leave out line 19

Fergus Ewing
202 In section 83, page 49, line 19, at end insert—

<<“will writer”,>

After section 84

Fergus Ewing
162 After section 84, insert—

<Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.
(2) The appeal is to be made by way of summary application.
(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
(b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.

Section 85

Fergus Ewing

163 In section 85, page 49, line 33, leave out <of the 1980 Act>

Fergus Ewing

203 In section 85, page 49, line 34, after <Act> insert <—

(d) any will or other testamentary writing,”,

( ) in subsection (2)(a), for “or papers” substitute “, papers, will or testamentary writing”,

( )>

Fergus Ewing

164 In section 85, page 49, line 35, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

Fergus Ewing

204 In section 85, page 49, line 35, at end insert—

<( )> after subsection (2C) insert—

“(2D) Subsection (1)(d) does not apply to a will writer within the meaning of Part 3 of the 2010 Act.”,>

Fergus Ewing

205 In section 85, page 50, line 1, after <agents> insert <or will writers>

Fergus Ewing

165 In section 85, page 50, line 1, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

Fergus Ewing

206 In section 85, page 50, line 5, after <agent> insert <or will writer>

Fergus Ewing

207 In section 85, page 50, line 9, after <agents> insert <or will writers>
Section 86

Fergus Ewing

67 In section 86, page 50, line 27, leave out <practices> and insert <practitioners>

Fergus Ewing

68 In section 86, page 50, line 30, leave out <practices> and insert <practitioners>

Fergus Ewing

69 In section 86, page 50, line 32, leave out <practices> and insert <practitioners>

Fergus Ewing

70 In section 86, page 50, line 33, leave out <practices> and insert <practitioners>

Fergus Ewing

71 In section 86, page 51, leave out lines 1 and 2 and insert—

<( ) litigation practitioners.>

Section 90

Fergus Ewing

72 In section 90, page 52, line 32, leave out <or a licensed legal services provider> and insert—

<(2B) This section does not apply in relation to the taking or using by a licensed legal services provider of a name, title, addition or description if the licensed provider has the Society’s written authority for using it.>

(2C) For the purpose of subsection (2B), the Council are to make rules which—

(a) set the procedure for getting the Society’s authority (and specify the conditions that the Society may impose if it gives that authority),

(b) specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority)>

Fergus Ewing

73 In section 90, page 53, line 6, leave out from second <in> to end of line 8 and insert—

<(a) after the entry for “the 2007 Act” insert—

““the 2010 Act” means the Legal Services (Scotland) Act 2010;”,

(b) at the appropriate alphabetical place insert—

““licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the 2010 Act;”.

>
Section 91

Bill Aitken

359 In section 91, page 53, line 14, at end insert—

<(  ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (e) insert—

“(f) a solicitor has been convicted by any court of an act involving dishonesty or has been sentenced to a term of imprisonment;”>

Bill Aitken

360 In section 91, page 53, line 14, at end insert—

<(  ) In section 18(1) (suspension of practising certificate) of the 1980 Act, after paragraph (f) insert—

“(g) a disqualification order under the Company Directors Disqualification Act 1986 (c.46) is made against a solicitor;”>

Bill Aitken

361 In section 91, page 53, line 14, at end insert—

<(  ) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“(  ) A practising certificate which has ceased to have effect by virtue of section 18(1)(g) shall again have effect when the disqualification ceases to have effect.”>

Fergus Ewing

74 In section 91, page 53, leave out lines 29 to 31

Bill Aitken

362 In section 91, page 53, line 34, at end insert—

<(ai) subsection (1A)(e)(ii) is repealed,

(bi) after subsection (1A)(e)(ii), insert—

“(iia) that any recognition granted under this section shall have effect from the date it bears, but shall expire on the 31st October next after it is issued;”>

Bill Aitken

363 In section 91, page 53, line 37, at end insert—

<(ia) after subsection (1A), insert—
“(1AA) Rules under this section may make provision requiring firms of solicitors to register with the Council and providing for their regulation and subsection (1A) shall apply for the purpose of regulating and registering such firms as it applies for the purpose of regulating and recognising incorporated practices, subject to any necessary modifications (and firms of solicitors when registered and for as long as they are registered are in this Act referred to as “registered firms of solicitors”).

(1AB) In subsection (1AA), a “firm of solicitors” includes—
(a) a single solicitor practising under the solicitor’s own name; and
(b) a solicitor otherwise practising as a sole practitioner.”

After section 91

Fergus Ewing

75 After section 91, insert—

<Citizens advice bodies

(1) In section 26 of the 1980 Act, in subsection (2), after “law centre” insert “or a citizens advice body”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““citizens advice body” means an association which is formed (and operates)—
(a) otherwise than for the purpose of making a profit, and
(b) with the sole or primary objective of providing legal and other advice (including information) to the public for no fee, gain or reward;”.

(3) The Scottish Ministers may by regulations modify the definition of “citizens advice body” in section 65(1) of the 1980 Act.

(4) Before making regulations under subsection (3), the Scottish Ministers must consult—
(a) the Lord President,
(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate.>

Fergus Ewing

208 After section 91, insert—

<Lay representation

Court of Session rules

In the Court of Session Act 1988—

(a) in section 5 (power to regulate procedure), after paragraph (ee) insert—

“(ef) to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf.”,
(b) after section 5 insert—

“5A Rules for lay representation

(1) Rules under section 5(ef)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 5(ef) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 5(ef) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or

(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Fergus Ewing

388 After section 91, insert—

<Sheriff court rules

In the Sheriffs Courts (Scotland) Act 1971—

(a) in section 32 (power of Court of Session to regulate civil procedure), in subsection (1), after paragraph (m) insert—

“(n) permitting a lay representative, when appearing at a hearing in any category of civil proceedings along with a party to the proceedings, to make oral submissions to the sheriff on the party’s behalf.”,

(b) after section 32 insert—

“32A Rules for lay representation

(1) Rules under section 32(1)(n)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 32(1)(n)—

(a) does not restrict the operation of section 36(1),

(b) is subject to any enactment (apart from section 36(1)) under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 32(1)(n) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or
(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Fergus Ewing

210 After section 91, insert—

<Guarantee Fund

Use of Guarantee Fund

In section 43 (Guarantee Fund) of the 1980 Act—

5 (a) in subsection (2)—

(i) the word “or” immediately preceding paragraph (b) is repealed,

(ii) after paragraph (b) insert “; or

(iii) any licensed legal services provider or any person within it, even if—

(i) the Society is not its approved regulator, or

(ii) subsequent to the act concerned it has ceased to operate.”,

(b) in subsection (3), after paragraph (cc) insert—

“(cd) to a licensed provider or an investor therein in respect of a loss suffered by reason of dishonesty to which subsection (2)(c) relates in connection with the licensed provider’s provision of legal services (with the same meaning as for Part 2 of the 2010 Act);”,

(c) in subsection (7)(c), after “incorporated practice” insert “or a licensed provider”;

(d) after subsection (7) insert—

“(8) In the case of licensed providers, this section and Part I of Schedule 3 apply in relation to (and only to) such licensed providers as are regulated by an approved regulator that in furtherance of section (Choice of arrangements)(4) of the 2010 Act does not maintain a compensation fund as referred to in that section.

(9) In this section and paragraph 1 of Schedule 3—

“approved regulator”,

“investor”,

are to be construed in accordance with Part 2 of the 2010 Act.”.

Bill Aitken

210A As an amendment to amendment 210, leave out line 9

Bill Aitken

210B* As an amendment to amendment 210, line 19, leave out from <an> to end of line 22 and insert <the Society as their approved regulator>
Fergus Ewing

211 After section 91, insert—

<Contributions to the Fund

(1) In Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act, in paragraph 1—

5  (a) in sub-paragraph (2A)—

(i) the words “directors of incorporated practices” become head (a),

(ii) after that head (as so numbered) insert “, or

(b) investors in licensed legal services providers.”,

(b) in sub-paragraph (2B)—

(i) the words from “by every” to the end become head (a),

(ii) in that head (as so numbered), for “scale of such” substitute “relevant scale of annual corporate”,

(iii) after that head (as so numbered) insert “, and

(b) by every licensed provider in respect of each year during which or part of which it operates as such under the licence issued by its approved regulator a contribution (also an “annual corporate contribution”) in accordance with the relevant scale of annual corporate contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) for “scale” in the first place where it occurs substitute “scales”,

(ii) the words from “, which scale” to the end are repealed,

(d) after sub-paragraph (3) insert—

“(3A) The scales of annual corporate contributions—

(a) are to be fixed under sub-paragraph (3) by reference to all relevant factors, including—

(i) in the case of incorporated practices, the number of solicitors that they have as directors or employees,

(ii) in the case of licensed providers, the number of solicitors that they have as investors or employees,

(b) may otherwise make different provision as between incorporated practices and licensed providers.”,

(e) in sub-paragraph (4), after “incorporated practice” insert “or a licensed provider”,

(f) in sub-paragraph (5), after “incorporated practice” insert “and licensed provider”,

(g) in sub-paragraph (8), after “incorporated practice” insert “or a licensed provider”.

(2) In Schedule 3 to the 1980 Act, in paragraph 3(2)—

(a) for “and incorporated practices” substitute “, incorporated practices and licensed providers”,
(b) for “or incorporated practice or practices” substitute “, incorporated practice or practices or licensed provider or providers”.

Bill Aitken

211A* As an amendment to amendment 211, line 15, after <by> insert <the Society as>

Fergus Ewing

212 After section 91, insert—

<Cap on individual claims

In Schedule 3 to the 1980 Act—

(a) in paragraph 4, after sub-paragraph (3) insert—

“(3A) The amount of an individual grant from the Guarantee Fund may not exceed £1.25 million.”,

(b) after paragraph 4 insert—

“5(1) The Scottish Ministers may by regulations amend the sum specified in paragraph 4(3A).

(2) Before making regulations under sub-paragraph (1), the Scottish Ministers must consult the Council (and take account of sections 4 and (Consultation by Ministers) of the 2010 Act).

(3) The power to make regulations under sub-paragraph (1) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.

Robert Brown

365 After section 91, insert—

<Protection of branding of firm description

(1) The Scottish Ministers may, after consulting—

(a) the Law Society,

(b) the Faculty of Advocates,

(c) any approved regulator,

(d) any approving body, and

(e) any other person or body considered appropriate by the Scottish Ministers, designate such terms as it considers appropriate as being restricted in use to firms of solicitors or licensed providers or specified categories of the same.

(2) The Scottish Ministers may by regulations require approved regulators to include provision in their practice rules as to the use of terms designated under subsection (1).>
Before section 92

Fergus Ewing

76 Before section 92, insert—

<Acting as approved regulator

After section 1 of the 1980 Act insert—

“1A Power to act as statutory regulator

The Society may—

(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,

(b) do anything that is necessary or expedient for the purposes of doing so.”>

Robert Brown

76A As an amendment to amendment 76, line 7, at end insert—

<( ) act as an approving body within the meaning of Part 3 of the 2010 Act,>

Bill Aitken

364 Before section 92, insert—

<Scottish solicitors guarantee fund

In paragraph 1 of Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act—

(a) in sub-paragraph (2A) after “are” insert “(a)” and after “practices” insert—

“(b) partners in a registered firm of solicitors;

(c) in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practicing under the solicitors own name or a solicitor otherwise practicing as a sole practitioner.”

(b) after sub-paragraph (2B) insert—

“(2BB) Subject to the provisions of this Act, there shall be paid to the Society on behalf of the Guarantee Fund by every registered firm of solicitors in respect of each year during which, or part of which, it is registered under section 34(1AA) a contribution (hereafter referred to as an “annual practice contribution”) in accordance with the scale of such contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) after “corporate contributions” insert “and the annual practice contribution”

(ii) after “directors” insert “partners”,

(iii) after “practices” insert “or registered firms of solicitors”, and
(iv) in paragraph (4), after “practice” insert “and no annual practice
contribution by a registered firm of solicitors”,

(d) in sub-paragraph (5)—

(i) after “corporate contribution”)” insert “and upon every registered
firm of solicitors a contribution (hereinafter referred to as a
“special practice contribution”),

(ii) after “corporate contribution” (where it appears for the second
time) insert “and a special practice contribution”,

(c) in sub-paragraph (8), after “incorporated practice” insert “or of a registered firm
of solicitors”.

Section 92

Bill Aitken
389 In section 92, page 54, line 22, leave out <“or appointed”> and insert <“co-opted or appointed”>

Bill Aitken
390 In section 92, page 54, line 27, after <election> insert <co-option>

Bill Aitken
391 In section 92, page 54, line 30, after <election> insert <or co-option>

Bill Aitken
392 In section 92, page 54, line 34, after <electable> insert <or eligible to be co-opted>

Fergus Ewing
77 In section 92, page 55, line 3, leave out <objectives> and insert <functions>

Fergus Ewing
78 In section 92, page 55, leave out lines 4 to 27

After section 92

Bill Aitken
366 After section 92, insert—

<Guarantee Fund

In section 43 (guarantee fund) of the 1980 Act—
(a) in subsection (2) for “the Guarantee Fund shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of” substitute “where the Council are satisfied that a person has suffered or is likely to suffer loss in consequence of dishonesty on the part of any person or body mentioned in subsection (2A), the Council may make a grant or loan out of the Guarantee Fund for the purpose of relieving that loss on such terms and conditions as the Council may determine.

(2A) The persons or bodies mentioned in this subsection are—”,

(b) in subsections (3), (4) and (5), after “grant” wherever appearing, insert “or loan”,

(c) after subsection (3) insert—

“(3A) Where an application for a grant or loan is made in any case which does not fall within subsection (3), the Council may, as it thinks fit, grant or refuse that application but, where it refuses the application, the Council shall give reasons to the applicant for doing so.

(3B) Where the Council grant that application, the Council shall determine the amount of the grant or loan and the terms and conditions upon which it is made.”>

Bill Aitken

367 After section 92, insert—

<Safeguarding interests of clients in certain other cases

In section 46(3A) (safeguarding interests of clients in certain other cases) of the 1980 Act—

(a) for “apply to the court” substitute “make”,

(b) from “leave” to the end substitute “the approval of the Council”.>

Bill Aitken

368 After section 92, insert—

<Subscription to the Law Society

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 6A insert—

“6B(1) Every practice shall, for each year, pay to the Society such subscription as may be fixed from time to time by the Society in general meeting and different subscriptions may be fixed for different kinds of practices.

(2) The subscription shall be payable by the practice at the time of its application for registration or recognition.

(3) If a practice is first registered or recognised after the beginning of any year, the subscription payable by it shall be calculated by reference to the number of months remaining in that year after it is registered or recognised.

(4) In this paragraph and in paragraph 6C—
“practice” means a registered firm of solicitors or an incorporated practice; and “year” means the period of 12 months commencing on 1 November or such other day as may be fixed by the Council.

6C(1) The Society may, in addition to the subscription imposed paragraph 6C(1), impose in respect of any year a special subscription on all practices of such amount and payable at such time and for such specified purposes as the Society may determine in general meeting.

(2) The Society may determine in general meeting that different special subscriptions may be imposed under subparagraph (1) in respect of different kinds of practices or that the special subscription shall not be payable by a kind of practice.

(3) No imposition may be made under subparagraph (1) unless a majority of members voting at the general meeting at which it is proposed has, whether by proxy or otherwise, voted in favour of its being made.”

Bill Aitken

369 After section 92, insert—

<Charging for services by the Law Society

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 10 insert—

“10A(1) The Society may, in accordance with a scheme of charges fixed from time to time by the Council—

(a) charge for any services which it provides in the course of carrying out its functions; and

(b) demand and recover those charges from any person to whom it provides those services.

(2) The Council may fix charges in a scheme under subparagraph (1) by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to it to be appropriate.”

Bill Aitken

370 After section 92, insert—

<Loans from the guarantee fund

In Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act, after paragraph 4 insert—

“4A The Council may make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council.”
Section 93

Fergus Ewing

79 In section 93, page 56, line 2, at end insert—

<( ) Accordingly, the Council (acting in any other capacity) must not interfere unduly in the regulatory committee’s business.>

Fergus Ewing

80 In section 93, page 56, line 3, at end insert—

<(< ) the committee’s membership may include persons who are not members of the Council,>

Fergus Ewing

81 In section 93, page 56, line 4, at end insert—

<(< ) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1).>

Fergus Ewing

82 In section 93, page 56, line 7, at end insert—

<(< ) a sub-committee—

(i) is also subject to those rules,

(ii) may be formed without the Council’s approval.>

Fergus Ewing

83 In section 93, page 56, line 8, after <committee> insert <(or a sub-committee of it)>

Fergus Ewing

84 In section 93, page 56, line 10, at end insert—

<(< ) prescribe a maximum number of members that the regulatory committee may have,>

Fergus Ewing

85 In section 93, page 56, line 17, at end insert <(and take account of sections 4 and (Consultation by Ministers) of the 2010 Act)>

Fergus Ewing

213 In section 93, page 56, line 29, after <agents> insert <or will writers>
Fergus Ewing

86 In section 93, page 56, line 29, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

Fergus Ewing

87 In section 93, page 56, line 35, after <of> insert—

<( ) setting standards of qualification, education and training,
( ) keeping the roll,
( ) administering the Guarantee Fund,
( )>

After section 93

Fergus Ewing

88 After section 93, insert—

The 1980 Act: further modification

Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—

“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.

Fergus Ewing

89 After section 93, insert—

Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—

(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.

(2) In section 12C (removal of name from register on request) of the 1980 Act—

(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—
“(2) But the Council are required to remove the name or annotation only if they are
satisfied that—
(a) the solicitor has made adequate arrangements with respect to the
business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.

James Kelly

373 After section 93, insert—

Representative functions of the Law Society

(1) The 1980 Act is amended as follows.
(2) In section 3(1) (establishment and functions of Council of the Law Society), at the
beginning insert “Subject to section 3C,”.
(3) In section 3A (discharge of functions of Council of the Law Society), in subsection (11),
after “section 3B” insert “and section 3C”.
(4) After section 3B (regulatory committee) insert—

3C The representative functions of the Society

(1) The representative functions of the Society shall not vest in, or be exercised by,
the Council but shall be exercised on behalf of the Society by a Representative
Council.
(2) Membership of the Representative Council shall be elected in accordance with
the provisions of the scheme made under paragraph 2(a) of Schedule 1.
(3) Only solicitors may be elected to the Representative Council.
(4) The Chair of the Representative Council shall be the General Secretary of the
Society who shall be elected in accordance with the provisions of the scheme
made under paragraph 2(a) of Schedule 1.
(5) The General Secretary of the Society may not, while holding that office, serve
as President of the Society.
(6) The Representative Council may arrange for any of its functions (other than
excepted functions) to be discharged on their behalf by—
(a) a committee of the Representative Council;
(b) a sub committee of such a committee; or
(c) an individual (whether or not a member of the Society’s staff).
(7) The Representative Council may, in exercise of the power conferred by
subsection (6), impose restrictions or conditions on the body or person by
whom the function is to be discharged.
(8) An arrangement made under this section may identify an individual by name,
or by reference to an office or post which the individual holds.
An arrangement under this section for the discharge of any of the functions of the Representative Council may extend to any of the functions of the Society which is exercisable by the Representative Council.

For the purposes of this section, “the representative functions of the Society” means the functions of the Society in carrying out the objects of the Society in promoting the interests of the solicitors’ profession in Scotland under section 1(2)(a).”

In Schedule 1 (the Law Society of Scotland)—

(a) in paragraph 2(a), after “the Council” insert “and the Representative Council”;
(b) in paragraph 2(d), after “sub-committees” insert “of the Council and of the Representative Council”; and
(c) in paragraph 3 after “Council” (wherever it appears) insert “or Representative Council”.

After section 94

Fergus Ewing

After section 94, insert—

Notification if suspension lifted

(1) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“(5B) On the occurrence of any of the circumstances mentioned in subsections (4) to (5A), the solicitor concerned must notify the Council in writing (and without delay).”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of the 1980 Act, after subsection (4) insert—

“(4A) On the occurrence of any of the circumstances mentioned in subsections (2) to (4), the lawyer concerned must notify the Council in writing (and without delay).”.

Bill Aitken

After section 94, insert—

Complaints to Tribunal

(1) Section 51 of the 1980 Act (complaints to Tribunal), is amended as follows.

(2) In subsection (1A) for “in respect of” to the end substitute “made the Council (whether or not on behalf of any other person) against—

(a) a solicitor, whether or not the solicitor had a practising certificate in force at the time the conduct complained of occurred and notwithstanding that subsequent to that time the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice;
(b) a firm of solicitors, whether or not since the time of the conduct complained of there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;

c) an incorporated practice, whether or not since the time of the conduct complained of there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) or has been wound up;

d) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 and includes any such person, whether or not the person had acquired the right at the time of the conduct complained of and notwithstanding that subsequent to that time the person no longer has the right;

e) a conveyancing practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

(f) an executry practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

and any reference in Part IV to any of those persons or practices mentioned in paragraphs (a) to (f) shall be construed accordingly."

(3) In subsection (2), after “that” insert—

“(a) a solicitor may have been guilty of professional misconduct or unsatisfactory professional conduct;

(b) a solicitor or”.

Bill Aitken

375 After section 94, insert—

<Procedure on complaints and appeals to Tribunal>

(1) The 1980 Act is amended as follows.

(2) In section 52 (procedure on complaints and appeals to Tribunal), after subsection (3) insert—

“(4) For the avoidance of doubt, rules made by the Tribunal under subsection (2) may provide for the functions of the Tribunal to be exercised on behalf of the Tribunal, in relation to a particular case or part of a case—

(a) by any particular tribunal constituted in accordance with paragraph 5 of Schedule 4 to deal with that case or part;

(b) by the chairman or vice chairman of the Tribunal other than the functions of hearing and determining the merits of any case.”>
In section 96, page 57, line 27, after <Scotland> insert <(including by reference to any relevant factor relating particularly to rural or urban areas)>

Section 97

Leave out section 97 and insert—

Information about legal services

After section 35A of the 1986 Act insert—

"35AA Information about legal services

(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—

(a) each of the bodies mentioned in subsection (3)(a) and (b) must—

(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and

(ii) give the Board a summary of the relevant facts.

(b) the body mentioned in subsection (3)(d) must—

(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and

(ii) give the Board a summary of the relevant facts.

(3) The bodies are—

(a) the Law Society,

(b) the Faculty of Advocates,

(c) the Scottish Court Service,

(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—

(a) section 1(2A),

(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007."
Section 98

Fergus Ewing

92 In section 98, page 58, line 13, leave out <29(9),> and insert <29—

( ) in subsection (4), after “members” insert “, and the Scottish Ministers,”,

( ) in subsection (9),>

After section 98

Fergus Ewing

93 After section 98, insert—

<The 2007 Act: further provision>

(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—

“(1A) The Scottish Ministers may make such further provision as, having regard to
the effect of the Legal Services Act 2007 so far as concerning the subject
matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider
necessary or expedient in connection with this Act or any related provisions of
the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after
“section 78(1)” insert “or (1A)”.

Section 99

Fergus Ewing

94 In section 99, page 58, line 36, at end insert—

<( ) section 37(6)(a)(i),>

Fergus Ewing

214 In section 99, page 58, line 36, at end insert—

<( ) section 52(2A),>

Fergus Ewing

166 In section 99, page 59, line 3, leave out <81(5)> and insert <81(5)(b)>

Fergus Ewing

215 In section 99, page 59, line 3, at end insert—

<( ) section (Regulatory schemes)(2)(f),

( ) section (Ministerial intervention)(5)(b),

( ) section (Step-in by Ministers)(1),>
After section 99

Fergus Ewing

378 After section 99, insert—

<Further modification

(1) The Scottish Ministers may by regulations made by statutory instrument—
   (a) amend the percentage specified in section (Majority ownership)(1)(a), or
   (b) repeal section (Majority ownership).

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe that the effect of the amendment or (as the case may be) repeal would be—
   (a) compatible with the regulatory objectives, and
   (b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—
   (a) the Lord President,
   (b) the Law Society,
   (c) every approved regulator,
   (d) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.>

Section 101

Fergus Ewing

95 In section 101, page 60, line 7, at end insert—

<( ) a reference to a litigation practitioner is to a person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act.>

Schedule 9

Fergus Ewing

96 In schedule 9, page 79, line 17, at end insert—

<litigation practitioner>

Fergus Ewing

167 In schedule 9, page 80, line 9, leave out <outside> and insert <non-solicitor>
Fergus Ewing

216 In schedule 9, page 80, line 16, at end insert—
  <approving body (of will writer) section (Approving bodies)>

Fergus Ewing

168 In schedule 9, page 80, line 17, after <and> insert <confirmation>

Fergus Ewing

217 In schedule 9, page 80, line 18, leave out <section 75> and insert <sections 75 and (Regulatory schemes)>

Fergus Ewing

218 In schedule 9, page 80, line 18, at end insert—
  <will writer and will writing services section (Will writers and services)>
Legal Services (Scotland) Bill

3rd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the third day of Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

### Groupings of amendments

**Operational positions and appointment to such positions**
44, 45, 46, 47, 48, 319, 49, 321, 323, 50, 51, 102

**Designated persons**
52, 53, 330, 54, 55

**Outside investors**
104, 110, 110A, 113, 113A

**More about investors**
174, 175, 175A, 118, 119, 177, 214

**Discontinuance of services**
56, 57

**Professional practice**
58, 59, 60, 61, 62, 63, 64, 65

**Complaints about, and levy payable by, approved regulators**
133, 134, 135, 136, 137, 138, 139, 140

**Complaints about providers**
141, 142, 143, 144

**Appeal procedure**
66, 162

**Confirmation services – further requirements**
181, 357, 151, 358, 380, 152, 381, 382, 153, 154, 383, 384, 385, 386, 387, 182, 155, 156, 157, 158, 183, 159, 160, 166, 168
Notes on amendments in group
Amendment 357 is a direct alternative to amendment 151

Will writing services
184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201,
199, 161, 202, 163, 203, 164, 204, 205, 165, 206, 207, 213, 215, 216, 217, 218

Applying the regulatory objectives
67, 68, 69, 70, 71

Description of licensed legal services providers
72, 365

Practising rules
73, 359, 360, 361, 74

Rules for registration of firms
362, 363

Citizens advice bodies
75

Lay representation
208, 388

Guarantee fund
210A, 210B, 211A, 364, 366, 370

Cap on individual claims
212

Acting as an approved regulator
76, 76A

Council membership
389, 390, 391, 392, 77, 78

Safeguarding interests of clients
367

Law society – finance
368, 369

Regulatory committee
79, 80, 81, 82, 83, 84, 85, 86, 87

1980 Act - further modification
88, 89, 90

Representative functions of the Law Society
373
Complaints to tribunal
374, 375

Information about legal services
379, 91

2007 Act – minor amendments
92, 93

Amendments already debated

Compensation
With 169 – 210, 211

Reference to non-solicitor investors

Exemption from fitness test
With 21 – 108, 132

Ban for improper behaviour
With 100 – 106, 114, 117, 147, 148, 149, 150

Licensed providers
With 39 – 94, 95, 96

Ownership of licensed providers
With 310 – 378

Will writers
With 173 – 179, 180
You may recall, that along with other members of the Legal Aid Negotiating Team of the Law Society of Scotland, I attended to give evidence before your Committee on 26 January 2010. I trust that you found the input helpful and I write now, in a personal capacity, to comment on an amendment [which has been proposed to the Legal Services Bill currently under consideration.

You will be aware that in a recent referendum the membership of the Law Society of Scotland voted overwhelmingly (73%-27%) to endorse the Law Society’s continuing role in representing as well as regulating the profession. Those of us who voted with the majority may reasonably have hoped that the decision of the referendum would be treated with respect and as the settled will of the profession on the issue. Sadly those hopes have been dashed by the amendment tabled by the Glasgow MSP James Kelly [amendment 373] to the Legal Services Bill which proposes to divest the Council of the Law Society of its representative functions. The Executive of the Glasgow Bar Association had been party to requisitioning the referendum with a view to removing the representative function of the Society. It is disappointing that the Executive of the Glasgow Bar Association is understood to be backing the amendment table by Mr Kelly.

Those who requisitioned the referendum claimed to be doing so from “a position of principle”. The vote in favour of the status quo was not only convincing in its own terms but strengthened in the context of the second biggest turn out for a vote in the Society’s history. A democratic endorsement of the Society’s position could reasonably have been anticipated as allowing the profession to move forward. Whilst some of the requisitioners, such as members of the WS Society, have recognised this backing which the Society has received from its members, sadly the Executive of the Glasgow Bar Association has chosen not to do so. Caroline Docherty, the Deputy Keeper of the signet at the WS Society, apparently recognising that the vote produced a decisive outcome, has commented “The Law Society should benefit from its role having been openly debated and resolved by a democratic vote of the membership”.

The President of the Glasgow Bar Association has been reported as interpreting the result as “a major problem” for the Society and concluding that the Society “must change”. The rational for this interpretation of a 73% backing for the Society appears to be that a majority of total enrolled members failed to endorse it. This of course assumes that all those who did not vote were hostile to the status quo. The same doubtful logic would however point to the conclusion that the Glasgow Bar Association in
requisitioning the referendum received support from less than 10% of the profession. This escaped comment. The Scotsman newspaper reported that the Society received “overwhelming backing” from its members in the referendum.

Whilst those who requisitioned the referendum may have misinterpreted the mood of the profession, with regard to the Society’s present role, the Society itself received an indisputable mandate to continue representing the profession. But with the votes only just counted the Executive of the GBA has declared support for Mr Kelly’s amendment. Clearly the Executive of the GBA, having abrogated any responsibility to engage with the Scottish Government, Crown Office, Scottish Court Services, the Scottish Legal Aid Board and the Society on issues of real concern, can simply focus on it’s latest dispute with the Society.

The proposed amendment states
“The representative function of the Society shall not vest in, or be exercised by, the Council but shall be exercised on behalf of the Society by a Representative Council”

Those urging MSPs to back this amendment seek to undermine the democratic will of the Scottish legal profession by supporting legislative change which members of the profession have made clear they do not want. The Society should maintain responsibility for representing the profession, promoting the interests of the profession and regulating the profession. The proposed amendment would divest the Council of the Law Society of that role. The vote in favour of the status quo was emphatic but it is proposed that a representative Council of solicitors should take over. Just who is to form part of this Council we do not know and in what way those members would be better than those presently undertaking the (usually thankless) task, we are not told.

In the formal paper sent to all solicitors seeking the support in the referendum, those proposing a change complained that the profession was overloaded with representation and that splitting the “dual role” would offer savings of up to 40% in professional dues yet the Executive of the Glasgow Bar Association from the busiest Court in Scotland backs and amendment choosing to support the creation of another tier of representation with, doubtless, additional financial obligations as a result.

Cost implications are however, frankly, incidental - the proposed legislative change is contrary to the professions’ clearly expressed support for the status quo. Members of the profession made it clear that the Society in its present form should retain responsibility for promoting the interests of the solicitors’ profession. Divesting the governing body of this role to a Representative Council on behalf of the Society is far from the “elegant solution” described by Mr Dailly of the Govan Law Centre, another who has found himself on the losing side and doesn’t want to accept it. Giving support to the proposed amendment may even be seen as a breach of trust, not only by those who
voted in favour of the Society retaining its role but, indeed, all of those who participated in the referendum process.

Many in the profession will be astonished that the Executive of the Glasgow Bar Association continue to follow a course of, albeit predictable, opposition to the Society at a time when its members face real concerns about their practices and livelihood in the short term. Whether the Executive of the GBA likes it or not it should sooner or later recognise that solicitors, both by an overwhelming vote at a Special general Meeting in 2008 and in the recent referendum want the Law Society, and those individuals who discharge the responsibilities of the Society, to continue with a representational role on their behalf.

I trust that the foregoing is of some assistance to you, and to your fellows on the Committee, in considering the Bill. If you feel that any further information or input would be of assistance please feel free to get in touch.

Kenneth A R Dalling
Solicitor
16 June 2010
Amendment 373 as proposed by James Kelly MSP

We have certain concerns over representations that the Law Society may have made to the Justice Committee in response to this proposed amendment. We base our concerns upon a press release issued by the Law Society on 7th June after its meeting with the Justice Committee.

The Law Society has issued a press release stating that solicitors have already decided the issue (which Mr Kelly’s amendment raises) in a referendum and that the profession voted against the dual regulatory and representation functions of the Law Society being split “in this way”. That is not the case. Mr Kelly’s amendment is an entirely different proposal to that put to the profession in a recent referendum.

If the legal services market is deregulated via the Legal Services Bill, then Scotland will become the ONLY democratic country in the world that has a deregulated legal services market and still has a solicitors’ governing Council which both regulates and represents solicitors. Mr Kelly’s amendment would prevent Scotland from enjoying this dubious distinction.

We have no difficulty with the Law Society continuing to regulate and represent the profession, providing those functions are split and clearly defined WITHIN the body of the Law Society itself. At present, that is not the position. Mr Kelly’s amendment would allow the separate functions to be clearly defined and separated, thus allowing clarity for the public and avoiding any ECHR Article 11 challenges from solicitors. The amendment would also enhance democracy within the Law Society itself.

At present, the Law Society in theory has an elected Council. In practice, there is rarely a contested election. The Council of the Law Society is ultimately responsible for both the regulation and representation of solicitors. There is no division of those functions within the Council. If s.92 is enacted then the public will have (at least 20%) participatory and voting rights on the Law Society Council (which represents solicitors). This is in addition to the chair and a 50% share of the Law Society’s regulatory committee (s.93). The regulatory committee however, is governed by the Council, which is therefore responsible for the regulation and representation of solicitors. In effect, therefore, s.92 deals with the representation of solicitors and s.93 deals with the regulation of solicitors. We
have no difficulty with the regulatory provisions for solicitors as contained within the Legal Services Bill. However, as solicitors, we feel it neither appropriate nor fair that the public should represent solicitors. Regulate solicitors - YES. Represent them - NO.

Solicitors must be members of the Law Society of Scotland. Article 11 of the ECHR allows Freedom of Association for citizens. Compulsory membership, or closed shops, are, therefore, on the face of it, contrary to Article 11. However, the European Court has stressed that professional bodies, such as the Law Society, can insist on compulsory membership and not be in breach of Article 11, under explanation that it provides reassurance to the public that solicitors are effectively, and compulsorily REGULATED. However, the European Court has also stressed that for a professional body, such as the Law Society, to insist on compulsory membership it must remain “independent”. If the public have full voting and participatory rights on the Law Society’s REPRESENTATIVE Council, then that Council loses its independence and the Law Society therefore becomes vulnerable to a challenge from solicitors, under Article 11 of the ECHR.

If Mr Kelly’s amendment is allowed, such a challenge would fail because it clearly vests the REPRESENTATION of solicitors in solicitors themselves, thus protecting the independence of solicitors and negating any Article 11 challenge.

Day in daily, solicitors have to deal with ethical issues such as client confidentiality and legal professional privilege. These are complex issues requiring the exercise of fine judgment calls. It is inappropriate, and unfair, that unqualified members of the public should be allowed to represent the views of the profession on such issues upon which they will have little knowledge or experience. Like any other profession or trade, solicitors should represent solicitors.

It has been suggested that these matters can be dealt with internally by the Law Society. They cannot. As Mr Kelly’s amendment effects, an amendment to s.1 of the Solicitors’(Scotland) Act 1980 is required. This is therefore a matter for the Parliament.

Mr Kelly’s amendment, far from undermining the Law Society, will strengthen its position as the representative and regulatory body for solicitors in Scotland. If the amendment is not allowed then it is our view that the Law Society will face a legal challenge as outlined, which could lead to a court enforcing change upon the Law Society, perhaps in a far more drastic way than that proposed in Mr Kelly’s amendment.

The amendment will result in very little internal re-organisation within the Law Society itself: just the establishment and election of a separate REPRESENTATIVE Council. But the amendment will ensure that a jealously
guarded, democratic principle is maintained - that of an INDEPENDENT solicitors’ profession.

We urge you to support the amendment.

John McGovern, Solicitor Advocate, Council of Law Society of Scotland, and President of Glasgow Bar Association
Frank McGuire, Solicitor Advocate
Patrick Maguire, Solicitor Advocate
Mike Dailly, Council of Law Society of Scotland
Walter Semple, Council of Law Society of Scotland
David O’Hagan, Council of Law Society of Scotland

10 June 2010
Present:

Bill Aitken (Convener)  Robert Brown
Bill Butler (Deputy Convener)  Cathie Craigie
Nigel Don  James Kelly
Stewart Maxwell  Dave Thompson

Legal Services (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).


The following amendments were agreed to (by division):

319 (For 5, Against 0, Abstentions 3)
321 (For 5, Against 0, Abstentions 3)
323 (For 5, Against 0, Abstentions 3)
113A (For 5, Against 3, Abstentions 0)
175A (For 5, Against 0, Abstentions 3)
142 (For 6, Against 1, Abstentions 1)
357 (For 5, Against 0, Abstentions 3)
358 (For 5, Against 0, Abstentions 3)
159 (For 5, Against 0, Abstentions 0)
210 (For 7, Against 1, Abstentions 0)
211 (For 7, Against 1, Abstentions 0).

The following amendments were disagreed to (by division):

380 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
382 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
383 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
384 (For 3, Against 5, Abstentions 0)
385 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
386 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote)
387 (For 3, Against 4, Abstentions 1)
365 (For 4, Against 4, Abstentions 0; amendment disagreed to on casting vote).
Amendment 210A was moved and, with the agreement of the Committee, withdrawn.

The following amendments were not moved: 330, 110A, 381, 359, 360, 361, 362, 363, 210B and 211A.

Sections 42, 44, 46, 48, 55, 56, 61, 62, 63, 66, 69, 70, 71, 72, 78, 79, 80, 84, 87, 88 and 89 were agreed to without amendment.

Sections 39, 40, 41, 43, 45, 47, 49, 50, 51, 52, schedule 8, and sections 53, 54, 57, 58, 59, 60, 64, 65, 67, 68, 73, 74, 75, 76, 77, 81, 82, 83, 85, 86, 90 and 91 were agreed to as amended.

The Committee ended consideration of the Bill for the day, amendment 365 having been disposed of.
Legal Services (Scotland) Bill: Stage 2

09:35

The Convener: The principal business of the morning is day 3 of stage 2 proceedings on the Legal Services (Scotland) Bill. There is no limit as to how far the committee can proceed today. It is not realistic to expect that we will complete our consideration, but we made good progress last week and I anticipate that we will do so again today.

I welcome the Minister for Community Safety, Fergus Ewing. In accordance with normal practice, a number of Scottish Government officials will sit beside the minister, and officials might alternate during the morning’s business. Members should have their copies of the bill, the third marshalled list of amendments and the groupings of amendments. I propose to have a brief break at approximately 11 am—I see that Mr Ewing assents to that.

Section 39—Head of Legal Services

The Convener: Amendment 44, in the name of the minister, is grouped with amendments 45 to 48, 319, 49, 321, 323, 50, 51 and 102.

The Minister for Community Safety (Fergus Ewing): Amendment 44 will add the qualification “valid” to “practising certificate” in relation to heads of legal services, with the effect that a head of legal services must hold a valid practising certificate. Amendment 45 will make changes to section 39(2), with the effect that the head of legal services’ practising certificate must not be subject to conditions imposed by the disciplinary tribunal under section 53(5) of the Solicitors (Scotland) Act 1980. Amendment 45 takes account of representations from the Law Society of Scotland.

Amendment 46 will add a new paragraph to section 39(5), the effect of which will be to require a head of legal services to ensure that designated persons adhere to the professional principles that are set out in section 2. We lodged the amendment in response to concerns that were expressed at stage 1 about non-lawyer designated persons doing legal work.

Amendment 47 is a drafting amendment. Amendments 48 and 49 will alter sections 39 and 40 to clarify that the Scottish ministers can make regulations only relating to the functions of heads of legal services and heads of practice that they are required to exercise as a result of their position and not in a general capacity. The approach addresses concerns that the Law Society raised about the independence of the legal profession.
Amendment 50 will provide that the basis on which a person’s suitability for an appointment to an operational position can be determined is set out in the practice rules rather than the licensing rules, as at present.

Amendment 51 will add a new subsection to section 43, which will make provision for an appeal to the sheriff against a decision by an approved regulator to rescind the appointment of a head of legal services, head of practice or member of the practice committee. Amendment 51 directly addresses concerns that the Law Society raised.

Amendment 102 will provide that licensing rules must stipulate that a licence may be suspended if a licensed provider deliberately continues to have within it a person who has been disqualified from certain positions.

Amendments 319, 321 and 323, in the name of Robert Brown, will require the Scottish ministers to consult the Lord President before making regulations about heads of legal services, heads of practice and the practice committee, respectively. I note the committee’s position on Lord President issues, as previously debated, and in the light of that I am no longer minded to oppose amendments 319, 321 and 323. I look forward to hearing members’ comments.

I move amendment 44.

The Convener: No doubt Mr Brown will bear in mind the minister’s comments with regard to the principle of the Lord President’s involvement, which I would have thought is now established.

Robert Brown (Glasgow) (LD): As the minister said, amendments 319, 321 and 323 relate to the powers of the Lord President in relation to the important functions of the head of legal services, the head of practice and the practice committee. It is highly appropriate that the Lord President be consulted on such matters.

Amendment 44 agreed to.

Amendments 45 to 48 moved—[Fergus Ewing]—and agreed to.

Amendment 319 moved—[Robert Brown].

The Convener: The question is, that amendment 319 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 319 agreed to.

Section 39, as amended, agreed to.

Section 40—Head of Practice

Amendment 49 moved—[Fergus Ewing]—and agreed to.

Amendment 321 moved—[Robert Brown].

The Convener: The question is, that amendment 321 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 321 agreed to.

Section 40, as amended, agreed to.

Section 41—Practice Committee

Amendment 323 moved—[Robert Brown].

The Convener: The question is, that amendment 323 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 323 agreed to.

Section 41, as amended, agreed to.
Section 42 agreed to.

Section 43—Challenge to appointment
Amendments 50 and 51 moved—[Fergus Ewing]—and agreed to.
Section 43, as amended, agreed to.
Section 44 agreed to.

Section 45—Effect of disqualification
Amendment 102 moved—[Fergus Ewing]—and agreed to.
Section 45, as amended, agreed to.
Section 46 agreed to.

Section 47—Designated persons
The Convener: Amendment 52, in the name of the minister, is grouped with amendments 53, 330, 54 and 55.

Fergus Ewing: During stage 1, concern was expressed about designated persons relating to the possibility of the bill allowing for non-solicitors to do legal work. I have, therefore, lodged amendments to provide further safeguards. Amendment 55 makes the head of legal services responsible for ensuring that designated persons who carry out legal work are adequately supervised in doing so and ensures that only designated persons can carry out legal work within a licensed provider. I consider that giving an explicit duty to the head of legal services to ensure adequate supervision of a designated person and stating explicitly that being designated does not affect what an individual can or cannot do by virtue of the reserved areas in section 32 of the Solicitors (Scotland) Act 1980—in addition to making designated persons subject to the professional principles in amendment 46—addresses the concerns that have been raised. Indeed, amendment 55 goes much further than the current position in traditional firms, whereby an unqualified person such as a paralegal is able to undertake legal work, including work in the reserved areas, simply on the basis that such a person is employed by a solicitor.

At present, when an unqualified person behaves badly, the solicitor, rather than the unqualified person, will face disciplinary proceedings. Again, the bill goes much further than the current position in traditional firms, as section 44 provides that persons—solicitors or non-solicitors—can be disqualified from being designated. Furthermore, when non-solicitor designated persons are also investors, they could be banned from having an interest in a licensed provider because of improper behaviour under the proposed new section that is provided for in amendment 114.

Amendment 52 inserts the word “written” into section 47(2) so that the licensed provider will have to indicate designation in writing.

Amendment 53 deals with drafting.

09:45
Amendment 55 inserts a new section, “Working context”, following section 47. As has been noted, the new section makes the head of legal services responsible for ensuring that designated persons who undertake legal work are adequately supervised and provides that only designated persons can undertake legal work in a licensed provider.

Amendment 54 is consequential to amendment 55.

Amendment 330, which is in Robert Brown’s name, would remove the provision that allows an investor in a licensed provider to be a designated person. If the amendment were agreed to, it would prevent a solicitor or non-solicitor investor from doing legal work in the licensed provider. I want to ensure that all investors can be designated to do legal work. However, to protect consumers, all non-solicitor investors will be subject to the rigorous fitness-for-involvement test.

It is important that those who have the most interest in the business can invest and work in the licensed provider. Accordingly, I invite Robert Brown not to move amendment 330.

I move amendment 52.

Robert Brown: I support the Government amendments in the group, but designation is a curious concept in the bill and it is interesting that its purpose is not defined. Designation means designation

“to carry out legal work”,

so it is significant. I understand why it might be necessary to designate an official or paralegal in a legal services provider for that purpose, but I do not follow the basis for designating an investor in a firm.

I would like the minister to elaborate on his comment that, if amendment 330 were agreed to, it would prevent solicitors in a firm from doing legal work—perhaps I misunderstood that. That was not the intention behind the amendment—if it were, the method of arriving at the result was curiously phrased. Investors—in general, they are outside investors—surely do not do legal work, unless they are separately qualified, so why should they be designated?

Amendment 330 is intended to narrow the scope of designated persons by omitting investors. I rather thought that the Scottish Government had
accepted the logic of that when it proposed to delete the reference to a manager in section 47(3)(b)(i). That followed the logic of employees—yes; investors—no. The minister might persuade me that I have got that all wrong, as I am sure that I have, but I require to be persuaded.

**The Convener:** Mr Brown shows characteristic modesty.

An arguable point is involved, but perhaps some clarification is required about the total intent. We can see what the Government aims at, but perhaps we are not quite convinced that the wording has succeeded. I ask the minister for clarity, which would help.

**Fergus Ewing:** We all want to move in the same direction. The Government's amendments were framed to meet concerns that the committee expressed after stage 1. The bill makes no changes to the work that is reserved to solicitors under the Solicitors (Scotland) Act 1980. In traditional law firms, unqualified people can work in reserved areas if they prove that they drew up or prepared the writ or papers in question without receiving or expecting to receive any fee or reward. That is the existing legal practice.

I made the point that the Government amendments, which I understand are broadly acceptable, will impose additional duties and safeguards in relation to non-solicitors’ work on legal matters in legal services providers. That approach is correct and we are happy to take it, following the committee’s recommendations.

My point that Robert Brown’s amendment 330 would risk preventing solicitors in legal services providers from undertaking legal work was restricted to solicitors who are investors. Perhaps that is an unintended consequence of his amendment, as he said. If there are to be solicitors who are investors in LSPs, it would be a bit perverse if they could invest, but not do legal work, in the LSP of which they were a member.

I am happy to have discussions about the matter with Mr Brown, the convener and other members if they so wish to ensure that we have provided all the necessary safeguards sought by the committee that are reasonable and appropriate.

**The Convener:** I will allow Robert Brown to make another contribution.

**Robert Brown:** I accept the minister’s point about possible unintended consequences. That issue needs to be explored further. However, will he address the issue of investors who are not solicitors, and give the committee an understanding of why investors in that capacity need to be designated and what the implications of that are? That is essentially the point that I was trying to make in my amendment.

**Fergus Ewing:** Our proposal would mean that such designated persons—that is, non-solicitors in legal services providers—would nonetheless be able to be investors. I think that we all accept the principle that, if one has an alternative business structure, it is unfair for the office manager or other non-qualified people who play a big part in a legal firm not to benefit from it. Why should they be excluded from being shareholders? Their shareholding may be modest. Employees of John Lewis, for example, have a stake—albeit a modest one—in that company. Designated people often do very good work in debt collection, for example. I think that I have mentioned to the committee before that a lady who did debt collection work in a firm that I was in did that work much more efficiently than any solicitor could, because she was much more organised. That is an anecdotal argument, but it is nonetheless a good one. She might have been an ideal person to have had a stake in the business and thereby could have benefited from its success and been motivated for it to succeed. That is one of the broad intentions behind our proposal.

If Robert Brown remains not 100 per cent persuaded—I wonder whether it is possible to persuade Robert Brown 100 per cent; that is an interesting challenge for all of us—

**The Convener:** That is most unkind.

**Fergus Ewing:** That is not necessarily a criticism, convener. I would be more than happy to discuss the matter further with Mr Brown if he remains not 100 per cent persuaded. We all have the same aim: to protect the public fully in relation to non-solicitors carrying out legal work in the new entities.

**The Convener:** When you are in a hole, minister, you should stop digging.

**Amendment 52 agreed to.**

**Amendment 53 moved—[Fergus Ewing]—and agreed to.**

**The Convener:** I invite Robert Brown to move or not move amendment 330.

**Robert Brown:** I am not entirely satisfied, but I will discuss the matter further, if I may. I will not move amendment 330 at this stage.

**The Convener:** I think that that is the appropriate way forward.

**Amendment 330 not moved.**

**Amendment 54 moved—[Fergus Ewing]—and agreed to.**

**Section 47, as amended, agreed to.**
After section 47

Amendment 55 moved—[Fergus Ewing]—and agreed to.

Section 48 agreed to.

Section 49—Fitness for involvement

Amendment 103 moved—[Fergus Ewing]—and agreed to.

The Convener: The next group is on outside investors. Amendment 104, in the name of the minister, is grouped with amendments 110, 110A, 113 and 113A.

Fergus Ewing: Amendment 104 is a drafting amendment.

Amendment 110 relates to the fitness-for-involvement test. During stage 1, the committee rightly focused much attention on that test and recommended that we consider whether improvements could be made.

Amendment 110 provides one such improvement. It inserts a new subparagraph into section 50(2)(a) to provide that a non-solicitor’s associations are relevant to that investor’s fitness for involvement in a licensed provider. It makes it clear that those associations include “family, business or other associations” that have a bearing on the investor’s character. That provision will ensure that the fitness test is as robust as possible.

Amendment 110A, in the name of Robert Brown, seeks to qualify amendment 110 by stating that family, business or other associations are relevant only in so far as they have a bearing on an individual’s “suitability” to be an investor. I await with interest Mr Brown’s arguments on the matter, but we believe that such a provision is unnecessary. All the fitness-for-involvement provisions are focused on the suitability of persons to be investors, and there is no need to state that explicitly for that one provision. For those reasons, we do not support amendment 110A.

Amendment 113 also relates to the fitness-for-involvement test. It ensures that individuals are not able to avoid the fitness test by hiding behind a company or a number of companies. It adds a new subsection after section 50(4) and provides that, where a non-solicitor investor is a body, it is relevant for the approved regulator to consider whether the persons who own and control that body would meet the fitness-for-involvement test if they were investing individually. Accordingly, an approved regulator will have to consider the fitness not only of any body that invests in a licensed provider but of that body’s owners and controllers.

Amendment 113A, in the name of Robert Brown, appears to be an attempt to widen the group of people who can be subjected to the fitness test by virtue of amendment 113 to include those who have “substantial influence” in the body. With respect, I consider amendment 113A to be unnecessary, as those people who have a substantial influence in the body would be covered by the reference in my amendment 113 to “persons controlling” the body. For that reason, we do not support amendment 113A.

I move amendment 104, and I invite Robert Brown not to move his amendments.

Robert Brown: I am not sure why amendment 104 removes the reference to outside investors being controlled by the licensing rules.

More generally, the committee has had concerns about preventing unsuitable people from entering the legal services market. I support amendment 110 from the Scottish Government, but it does not quite hit the nail on the head. It seems possible for an outside investor to be apparently clean, as far as can be proved, as regards his family and associations, but still to be unsuitable, on broader grounds, to be such an investor.

We are all aware of the publicity and concerns surrounding public sector bodies and contractual arrangements. Amendment 110A does not limit the grounds on which such issues can be considered, as the minister suggested, but widens them. I do not think that we should be opening doors that should remain firmly shut.

Similarly, and perhaps more importantly, amendment 113A supplements the Scottish Government’s amendment 113. The substantial issue is indeed influence, not control, and amendment 113A tightens up the provisions considerably. I do not accept the minister’s view, which I think is contrary to English language usage and logic, that “control” is the same as “influence”. “Control” means control; “influence” means something rather less.

We could get into complicated issues around minority shareholdings and so on, but the wording “substantial influence” is designed to get at those people who, without actually controlling a body in the sense that they have a majority vote, for instance, nevertheless have substantial influence on the direction of travel of the organisation. In discussion, most committee members have expressed the view that influence is at least as important as control in this regard. We need a slightly wider provision when it comes to the important issue of outside investment in legal organisations. That is the background to amendment 113A.
The Convener: The matter concerned the committee seriously during stage 1 consideration. None of us wishes it to be possible for any firm providing legal services to be infiltrated by people with malign intent. We must ensure that any safeguards that we put in place form a significant barrier to any such insinuation.

I have some difficulties with the workability of Robert Brown’s amendments, although I accept his arguments in general terms. Perhaps, when he sums up, the minister might direct me along the lines of how he sees the provisions being enforced were we to approve Mr Brown’s amendments today.

10:00

Fergus Ewing: Again, we all want to go in the same direction so we are responding to the concerns that the committee expressed at stage 1 and working in partnership with the committee on these matters.

It might be useful for us to remind ourselves of the way in which the bill works. Section 49 makes provision on fitness for involvement and section 50, which we are looking at just now, delimits factors as to fitness. We want to make sure that, as section 49(1) says,

“An approved regulator must—
(a) before issuing a licence to a licensed legal services provider ... satisfy itself as to the fitness”

for involvement of that licensed provider.

Section 50 then goes on to describe what that means in practice. It takes into account the traditional issues and standard tests that we are familiar with, such as whether someone has been adjudged bankrupt or disqualified from being a director. The new test that we have introduced would, I believe, cover the scenario of the procurement issue involving NHS Greater Glasgow and Clyde, although I should say that that involved a different area of law altogether. It will mean that we can look at the probity and character of an investor as well as their associations.

If I may be candid, we are talking about potential criminal associations. If the police provide information to a regulator about an applicant’s criminal associations, one hopes and expects that the legislation will ensure that that applicant will not become a licensed legal services provider. That is what we are trying to achieve. These amendments tidy up the provisions further and ensure that they are as tight as possible.

Mr Brown’s amendment 110A is not necessary and might actually delimit things. However, he has responded with a textual argument and says that he does not agree. Again, I am happy to look closely at the issue with him before stage 3, and to write to the committee once we have had those discussions. Indeed, in relation to all such matters about which I say I am happy to have discussions, it might be useful for us to have those discussions early on, if possible. Then we can write to the committee and can have an organised process that is carried out with as much notice as possible before stage 3, so that we are not all rushing around at the last minute. I give the committee that undertaking—I see that the officials are noting it down carefully as I speak.

We all want to move in the right direction. However, amendment 110A is not necessary and might be counterproductive; it might delimit things in a way that is not intended. Although Robert Brown disagrees with that, if he is willing not to move amendment 110A today, we can discuss who is right about that in an open fashion and come back to the committee with our arguments. No doubt we will also discuss the point with the Law Society as it will take a close interest.

Amendment 113A seeks to introduce the test of influence and relates to the arguments around influence versus control. We looked at the issue from the point of view of a regulator who is trying to ascertain what “influence” means, because it does not have a clear meaning. It can cover a spectrum of matters, from the completely insubstantial to the major. Given that element of vagueness, it is not a helpful or necessary test. Again, because we all want to make this system of regulation as tough as possible so that we can keep the crooks out, we are determined to work with the committee to make sure that it will work as well as we hope and expect it to.

If Mr Brown is happy not to move his amendments, we will be happy to revert to him in the way that I have described.

Amendment 104 agreed to.

Amendments 105 to 107 moved—[Fergus Ewing]—and agreed to.

Section 49, as amended, agreed to.

After section 49

Amendment 108 moved—[Fergus Ewing]—and agreed to.

Section 50—Factors as to fitness

Amendment 109 moved—[Fergus Ewing]—and agreed to.

Amendment 110 moved—[Fergus Ewing.]

The Convener: Amendment 110A, in the name of Robert Brown, has already been debated with amendment 104. Is Mr Brown moving or not moving the amendment?
Robert Brown: There is a possible deficiency with the and/or aspect of the amendment. That being the case, I will have further discussions and not move it at this stage.

Amendment 110A not moved.
Amendment 110 agreed to.
Amendments 111 and 112 moved—[Fergus Ewing]—and agreed to.
Amendment 113 moved—[Fergus Ewing].
Amendment 113A moved—[Robert Brown].

The Convener: The question is, that amendment 113A be agreed to. Are we agreed?

Members: No.
The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.
Amendment 113A agreed to.
Amendment 113, as amended, agreed to.
Section 50, as amended, agreed to.

After Section 50
Amendment 114 moved—[Fergus Ewing]—and agreed to.

Section 51—Behaving properly
Amendments 115 to 117 moved—[Fergus Ewing]—and agreed to.
Section 51, as amended, agreed to.

Section 52—More about investors
The Convener: Amendment 174, in the name of the minister, is grouped with amendments 175, 175A, 118, 119, 177 and 214.

Fergus Ewing: The bulk of these amendments are about the powers that the Scottish ministers have by virtue of section 52 relating to external investors. In the light of concerns that Justice Committee members and others raised about investors, we reconsidered section 52 and lodged amendments to ensure that the provisions are as robust as possible.

Amendment 174 removes text from section 52(2)(a). Amendment 175 inserts new subsections (2A) and (2B) into section 52. New subsection (2A)(a) provides a power for the Scottish ministers to amend, by regulations, the percentage relating to exemptible investors that was introduced by amendment 108, which the committee has already considered. As was mentioned in relation to amendment 108, that important safeguard gives the Scottish ministers the flexibility to deal with any unforeseen issues in relation to the exemption of investors. By virtue of amendment 214, regulations that are made under the power will be subject to the affirmative procedure.

New subsection (2A)(b) replaces, with slight modification, section 52(2)(a)(iv), which amendment 174 removes. Subsections (2B)(a) and (b) replace sections 52(2)(a)(i) and (iii), which amendment 174 removes, with a minor drafting change. Subsection (2B)(c) replaces and expands section 52(2)(a)(ii), which amendment 174 removes, by setting out what interest is relevant in calculating a percentage stake of ownership or control in an entity, and what associations count towards such a stake. The effect of the provision is that the Scottish ministers’ regulation-making powers are extended to include consideration of what counts as an interest or stake in a licensed provider, including further provision about family, business and other associates. That expansion makes the bill more robust in respect of outside or non-solicitor investors.

Amendment 175A, in the name of Robert Brown, seeks to make the power in section 52(2)(a)(a) subject to the consent of the Lord President. I made my views on the issue known previously. However, given the committee’s views, I am no longer minded to oppose the amendment.

Amendment 177 is a drafting amendment and replaces text that amendment 118 removes. Amendment 119 inserts into section 52(4)(a) the phrase “to any extent”, making it absolutely clear that the provision catches all investors, even those with a minimal interest or stake in the entity.

In its stage 1 report, the Subordinate Legislation Committee suggested that regulations that are made under the power in section 52(2), which allows for provision to be made about investors in licensed providers, should be subject to the additional scrutiny of affirmative procedure. I acknowledge that the power is potentially wide ranging. However, as I stated in my response to the Subordinate Legislation Committee, I believe that that is necessary, given the importance of ensuring that the provisions relating to outside investors are robust. I maintain that negative procedure is appropriate for the majority of regulations that are made under those powers, which apply only to a narrow class of persons. For
that reason, I do not intend to change the parliamentary procedure that is to be used for the majority of regulations that will be made under the powers.

However, I accept the Subordinate Legislation Committee recommendation in relation to the power in section 52(2)(a)(iv), to modify definitions of different types of investors. As I have said, amendment 175 places that power in new subsection (2A)(b) of section 52. Amendment 214 makes regulations that are made under that provision subject to affirmative procedure.

I move amendment 174.

Robert Brown: I have nothing to add.

Amendment 174 agreed to.

Amendment 175 moved—[Fergus Ewing].

Amendment 175A moved—[Robert Brown].

The Convener: The question is, that amendment 175A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 175A agreed to.

Amendment 175, as amended, agreed to.

Amendments 118, 119, 176 and 177 moved—[Fergus Ewing]—and agreed to.

Section 52, as amended, agreed to.

Section 54—Ceasing to operate

Amendment 57 moved—[Fergus Ewing]—and agreed to.

Section 54, as amended, agreed to.

Sections 55 and 56 agreed to.

Section 57—Employing disqualified lawyer

The Convener: Amendment 58, in the name of the minister, is grouped with amendments 59 to 65.

Fergus Ewing: Amendments 58 and 60 are drafting amendments.

Amendment 59 adds, after section 57(6), the wording:

"the Court’s determination is final."

I consider it appropriate that, for all appeals that it is possible to make to the sheriff court or the Court of Session under the bill, the decision of the sheriff or the court should be final and no further appeal should be possible.

Amendment 61 relates to section 59. As section 59 is currently drafted, a person would commit an offence if they implied that they were a licensed provider even if they were legitimately such an entity. Amendment 61 will ensure that an offence will be committed only if such an implication is false.

Amendments 62 to 65 are drafting amendments.

I move amendment 58.

The Convener: I have a brief comment to make. You have not considered it appropriate to include an appeal provision in the event of there being anything wrong. I take it that you agree with me that were someone to wish to take the matter
further, it would be open to them to do so by means of judicial review.

Fergus Ewing: I have not sought specific advice on that from the Scottish Government legal directorate, but my officials say that that is their understanding.

The Convener: Therefore, there would be a remedy.

Amendment 58 agreed to.

Amendments 179 and 59 moved—[Fergus Ewing]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Concealing disqualification

Amendments 60 and 180 moved—[Fergus Ewing]—and agreed to.

Section 58, as amended, agreed to.

Section 59—Pretending to be licensed

Amendment 61 moved—[Fergus Ewing] and agreed to.

Section 59, as amended, agreed to.

Section 60—Professional privilege

Amendments 62 and 63 moved—[Fergus Ewing] and agreed to.

Section 60, as amended, agreed to.

Sections 61 to 63 agreed to.

Section 64—Complaints about regulators

The Convener: Amendment 133, in the name of the minister, is grouped with amendments 134 to 140.

Fergus Ewing: As currently drafted, section 64 provides that complaints against approved regulators are made to the Scottish ministers, who may investigate the complaints themselves or delegate the function to the Scottish Legal Complaints Commission. The provision is an exception to that for the handling of other types of legal complaints, all of which go in the first instance to the SLCC, which acts as a gateway. In their evidence to the committee, Consumer Focus Scotland and the Office of Fair Trading raised their concerns about the matter and suggested that an inconsistent approach has the potential to confuse consumers. The committee recommended that further consideration be given to complaints against regulators and that the evidence provided by the SLCC should be examined.

Following discussion at the bill reference group, I decided that the SLCC’s gateway function should be extended to include complaints against approved regulators. That will ensure that the bill creates a consistent initial point of contact for all legal complaints. Amendment 133 adds new subsections at the start of section 64 to provide that a complaint against approved regulators must be made to the SLCC; that it is responsible for determining the nature of the complaint; and that, if the complaint is not a handling complaint, and is not “frivolous, vexatious or totally without merit”, the SLCC will refer it to the Scottish ministers. Amendments 134 to 137 are consequential on amendment 133. Amendment 138 is a drafting amendment. Amendment 139 ensures that, where ministers delegate to the SLCC the function to investigate complaints against regulators, they can remove the requirement on the SLCC to refer such complaints to them.

Amendment 140 inserts a new section after section 64, on the levies that approved regulators are to pay to the SLCC. At the moment, the bill does not provide for the funding of complaints against regulators, which the SLCC highlighted as being of particular concern in its evidence to the Justice Committee at stage 1. In addition, amendment 133 gives the SLCC the function of acting as a gateway for all complaints regulators. Obviously, that has an associated cost. The new section provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator, having had that function delegated to it under section 64(6), and that that complaint is upheld. Following consultation with approved regulators and the Scottish ministers, the SLCC will set the amount of the annual general levy and the complaints levy. In the unlikely event that the Scottish ministers decide to investigate a complaint themselves, regulations can be made under section 64(7) to require approved regulators to cover the costs.

I move amendment 133.

Amendment 133 agreed to.

Amendments 134 to 139 moved—[Fergus Ewing]—and agreed to.

Section 64, as amended, agreed to.

After section 64

Amendment 140 moved—[Fergus Ewing] and agreed to.

Section 65—Complaints about providers

The Convener: Amendment 141, in the name of the minister, is grouped with amendments 142 to 144.
**Fergus Ewing:** At the moment, the SLCC is required annually to consult professional organisations and other members on its budget for the next financial year. As licensed providers are to be subject to both the annual general levy and the complaints levy, I feel that they and approved regulators should be included in the consultation. That is what Amendment 141 will achieve. Amendment 142 is a drafting amendment.

Amendment 143 alters the way in which the annual general levy that is payable to the SLCC by licensed providers is collected. Under the bill at present, the levy is to be paid directly to the SLCC by those providers. Under section 27 of the Legal Profession and Legal Aid (Scotland) Act 2007, the relevant professional body—that is, the Law Society, the Faculty of Advocates or the Association of Commercial Attorneys—has a duty to collect the levy from its members and pay it over in a single sum to the SLCC. As a result, the bill’s current provisions might cause the SLCC some difficulties, in that it will have to collect the levy individually from all licensed providers instead of from three bodies, with an associated logistical and cost burden. The SLCC has indicated that, although it can adapt to cope with that system of collecting the levy, it will in doing so incur significant additional costs and its strong preference is for the collection of the levy from the new bodies and individuals to be consistent with the system in the 2007 act. I agree and, accordingly, amendment 143 requires approved regulators to gather the levy from their licensed providers and pay it to the SLCC in a single sum.

Amendment 144 is a minor amendment that adds two terms to the 2007 act that are to be interpreted in accordance with the bill.

I move amendment 141.

**Robert Brown:** I want to raise a minor technical matter about amendment 142. I have to say that I deprecate parliamentary draftsmen’s tendency to start sentences with the word “But”. Given that such a use adds nothing whatever to the sentence’s meaning, especially in this instance, I oppose this particular amendment.

The Convener: That is not a pedantic point. Sentences that begin with “But” are clearly inappropriate and contrary to any grammar that I was ever taught. Do you wish to say anything about this, minister? I appreciate that although you might well share the views that Mr Brown and I have expressed, it might not be politic of you to say so.

**Fergus Ewing:** At this historic moment in the Scottish Parliament’s deliberations, I feel duty-bound to defend the draftsmen who have used this word, which they say appears frequently in legislation and is in accord with principles that are not opposed by many grammarians.

Amendment 141 agreed to.

Amendments 142 to 144 moved—[Fergus Ewing].

The Convener: Does any member object to a single question being put on these amendments?

**Robert Brown:** Yes.

The Convener: I will therefore call the amendments seriatim. The question is, that amendment 142 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against
Brown, Robert (Glasgow) (LD)

Abstentions
Aitken, Bill (Glasgow) (Con)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 142 agreed to.

The Convener: As members will note, I abstained on this occasion. I think that the point was there to be made and should be borne in mind in future.

Amendments 143 and 144 agreed to.

Section 65, as amended, agreed to.

Section 66 agreed to.

Section 67—Registers of licensed providers
Amendments 145, 64, and 65 moved—[Fergus Ewing]—and agreed to.

Section 67, as amended, agreed to.

Section 68—Lists of disqualified persons
Amendments 146 to 150 moved—[Fergus Ewing]—and agreed to.

Section 68, as amended, agreed to.

Sections 69 and 70 agreed to.

After section 70
10:30

The Convener: Amendment 66, in the name of the minister, is grouped with amendment 162.

Fergus Ewing: Amendments 66 and 162 relate to the appeals process. Following the introduction of the bill, the Sheriff Court Rules Council made representations to the Scottish Government to suggest that the bill should provide for the procedure that is to apply to appeals to the sheriff and specify exactly what a sheriff can do with regard to various rights of appeal. That is set out in amendments 66 and 162, which provide for, respectively, appeals that relate to the regulation of licensed legal services and those that relate to confirmation and will writing services.

I move amendment 66.

Amendment 66 agreed to.

Sections 71 and 72 agreed to.

Section 73—Approving bodies

The Convener: Amendment 181, in the name of the minister, is grouped with amendments 357, 151, 358, 380, 152, 381, 382, 153, 154, 383 to 387, 182, 155 to 158, 183, 159, 160, 166 and 168.

I point out that, contrary to the information that is contained in the groupings, amendment 357 is not a direct alternative to amendment 151.

Fergus Ewing: Amendments 181 to 183 are technical drafting amendments. Amendments 357 and 358, in the name of Bill Aitken, return to the issue of the Lord President’s consent. I have made my views known on that but, given the committee’s views, I am no longer minded to oppose those amendments.

Amendment 151 allows the Scottish ministers to remove or vary conditions after consulting the approving body. Amendment 152 requires ministers to give reasons if they intend to refuse to certify or impose conditions on an applicant to be an approving body. Although it is unlikely that ministers would take such action without giving reasons, it is reasonable to require such explanation to be given.

The Subordinate Legislation Committee expressed concerns in its stage 1 report about the powers that are given to ministers under section 74(7) and section 81(5). After further consideration, I have lodged amendments 153, 154 and 160. Amendment 153 narrows the scope of the Scottish ministers’ power to make regulations that relate to the criteria for the approval of regulators of confirmation agents. It will ensure that the criteria relate to the applicant’s capability to act as an approving body.

Amendment 154 removes section 74(7)(c). As a result, ministers will no longer be able to make regulations about what categories of bodies may or may not be approving bodies. I accept the concerns about the power being very wide, and now consider it to be unnecessary. Ministers are able to exclude unsuitable applicants by reference to their application, and it is unlikely that it would ever be desirable to exclude an entire class of applicants without individual consideration.

Amendment 160 amends section 81(5) so that regulations that are made under it may include provision for the review of confirmation agents. The existing powers are narrowed so that provision about the functions of approving bodies or relating to confirmation agents can be made only where Scottish ministers consider it to be necessary to safeguard the interests of clients of confirmation agents.

Amendment 159 substitutes a new section 81(4) to provide in the text of the bill a requirement on approving bodies to carry out an annual review. I consider such a review to be an important part of the on-going monitoring of confirmation agents.

The bill as introduced makes provision in section 76(3) for any penalty that is imposed by an approving body on a confirmation agent to be paid to the approving body. Further consideration has been given to the appropriateness of allowing approved regulators to impose and retain fines. I consider it to be more appropriate that a financial penalty that is imposed under section 76 is paid to the Scottish ministers rather than the approving body. Amendment 155 provides for that while allowing the approving body to collect the penalty on ministers’ behalf.

The bill as introduced does not provide for the audit of approving bodies. In order to support ministers’ oversight role in the regulatory framework and to ensure that approving bodies are operating effectively, they are required by amendment 156 to carry out an annual internal review of their operation as such and send a report to the Scottish ministers. The report will be laid before Parliament.

Amendment 157 clarifies that a person commits an offence under section 77(1)(b) only if they imply falsely that they are a confirmation agent. Amendment 158 is consequential on amendment 157.

Amendment 380, in the name of James Kelly, requires Scottish ministers to consult the OFT and other appropriate persons or bodies before either imposing conditions on certification of an applicant to be an approving body of confirmation agents, or amending, adding or deleting any such conditions. The amendment is unnecessary and potentially inappropriate. The requirement under section 74(3) to consult the OFT before deciding whether to certify an applicant could include consideration
Amendment 385, in the name of James Kelly, would require that the regulatory scheme of any approving body must describe the qualifications required to be a confirmation agent. The amendment is unnecessary. As I have said, the level of training required to be a confirmation agent will be set out in the regulatory scheme, so there is no need for a separate mention of qualifications.

Amendment 386, in the name of James Kelly, would require annual renewal of certification for confirmation agents. It is not necessary, as amendment 159 amends section 81(4) in such a way as to require an annual review by an approving body of the performance of all its confirmation agents. Furthermore, approving bodies will monitor the confirmation agents on an on-going basis and will be able to take action to revoke or suspend their right to practise should that be necessary.

Amendment 387, in the name of James Kelly, would require that a confirmation agent keeps in place sufficient arrangements for compensating persons who suffer loss by reason of dishonesty. I do not support the amendment. An application for grant of confirmation is an administrative process that does not involve handling clients’ moneys, so a compensation fund is unnecessary.

Amendment 166 is consequential on amendment 160. The effect would be that the regulation power for Scottish ministers in relation to confirmation agents in section 81(5)(b) is subject to affirmative resolution. Amendment 168 is a drafting amendment.

I move amendment 181 and invite members not to move the amendments in their names.

The Convener: Your representations on amendments 357 and 358 fall on stony ground as far as I am concerned. I will pursue the amendments on the basis of previous arguments as well as the principle established by the committee.

With regard to the amendments in the name of James Kelly, as ever I will listen with considerable interest to what he has to say. No doubt, when addressing matters, he will deal with the various points that the minister has raised, such as the necessity of some of the amendments; the issue of the holding of money, which is dealt with in amendment 387; whether the matter in amendment 383 could be dealt with in guidance; and the possibility of appeal by means of judicial review, which relates to amendment 382. I will listen to what Mr Kelly has to say, but I am minded to support the Government on those matters.

James Kelly (Glasgow Rutherglen) (Lab): I support the convener’s position on amendments 357 and 358, as I am not convinced by the
Amendments 380 and 383 cover qualifications. Therefore, I intend to press amendment 386, which affirms that the licence must be reviewed annually. The minister said that the regulated scheme will cover annual reviews, but the requirement in amendment 386 for the agent to hold a certificate that is granted annually is more stringent and provides greater protection.

I take a similar approach to amendment 387. Throughout our evidence taking, we have discussed guarantees and compensation funds. Service providers might get into a situation where funds go missing, and we do not want customers to be punished in such cases. I submit that the establishment of a compensation fund is essential because it will provide greater safeguards.

10:45

Robert Brown: I confess that I am slightly less convinced that the area that is covered by amendments 357 and 358 requires the Lord President's involvement. It is not quite the same as the areas that we have already discussed. If there is any further argument about that, I will be interested to hear it, because I think that the area is slightly different.

Amendments 380 and 383 cover the question of conditions. I might have missed it but, if there is no provision that allows the imposition of conditions, will the Government be able to impose conditions? It is a question of the Government having the power to start with. Perhaps the power is already in the bill somewhere and I have just missed it. I ask the minister to confirm that.

The point of amendment 381 is manifestly covered by amendment 152. Amendment 382 seems unnecessary. I agree with the minister's comments in that regard. I am certainly not in favour of adding to the bulk of statutes unless doing so adds something to the substance of the matter.

I have some sympathy with amendments 384 and 385, on qualifications and experience. The minister might want to say a little bit more about them. We do not want to straitjacket the matter too much but, at the same time, it is an important issue.

Amendment 386 echoes the point that I made before about the requirement for legal services providers to have an annual certificate. The amendment raises a relevant point. We need to consider the procedures and what will happen. The annual renewal of the certificate is an opportunity to ensure that things happen in the way that they should, because people will be required to check and certify certain things and ensure that everything is in order. It is a good control mechanism to ensure that things happen as they should, and it is a simple one as well.
The Convener: In discussing amendment 386, are you going to comment on amendment 159?

Robert Brown: I have forgotten the point of amendment 159.

The Convener: Government amendment 159 seems largely to address Mr Kelly’s point. I would be interested to hear your views on it.

Robert Brown: I do not think that amendment 159 does that. It covers a slightly different issue. There is a formal procedure to be gone through in that area, and no doubt other issues are involved in it. Annual licensing seems to me to be the important mechanism in that case as well. I am not persuaded that amendment 159 necessarily does the trick, although it is a useful back-up.

The Convener: Sorry to have interrupted you. I thought that you should have an opportunity to make that point.

Robert Brown: That is fine.

On amendment 387, on a compensation fund, the minister made the point that no money will change hands when people apply for confirmation, but I am not sure whether granting confirmation is all that confirmation agents will do. It might be that that is not the only regulated function, so it seems to me that there are wider issues. In some circumstances, agents could hold quite a lot of money. I might have totally misunderstood what confirmation agents do, but I think that there are wider issues than just the issuing of documentation. I would like to hear a little more from the minister about that.

The Convener: As there are no other contributions, I ask the minister to wind up. I think that particular attention should be paid to amendments 384, 385 and 387.

Fergus Ewing: On the duty to consult the OFT, I am sure that members will have noticed that the bill already includes an explicit duty on ministers to consult the OFT. Section 74(3) states:

“Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult the OFT.”

Section 74(4) states:

“In consulting under subsection (3), the Scottish Ministers must send a copy of the application to the OFT.”

It is absolutely clear that, when we are looking at approving bodies for confirmation agents, we must consult the OFT. That duty is right and clear. It is plain that the OFT’s interests relate substantially to competition issues. That is where it has a relevant locus. We believe, with respect, that that is the correct approach and that the amendments in the name of Mr Kelly are not appropriate.

On whether there needs to be a compensation fund, my understanding is that confirmation agents, in that role, do not hold clients’ money. If they do not hold clients’ money—third parties’ money—there is no money to embezzle. They do not have the scope to carry out fraud because they are not looking after money for third parties. Confirmation agents might also be accountants but, if they are holding clients’ money as accountants, not as confirmation agents, that will be a matter for the regulation of accountants—it is not something for this bill. However, qua confirmation agents, given that they do not have the capacity to carry out fraud, it seems somewhat unfair and burdensome to impose on them an obligation to pay a levy for insurance that they do not need.

That is my understanding of the position. My officials and I had a quick discussion about it. If I have misled the committee in any way, we will immediately revert to you thereafter, but we do not think that I have done so. That is the basis on which we proceeded in this respect. If we were wrong, Mr Kelly’s arguments would have force, but I think that we are probably not wrong in this respect. I hope that our arguments will be accepted. Mr Brown also referred to that issue.

On training, I respectfully point out to committee members section 75(2), which deals with what the approving body must do. We are looking to the approving body to ensure that proper regulations are brought into force. That is the scheme in this part of the bill. The approving body must make a regulatory scheme. The very first thing that a regulatory scheme must do is "describe the training requirements to be met by a prospective confirmation agent".

Members’ legitimate concern that confirmation agents should be appropriately trained is therefore dealt with explicitly in section 75(2)(a). Incidentally—just to reassure members—that section provides that the scheme must "incorporate a code of practice to which a confirmation agent is subject"—thereby ensuring high standards, as one would expect. It also provides that professional indemnity is required. Perhaps Mr Brown was asking what other responsibilities confirmation agents might have. Plainly, they have a duty to carry out work without being negligent. If negligence arises, then and only then might their clients have a claim qua delict, rather than fraud. There is provision for professional indemnity in section 75(2)(c).

There could be a question about what sort of training confirmation agents should do. I am not aware that there is a specific diploma or recognised degree or qualification in that respect. I suspect that the training is more likely to comprise
a sort of melange of disciplines relating both to accounting and to confirmation, with perhaps a bit of finance thrown in. I am sure that members will appreciate that in confirmation work, one needs to be reasonably familiar with a wide range of financial instruments and other such relatively abstruse matters.

The point is that there is not one recognised qualification that we could point to. As that is the case, it follows logically that the best way to ensure that appropriate training is stipulated and required is to leave the detail to guidelines and the professionals who carry out the work. I give an undertaking that appropriate bodies, such as the Institute of Chartered Accountants of Scotland and the Law Society of Scotland, will be consulted on such matters, but that is no more than one would expect, as those bodies would probably be involved in helping to specify what any curriculum or qualification might entail.

Those comments cover the amendments on training, compensation and the OFT. On the annual report, I think that amendment 159 is fairly crystal clear. It says that the approving body that regulates confirmation agents must do three things:

“(a) review annually the performance of its confirmation agents,
(b) prepare a report on the review,
(c) send a copy of the report to the Scottish Ministers.”

That is crystal clear; it could not be clearer. The amendment will ensure that there is proper, sufficient monitoring without going over the score and imposing an unreasonable number of burdens on the approving body. It will ensure that performance is reviewed annually, the report of which the Scottish ministers will then lay before Parliament. With respect, I suggest that amendment 159 covers the issue.

Finally, convener, I should apologise for inviting you not to move amendments 357 and 358, on the Lord President, as I had already indicated that they are based on the arguments that we have discussed before and which I accept. I do not oppose the amendments and am happy to have the opportunity to correct my comments and clarify that matter.

Amendment 181 agreed to.

Section 73, as amended, agreed to.

Section 74—Certification of bodies

Amendment 357 moved—[Bill Aitken].

The Convener: The question is, that amendment 357 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 151 moved—[Fergus Ewing]—and agreed to.

Amendment 358 moved—[Bill Aitken].

The Convener: The question is, that amendment 358 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 5, Against 0, Abstentions 3.

Amendment 357 agreed to.

Amendment 151 moved—[Fergus Ewing]—and agreed to.

Amendment 358 moved—[Bill Aitken].

The Convener: The question is, that amendment 358 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

I use my casting vote against the amendment because I do not consider it necessary.
Amendment 380 disagreed to.

Amendment 152 moved—[Fergus Ewing]—and agreed to.

Amendment 381 not moved.

Amendment 382 moved—[James Kelly].

The Convener: The question is, that amendment 382 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The Convener: The amendment is unnecessary.

Amendment 382 disagreed to.

Amendments 153 and 154 moved—[Fergus Ewing]—and agreed to.

Amendment 383 moved—[James Kelly].

11:00

The Convener: The question is, that amendment 383 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

The Convener: The amendment is unnecessary.

Amendment 383 disagreed to.

Section 75—Regulatory schemes

Amendment 384 moved—[James Kelly].

The Convener: The question is, that amendment 384 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 384 disagreed to.

Amendment 385 moved—[James Kelly].

The Convener: The question is, that amendment 385 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

My casting vote goes against the amendment, as it is unnecessary.

Amendment 385 disagreed to.

Amendment 386 moved—[James Kelly].

The Convener: The question is, that amendment 386 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

There being equality of votes, I vote against the amendment as the matter can be dealt with by guidance.

Amendment 386 disagreed to.

Section 74, as amended, agreed to.
Maxwell, Stewart (West of Scotland) (SNP)  
Thompson, Dave (Highlands and Islands) (SNP)  

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

My casting vote goes against the amendment, as the matter is adequately dealt with by amendment 159.

Amendment 386 disagreed to.

Amendment 387 moved—[James Kelly].

The Convener: The question is, that amendment 387 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)  

Against  
Aitken, Bill (Glasgow) (Con)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)  
Thompson, Dave (Highlands and Islands) (SNP)  

Abstentions  
Brown, Robert (Glasgow) (LD)  

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 387 disagreed to.

The Convener: If the assurances given by the minister turn out not to be true—I know that they were given in all good faith—the matter will require to be revisited.

Amendment 182 moved—[Fergus Ewing]—and agreed to.

Section 75, as amended, agreed to.

Section 76—Financial sanctions  
Amendment 155 moved—[Fergus Ewing]—and agreed to.

Section 76, as amended, agreed to.

After section 76  
Amendment 156 moved—[Fergus Ewing]—and agreed to.

Section 77—Pretending to be authorised  
Amendments 157 and 158 moved—[Fergus Ewing]—and agreed to.

Section 77, as amended, agreed to.

Sections 78 to 80 agreed to.

Section 81—Ministerial intervention  

Amendments 183, 159 and 160 moved—[Fergus Ewing].

The Convener: Does any member object to my putting a single question on the amendments?

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Yes.

The Convener: That is fine. I will therefore call the amendments seriatim.

Amendment 183 agreed to.

The Convener: The question is, that amendment 159 be agreed to. Are we agreed?

Members: No.

Cathie Craigie: I do not want to vote for the amendment, as I do not know that it does what the committee wants.

The Convener: That is a perfectly honourable position.

Cathie Craigie: I want to reserve my position until stage 3.

The Convener: Right. There will be a division.

For  
Aitken, Bill (Glasgow) (Con)  
Brown, Robert (Glasgow) (LD)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)  
Thompson, Dave (Highlands and Islands) (SNP)  

The Convener: The result of the division is: For 5, Against 0, Abstentions 0.

Amendment 159 agreed to.

Amendment 160 agreed to.

Section 81, as amended, agreed to.

The Convener: This might be an appropriate time to stop for 10 minutes.

11:06  
Meeting suspended.

11:24  
On resuming—

After section 81  

The Convener: We move on to will writing services. Amendment 184, in the name of the minister, is grouped with amendments 185 to 198, 200, 201, 199, 161, 202, 163, 203, 164, 204, 205, 165, 206, 207, 213 and 215 to 218.

Fergus Ewing: Will writing is not a reserved activity under the Solicitors (Scotland) Act 1980. Unqualified individuals can provide will writing services, but the fact that there are no requirements for training, professional indemnity
insurance or other safeguards means that consumers are vulnerable to non-regulated practices, which are often unnecessarily expensive.

An example that was brought to my attention concerned an elderly client who was charged £1,000 for a straightforward will in a non-inheritance tax estate. That client was driven to her bank by the will writer to withdraw the money, in cash, to pay the fee. In another case, consumers who wanted a will were sold specialised services that they did not require. In some cases, consumers have been persuaded to pay up to £2,400 when a simple will costing £150 or, indeed, much less would have sufficed.

As well as individual instances of poor practice, it is possible to identify some main themes, including a lack of skill and competence; poor knowledge of inheritance tax; the provision of advice that is based on English law; low advertised costs that translate into substantial fees through bait and switch and the lying in of other services; cold calling and unsolicited mail; a lack of professional indemnity insurance; and poor storage of wills. Over the past few months, bodies including the Law Society of Scotland and the Scottish Law Agents Society have lobbied for non-lawyer will writers to be subject to regulation. In addition, three existing self-regulatory will writing bodies have indicated their support for the introduction of regulation in this area and a willingness to regulate.

Shortly after the bill's introduction, I informed the committee that regulation of non-lawyer will writers was under consideration and that amendments to put such regulation in place might be lodged at stage 2. During stage 1, I reiterated my support for regulation, subject to the results of a consultation that was under way. The committee agreed that "unregulated will writing is an issue that requires to be addressed".

The consultation exercise has since been completed. An overwhelming majority of respondents were in favour of the introduction of regulation for non-lawyer will writers. A majority were also in favour of the establishment of a regulatory scheme similar to the one that is proposed for confirmation services in part 3 of the bill.

Therefore, I have lodged amendments—33 of them—to establish a robust regulatory framework for non-lawyer will writers and to prevent any unregulated non-lawyers from drafting wills for fee, gain or reward. The regulation will continue to allow non-lawyers to provide a will writing service but will protect consumers by ensuring that all such will writers are subject to robust regulatory rules, enforcement measures and sanctions.

However, individuals who prepare their own wills—including deathbed wills—with or without a do-it-yourself pack or other persons who provide a free advice service will not be affected, nor will solicitor will writers, who are already regulated by the Law Society of Scotland.

As I said, the regulatory framework is similar to the one that is proposed for confirmation services. It may come as a relief that, therefore, I do not intend to go through each of the 33 amendments or the 11 proposed new sections in turn, but I will explain how the framework will operate and will highlight some key amendments.

Amendments 203 and 204 seek to make changes to section 32 of the Solicitors (Scotland) Act 1980 to make will writing an activity that is reserved to solicitors unless it is carried out by persons who are regulated under the bill. As with confirmation services, the regulation of non-lawyer will writers will be carried out by professional or other bodies that will regulate their own members with approval and oversight from the Scottish ministers. Any body that wishes its members to be able to draft wills must make an application to the Scottish ministers to receive certification as an approving body.

We estimate that the costs to the Scottish Government will be minimal and similar to those that are set out in relation to confirmation agents in the financial memorandum. As part of the application, the approving body will be required to set out a regulatory scheme, which is described in amendment 187. As with the regulatory scheme for confirmation services, it will include qualifying criteria and training requirements, a code of practice and complaints procedures and sanctions. Crucially, it must require that will writers have in place sufficient arrangements for professional indemnity. In addition, to address specific concerns that have been raised about will writers, such schemes must provide that the code of practice and related standards to which will writers are subject apply to anyone acting on their behalf; that if a service for storing wills is offered, sufficient arrangements are in place for their storage, including arrangements to maintain such arrangements in the event that the will writer's business ceases to exist; that it is a breach of the code of practice for the will writer to fail to comply with any enactment that is specified in the code of practice; and that a breach of the code of practice by a person acting on behalf of a will writer constitutes a breach by the will writer.

11:30

Amendment 191 will give powers to the Scottish ministers to revoke certification should an approving body fail to comply with a direction that
it is given by them, such as a requirement to review or amend its scheme.

Amendments 197 and 198 make provision for complaints about will writers by altering the existing sections in the bill that deal with complaints about confirmation agents. Both service and conduct complaints can be made about will writers. They will be handled by the Scottish Legal Complaints Commission and the approving body respectively in the same way that complaints about other types of legal services practitioners are handled by the SLCC and their professional bodies.

Amendment 195 provides that, if the Scottish ministers believe that intervention is necessary in order to ensure that the provision of will writing services is regulated effectively, they may make regulations to establish a body with a view to its becoming an approving body or make regulations to allow them to act as an approving body. Regulations that are made under those provisions are to be subject to affirmative procedure. The power is similar to the step-in power in section 35 relating to licensed providers, and is a slight departure from the regulatory approach taken with confirmation agents. That is because, unlike confirmation agents, will writers currently exist and will writing is the primary or sole function of many of them. By introducing a prohibition on their current activities unless they are regulated, there is a risk of putting those individuals out of business entirely if their approving body ceased to regulate. Therefore, I believe that step-in powers are needed to allow ministers to act if necessary and as a last resort to ensure that will writing services are regulated.

I have covered the key amendments in the group and given a broad overview of how the regulation of non-will writers will operate. I do not intend specifically to cover the various consequential and drafting amendments in the group.

In summary, the regulation will continue to allow non-lawyers to provide a will writing service, but will ensure that such will writers are subject to robust regulatory rules, enforcement measures and sanctions. Serious concerns about non-lawyer will writers have been expressed elsewhere. The regulation will be the first regulation of its kind in the United Kingdom and will ensure that Scottish consumers are given the protection that they deserve.

I move amendment 184.

Robert Brown: I strongly welcome the amendments, which reflect the committee’s views. The letter that we received from the Scottish Law Agents Society right at the beginning pointed out concerns that existed. The amendments fill a gap in the bill.

I want to ask about the provision of such services through the internet. It is clear that there is potential, as there was and is with will forms, for English styles and phraseology that are not always suitable to Scottish circumstances to be supplied by providers in other parts of the UK, for example, in a way that is, from the Scottish Government’s point of view, difficult to get at. Will the minister comment on that aspect?

Stewart Maxwell (West of Scotland) (SNP): I, too, welcome the amendments and agree with Robert Brown. I back up his question about wills on the internet. I think that it was mentioned when I was questioning Which? at stage 1 that it offers a will service on the internet that is regulated by English law. Consumers in Scotland may be completely unaware that they will get a will that is determined by English law. There is a serious issue. Will the minister say how that matter could be dealt with here or whether it could be dealt with in consultation with the UK Government?

James Kelly: I welcome the amendments, many of which have emerged as a result of concerns that were raised at stage 1. One strength of the parliamentary process is that we can flag up and reiterate in our stage 1 report any concerns that are expressed in evidence. The process has certainly helped the minister, who has taken on board the committee’s formal and informal comments, and these particular amendments strengthen the system.

The Convener: I concur. This series of amendments plugs an important gap in consumer protection.

I ask the minister to wind up and to address, in particular, the issues raised by Mr Brown and Mr Maxwell.

Fergus Ewing: Mr Brown and Mr Maxwell asked about will writing services that are offered via the internet, presumably for a fee—at least, I think that is what is being envisaged.

Under the regulations, anyone offering such services to people in Scotland will require to be authorised and regulated and these amendments include not only enforcement provisions but, in amendment 190, a new offence of pretending to be authorised. So there is a requirement to be authorised and an offence of pretending to be authorised. As a result, anyone who pretends to be a will writer without having registered may be committing an offence.

It is perfectly possible for those who become registered as will writers to offer services on the internet; indeed, there is no reason why that should not be the case, provided that the
individual is properly regulated and complies with the new rules. After all, providing such services on the internet is not necessarily wrong. I think that Mr Brown and Mr Maxwell envisage scenarios in which cowboys offer these services, but such activities—if these individuals seek to charge a fee—will be outlawed. In that respect, I think that the amendments cater for and cover that particular scenario but given that we are discussing 33 amendments, 11 new sections and what is, in effect, an entirely new chapter of the bill, we are of course happy to look again at the issue.

As for our dealings with the UK Government, which Mr Maxwell asked about, we are very happy to discuss this matter with it and, indeed, would like our friends and colleagues south of the border to follow happily the lead that we are giving in the UK on this issue. It would certainly be useful to have some exchange in this respect, because—to be quite candid and frank about this—I am sure that consumers south of the border are being ripped off by cowboys charging a fortune for a service that might well be defective. Such a practice is wrong, no matter whether it is happening in Paisley or Plymouth, and I am very happy to work with our UK Government colleagues on the matter.

I am very pleased by the committee's broad support for the amendments and acknowledge the work that the Law Society and the Scottish Law Agents Society have carried out. Indeed, both organisations gave evidence to this effect at stage 1. I thank the committee for its input and believe that, if members agree to the amendments, we will be doing a good thing.

Amendment 184 agreed to.

Amendments 185 to 195 moved—[Fergus Ewing]—and agreed to.

Section 82—Regard to OFT input

Amendment 196 moved—[Fergus Ewing]—and agreed to.

Section 82, as amended, agreed to.

Section 83—Complaints about agents

Amendments 197, 198, 200, 201, 199, 161 and 202 moved—[Fergus Ewing]—and agreed to.

Section 83, as amended, agreed to.

Section 84 agreed to.

After section 84

Amendment 162 moved—[Fergus Ewing]—and agreed to.

Section 85—Consequential modification

Amendments 163, 203, 164, 204, 205, 165, 206 and 207 moved—[Fergus Ewing]—and agreed to.

Section 85, as amended, agreed to.

Section 86—Application by the profession

The Convener: Amendment 67, in the minister's name, is grouped with amendments 68 to 71.

Fergus Ewing: Amendments 67 to 70 substitute the word "practitioners" for "practices" in every occurrence in section 86. They are drafting amendments to achieve consistency with usage elsewhere in the bill.

Amendment 71 is a drafting amendment to substitute "litigation practitioners" for the fuller wording in section 86(4)(d). Amendment 95, which we have already debated and which affects section 101, introduces the definition of "litigation practitioner" because the term occurs in a few places.

I move amendment 67.

Amendment 67 agreed to.

Amendments 68 to 71 moved—[Fergus Ewing]—and agreed to.

Section 86, as amended, agreed to.

Sections 87 to 89 agreed to.

Section 90—Qualified persons

The Convener: The next group is on the description of licensed legal services providers. Amendment 72, in the minister's name, is grouped with amendment 365.

Fergus Ewing: Amendment 72 relates to the branding of licensed providers. The Law Society of Scotland has expressed concern that a licensed provider that primarily provides non-legal services, such as a large accountancy firm that employs only a few solicitors, could nevertheless brand itself as a firm of solicitors. I agree that that is a potential issue, so I have lodged amendment 72 to remove the exemption that allows licensed providers to call themselves solicitors or a firm of solicitors. Instead, the amendment requires a licensed provider to have the Law Society's written permission before so labelling itself.

Amendment 72 will also require the Law Society's council to make rules that "set the procedure for getting the Society's authority", and "specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority)".
That will allow licensed providers that are primarily firms of solicitors to be labelled as such, while preventing the use of that brand in a potentially misleading way.

11:45

Amendment 365, in the name of Robert Brown, is similar to amendment 72, in that it relates to branding. However, amendment 365 would put the onus on the Scottish ministers to decide what terms could be used by whom. It would allow ministers to designate terms, the use of which would be restricted to firms of solicitors or licensed providers, or different types of those entities.

It is not appropriate to include such a provision in the bill. It should be left to approved regulators, such as the Law Society, to determine which terms are acceptable. The Scottish ministers may, if necessary, provide guidance on the matter.

The main issue is not, as it says in amendment 365, whether the Government should be able to “designate such terms as it considers appropriate as being restricted in use”.

The term that we are worried about is “solicitor”. That is what we are concerned about. I recommend the approach in amendment 72, which deals specifically with the matter, and I invite Robert Brown not to move amendment 365.

I move amendment 72.

Robert Brown: I support amendment 72. However, it relates only to the term “solicitor”, as the minister said, which was not the limit of the committee’s concerns. We examined a number of different titles.

This is a tricky area, because we must consider how wide provision should be. The issue is branding. The public are entitled to know who are the people who use certain terms. There should be restrictions on who uses the term “solicitor”, but there are other terms. For example, is it valid for someone to describe their organisation as “solicitors and accountants” if it is made up of one solicitor and 20 accountants? That is probably in the range of what is all right, but what about the term “lawyer”, which is used quite widely, suggests quite a lot and gives a degree of confidence to people? As I understand it, the term can be used by people who have no particular qualifications.

There is a range of possibilities and an entity’s descriptive title is important in the public interest. That is a matter for the Scottish ministers, and the power in amendment 365 could be used with value in certain circumstances, although ministers might decide, on consideration, not to use it. Amendment 365 sets out a list of people whom ministers might consult—it does not include the Lord President, which is a matter that I might have to come back to.

There is a serious issue to do with people’s confidence in the system. I do not think that anyone can get too excited about the term “licensed legal services provider”, but terms such as “lawyer” are altogether different. The Government might well take an interest in the matter, in the public interest.

The Convener: There is nothing wrong with amendment 72, but Robert Brown is right to raise an issue that caused the committee considerable concern at stage 1. For the public, the term “lawyer” covers a multitude of tasks—and indeed sins. It can be used collectively, it is occasionally used pejoratively and it can be used in respect of a person who has the most remote connection with legal services.

Therefore, there is at least an argument for tightening things up, so that what is described as a lawyer is what members understand by the term. We must recognise that the public do not always have the knowledge that members have as a result of our activities on the committee, so protection might be necessary.

Amendment 72 is unobjectionable, but I will be interested to hear Mr Ewing’s response to Mr Brown. I suspect, as I think that Mr Brown does, that a little more work is needed on amendment 365.

Fergus Ewing: The debate has been useful. It is clear that the greatest concerns rightly focus on LSPs that it is plain are largely accountancy firms calling themselves solicitors. Amendment 72 deals with that, and I am grateful to members for their support. The question is whether we need to go further than simply protecting the use of the term “solicitor”. It is a reasonable debate, and I will respond as follows.

First, although solicitor is a species of the genus lawyer, it is recognised in law. The term “solicitor” is protected by law; one cannot call oneself a solicitor if one is not, and it is an offence under the 1980 act to do so. As the convener rightly says, the word “lawyer” is a much wider term that encompasses a variety of people. For example, a paralegal could legitimately say, “I am a lawyer”, as could an advocate or a barrister. Others might claim, with some legitimacy, the use of the term. It is not a term for which, as I understand it, there is any particular existing statutory protection.

Given that situation, it is fair to say that the issues that Robert Brown and the convener rightly raise go somewhat beyond the scope of what we have been considering. We are happy to examine the matter with the Law Society of Scotland and to consider specifically whether anything else needs to be done, and can be done in the bill. I am not
convinced that it can, but it would probably require the 1980 act to be amended, which would need fairly detailed consultation, including with the UK Government.

It is perhaps analogous to the issue of whether the term “accountant” is protected. As I understand it, the use of that term is not protected by ICAS, and covers chartered accountants, certified accountants and those who may not have any particular qualifications. From time to time that has been an issue with ICAS, which rightly feels that there should be protection of the word “accountant”.

I am happy to go away and consider the issue further with the Law Society of Scotland. There is a fair gap between stage 2 and stage 3 proceedings. I am not convinced that we would be able to grapple with and resolve the issue at stage 3, but I am willing to examine it with members and the Law Society. On that basis. I hope that members will—and I urge them to—support amendment 72. Perhaps Robert Brown would be willing not to move his amendment, on the basis of my assurances that we will get back to the committee on those matters.

Amendment 72 agreed to.

The Convener: The next group is on practising rules. Amendment 73, in the name of the minister, is grouped with amendments 359 to 361 and 74.

Fergus Ewing: Amendment 73 will amend section 65(1) of the Solicitors (Scotland) Act 1980—which provides the interpretation of terms that are used in that act—by adding references to the Legal Services (Scotland) Act 2010 and licensed providers. Amendment 74 is a drafting amendment.

Amendments 359, 360 and 361, in the name of Bill Aitken, would amend the Solicitors (Scotland) Act 1980 and provide that a solicitor’s practising certificate must be suspended if he or she were convicted of dishonesty or were in prison, or if a disqualification order under the Company Directors Disqualification Act 1986 were made against him or her, although the solicitor may have the practising certificate reinstated when the disqualification order ceased to have effect.

The Law Society of Scotland submitted to the Scottish Government various proposals for amendments to the 1980 act, which the society described as being necessary technical amendments. Accordingly, I gave assurances to the committee that any changes to the 1980 act would be technical in nature, and limited to those that we considered to be necessary. I have lodged a number of amendments to respond to the Law Society’s concerns.

However, I consider that amendments 359, 360 and 361, which mirror those that the Law Society suggested, represent a change in policy; they are not necessarily technical amendments. In addition, the Law Society did not supply evidence to indicate that there is a problem with the provisions in the 1980 act as it stands, and I am not aware of any consultation on those matters within or outwith the legal professions.

I consider there to be significant issues with amendments 359, 360 and 361.

The Scottish Solicitors Discipline Tribunal already has the power to suspend the practising certificate of any solicitor who is convicted of an act involving dishonesty or who is sentenced to a term of imprisonment under section 53 of the 1980 act. Amendment 359 would make such suspension automatic and would remove the entitlement to a hearing and the right of appeal to the court. It is not appropriate to make such a substantial change without considering fully the implications of, and examining the rationale behind, the Law Society’s request.

Amendment 360 would provide for a similar suspension of a practising certificate in the event that a solicitor was subject to a disqualification order made under the Company Directors Disqualification Act 1986. There is a wide range of reasons for such disqualification orders to be made, and although they all undoubtedly make one unfit to be a director of a company, it is not immediately clear that they all necessarily make one unfit to be a solicitor. If an issue exists with that, the Law Society ought to provide much more information and appropriate consideration should be given to whether such a change is truly necessary.

Furthermore, there do not appear to be any provisions to bring such suspensions to an end. Under amendment 360, if a solicitor was sentenced to imprisonment but was subsequently acquitted, or his or her sentence reduced to a non-custodial punishment, there would be no means by which to apply for termination of the suspension. The absence of such a provision raises significant questions about the amendments’ compatibility with article 1 of protocol 1 of the European convention on human rights.

Consequently, although I agree that the amendments raise important issues, I cannot support them. The 1980 act has been in operation for 30 years. I am not aware that there have been any problems in the area and want to consider the issues in much greater detail before committing to such a significant change in policy. Of course, I am happy to discuss that with the Law Society before stage 3.
I move amendment 73.

The Convener: The two amendments in the group that I lodged are, as the minister said, Law Society amendments. Throughout consideration of the bill, one of our primary concerns has been to ensure that it is as tight as possible. We do not want a situation whereby—this has been repeated throughout arguments about a number of sections of the bill—people of dubious character come into the profession, and we want to ensure that any actions that we take through the legislation strictly uphold the integrity of the Scottish legal profession. Fortunately, that integrity has not often been called into question, so we can be reasonably relaxed.

However, the purpose of amendment 359 is to ensure that when a court has given a custodial sentence, and bearing in mind the fact that these days it is virtually impossible to get a custodial sentence in certain circumstances, anyone who has been given a custodial sentence will have committed a serious offence. I thought that the provisions in amendment 359 would be a useful addition to the armoury that we are using to maintain the integrity of the profession that we all value. The wording of amendment 359 is the same as that in section 53(1)(b) except that it does not specify that the term of imprisonment must be not less than two years.

Amendment 360 deals with the problems that could arise under the companies acts, and the arguments are similar.

I have listened carefully to what the minister said, particularly about compliance with article 1. That is a significant argument. I have also taken on board the minister’s undertaking that the matter can be re-examined. In the circumstances, I will not move amendments 359 and 360.

12:00

Fergus Ewing: I have undertaken to discuss the matter with the Law Society before stage 3, if that is desired. I am happy to do that.

Amendment 73 agreed to.

Section 90, as amended, agreed to.

Section 91—Changes as to practice rules

Amendments 359 to 361 not moved.

Amendment 74 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 362 in my name is in a group with amendment 363. It is basically a technical amendment in respect of the 1980 act. Given the previous arguments, I will not move amendment 362, so further debate would be academic. The same arguments apply to some extent to amendment 363, in respect of which I think the definition has been dealt with elsewhere.

Amendments 362 and 363 not moved.

Section 91, as amended, agreed to.

After section 91

The Convener: Amendment 75, in the name of the minister, is in a group on its own.

Fergus Ewing: Our intention when drafting the bill was to ensure that charitable bodies are not burdened by unnecessary regulation and cost; it was not to restrict the way in which organisations such as citizens advice bureaux can operate. However, Citizens Advice Scotland raised concerns about the inability of bureaux to employ solicitors directly, and concerns about wider implications were also raised by the Justice Committee.

We met CAS on 12 February to discuss the matter in more detail. It made it clear that, rather than their becoming involved in the new regulatory scheme, it wants provision to simply allow citizens advice bureaux to employ solicitors directly. Although CAS encourages solicitors to work for bureaux on a pro bono basis, it wants to be able to pay solicitors for the provision of legal services to members of the public if they are not able to encourage them to provide their services for free.

CAS is prohibited from employing solicitors by section 26(1) of the Solicitors (Scotland) Act 1980, which makes it an offence for any solicitor, upon the account or for the profit of any unqualified person, to, for example, act as an agent in any court proceedings or prepare certain writs. However, law centres are currently able to employ solicitors, as the result of a specific exemption in section 26(2) of the 1980 act. I have decided that a similar exemption for CABx is the most effective way of allowing them to do the same. Amendment 75 will resolve that issue without involving citizens advice bureaux in the new regulatory regime, with the regulatory and cost burdens that that would entail. It will amend the 1980 act so that the general prohibition in section 26(1) does not apply to a solicitor who is employed by an individual bureau, thereby allowing citizens advice bodies to employ solicitors. It defines a citizens advice body as a non-profit-making body that has

"the sole or primary objective of providing legal and other advice (including information) to the public", without charge. The intention is that that definition will capture CABx and similar bodies. However, should the definition be too broad or too narrow, there is provision for the Scottish ministers to make regulations altering the definition, after consulting the Lord President, the Office of Fair Trading and other appropriate organisations.
I move amendment 75.

Amendment 75 agreed to.

The Convener: Amendment 208, in the name of the minister, is grouped with amendment 388.

Fergus Ewing: Amendments 208 and 388 will implement the recommendation that was made in the “Report of the Scottish Civil Courts Review” that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only in circumstances in which the court considers that such representation would help it. The amendments will amend the Court of Session Act 1988 and the Sheriff Courts (Scotland) Act 1971 to allow the Court of Session to make appropriate rules of court to permit a lay representative, when appearing along with a party litigant, to make oral submissions to the court on the party’s behalf. That is the first recommendation of the “Report of the Scottish Civil Courts Review” that requires that primary legislation be implemented.

I move amendment 208.

Amendment 208 agreed to.

Amendment 388 moved—[Fergus Ewing]—and agreed to.

Amendment 210 moved—[Fergus Ewing].

The Convener: Amendment 210A, in my name, is grouped with amendments 210B, 211A, 364, 366 and 370. Amendment 210A addresses the somewhat vexed question of the guarantee fund. Although there may be differences in nuance among us, the political view—indeed, the external view—is clearly that there must be a guarantee fund. In the absence of the ability to fund us in other directions, with insurance underwriters unable to provide some form of insurance cover—apart from anything else, the ability to insure against one’s own fraud indicates a fairly novel approach to life—there is no apparent answer apart from the utilisation, to some extent, of the Law Society guarantee fund as it exists at the moment.

For its part, the Law Society has expressed some unease about the purpose behind amendment 210 and the related amendments. It seems that, if the Law Society fund must be utilised in providing what we all agree is necessary protection to the consumer, it should have some input to regulation of individuals who have the potential to have a negative impact on the operation of that fund.

I hope that the matter might be agreed further down the road. However, having considered the matter at considerable length, I do not see any way round it. We must have the appropriate protection in place, and I can come up with no reasonable solution other than the Law Society fund. At the same time, I recognise the Law Society’s anxieties and concerns that we could have an influx into the profession, which could, in certain circumstances—although there is no need to exaggerate the argument—result in the fund being left vulnerable if the Law Society did not have the power to regulate in that respect.

I move amendment 210A.

Robert Brown: This is an unusual process in which we are going back to a previous group of amendments and we are apparently considering amendments to an amendment that we have debated, but not yet voted on. I am not certain that I follow the interrelation with the 1980 act, as the issue is a bit complicated in that regard.

I support the aim of amendment 210B to restrict the operation of the fund to the Law Society. Nevertheless, given last week’s votes, I wonder whether it might be cleaner to insert a clear requirement at stage 3 for a body wishing to be an approved regulator to have guarantee fund arrangements. With respect, I do not altogether accept your comments about that, convener. The insurance aspect is straightforward, and there is no miracle solution in that direction. However, if accountants, for instance, wished to play a regulatory role, I cannot see any particular reason why they could not provide a guarantee fund arrangement of their own. The same might be said about other parties.

As I said last week, if other bodies wish to regulate but cannot provide a guarantee fund arrangement because of their size or whatever, we have to question whether they ought to be in the regulatory business in the first place. I have some scepticism regarding the underlying regulatory competition issues.

I have seen the letter from the Law Society of Scotland, which seems to be a little bit confused when it comes to the principle. I am not prepared to put into the bill something that has not yet been worked out, or that may not be satisfactory. We all agree that there must be guarantee fund arrangements for such circumstances, but let the minister sort out a properly thought-out proposal with the profession that could be provided for at stage 3. We have plenty of time for that, and the committee can be involved in the process over the recess if necessary.

My view in principle remains that, if a body wishes to regulate, it should set up its own guarantee fund arrangement. If it cannot do so, it might be too small to regulate in the first place. There is no public interest that requires special arrangements to ensure regulatory competition. I will oppose amendment 210. I am happy to support the convener’s amendments to improve it,
but I will be voting against amendment 210 if it comes to the vote.

Fergus Ewing: I very much welcome the convener’s statement that there must be a guarantee fund. That principle is plainly accepted; I reached it at the very first meeting that I had about the bill. I undertook during stage 1, when giving evidence and in my speech in the chamber, that there must be a guarantee fund. There must be protection for the public against fraud by LSPs, as there is for solicitors. We all support that principle.

Amendments 210A, 210B and 211A, in the name of the convener, seek to limit the use of the guarantee fund to licensed providers that are regulated by the Law Society of Scotland, whereas my amendment 210 would allow all licensed providers to use the fund.

There is agreement among the committee, and among most other bodies of people whom I have consulted, that people who suffer pecuniary loss as a result of fraud while receiving legal services from a licensed provider should have recourse to the same level of compensation arrangements as are provided for by the guarantee fund.

The convener indicated that the guarantee fund is the only practical option. We reached that conclusion, as I indicated last week, after considering the alternatives. It is worth repeating that the guarantee fund is a statutory fund. It does not belong to the Law Society—it was set up under statute and is administered by the Law Society. It is a standalone fund. Were the Law Society to be required to set up a new fund, it would find it as difficult as anyone else. So, too, would accountants. Setting up a multimillion-pound fund to guarantee against fraud is an extremely costly business. That is why the guarantee fund is the only practical option.

There is great force behind the proposition that allowing licensed providers to use the guarantee fund would pose little risk, partly because of the size of the firms that are likely to become licensed providers and the historically low number of claims against such firms. That would bring with it the happy result that the guarantee fund would be in receipt of more contributions—firms would be required to pay into the fund but would not be subject to outgoings in claims against the fund. In other words, the use of the fund has potential benefits. Indeed, the record clearly shows that. Since last week, when I said that I was not certain about the matter, I have looked into it, and the record of claims shows that they tend to involve smaller firms—sadly. There are, therefore, potential benefits from having the guarantee fund.

It has even been suggested that there could be a substantial reduction in the levy of the guarantee fund, taking into account the developments that we are discussing, as well as the pattern of claims over the past couple of years and the size of the fund. That could be beneficial to the generality of solicitors. It should be noted that the guarantee fund covers all solicitors and will continue to do so, whether or not amendments are made to extend cover to licensed providers.

12:15

I appreciate the concerns that have been expressed and make clear that this is the most important unresolved issue. We are in detailed discussion with the Law Society about the matter and have made our views clear to it. We do not think that other regulators would be able to establish a new fund. Were that a requirement, it is unlikely that there would be any other regulators. I appreciate that there are concerns about the matter and will endeavour to establish an agreed approach to the use of the guarantee fund in advance of stage 3.

The Law Society administers the fund, so it has the controls that arise from that. The society deals with claims and considers them carefully; it will continue to do so, no matter where claims come from. As matters rest, the society will have that element of control, as a watchdog and administrator, to ensure that no improper or invalid claims are accepted. As long as it has that responsibility, it will seek to continue to discharge it.

Following the convener’s remarks, I am happy to consider additional provisions to provide the Law Society with additional comfort on the matter. For example, it may be possible to confer limited monitoring functions on the society, so that it can ascertain whether everything possible is being done to prevent claims on the guarantee fund by licensed providers that it does not regulate. That could be the subject not only of further discussion but of amendments at stage 3. I hope that that is helpful to members.

Having addressed the most important amendments in the group, I turn to those that remain. Amendments 364, 366 and 370, along with various other suggested amendments to the Solicitors (Scotland) Act 1980, were proposed to me by the Law Society of Scotland some time ago. The society described them as necessary technical amendments. Accordingly, I gave assurances that any changes to the 1980 act would be technical in nature and limited to those that we considered to be necessary. However, amendments 364, 366 and 370 are not simply technical amendments—they represent a significant change of policy. The Law Society has not supplied evidence to indicate that there is a problem with the provisions of the 1980 act as it
stands. I am not aware of any consultation on these matters within or outwith the legal profession.

Amendment 364, in the name of Bill Aitken, would insert amendments into paragraph 1 of part 1 of schedule 3 to the 1980 act. The effect of the amendment would be to allow the Law Society to collect contributions to the guarantee fund at an entity level, rather than from individual partners in solicitors firms and sole practitioners. To some extent, that would be a move away from individual regulation to entity regulation. At present, all principals in a solicitor firm, including sole practitioners, pay into the guarantee fund as individuals. I am not aware of any difficulties with the arrangement, or of any consultation that has taken place on the proposed changes.

I have said all along that those firms that wish to remain as traditional practices will be unaffected by the bill, which is permissive in nature. Amendment 364 would affect such practices, regardless of whether they chose to adopt new business structures. I oppose the amendment on the ground that it involves a significant change of policy that has not been consulted on and which would affect those solicitors who chose to remain in traditional practices.

Amendment 366, in the name of Bill Aitken, would amend section 43 of the 1980 act so that the purpose of the guarantee fund would be to make grants to compensate not only persons who had suffered loss owing to dishonesty, but those who were “likely to suffer loss”. Amendment 370, in the name of Bill Aitken, would amend part 1 of schedule 3 to the 1980 act by asserting new paragraph 4A, which would allow the council to

“make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council.”

The amendments would change fundamentally the purpose of the guarantee fund. The 1980 act states that the fund is

“for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of” solicitors. In other words, we are talking about fraud and the purpose of the fund is to provide compensation for fraud, not to grant loans that might not be paid back. The effect of the two amendments would be to allow the council to make loans to judicial factors for investigating breaches of the accounts rules and to make grants to those who are “likely to suffer loss”. That is absolutely not the purpose of the guarantee fund. It does not compensate for negligence on the part of a solicitor or fund the investigation of accounts rules breaches, and it is not for instances of possible fraud. Its sole purpose is to compensate those who have had the misfortune to be the victims of actual fraud.

For those reasons and because the amendments represent a fundamental change of policy, I cannot support them. I invite the convener to withdraw amendment 210A and not to move his other amendments.

The Convener: It has been useful to have this argument, out of which has come a complete reaffirmation of the political will that there must be a fund. I listened with interest to Robert Brown’s arguments, which were cogent as always, on the possible alternatives to using the Law Society fund. Although I accept that there might be an argument that some incomers could arrange for a suitable fund, it could not be done without complex negotiations, study and all that goes with that. The Law Society fund is a mature fund, as it has been described by certain occupations, and has been running satisfactorily for several years. It strikes me that we should build on that fund, as to go down any other route would be unnecessarily complex and convoluted.

I listened with considerable interest to what the minister said about the reassurances that the Law Society undoubtedly needs. The ideal situation, on which most members of the committee agree, would be to have in place the fund as agreed unanimously, but to increase the assurance that the Law Society fund would not be prejudiced by giving the society powers to carry out some regulation. On the basis of the minister’s undertakings that there will be further discussions and that the appropriate amendments will be lodged at stage 3, I will not press amendment 210A and related amendments. However, firm assurances and discussions will be required on the matter before stage 3.

On amendment 370, I listened to what the minister said about loans. We should take a commonsense approach to carry out that kind of transaction with the smallest possible financial outlays on the part of those intervening. However, I accept that if no fraud is involved, my argument outlays on the part of those intervening. However, I accept that if no fraud is involved, my argument to use the fund loses validity. I will not move amendment 370. However, I still think that there is an argument for amendment 364 being accepted, so I will move it.

Amendment 210A, by agreement, withdrawn.
Amendment 210B not moved.

The Convener: The question is, that amendment 210 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Amendment 210 agreed to.

Amendment 211 moved—[Fergus Ewing].

Amendment 211A not moved.

The Convener: The question is, that amendment 211 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

Against
Brown, Robert (Glasgow) (LD)

The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Amendment 211 agreed to.

The Convener: The next group is on a cap on individual claims. Amendment 212, in the name of the minister, is the only amendment in the group.

Fergus Ewing: The Law Society of Scotland has made representations to me that the guarantee fund in its current form, which involves potentially unlimited liability, is unsustainable. If a multimillion-pound, Enron-type fraud claim on the guarantee fund was successful, the fund would be emptied, but more worryingly, every partner in the private law firm would be liable to pay any remainder, which could put them and their firms out of business. In addition, we consider that it is more important that individuals and small to medium-sized businesses are compensated rather than multimillion-pound firms. Consequently, I lodged amendment 212, which provides a cap on the pay-out for each individual claim.

Following its meeting on 1 April 2010, the Law Society’s guarantee fund committee recommended to the society’s council a cap of £1.25 million per claim. The Solicitors Regulation Authority in England and Wales limits pay-outs to £2 million. In Northern Ireland, the cap is £750,000, and in the Republic of Ireland it is €700,000, which I am told is just over £580,000.

The Law Society has assured me that a cap of £1.25 million per claim is appropriate. The figure was arrived at after consideration of a number of relevant factors such as consistency with other bodies, the likelihood of a claim for a sum approaching that figure, and the need to ensure that the figure does not prejudice smaller businesses that rely on having the guarantee fund in order to be able to carry out certain types of business. Other factors in arriving at the £1.25 million per claim figure were the fact that the highest individual pay-out in the past eight years was £215,000 and the fact that the average pay-out in the years 2005 to 2009 was about £11,000 to £12,000, which is obviously substantially less than the proposed cap of £1.25 million.

In summary, although robust consumer protection is obviously of paramount importance, an uncapped fund could destroy the legal profession in Scotland. Amendment 212 will ensure that consumers continue to be protected while largely removing that risk.

I move amendment 212.

Robert Brown: I agree with the amendment and I have no particular difficulty with the cap that has been suggested. However, I gather that it has been suggested that the Government will consider an overall cap—in other words, not a cap for individual claims but a cap on the corporate total that arises from an individual deficiency when a number of clients claim. I have some difficulty with that. If there was a limit of, say, £10 million and 12 people appeared with a claim of £1 million each against the fund, I find it difficult to see how we could work that through. Would the first 10 get a settlement and the next two not? How would we time it? There are some problems with the idea of an overall cap. Were it to come back at stage 3, the practicality of such an arrangement would have to be looked at carefully.

The Convener: Minister, you will no doubt address that point from Mr Brown.

Given that the amounts that have been claimed are well below the proposed limit of £1.25 million, we can be reassured that a problem will not arise. It is difficult to envisage an Enron-type circumstance obtaining in Scotland, so we should perhaps not overdramatise that possibility. That said, the consequences for individuals could be serious in respect of claims at the higher level. What we are seeking to do is just the same as any insurer would do in respect of an indemnity limit under a public liability insurance policy, for example, so it is unobjectionable.
Some reply has to be made to Mr Brown about the potential difficulties in respect of a limit being applied where a number of claims arise out of the same occurrence and the aggregate goes beyond the £1.25 million.

12:30

**Fergus Ewing:** I am grateful to the committee for its support. Certainly no one expects that there should be an Enron-type claim or a Bernie Madoff-type claim, but I guess that in the United States of America they were not expecting such things to happen either, but they did. We cannot exclude the possibility of such ghastly financial frauds taking place on our shores either, which is one of the reasons why we have agreed with the Law Society’s argument to support a cap. I am grateful for members’ support for that proposal.

Mr Brown’s remarks were addressed to an amendment that is not before us, which would seek to provide a maximum limit—I think on a per annum basis—on the total amount that can be drawn from the guarantee fund. My recollection is that the Law Society might be proposing the figure of just over £10 million per annum. Mr Brown has reservations about such an argument. One hopes that there is not likely to be too serious an eventuality.

I anticipated that this issue might come up, so I looked at the levels of claims and noticed that the value of claims in 2008-09 was £1.7 million in total. Perhaps more worryingly, in 2006-07, the value of claims received—not claims admitted—was £4.29 million. In that year, the figure for claims admitted was only £255,000 and for claims withdrawn was £772,000. Plainly, a sum of £4 million is a very large amount of money to be made in one year by way of claims. I stress that those are not necessarily—and are unlikely to be—claims that are admitted.

Nonetheless, it is reasonable for the Law Society to put forward the idea of having a cap. However, we do not think that the argument should be supported, for the reasons that I have outlined.

*Amendment 212 agreed to.*

*Amendment 365 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 365 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

**Against**

Aitken, Bill (Glasgow) (Con)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 0. The casting vote goes against the amendment.

*Amendment 365 disagreed to.*

**The Convener:** Having listened to the discussion, I think that the case for amendment 365 is very arguable. It strikes me that one can go only so far in this respect. If the wording had been tightened up, I might have considered the argument in even greater depth and I might have been persuaded. Mr Brown can do his homework over the summer.

We have been sitting for well over three hours, which I think is long enough given that we will have to revert to this next week. We have made considerable progress this morning. I thank the minister and his colleagues for their attendance.

12:34

Meeting suspended.
Legal Services (Scotland) Bill

4th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Sections</th>
<th>Schedules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 29</td>
<td>1 to 6</td>
</tr>
<tr>
<td>30</td>
<td>7</td>
</tr>
<tr>
<td>31 to 52</td>
<td>8</td>
</tr>
<tr>
<td>53 to 101</td>
<td>9</td>
</tr>
<tr>
<td>102</td>
<td>Long Title</td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 92

Fergus Ewing

76  Before section 92, insert—

&lt;**Acting as approved regulator**

After section 1 of the 1980 Act insert—

**“1A Power to act as statutory regulator”**

The Society may—

(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,

(b) do anything that is necessary or expedient for the purposes of doing so.”

Robert Brown

76A  As an amendment to amendment 76, line 7, at end insert—

&lt;  ( ) act as an approving body within the meaning of Part 3 of the 2010 Act,&gt;

Bill Aitken

364*  Before section 92, insert—

&lt;**Scottish Solicitors Guarantee Fund**

In paragraph 1 of Part 1 of Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act—

(a) in sub-paragraph (2A) after “are” insert “(a)” and after “practices” insert—

“(b) partners in a registered firm of solicitors;
(c) in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practicing under the solicitors own name or a solicitor otherwise practicing as a sole practitioner.”

(b) after sub-paragraph (2B) insert—

“(2BB) Subject to the provisions of this Act, there shall be paid to the Society on behalf of the Guarantee Fund by every registered firm of solicitors in respect of each year during which, or part of which, it is registered under section 34(1AA) a contribution (hereafter referred to as an “annual practice contribution”) in accordance with the scale of such contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) after “corporate contributions” insert “and the annual practice contribution”,

(ii) after “directors” insert “, partners”,

(iii) after “practices” insert “or registered firms of solicitors”, and

(d) in sub-paragraph (4), after “practice” insert “and no annual practice contribution by a registered firm of solicitors”,

(e) in sub-paragraph (5)—

(i) after “corporate contribution”)” insert “and upon every registered firm of solicitors a contribution (hereinafter referred to as a “special practice contribution”)”,

(ii) after “corporate contribution” (where it appears for the second time) insert “ and a special practice contribution”,

(f) in sub-paragraph (8), after “incorporated practice” insert “or of a registered firm of solicitors”,”>

Section 92

Bill Aitken

389 In section 92, page 54, line 22, leave out <“or appointed”> and insert <“, co-opted or appointed”>

Bill Aitken

390 In section 92, page 54, line 27, after <election> insert <, co-option>

Bill Aitken

391 In section 92, page 54, line 30, after <election> insert <or co-option>

Bill Aitken

392 In section 92, page 54, line 34, after <electable> insert <or eligible to be co-opted>

Fergus Ewing

77 In section 92, page 55, line 3, leave out <objectives> and insert <functions>
Fergus Ewing

78 In section 92, page 55, leave out lines 4 to 27

After section 92

Bill Aitken

366 After section 92, insert—

<Guarantee Fund

In section 43 (guarantee fund) of the 1980 Act—

(a) in subsection (2) for “the Guarantee Fund shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of” substitute “where the Council are satisfied that a person has suffered or is likely to suffer loss in consequence of dishonesty on the part of any person or body mentioned in subsection (2A), the Council may make a grant or loan out of the Guarantee Fund for the purpose of relieving that loss on such terms and conditions as the Council may determine.

(2A) The persons or bodies mentioned in this subsection are—”,

(b) in subsections (3), (4) and (5), after “grant” wherever appearing, insert “or loan”,

(c) after subsection (3) insert—

“(3A) Where an application for a grant or loan is made in any case which does not fall within subsection (3), the Council may, as it thinks fit, grant or refuse that application but, where it refuses the application, the Council shall give reasons to the applicant for doing so.

(3B) Where the Council grant that application, the Council shall determine the amount of the grant or loan and the terms and conditions upon which it is made.”>

Bill Aitken

367 After section 92, insert—

<Safeguarding interests of clients in certain other cases

In section 46(3A) (safeguarding interests of clients in certain other cases) of the 1980 Act—

(a) for “apply to the court” substitute “make”,

(b) from “leave” to the end substitute “the approval of the Council”>
After section 92, insert—

<Subscription to the Law Society>

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 6A insert—

“6B(1) Every practice shall, for each year, pay to the Society such subscription as may be fixed from time to time by the Society in general meeting and different subscriptions may be fixed for different kinds of practices.

(2) The subscription shall be payable by the practice at the time of its application for registration or recognition.

(3) If a practice is first registered or recognised after the beginning of any year, the subscription payable by it shall be calculated by reference to the number of months remaining in that year after it is registered or recognised.

(4) In this paragraph and in paragraph 6C—

“practice” means a registered firm of solicitors or an incorporated practice; and
“year” means the period of 12 months commencing on 1 November or such other day as may be fixed by the Council.

6C(1) The Society may, in addition to the subscription imposed paragraph 6C(1), impose in respect of any year a special subscription on all practices of such amount and payable at such time and for such specified purposes as the Society may determine in general meeting.

(2) The Society may determine in general meeting that different special subscriptions may be imposed under subparagraph (1) in respect of different kinds of practices or that the special subscription shall not be payable by a kind of practice.

(3) No imposition may be made under subparagraph (1) unless a majority of members voting at the general meeting at which it is proposed has, whether by proxy or otherwise, voted in favour of its being made.”>

After section 92, insert—

<Charging for services by the Law Society>

In Schedule 1 (the Law Society of Scotland) to the 1980 Act, after paragraph 10 insert—

“10A(1) The Society may, in accordance with a scheme of charges fixed from time to time by the Council—

(a) charge for any services which it provides in the course of carrying out its functions; and

(b) demand and recover those charges from any person to whom it provides those services.

(2) The Council may fix charges in a scheme under subparagraph (1) by reference to such matters, and may adopt such methods and principles for the calculation and imposition of the charges, as appear to it to be appropriate.”>
Bill Aitken

370 After section 92, insert—

<Loans from the guarantee fund

In Part 1 of Schedule 3 (the Scottish solicitors guarantee fund) to the 1980 Act, after paragraph 4 insert—

“4A The Council may make loans from the Guarantee Fund to judicial factors appointed by the court on the petition of the Council.”>

Section 93

Fergus Ewing

79 In section 93, page 56, line 2, at end insert—

<(  ) Accordingly, the Council (acting in any other capacity) must not interfere unduly in the regulatory committee’s business.>

Fergus Ewing

80 In section 93, page 56, line 3, at end insert—

<(  ) the committee’s membership may include persons who are not members of the Council,>

Fergus Ewing

81 In section 93, page 56, line 4, at end insert—

<(  ) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1),>

Fergus Ewing

82 In section 93, page 56, line 7, at end insert—

<(  ) a sub-committee—

(i) is also subject to those rules,

(ii) may be formed without the Council’s approval.>

Fergus Ewing

83 In section 93, page 56, line 8, after <committee> insert <(or a sub-committee of it)>
Fergus Ewing

84 In section 93, page 56, line 10, at end insert—

<( ) prescribe a maximum number of members that the regulatory committee may have,>

Fergus Ewing

85 In section 93, page 56, line 17, at end insert <(and take account of sections 4 and (Consultation by Ministers) of the 2010 Act)>

Fergus Ewing

213 In section 93, page 56, line 29, after <agents> insert <or will writers>

Fergus Ewing

86 In section 93, page 56, line 29, leave out <Legal Services (Scotland) Act 2010> and insert <2010 Act>

Fergus Ewing

87 In section 93, page 56, line 35, after <of> insert—

<( ) setting standards of qualification, education and training,
( ) keeping the roll,
( ) administering the Guarantee Fund,
( )>

After section 93

Fergus Ewing

88 After section 93, insert—

<The 1980 Act: further modification

Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—

“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.

>
Fergus Ewing

After section 93, insert—

<Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—
(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—
“(2) But the Council are required to remove the name or annotation only if they are satisfied that—
(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.

(2) In section 12C (removal of name from register on request) of the 1980 Act—
(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “, on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—
“(2) But the Council are required to remove the name or annotation only if they are satisfied that—
(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.>

James Kelly

After section 93, insert—

<Representative functions of the Law Society

(1) The 1980 Act is amended as follows.

(2) In section 3(1) (establishment and functions of Council of the Law Society), at the beginning insert “Subject to section 3C,”.

(3) In section 3A (discharge of functions of Council of the Law Society), in subsection (11), after “section 3B” insert “and section 3C”.

(4) After section 3B (regulatory committee) insert—

“3C The representative functions of the Society

(1) The representative functions of the Society shall not vest in, or be exercised by, the Council but shall be exercised on behalf of the Society by a Representative Council.

(2) Membership of the Representative Council shall be elected in accordance with the provisions of the scheme made under paragraph 2(a) of Schedule 1.

(3) Only solicitors may be elected to the Representative Council.
The Chair of the Representative Council shall be the General Secretary of the Society who shall be elected in accordance with the provisions of the scheme made under paragraph 2(a) of Schedule 1.

The General Secretary of the Society may not, while holding that office, serve as President of the Society.

The Representative Council may arrange for any of its functions (other than excepted functions) to be discharged on their behalf by—

(a) a committee of the Representative Council;
(b) a sub committee of such a committee; or
(c) an individual (whether or not a member of the Society’s staff).

The Representative Council may, in exercise of the power conferred by subsection (6), impose restrictions or conditions on the body or person by whom the function is to be discharged.

An arrangement made under this section may identify an individual by name, or by reference to an office or post which the individual holds.

An arrangement under this section for the discharge of any of the functions of the Representative Council may extend to any of the functions of the Society which is exercisable by the Representative Council.

For the purposes of this section, “the representative functions of the Society” means the functions of the Society in carrying out the objects of the Society in promoting the interests of the solicitors’ profession in Scotland under section 1(2)(a).”

In Schedule 1 (the Law Society of Scotland)—

(a) in paragraph 2(a), after “the Council” insert “and the Representative Council”;
(b) in paragraph 2(d), after “sub-committees” insert “of the Council and of the Representative Council”; and
(c) in paragraph 3 after “Council” (wherever it appears) insert “or Representative Council”.

After section 94

Fergus Ewing

After section 94, insert—

Notification if suspension lifted

(1) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act, after subsection (5A) insert—

“(5B) On the occurrence of any of the circumstances mentioned in subsections (4) to (5A), the solicitor concerned must notify the Council in writing (and without delay).”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of the 1980 Act, after subsection (4) insert—
“(4A) On the occurrence of any of the circumstances mentioned in subsections (2) to (4), the lawyer concerned must notify the Council in writing (and without delay).”.

Bill Aitken

374 After section 94, insert—

<Complaints to Tribunal

(1) Section 51 of the 1980 Act (complaints to Tribunal), is amended as follows.

(2) In subsection (1A) for “in respect of” to the end substitute “made the Council (whether or not on behalf of any other person) against—

(a) a solicitor, whether or not the solicitor had a practising certificate in force at the time the conduct complained of occurred and notwithstanding that subsequent to that time the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice;

(b) a firm of solicitors, whether or not since the time of the conduct complained of there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;

(c) an incorporated practice, whether or not since the time of the conduct complained of there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) or has been wound up;

(d) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 and includes any such person, whether or not the person had acquired the right at the time of the conduct complained of and notwithstanding that subsequent to that time the person no longer has the right;

(e) a conveyancing practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

(f) an executry practitioner and includes any such practitioner, whether or not registered at the time of the conduct complained of and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

and any reference in Part IV to any of those persons or practices mentioned in paragraphs (a) to (f) shall be construed accordingly.”

(3) In subsection (2), after “that” insert—

“(a) a solicitor may have been guilty of professional misconduct or unsatisfactory professional conduct;

(b) a solicitor or”.>
Bill Aitken

375 After section 94, insert—

Procedure on complaints and appeals to Tribunal

(1) The 1980 Act is amended as follows.

(2) In section 52 (procedure on complaints and appeals to Tribunal), after subsection (3) insert—

“(4) For the avoidance of doubt, rules made by the Tribunal under subsection (2) may provide for the functions of the Tribunal to be exercised on behalf of the Tribunal, in relation to a particular case or part of a case—

(a) by any particular tribunal constituted in accordance with paragraph 5 of Schedule 4 to deal with that case or part;

(b) by the chairman or vice chairman of the Tribunal other than the functions of hearing and determining the merits of any case.”

Section 96

Fergus Ewing

379 In section 96, page 57, line 27, after <Scotland> insert <(including by reference to any relevant factor relating particularly to rural or urban areas)>

Section 97

Fergus Ewing

91 Leave out section 97 and insert—

Information about legal services

After section 35A of the 1986 Act insert—

35AA Information about legal services

(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—

(a) each of the bodies mentioned in subsection (3)(a) and (b) must—

(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and

(ii) give the Board a summary of the relevant facts.

(b) the body mentioned in subsection (3)(d) must—

(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and

(ii) give the Board a summary of the relevant facts.

(3) The bodies are—

(a) the Law Society,
(b) the Faculty of Advocates,
(c) the Scottish Court Service,
(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—
(a) section 1(2A),
(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.”.

Section 98

Fergus Ewing

92 In section 98, page 58, line 13, leave out <29(9),> and insert <29—
( ) in subsection (4), after “members” insert “, and the Scottish Ministers,”,
( ) in subsection (9),>

After section 98

Fergus Ewing

93 After section 98, insert—
<The 2007 Act: further provision

(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—
“(1A) The Scottish Ministers may make such further provision as, having regard to the effect of the Legal Services Act 2007 so far as concerning the subject matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider necessary or expedient in connection with this Act or any related provisions of the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after “section 78(1)” insert “or (1A)”.

Section 99

Fergus Ewing

94 In section 99, page 58, line 36, at end insert—
<( ) section 37(6)(a)(i),>

Fergus Ewing

214 In section 99, page 58, line 36, at end insert—
<( ) section 52(2A),>
In section 99, page 59, line 3, leave out <81(5)> and insert <81(5)(b)>

In section 99, page 59, line 3, at end insert—

<(  ) section (Regulatory schemes)(2)(f),
(  ) section (Ministerial intervention)(5)(b),
(  ) section (Step-in by Ministers)(1),>

After section 99

After section 99, insert—

<Further modification

(1) The Scottish Ministers may by regulations made by statutory instrument—
    (a) amend the percentage specified in section (Majority ownership)(1)(a), or
    (b) repeal section (Majority ownership).

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe
    that the effect of the amendment or (as the case may be) repeal would be—
    (a) compatible with the regulatory objectives, and
    (b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—
    (a) the Lord President,
    (b) the Law Society,
    (c) every approved regulator,
    (d) the OFT, and such other organisation (appearing to them to represent the interests
        of consumers in Scotland) as they consider appropriate,
    (e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made
    unless a draft of the instrument has been laid before, and approved by resolution of, the
    Scottish Parliament.>

Section 101

In section 101, page 60, line 7, at end insert—

<(  ) a reference to a litigation practitioner is to a person having a right to conduct
    litigation, or a right of audience, by virtue of section 27 of the 1990 Act.>
Schedule 9

Fergus Ewing
96 In schedule 9, page 79, line 17, at end insert—
<litigation practitioner>

Fergus Ewing
167 In schedule 9, page 80, line 9, leave out <outside> and insert <non-solicitor>

Fergus Ewing
216 In schedule 9, page 80, line 16, at end insert—
<approving body (of will writer) section (Approving bodies)>

Fergus Ewing
168 In schedule 9, page 80, line 17, after <and> insert <confirmation>

Fergus Ewing
217 In schedule 9, page 80, line 18, leave out <section 75> and insert <sections 75 and (Regulatory schemes)>

Fergus Ewing
218 In schedule 9, page 80, line 18, at end insert—
<will writer and will writing services section (Will writers and services)>
Legal Services (Scotland) Bill

4th Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the fourth day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Acting as an approved regulator**
76, 76A

**Council membership**
389, 390, 391, 392, 77, 78

**Safeguarding interests of clients**
367

**Law society – finance**
368, 369

**Regulatory committee**
79, 80, 81, 82, 83, 84, 85, 86, 87

**1980 Act - further modification**
88, 89, 90

**Representative functions of the Law Society**
373

**Complaints to tribunal**
374, 375

**Information about legal services**
379, 91

**2007 Act – minor amendments**
92, 93
Amendments already debated

Reference to non-solicitor investors
With 98 – 167

Licensed providers
With 39 – 94, 95, 96

Ownership of licensed providers
With 310 – 378

More about investors
With 174 – 214

Confirmation services – further requirements
With 181 – 166, 168

Will writing services
With 184 – 213, 215, 216, 217, 218

Guarantee fund
With 210A – 364, 366, 370
Present:

Bill Aitken (Convener) Robert Brown
Bill Butler (Deputy Convener) Cathie Craigie
Nigel Don James Kelly
Dave Thompson Maureen Watt (Committee Substitute)

Apologies were received from Stewart Maxwell.

**Legal Services (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 4).

The following amendments were agreed to (without division): 76, 389, 390, 391, 392, 77, 78, 79, 80, 81, 82, 83, 84, 85, 213, 86, 87, 88, 89, 90, 379, 91, 92, 93, 94, 214, 166, 215, 378, 95, 96, 167, 216, 168, 217 and 218.

Amendment 373 was disagreed to (by division): (For 3, Against 5, Abstentions 0).

Amendments 367, 368 and 374 were moved and, with the agreement of the Committee, withdrawn.

The following amendments were not moved: 76A, 364, 366, 369, 370 and 375.

Sections 94, 95, 100 and 102 and the long title were agreed to without amendment.

Sections 92, 93, 96, 98, 99 and 101 and schedule 9 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
Legal Services (Scotland) Bill:
Stage 2

10:11
The Convener: The principal business of the morning is item 2, which is consideration of the Legal Services (Scotland) Bill at stage 2. This is the fourth and final day of stage 2 proceedings on the bill. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by a number of officials.

Members should have copies of the bill, the fourth marshalled list and the fourth groupings of amendments for today’s consideration.

Before section 92
The Convener: Amendment 76, in the name of the minister, is grouped with amendment 76A.

The Minister for Community Safety (Fergus Ewing): Good morning. I think that another official, Andrew Mackenzie, is about to join us.

Following the introduction of the bill, there were some concerns that the Law Society of Scotland does not have the ability, under the Solicitors (Scotland) Act 1980, to become an approved regulator. Amendment 76 ensures that it is able to act as an approved regulator under part 2 of the bill, should the society apply and be approved as such by the Scottish ministers.

Amendment 76A, in the name of Robert Brown, would give the Law Society the power also to act as an approving body of confirmation agents and, I assume, following approval of amendments in relation to will writers, of will writers as well, under part 3 of the bill. However, because of the nature of the regulatory framework in part 3 of the bill, the Law Society cannot become such a regulator. In that respect, the Government believes that the amendment represents a misunderstanding of part 3 of the bill. In contrast to part 2, potential regulators of confirmation agents under part 3 will apply to regulate their own members in relation to such services. One cannot be a member of the Law Society without being a solicitor, and solicitors are already, of course, able to provide confirmation and will-writing services, so the amendment would have no effect.

Furthermore, it is our belief that Mr Brown’s amendment would require major further amendment of the 1980 act, but such amendment has not been brought forward. It would also mean that the Law Society would have to admit as members non-solicitors, which is something that neither we nor, we imagine, the Law Society would support.
For those reasons, we do not support amendment 76A. I respectfully invite Robert Brown not to move it.

I move amendment 76.

Robert Brown (Glasgow) (LD): First, I support amendment 76, as it seems entirely appropriate.

In the light of the minister’s comments, I will not move amendment 76A. However, what does the minister anticipate will happen as regards regulatory bodies—or approval bodies, if you like—with respect to will-writing and confirmation services? The intention behind amendment 76A was to address those aspects. I thought that it was perhaps unlikely that there would be a desire for a regulatory body to emerge in that regard and that it was perhaps necessary to provide a fallback position. I would be interested in the minister’s comments on how he sees that element developing in practice, because I have always thought that the Law Society would end up as the main regulator under most aspects of the bill, and it seems that in the areas that we are discussing there might well be reason to consider that possibility.

Amendment 76A not moved.

10:15

Fergus Ewing: I am grateful to Robert Brown for not moving his amendment 76A. In winding up, I will seek to respond to the fair question that he asked.

The approach that we have taken in the bill is not to specify which bodies should be the regulating and approving bodies. Instead, we have set out a framework that determines how the regulating and approving bodies will be selected. In other words, we have not said that the Law Society of Scotland will be the regulating body, although we expect it to apply to be that body, and we have not said which body will be the approving body. The Institute of Chartered Accountants of Scotland might well come forward as a possible approving body in respect of confirmation agents and services, given that that work is, arguably, of an accounting nature, particularly for the more complex estates for which inheritance tax is a significant issue.

Section 73 in part 3 sets out that an approving body is, for the purposes of that part,

“a professional or other body which is certified ... by the ... Ministers under section 74.”

Section 74 sets out the certification process, under which the Scottish ministers must be satisfied that the body is appropriate to be certified. Section 75 sets out what must be in the regulatory scheme that the approving body produces. It must encompass all the things that members would expect to be provided by an approving body to ensure proper standards—namely, training, a code of practice and professional indemnity for negligence. All those are set out as a framework in the bill. The bill does not specify which body should be an approving body, but we expect that ICAS might emerge as one.

I hope that that answers Mr Brown’s question. If members have any more questions now or during the summer recess, we will endeavour to provide comprehensive answers.

Amendment 76 agreed to.

The Convener: Amendment 364, in my name, has already been debated with amendment 210A. The matter is the subject of on-going discussion and requires to be addressed at stage 3. I will therefore not move amendment 364.

Amendment 364 not moved.

Section 92—Council membership

The Convener: Amendment 389, in my name, is grouped with amendments 390 to 392, 77 and 78.

My amendments 389 to 392 are all on a similar theme and will simply confirm what has been a de facto position for some years. From time to time, it is necessary for the Law Society to co-opt individuals on to its council, for example those who have expertise in a particular subject. The Law Society has been doing that for several years and there have been no problems, but there is a question as to whether the practice has statutory confirmation. Amendments 389 to 392 will provide that confirmation.

The minister’s amendments 77 and 78 are unobjectionable.

I move amendment 389.

Fergus Ewing: The amendments in the name of the convener would expressly allow the Law Society to permit the co-option of solicitor members on to its council. I understand that such co-option is provided for in the Law Society’s constitution and that currently a number of such members are on the council. However, given that we are amending the Solicitors (Scotland) Act 1980 to allow for the appointment of lay members to the council, I agree with the convener that an explicit reference to co-option in that act might be necessary for the sake of clarity and completeness. I therefore invite members to support the convener’s amendments.

Amendment 77 is a drafting amendment.

Amendment 78 will remove the regulation-making powers in section 92, “Council membership”. Those powers would have allowed
the Scottish ministers to influence the composition of the council of the Law Society of Scotland by prescribing the number or proportion of lay members and the criteria for their appointment and would have had an impact on the society’s representative functions. Some concerns were raised about those powers by members of the legal profession and the Law Society, with suggestions that they might threaten the independence of the legal profession. However, the regulation-making powers were always seen as a last resort and would not have allowed the Scottish ministers to dictate who was a member of the council.

As long as all regulatory functions are dealt with by a regulatory committee that has adequate levels of lay membership and is not subject to interference from the council, I consider the regulation-making powers in section 92 to be unnecessary. Therefore, amendment 78 will remove the relevant provisions. Several amendments that are to be discussed in a later group will ensure that lay persons are adequately represented when regulatory matters are being dealt with. Amendment 78 will remove a provision that was the source of some considerable objection by members of the profession.

I invite the committee to agree to amendments 77 and 78.

**The Convener:** As no other members want to speak to the amendments, I see no reason to wind up the debate.

*Amendment 389 agreed to.*

*Amendments 390 to 392 moved—[Bill Aitken]—and agreed to.*

*Amendments 77 and 78 moved—[Fergus Ewing]—and agreed to.*

*Section 92, as amended, agreed to.*

**After section 92**

**The Convener:** In view of on-going discussions, I will not move my amendment 366, which was debated with amendment 210A.

*Amendment 366 not moved.*

**The Convener:** The next group is on safeguarding the interests of clients. Amendment 367, in my name, is the only amendment in the group.

The purpose of amendment 367 is to empower the council to make grants or loans to a person who has suffered, or is likely to have suffered, loss by reason of a solicitor’s dishonesty.

When a judicial factor is appointed, there can be complications and short-term difficulties in enabling legitimate transactions to be settled timeously. It could be argued that such issues can result from the perceived risk of dishonesty that has necessitated the appointment, but at an early stage of an appointment the judicial factor might not be able to confirm that there has been dishonesty, in which case no grant can be approved. There is currently no means to enable the guarantee fund to assist in resolving the short-term funding difficulties that can arise as a result of the appointment, even though the guarantee fund has concluded that there was sufficient evidence of dishonesty at the practice. If the issue is not addressed, such matters could lead to claims for compensation against the fund.

I move amendment 367.

**Fergus Ewing:** Amendment 367, in the convener’s name, was proposed to me by the Law Society of Scotland. As we understand it, the amendment relates to the ability of the Law Society council to apply to the Court of Session for an order to prevent any payment from being made out of a solicitor’s account in the event that the solicitor in question has ceased to practise and the council is not satisfied that all relevant documents and money have been made available to clients. The amendment would alter the relevant provision in the Solicitors (Scotland) Act 1980 to give the council that power directly, without needing to make an application to the court. Such an amendment would be a substantial change in policy and would give significant new powers to the council without due consideration or consultation.

I listened carefully to the convener’s remarks and I understand that there is some potential substance to the issue that has been raised, but we do not believe that such a major change is appropriate without taking the time fully to consider the implications and to allow for a perhaps more wide-ranging consultation within the legal profession.

We informed the Law Society prior to stage 2 that we would not be lodging such an amendment. At this time, we do not support amendment 367 and we respectfully invite the convener to withdraw it. If there is a legitimate issue that requires to be addressed, I am happy to discuss it further with the Law Society in advance of stage 3. It is one of the issues on which we will write to the Law Society following the conclusion of stage 2, inviting the society to discuss it with us should the society believe that it should be taken further.

**The Convener:** Having listened to what the minister has said, I am prepared to withdraw the amendment, with the caveat that if the matter is not resolved satisfactorily, I will bring it back at stage 3. I want there to be dialogue between the minister and the Law Society, and I ask to be kept informed of progress in that respect.
Amendment 367, by agreement, withdrawn.

The Convener: We continue on the theme of finance. Amendment 368, in my name, is grouped with amendment 369.

Amendment 368 would enable the Law Society to levy subscription fees on practice units. The existing situation is that, as Mr Brown will no doubt confirm, such fees are levied in respect of individual solicitors. Amendment 368, combined with other suggested amendments to section 34(1A) of the 1980 act and schedule 1 to that act, would enable the society, in the event that the profession agrees to create a firm registration system, to levy a subscription on firms that are registered. There is logic in that for a number of reasons. First, it would be administratively more convenient. Secondly, it would create a level playing field with licensed legal services providers under section 10(1)(e) of the bill. Thirdly, it would allow for consistency of approach in respect of levies that relate to all practice units irrespective of type, such as guarantee fund contributions. Finally, it would allow the society to create a more tailored approach in respect of the services that it offers. Basically, it would create a more transparent and equitable system.

Amendment 369 would give the Law Society the power to charge fees for services that the council of the Law Society renders. That might happen in a number of circumstances. For example, specific services might be provided to a legal services provider on application, or the Law Society might run courses on specific topics. All of that comes at a cost, and clearly there should be a way to recover such charges. It is unclear why the society feels that that would be necessary, although it may be that the arguments are as the convener has advanced them today—namely, that the society may wish to be able to charge for services that it provides, and to demand levies that relate to all practice units irrespective of type, such as guarantee fund contributions.

I move amendment 368.

Fergus Ewing: Amendment 368 would allow the Law Society of Scotland to impose subscription charges on an entity basis rather than on an individual basis, as at present. It would allow the Law Society to charge a special subscription on an entity basis. The Law Society has suggested that that would allow an approach that is consistent with that taken in the bill, whereby licensed providers are charged on an entity basis. The convener referred to that. However, I do not consider that such a change has been demonstrated to be necessary or desirable.

Regulation of licensed providers is at an entity level, so licensing fees are charged at an entity level. However, regulation of solicitors by the Law Society is at an individual level, so fees are charged at an individual level. To reflect that, at least 50 per cent of the membership of the regulatory committee must comprise lay members. That is set out in subsection (3) of new section 3B of the 1980 act, for which section 93 of the bill provides. That seems to me to be a consistent approach. In addition, I am not aware of any consultation on the matter within the legal profession.

10:30

Furthermore, these changes are fairly major and will affect all solicitors, and not just those who choose to utilise the new business structures permitted in the bill. As a Government, we have repeatedly stressed that the legislation is permissive by nature and therefore that solicitors who choose not to enter into an alternative business structure will not be affected by it. Our concern is that amendment 368 might inadvertently affect such solicitors. For example, it may change the charges that traditional practices have to pay. One might have expected such a change to have been debated within the Law Society before the amendment was lodged; I am not aware of any such consultation.

I suspect that the impact of the changes would depend primarily on those who are winners and those who are losers. In life, as we know, we tend to hear from the losers quite a lot and not so much from the winners. At present, we have no means of knowing the extent to which there will be winners and losers. Members of the profession may want to know which category they may fall into. While I fully understand the convener’s arguments, for those reasons it may be helpful if, with his agreement, the matter can be considered further with the Law Society. It is not an unreasonable proposal, but it is one that might entail a commitment to further consultation.

Amendment 369 would allow the Law Society to charge for services that it provides, and to demand and recover such charges. It is unclear why the society feels that that would be necessary, although it may be that the arguments are as the convener has advanced them today—namely, that the society may wish to be able to charge for attendance at certain post-qualifying legal education courses that it runs for the benefit of the profession. At present, solicitors pay through their practising certificate fee, which I am told is in the order of £680—a not insubstantial amount. At present, there is a charge but it is not a direct one. Nonetheless, the amendment represents a fairly major change. It is not clear to me exactly what
changes the Law Society has in mind. If it has in mind matters of the type that the convener has just described, the measure may be seen as not unreasonable. However, as drafted, the amendment would allow various other charges to be imposed. It might be prudent for there to be more discussion between the Government and the Law Society. Although we cannot support amendment 369 at present, we do not wish to dismiss the arguments behind it unduly. Therefore, again, I commit to further dialogue in my summer conversation with the Law Society. On that basis, I respectfully invite the convener not to press amendment 368 and not to move amendment 369.

The Convener: Your summer conversation will be fairly lengthy and convoluted. I can understand your arguments in respect of amendment 368 but I am less persuaded in respect of amendment 369. However, because it is essential that we get the matter right I will not move amendment 369 and will seek the committee’s agreement to withdraw amendment 368, with the caveat that if the issue is not resolved, the amendments will come back at stage 3.

Amendment 368, by agreement, withdrawn.
Amendment 369 not moved.

The Convener: I shall not move amendment 370, pending the summer conversation.

Amendment 370 not moved.

Section 93—Regulatory committee

The Convener: Amendment 79, in the name of the minister, is grouped with amendments 80 to 87.

Fergus Ewing: Section 93 of the bill requires the council of the Law Society to delegate its regulatory functions to a regulatory committee to ensure that those functions are carried out independently and in the public interest.

The amendments in the group that we are discussing seek to make some changes to the provisions on the regulatory committee. The proposed changes are necessary primarily as a result of amendment 78, which has already been considered and agreed to. Amendment 78 removed the power in section 92(4) that allowed the Scottish ministers to prescribe the proportion of lay members on the Law Society council. The provision of that power was opposed by certain members of the legal profession, and we agreed that it would not be necessary, given the Law Society’s stance and the undertakings that it gave. In the absence of that power, it is possible that the council might contain only a few lay members. We consider it vital that all regulatory functions be carried out by a body with significant lay membership to ensure independence and a focus on the public interest.

Although I am content for the council to make its own determination on the proportion of lay members, that is the case only when its functions relate solely to representative matters. Our amendments seek to ensure that there is a clear split between the representative functions of the council and the regulatory functions of the regulatory committee, and that no undue influence can be brought to bear that might undermine the robustness of the regulatory regime.

Amendment 79 will put it beyond doubt that the council of the Law Society cannot interfere unduly in the regulatory committee’s business. Amendment 82 seeks to reinforce the independence of the regulatory committee by providing that it can form sub-committees without the council’s approval.

On a practical note, allowing the council to decide how many lay members it has may result in there not being enough lay people to allow the regulatory committee to be formed, so it will be necessary to allow people to be appointed directly to the regulatory committee. That will be achieved by amendments 80 and 81. Amendment 83 will ensure that the work of sub-committees of the regulatory committee can continue in the event of a temporary shortfall in the number of lay members, as is currently the case with the regulatory committee.

Amendment 84 will give the Scottish ministers a power to set the maximum number of people on the regulatory committee. I feel that that measure is prudent to ensure that the regulatory committee does not grow to a size that prevents it from being able to act effectively.

Amendment 85 will ensure that the Scottish ministers act in accordance with the regulatory objectives when they make regulations under new section 3B(5) of the 1980 act and that they take account of the consultation requirements that were inserted by amendment 3, which was agreed to at a previous meeting. Amendment 86 is a drafting amendment.

Turning to amendment 87, I feel that the definition of regulatory functions needs to be a little more explicit to clarify certain areas that involve a representative and a regulatory element. Amendment 87 will achieve that by making provision in relation to, inter alia, the setting of standards of qualification, education and training. Plainly, that is a key element of any system of regulation and is designed to ensure that membership of the profession is restricted to people who have satisfied the necessary standards of qualification, education and training, thereby ensuring that the profession provides a
high quality of legal service. Accordingly, I invite the committee to support amendment 87.

I move amendment 79.

Amendment 79 agreed to.

Amendments 80 to 85, 213, 86 and 87 moved—[Fergus Ewing]—and agreed to.

Section 93, as amended, agreed to.

After section 93

The Convener: Amendment 88, in the name of the minister, is grouped with amendments 89 and 90.

Fergus Ewing: The Law Society proposed the amendments in this group and I accepted them.

Amendment 88 has the effect of requiring the council of the Law Society to enter on the roll of solicitors the place of business of every enrolled solicitor and registered European lawyer.

Amendment 89 has the effect of requiring the council of the Law Society to be satisfied that the solicitor or registered European lawyer has made adequate arrangements for any outstanding business before removing his or her name from the roll or register.

Amendment 90 requires a solicitor or registered European lawyer to notify the council of the Law Society when their practising or registration certificate—which would have ceased to have effect because they were bankrupt or had granted a trust deed, or because they had been sectioned or a guardian had been appointed under the Adults with Incapacity (Scotland) Act 2000—comes back into effect on their discharge.

I move amendment 88.

Amendment 88 agreed to.

Amendment 89 moved—[Fergus Ewing]—and agreed to.

The Convener: We come to representative functions of the Law Society. Amendment 373, in the name of James Kelly, is in a group on its own.

James Kelly (Glasgow Rutherglen) (Lab): Amendment 373 deals with the representative functions of the Law Society as distinct from regulation. As the bill progresses, it is becoming clear from discussions that some form of ABS will be implemented, although the form is to be finalised at stage 3. As I have said consistently throughout proceedings, I am concerned about the complexity of the regulators. The indications have been that there are perhaps going to be only one or two regulators, and everyone accepts that the Law Society will be one of them.

It is key that we have regulation in an ABS market in order to protect lawyers and consumers, and it is logical to have a split between representation and regulation—that is in the public interest. The regulatory committee in section 93 gives the public a role in that regulation, in the form of the chair and 50 per cent of the seats. It is absolutely correct to give the public a role, as there is a public interest in ensuring that regulation is carried out properly. We heard from witnesses at stage 1 about consumers’ concerns in dealing with the legal profession, and we must ensure that proper regulation is carried out in order to address those concerns. It is, therefore, correct to give the public a role on the Law Society’s regulatory committee.

Nevertheless, I submit that the representation function of the Law Society should be retained by lawyers exclusively. That is the position for other professional bodies. In a previous life, I was a qualified accountant and a member of the Chartered Institute of Management Accountants. The rules governing membership of the institute were strict: in order to obtain membership, a person had to pass all the exams and be a qualified accountant. Accountants were represented by accountants, and I believe that lawyers should be represented by lawyers. We will help to protect the independence of the legal profession by ensuring that lawyers have such representation.

Some people have submitted that amendment 373 would undermine the new arrangements that we are going to introduce, but I disagree. If we have a new solution, it is correct that we have a logical split between representation and regulation. That recognises the complexity of the new situation, gives the public a role and gives the legal profession a role in representing lawyers and protecting the independence of the profession. Amendment 373 supports the bill’s principle of modernising the Scottish legal system.

I move amendment 373.

Robert Brown: I have listened carefully to James Kelly, and I am interested to hear the minister’s views in due course. I am not at all enthusiastic about amendment 373. It has the potential to be quite destructive in terms of the whole basis on which the Law Society of Scotland operates—and should operate. It is true that, since the society’s foundation in 1949, there has been a tension between its representative and regulatory functions, which has raised issues from time to time. That has been the case recently, with the society engaging in discussions about the bill. However, the tension has not proved to be unmanageable.
There is no totally satisfactory division between the two functions of regulation and representation. Issues concerning risk, the master policy, the guarantee fund or standards might be regarded as regulatory, but they go to the heart of the professional standards that the Law Society trains its members to maintain and understand, and of how solicitors operate in general. The tension seems to be creative, not destructive.

The Law Society of Scotland was rightly and properly set up on a basis that unites the two strands, which come together in the council of the society. Other bodies have a representational function to a more limited degree, for example the Scottish Law Agents Society, the Glasgow Bar Association, the Royal Faculty of Procurators in Glasgow and other local bodies of that sort. They contribute to the representative side, but they cannot replace the Law Society’s national role in that regard.

Amendment 373 proposes a major and fundamental change. I believe that it has not been consulted on, discussed or decided on by the Law Society. If there is to be a debate about the amendment—which is entirely proper—such consultation should precede it.

Certainly at this point, I am strongly opposed to amendment 373.

The Convener: I largely concur with Robert Brown. The amendment has not been consulted on, but we require such consultation if it is to be taken further. However, James Kelly is right to underline the difficulties that inevitably arise from time to time where one body simultaneously deals with regulation and representation. I understand the problems that can arise, but I do not think that amendment 373, well intentioned as it undoubtedly is, represents a viable way forward.

Fergus Ewing: Members are obviously aware of the on-going debate about the Law Society’s dual representational and regulatory functions. Some people argued that there was an inherent conflict between those functions, and that the separation of those roles was required. That led to a referendum of the Law Society in May, in which 73 per cent of respondents voted in favour of the Law Society retaining both its representative and regulatory roles.

Amendment 373 seeks to remove from the council of the Law Society of Scotland its representative functions and to set up a separate representative council to take over those functions. The amendment is entirely unnecessary. Section 20(2) requires that an approved regulator that has both representative and regulatory functions, such as the Law Society, should exercise its regulatory functions separately from its representative functions. Section 20(1) makes it clear that

“The internal governance arrangements of an approved regulator must incorporate such provision as is necessary with a view to ensuring that the approved regulator will ... always exercise its regulatory functions ... independently of any other person or interest”

and

“properly in other respects”.

Section 20(2) goes on to state:

“In relation to an approved regulator which has representative functions,”

that is, the Law Society,

“relevant factors in connection with subsection (1)(a),”

from which I have just read, include

“the need for ... the approved regulator to ... exercise its regulatory functions separately from its other functions (in particular, any representative functions)”.

I submit that the bill already expressly, explicitly and clearly contains a requirement that there be a split, in the sense of a division, separating out the exercise of the regulator’s representative functions from its regulatory functions. That was explicitly included in the bill to achieve the aims that Mr Kelly seeks to achieve by his amendment. Because the aims are already in the bill, we do not need an amendment to bring in something similar.

In respect of the Law Society, section 93 establishes a regulatory committee to which all regulatory functions of the council must be delegated. Amendments 79 to 87, which we have just debated, clarify and strengthen the separation of functions between representation and regulation. As a result, all regulatory functions will be dealt with by the regulatory committee, while all representative matters will be handled by the council. Unlike the regulatory committee, the council will be under no obligation to appoint a certain proportion of lay members. Given that its sole focus will be on representative issues, I expect that the membership will be primarily composed of solicitors, as it is currently.

For those reasons, I do not support amendment 373, and I respectfully invite Mr Kelly to withdraw it.

The Convener: Mr Kelly, please wind up and indicate whether you intend to press or withdraw amendment 373.

James Kelly: I intend to press it. On the referendum that the minister referred to, the Law Society has run a number of votes and referendums in recent months, which have had, at times, contradictory outcomes. I note the minister’s point, but when we discussed the new structures at the first meeting in stage 2, my colleague Bill Butler lodged the 25:75 amendment,
which was the one that had the greatest endorsement from the Law Society—a point that he did not make in its favour. It is up to us as committee members and politicians to come up with the best structure for the operation of the legal profession and the industry in Scotland.

The minister said that amendment 373 is unnecessary, but it provides greater clarity and specifies more clearly the representation roles, particularly in relation to the role of lawyers on the representative committee, and provides greater direction to the profession. We are moving into a new situation in which an ABS model will apply, and we need to get the roles and structures absolutely correct. It is essential to have a split between regulation and representation, and the public should have a voice on the regulatory committee. The important democratic principle of lawyers being represented by lawyers is also correct and will protect the industry and the legal profession. I urge members to support amendment 373.

The Convener: The question is, that amendment 373 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Butler, Bill (Glasgow Anniesland) (LD)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 373 disagreed to.

Section 94 agreed to.

After section 94

Amendment 90 moved—[Fergus Ewing]—and agreed to.

The Convener: We now turn to complaints to the tribunal. Amendment 374, in my name, is grouped with amendment 375.

Amendment 374 has a dual purpose. First, it seeks to make it clear that the council can make a complaint to the tribunal against a solicitor on behalf of another person. That is consequential upon amendments that were made by the Legal Profession and Legal Aid (Scotland) Act 2007, which imply that a complaint can be made on behalf of another person. It is understood that, when a member of the public writes to the Law Society about a solicitor, the Law Society may make a complaint on their behalf. Prior to the 2007 act, a distinction did not need to be drawn between a complaint made by a complainer on their own behalf and one made on behalf of another person. In the latter case, the council was the complainer and the initial person’s involvement was removed. That might have been the best way forward when the person was elderly or disabled, but compensation can be awarded only when the complainer has been directly affected by the misconduct, therefore if the council is the complainer, no compensation can be awarded. Making it clear that the council can complain on another person’s behalf will bring its powers into line with the new definition of a complainer and ensure that, when the council makes such complaints, the person can be awarded compensation.

Amendment 374’s other purpose is to make it clear that the practitioners against whom a complaint can be made to the tribunal are the same as those against whom a complaint may be made to the Scottish Legal Complaints Commission, which section 1 of the 2007 act established. The practitioners need to be the same because the commission must refer conduct complaints against practitioners to the council of the Law Society under section 6 of the 2007 act.

Amendment 375 would clarify the extent to which the tribunal rules may provide that functions that are conferred on the tribunal may be exercised on its behalf. It would make it clear that tribunal rules may provide for the tribunal’s function in relation to a case or part of a case to be exercised by a part of the tribunal that is constituted in accordance with paragraph 5 of schedule 4 to the 1980 act. That would remove any doubt as to whether the rules make the provision that rule 54 of the “Scottish Solicitors Discipline Tribunal Rules 2008” makes. It would also enable the rules to provide that the tribunal that deals with one aspect of a case does not have to deal with another aspect, and that the tribunal that deals with one aspect can decide on that aspect before a tribunal is constituted to deal with a later aspect.

I move amendment 374.

Fergus Ewing: The Law Society proposed several amendments to the 1980 act. Amendments 374 and 375 are some of the proposed amendments that I did not accept. Amendment 374, in the convener’s name, would allow the Law Society’s council to complain on another person’s behalf. It has been argued that no provision expressly envisages that the council may complain on another’s behalf. However, such a power is implied in the existing law, in section 53(2)(bb) of the 1980 act, which empowers the
tribunal to award compensation to a complainant. Section 42ZA of that act says that “complainant” means

“the person who made the complaint”,
or,

“where the complaint was made by the person on behalf of another person, includes that other person.”

I emphasise those provisions in the existing law because they stress that complaints can be made on another’s behalf. I listened carefully to your remarks, convener, about people who might not wish to make complaints themselves—you gave the example of an elderly person who might prefer the Law Society to complain. However, I have received no evidence from the Law Society that that has caused difficulties and I am not aware that the Law Society has consulted on the matter, so I do not support amendment 374.

Amendment 374 would clarify the persons against whom a complaint may be made—they are listed as solicitors, firms of solicitors, incorporated practices, people with rights to conduct litigation or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, conveyancing practitioners and executry practitioners. In each case, the amendment would allow complaints to be made even after a practitioner had ceased to practise. That provision is surely unnecessary for solicitors, firms of solicitors and incorporated practices. When section 51(1A) of the 1980 act was inserted by the Public Appointments and Public Bodies etc (Scotland) Act 2003, it was felt unnecessary to stipulate that section 51(1) of the 1980 act included complaints in respect of the solicitor groups. That is a technical reason for arguing that I am not aware of any difficulties in that regard since then, neither am I aware of any consultation on the matter.

11:00

The reference to those with rights to conduct litigation or rights of audience by virtue of section 27 of the 1990 act represents new policy, as those people are regulated not by the Law Society but by the Scottish ministers, and are subject to the disciplinary measures of their regulators, which are laid down in the regulatory scheme. I am not aware of any consultation on that, nor of any discussions with the Scottish Government. Most important, I am not aware of the Law Society discussing that with the Association of Commercial Attorneys, whose members have rights to conduct litigation and rights of audience, which would be affected by the proposal. Further, amendment 374 would enable the persons who are mentioned in section 51(3) of the 1980 act, such as the Lord Advocate or a judge, to complain that a solicitor might have been guilty of professional misconduct or unsatisfactory professional conduct, or that a solicitor might have failed to comply with any provision of the 1980 act or of rules made thereunder.

Amendment 374 aims to reinstate a provision that was removed by the Legal Services Act 2007, which disapplied sections 51(2) and 51(3) of the 1980 act in respect of professional conduct by a solicitor and inadequate professional services by a solicitor or incorporated practice, because of the new systems of complaints that were introduced thereby. Any complaint that is made about a solicitor’s conduct must now be made to the Scottish Legal Complaints Commission under section 2(1)(a)(i) of the Legal Profession and Legal Aid (Scotland) Act 2007, and not to the tribunal. The provision in the Legal Services Act 2007 was not in fact an error, as the Law Society has suggested to me—it was deliberate policy. It is therefore not appropriate to reinstate a provision that would conflict with the requirements of the Legal Profession and Legal Aid (Scotland) Act 2007.

Amendment 375, in the name of the convener, would confirm that rules that are made by the tribunal under section 52(2) of the 1980 act may provide for the functions of the tribunal to be exercised on behalf of the tribunal by any tribunal—if it is properly constituted as defined in paragraph 5 of schedule 4 to the 1980 act—or by the chairman or vice-chairman of the tribunal, unless the tribunal is hearing and determining the merits of any case. The amendment states that the measure is

“For the avoidance of doubt”,

with the implication being that it is not actually necessary. We have not heard that the issue has caused difficulties and nor are we aware of any consultation on the matter.

I do not support amendment 374, as it is not only largely unnecessary but inadmissible, in relation to the reference to those with rights to conduct litigation or rights of audience by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and in relation to the reinsertion of a provision that was removed by the Legal Services Act 2007. I do not support amendment 375, as I consider it to be unnecessary.

It is plain that the convener has raised substantial issues, which are largely technical. The amendments are intended to clear up doubt and ensure that things that we all recognise need to be done are done. Basically, our response is that we and the Law Society already have the powers to do those things, or that there has been a misconception about the purpose of legislation
and a failure to understand that the proposals might conflict with other legislation that was passed deliberately, but with slightly different policy intent. Nonetheless, because the issues are important, I plan to have discussions on the matters with the Law Society. I have set out at length and in painstaking detail some of the arguments that we will no doubt discuss with the Law Society in the coming months. I respectfully invite the convener to withdraw amendment 374 and not to move amendment 375.

The Convener: There is an issue in relation to amendment 374. The committee would not be minded to have a situation whereby an elderly person or a person who was incapacitated would lose the opportunity to complain, albeit by proxy. The issue must be examined further, although to an extent I am reassured by the minister’s point that the remedy might be in other legislation. I listened carefully to what the minister said, so I will seek permission to withdraw amendment 374, with the usual caveats.

Amendment 374, by agreement, withdrawn.

Amendment 375 not moved.

Section 95 agreed to.

Section 96—Availability of legal services

The Convener: Amendment 379, in the name of the minister, is grouped with amendment 91.

Fergus Ewing: Access to justice is an important issue, and I am aware of the concerns that have been raised about the potential effects of increased competition on the provision of legal services throughout Scotland. Safeguards are already present in the bill to ensure that access to justice is not threatened. Section 11 requires approved regulators to include in their licensing rules provision for dealing with applications when they believe that there may be a material and adverse effect on the provision of legal services. The approved regulators are also able to consult the Office of Fair Trading in such situations.

Section 96 provides further protection by giving the Scottish Legal Aid Board a duty to monitor the availability and accessibility of legal services in Scotland and to give advice to the Scottish ministers in that area. However, in the light of concerns that particular areas—specifically rural areas—will be disproportionately affected by any increase in competition, I have decided to strengthen the provision in section 96. Amendment 379 expands section 96 to ensure that factors that particularly affect rural or urban areas are taken into account when the Scottish Legal Aid Board monitors the availability and accessibility of legal services in Scotland.

Amendment 91 relates to the duty that is given to SLAB in section 95 to exclude solicitors or advocates from giving legal assistance to clients who are entitled to legal aid, by way of an amendment to the Legal Aid (Scotland) Act 1986. That duty is currently held by the Law Society and the Faculty of Advocates. Following the introduction of the bill, SLAB suggested that, in order to carry out that function, it would need the Scottish Legal Complaints Commission, the Law Society and the Faculty of Advocates to notify it of any misconduct by solicitors or advocates. I agree with that assessment. Without such information, SLAB would not be able to exclude a solicitor or advocate on the grounds cited in section 31(3) of the 1986 act. Amendment 91 requires the SLCC, the Law Society and the Faculty of Advocates to inform SLAB when a service or conduct complaint relating to a solicitor or advocate is upheld and to give relevant details of the complaint. The proposed new section that would be inserted into the 1986 act by amendment 91 also incorporates the contents of the existing section 97, which would be removed.

I move amendment 379.

Amendment 379 agreed to.

Section 96, as amended, agreed to.

Section 97—Information about legal services

Amendment 91 moved—[Fergus Ewing]—and agreed to.

Section 98—Minor amendments

The Convener: Amendment 92, in the name of the minister, is grouped with amendment 93.

Fergus Ewing: Amendment 92 amends the Legal Profession and Legal Aid (Scotland) Act 2007 to require the SLCC to consult the Scottish ministers, in addition to relevant professional organisations and their members, each January on its proposed budget for the next financial year. Given the recent controversy over the levies that have been imposed by the SLCC, I feel that such consultation would be appropriate.

Amendment 93 is fairly technical and relates to the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007. The ancillary provision is currently limited in scope due to changes made by the Legal Services Act 2007 that affect the Legal Profession and Legal Aid (Scotland) Act 2007. The amendment allows the ancillary provision to be used as intended, including in areas altered by the Legal Services Act 2007.

I move amendment 92.

Amendment 92 agreed to.
Section 98, as amended, agreed to.

After section 98
Amendment 93 moved—[Fergus Ewing]—and agreed to.

Section 99—Regulations
Amendments 94, 214, 166 and 215 moved—[Fergus Ewing]—and agreed to.
Section 99, as amended, agreed to.

After section 99
Amendment 378 moved—[Fergus Ewing]—and agreed to.
Section 100 agreed to.

Section 101—Definitions
Amendment 95 moved—[Fergus Ewing]—and agreed to.
Section 101, as amended, agreed to.

Schedule 9—Index of expressions used
Amendments 96, 167, 216, 168, 217 and 218 moved—[Fergus Ewing]—and agreed to.
Schedule 9, as amended, agreed to.
Section 102 agreed to.
Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I am aware that quite a number of matters remain outstanding. Mr Ewing, I think that we would have preferred it had they all been reconciled at stage 2. Obviously, the Government and the Law Society in particular will require to have a fairly significant dialogue over the summer. However, I thank you and your officials for your assistance in the matter.

11:11
Meeting suspended.
CONTENTS

PART 1
THE REGULATORY OBJECTIVES ETC.

Introduction

1 Regulatory objectives
2 Professional principles
3 Legal services

Role of Ministers

4 Ministerial oversight
4A Consultation by Ministers

PART 2
REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1
APPROVED REGULATORS

Approved regulators

5 Approved regulators
6 Approval of regulators
7 Authorisation to act
7A Request for authorisation

Regulatory schemes

8 Regulatory schemes
9 Reconciling different rules

Licensing rules

10 Licensing rules: general
11 Initial considerations
12 Other licensing rules
13 Licensing appeals

Practice rules

14 Practice rules: general
15 Financial sanctions
16 Enforcement of duties
17 Performance report
18 Accounting and auditing
19 Professional indemnity

Internal governance
20 Internal governance arrangements
21 Communicating outside
22 More about governance

Regulatory functions etc.
23 Regulatory and representative functions
24 Assessment of licensed providers
25 Giving information to SLAB
26 Additional powers and duties
27 Guidance on functions

Performance
27A Review of own performance
28 Monitoring performance
29 Measures open to Ministers

Ceasing to regulate
30 Surrender of authorisation
31 Cessation directions
32 Transfer arrangements
33 Extra arrangements

Change of regulator
34 Change of approved regulator
35 Step-in by Ministers

CHAPTER 2
LICENSED LEGAL SERVICES PROVIDERS

Licensed providers
36 Licensed providers
37 Eligibility criteria
37A Majority ownership
38 Key duties

Operational positions
39 Head of Legal Services
40 Head of Practice
41 Practice Committee

Appointment to position etc.
42 Notice of appointment
43 Challenge to appointment
44 Disqualification from position
45 Effect of disqualification
46 Conditions for disqualification

Designated persons

47 Designated persons
47A Working context
48 Listing and information

Non-solicitor investors

49 Fitness for involvement
49A Exemption from fitness test
50 Factors as to fitness
50A Ban for improper behaviour
51 Behaving properly
52 More about investors

Discontinuance of services

53 Duty to warn
54 Ceasing to operate
55 Safeguarding clients
56 Distribution of client account

Professional practice etc.

57 Employing disqualified lawyer
58 Concealing disqualification
59 Pretending to be licensed
60 Professional privilege

CHAPTER 3
FURTHER PROVISION

Achieving regulatory aims

61 Input by the OFT
62 Role of approved regulators
63 Policy statement

Complaints

64 Complaints about regulators
64A Levy payable by regulators
65 Complaints about providers

Registers and lists

66 Register of approved regulators
67 Registers of licensed providers
68 Lists of disqualified persons

Miscellaneous

69 Privileged material
70 Immunity from damages
70A Appeal procedure
71 Effect of professional or other rules
PART 3
CONFIRMATION AND WILL WRITING SERVICES

CHAPTER 1
CONFIRMATION SERVICES

Regulation of confirmation agents

72 Confirmation agents and services
73 Approving bodies
74 Certification of bodies
75 Regulatory schemes
76 Financial sanctions
76A Review of own performance
77 Pretending to be authorised

Other regulatory matters

78 Revocation of certification
79 Surrender of certification
80 Register and list

Ministerial functions

81 Ministerial intervention

CHAPTER 2
WILL WRITING SERVICES

Regulation of will writers

81A Will writers and services
81B Approving bodies
81C Certification of bodies
81D Regulatory schemes
81E Financial sanctions
81F Review of own performance
81G Pretending to be authorised
81H Revocation of certification
81I Surrender of certification
81J Register and list

Ministerial functions

81K Ministerial intervention
81L Step-in by Ministers

CHAPTER 3
FURTHER PROVISION

82 Regard to OFT input
83 Complaints about agents and writers
84 Privilege and immunity
84A Appeal procedure
85 Consequential modification
PART 4
THE LEGAL PROFESSION

CHAPTER 1
APPLYING THE REGULATORY OBJECTIVES

86 Application by the profession

CHAPTER 2
FACULTY OF ADVOCATES

87 Regulation of the Faculty
88 Professional rules
89 Particular rules

CHAPTER 3
SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

90 Qualified persons
91 Changes as to practice rules
91A Citizens advice bodies

Lay representation

91B Court of Session rules
91C Sheriff court rules

Guarantee Fund

91D Use of Guarantee Fund
91E Contributions to the Fund
91F Cap on individual claims

The Law Society

91G Acting as approved regulator
92 Council membership
93 Regulatory committee

The 1980 Act: further modification

93A Keeping the solicitors roll etc.
93B Removal from the roll etc.
94 Removal from solicitors roll
94A Notification if suspension lifted

CHAPTER 4
OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance
96 Availability of legal services
96A Information about legal services
Scottish Legal Complaints Commission

98 Minor amendments

PART 5
GENERAL

99 Regulations
99A Further modification
100 Ancillary provision
101 Definitions
102 Commencement and short title

Schedule 1—Performance targets
Schedule 2—Directions
Schedule 3—Censure
Schedule 4—Financial penalties
Schedule 5—Amendment of authorisation
Schedule 6—Rescission of authorisation
Schedule 7—Surrender of authorisation
Schedule 8—Investors in licensed providers
Schedule 9—Index of expressions used
Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Legal Services (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; and for connected purposes.

PART 1
THE REGULATORY OBJECTIVES ETC.

Introduction

1 Regulatory objectives

For the purposes of this Act, the regulatory objectives are the objectives of—

(a) supporting the constitutional principle of the rule of law,
(b) protecting and promoting—
   (ai) the interests of justice,
   (i) the interests of consumers,
   (ii) the public interest generally,
(c) promoting—
   (i) access to justice,
   (ii) competition in the provision of legal services,
(d) promoting an independent, strong, varied and effective legal profession,
(e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
(f) promoting and maintaining adherence to the professional principles.

2 Professional principles

For the purposes of this Act, the professional principles are the principles that persons providing legal services should—
Legal Services (Scotland) Bill

Part 1—The regulatory objectives etc.

(a) support the proper administration of justice,
(b) act with independence in the interests of justice,
(ba) act with integrity,
(c) act in the best interests of their clients,
(d) maintain good standards of work,
(e) where—
   (i) exercising before any court a right of audience, or
   (ii) conducting litigation in relation to proceedings in any court,
    comply with such duties as are normally owed to the court by such persons,
(f) meet their obligations under any relevant professional rules,
(g) treat the affairs of their clients as confidential and act in conformity with professional ethics.

3 Legal services

(1) For the purposes of this Act, legal services are services which consist of (at least one of)—
   (a) the provision of legal advice or assistance in connection with—
      (i) any contract, deed, writ, will or other legal document,
      (ii) the application of the law, or
      (iii) any form of resolution of legal disputes, or
   (b) the provision of legal representation in connection with—
      (i) the application of the law, or
      (ii) any form of resolution of legal disputes.
(2) But, for those purposes, legal services do not include—
   (a) judicial activities,
   (b) any other activity of a judicial nature,
   (c) any activity of a quasi-judicial nature (for example, acting as a mediator).
(3) In subsection (1)(a)(iii) and (b)(ii), “legal disputes” includes disputes as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or obligations.

Role of Ministers

4 Ministerial oversight

(1) Subsections (2) and (3) apply in relation to the exercise by the Scottish Ministers of their functions under Parts 2 and 3 or arising by virtue of Part 4.
(2) The Scottish Ministers must, so far as practicable, act in a way which—
   (a) is compatible with the regulatory objectives, and
   (b) they consider most appropriate with a view to meeting those objectives.
The Scottish Ministers must adopt best regulatory practice under which (in particular) regulatory activities should be—

(a) carried out—

(i) effectively (but without giving rise to unnecessary burdens),

(ii) in a way that is transparent, accountable, proportionate and consistent,

(b) targeted only at such cases as require action.

4A Consultation by Ministers

(1) Subsection (2) applies in relation to the exercise by the Scottish Ministers of their functions under Parts 2 and 3 or arising by virtue of Part 4.

(2) Where (and to the extent that) the Scottish Ministers consider it appropriate to do so in the case of an individual function, they must consult such persons or bodies as appear to them to have a significant interest in the particular subject-matter to which the exercise of the function relates.

(3) The general requirement to consult under subsection (2) has effect in conjunction with, or in the absence of, any particular consultation requirement to which the Scottish Ministers are subject in a specific (and relevant) context.

PART 2

REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1

APPROVED REGULATORS

Approved regulators

(1) For the purposes of this Part, an approved regulator is a professional or other body which is approved as such by the Scottish Ministers under section 6.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approved regulator must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section 6(1)(c)),

(b) a copy of its proposed statement of policy under section 63(1),

(c) a description of—

(i) the applicant’s constitution and composition (including internal structure),

(ii) its internal governance arrangements,

(iii) its representative functions (if any),

(iv) its other activities (if any).

(4) The applicant—
(a) must provide the Scottish Ministers with such other information as they may reasonably require for their (or the Lord President’s) consideration of its application,
(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approved regulators that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge—
(a) an applicant to become an approved regulator,
(b) approved regulators.

6 Approval of regulators

(1) The Scottish Ministers may, with the consent of the Lord President, approve the applicant as an approved regulator if they are satisfied that—
(a) for regulating licensed legal services providers in accordance with this Part, the applicant has—
(i) the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it),
(ii) a thorough knowledge and understanding of the regulatory objectives and the professional principles contained in sections 1 and 2,
(iii) sufficient resources (financial and otherwise),
(b) the applicant will always exercise its regulatory functions—
(i) independently of any other person or interest,
(ii) properly in other respects (in particular, with a view to achieving public confidence),
(c) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 8),
(d) the applicant’s internal governance arrangements are, or will be, suitable (as determined with particular reference to section 20).

(2) The Scottish Ministers may, with the consent of the Lord President, approve the applicant as an approved regulator subject to conditions.

(2A) The Scottish Ministers are to impose under subsection (2) such particular conditions relating to the expertise mentioned in subsection (1)(a)(i) as are reasonably sought by the Lord President when consulted under section (Pre-approval consideration)(1).

(2B) The Scottish Ministers may remove or vary any conditions imposed under subsection (2)—
(a) after consulting the approved regulator, and
(b) where the conditions arose by virtue of subsection (2A), with the Lord President’s agreement.

(2C) Conditions under subsection (2) may, without prejudice to their generality, include conditions which may—
Part 2—Regulation of licensed legal services

Chapter 1—Approved regulators

(a) restrict the approval of the applicant by reference to particular categories of—
   (i) licensed providers,
   (ii) legal services,
(b) be given either—
   (i) without limit of time, or
   (ii) for a fixed period of at least 3 years.

(2D) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2).

(3) Before deciding whether or not to approve the applicant as an approved regulator, the Scottish Ministers must consult—

   (b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (c) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—

   (a) must send a copy of the application to the consultees,
   (b) may send a copy of any revised application to any (or all) of them.

(5) The Scottish Ministers must notify the applicant if they intend to—

   (a) refuse to approve it as an approved regulator, or
   (b) impose conditions under subsection (2).

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about approval under this section, including (in particular)—

   (a) the process for seeking their approval,
   (b) in relation to capability to act as an approved regulator, the criteria for their approval (including things that applicants must be able to demonstrate).

(8) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.

7 Authorisation to act

(1) An approved regulator may not exercise any of its regulatory functions unless it is authorised to do so by the Scottish Ministers under this section.

(2) The Scottish Ministers may give their authorisation if they are satisfied (or continue to be satisfied)—

   (a) as mentioned in subsection (1) of section 6,
   (b) as regards any criteria provided for under subsection (7)(b) of that section.
(3) Their authorisation may be given with restrictions imposed by reference to particular categories of—
   (a) licensed provider,
   (b) legal services.

(4) Their authorisation may be given—
   (a) either—
       (i) without limit of time, or
       (ii) for a fixed period of at least 3 years,
   (b) subject to conditions.

(5) The Scottish Ministers may, after consulting the approved regulator, remove or vary any conditions imposed under subsection (4)(b).

(10) The Scottish Ministers may by regulations make further provision about authorisation under this section including (in particular) the process for requests for their authorisation.

7A Request for authorisation

(1) A request for authorisation under section 7 may be—
   (a) made at any reasonable time (including at the same time as applying for approval under section 6),
   (b) withdrawn by the approved regulator (or applicant) at any time by giving the Scottish Ministers written notice to that effect.

(2) The Scottish Ministers must, with reasons, notify the approved regulator (or applicant) if they intend to—
   (a) withhold their authorisation, or
   (b) impose conditions under section 7(4)(b).

(3) If notification is given to the approved regulator (or applicant) under subsection (2), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(4) The approved regulator (or applicant) must provide the Scottish Ministers with such information as they may reasonably require for their consideration of its request for their authorisation.

(5) In section 7 and this section, a reference to authorisation means initial or renewed authorisation.

Regulatory schemes

8 Regulatory schemes

(1) An approved regulator must—
Part 2—Regulation of licensed legal services

Chapter 1—Approved regulators

(a) make a regulatory scheme for licensing and regulating the provision of legal services by its licensed legal services providers, and
(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) contain—
   (i) the licensing rules (see section 10),
   (ii) the practice rules (see section 14),

(b) include provision for reconciling different sets of regulatory rules (see section 9),

(c) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify).

(3) The regulatory scheme may—

(a) relate to—
   (i) one or more categories of licensed provider,
   (ii) some or all legal services,

(b) make different provision for different cases or types of case.

(4) An approved regulator may amend its regulatory scheme (or any aspect of it), but—

(a) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,

(b) the Scottish Ministers may not give their approval before—
   (i) the Lord President has consented, and
   (ii) they have consulted such other person or body as they consider appropriate.

(5) The Scottish Ministers may by regulations—

(a) confer authority for the regulatory schemes of approved regulators to deal with the provision by their licensed providers of such other services (in addition to legal services) as the regulations may prescribe, and

(b) specify the extent to which (and the manner in which) the regulatory schemes may do so.

9 Reconciling different rules

(1) The provision required by section 8(2)(b) to be in the regulatory scheme is such provision as is reasonably practicable (and appropriate in the circumstances) for—

(a) preventing or resolving regulatory conflicts, and

(b) avoiding unnecessary duplication of regulatory rules.

(2) For the purposes of this section, a regulatory conflict is a conflict between—

(a) the regulatory scheme of an approved regulator, and

(b) any professional or regulatory rules made by any other body which regulates the provision of legal or other services.
The Scottish Ministers may, with the consent of the Lord President, by regulations make further provision about regulatory conflicts (such as may involve an approved regulator).

Licensed rules

Licensing rules: general

(1) For the purposes of this Part, the licensing rules are rules about—

(a) the procedure for becoming a licensed provider, including (in particular)—

(i) the making of applications,

(ii) the criteria to be met by applicants,

(iii) the determination of applications,

(iv) the issuing of licences,

(b) the terms of licences and attaching to licences of conditions or restrictions,

(c) the—

(i) renewal of licences,

(ii) circumstances in which licences may be revoked or suspended,

(d) licensing provision affecting non-solicitor investors in licensed providers,

(e) licensing fees that are chargeable by the approved regulator.

(2) Rules made in pursuance of subsection (1)(a) to (c) must allow for review by the approved regulator of any decision made by it under the rules that materially affects an applicant for a licence or (as the case may be) a licensed provider.

(3) Licensing rules may include such further licensing arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(4) See also sections 43(6)(b), 45(3A), 49(2), 49A(3) and 52(2)(b) and paragraph 3A(2) of schedule 8 (as well as sections 11 and 12).

Initial considerations

(1) Licensing rules must provide for—

(a) consultation with the OFT, where appropriate in accordance with subsection (2), in relation to a licence application,

(b) how the approved regulator is to deal with a licence application where it believes that granting it would cause (directly or indirectly) a material and adverse effect on the provision of legal services.

(2) For the purpose of subsection (1)(a), it is appropriate to consult the OFT where the approved regulator believes that the granting of the licence application may have the effect of—

(a) preventing competition within the legal services market, or

(b) significantly restricting or distorting such competition.
12 Other licensing rules

(1) Licensing rules may allow for—
   (a) an applicant to be issued with a provisional licence—
      (i) in anticipation of its becoming (or becoming eligible to be) a licensed provider, and
      (ii) whose full effect as a licence is conditional on its becoming a licensed provider (and such other relevant matters as the rules may specify), or
   (b) a licensed provider to be issued with a provisional licence—
      (i) in anticipation of its transferring to the regulation of the approved regulator, and
      (ii) whose full effect as a licence is conditional on the transfer occurring (and such other relevant matters as the rules may specify).

(2) Licensing rules must—
   (a) state that a licence application may be refused on the ground that the applicant appears to be incapable (for any reason) of complying with the regulatory scheme,
   (b) provide for grounds for non-renewal, revocation or suspension of a licence where the licensed provider is breaching (or has breached) the regulatory scheme.

13 Licensing appeals

(1) An applicant for a licence or (as the case may be) a licensed provider may appeal against a relevant licensing decision taken by virtue of this Part—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which that decision is intimated to it.

(2) A relevant licensing decision is a decision to—
   (a) refuse the licensed provider’s application for—
      (i) a licence, or
      (ii) renewal of its licence,
   (b) attach conditions or restrictions to its licence, or
   (c) revoke or suspend its licence.

Practice rules

14 Practice rules: general

(1) For the purposes of this Part, the practice rules are rules about—
   (a) the—
      (i) operation and administration of licensed providers,
      (ii) standards to be met by licensed providers,
   (b) the operational positions within licensed providers,
(c) accounting and auditing (see section 18),
(d) professional indemnity (see section 19),
(da) compensation (see section (compensation)),
(e) the making and handling of any complaint about—
   (i) a licensed provider,
   (ii) a designated or other person within a licensed provider,
(f) the measures that may be taken by the approved regulator, in relation to a licensed provider, if—
   (i) there is a breach of the regulatory scheme, or
   (ii) a complaint referred to in paragraph (e) is upheld.
(2) Rules made in pursuance of subsection (1)(f) must allow a licensed provider to make representations to the approved regulator before it takes any of the measures available to it under the rules.
(3) Practice rules may include such further arrangements as to the professional practice, conduct or discipline of licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.
(4) See also sections 43(6)(a), 45(4) and 50A(4) (as well as sections 15 to 19).

15 Financial sanctions
(1) Practice rules made in pursuance of section 14(1)(f) may provide for the imposition of a financial penalty.
(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their approval under section 6.
(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approved regulator may collect it on their behalf).
(4) A licensed provider may appeal against a financial penalty (or the amount of a financial penalty) imposed on it by virtue of this section—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the penalty is intimated to it.
(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

16 Enforcement of duties
(1) Practice rules must include provision that it is a breach of the regulatory scheme for a licensed provider to—
   (a) fail to comply with section 38, or
   (b) fail to comply with its—
      (i) other duties under this Part, or
Part 2—Regulation of licensed legal services

Chapter 1—Approved regulators

(ii) duties under any other enactment specified in the scheme.

(2) Practice rules must require a licensed provider to—

(a) review and report on its performance (see section 17), and

(b) have its performance and that report assessed by the approved regulator.

Performance report

(1) Practice rules made by reference to section 16(2)(a) are (in particular) to give the Head of Practice of a licensed legal services provider the functions of—

(a) carrying out an annual review, and

(b) sending a report (in a specified form) on the review to the approved regulator.

(2) The review must include an examination of—

(a) the licensed provider’s compliance with section 38(1), and

(b) the involvement of any non-solicitor investors in the licensed provider.

(3) Practice rules made by reference to section 16(2)(b) may describe the approved regulator’s functions under section 24.

Accounting and auditing

Practice rules must—

(a) require licensed providers to keep in place proper accounting and auditing procedures,

(b) include provision corresponding to that applying under sections 35 to 37 (accounts rules) of the 1980 Act in relation to an incorporated practice.

Professional indemnity

Practice rules must—

(a) require licensed providers to keep in place sufficient arrangements for professional indemnity,

(b) include provision corresponding to that applying under section 44 (professional indemnity) of the 1980 Act in relation to an incorporated practice.

Internal governance

The internal governance arrangements of an approved regulator must incorporate such provision as is necessary with a view to ensuring that the approved regulator will—

(a) always exercise its regulatory functions—

(i) independently of any other person or interest,

(ii) properly in other respects (in particular, with a view to achieving public confidence),
(b) continue to allocate sufficient resources (financial and otherwise) to the exercise of its regulatory functions,
(c) review regularly how effectively it is exercising its regulatory functions (in particular, by reviewing the effectiveness of its regulatory scheme).

(2) In relation to an approved regulator which has representative functions, relevant factors in connection with subsection (1)(a) include (in particular) the need for—

(a) the approved regulator’s code of conduct (if any) for its members to be compatible with the regulatory objectives and the professional principles,
(b) the approved regulator to—

(i) exercise its regulatory functions separately from its other functions (in particular, any representative functions), and
(ii) avoid conflicts of interest in relation to its regulatory functions,
(c) the approved regulator to secure that a reasonable proportion of the individuals who are responsible for the exercise of its regulatory functions are not qualified legal practitioners.

(3) The approved regulator’s regard to the factor mentioned in subsection (2)(b) is demonstrable by (for example) its securing that within its structure its regulatory functions are clearly demarcated.

21 Communicating outside

(1) The internal governance arrangements of an approved regulator must not, in relation to the persons who are involved in the exercise of its regulatory functions, prevent the persons from engaging in consultation or other communication with—

(a) other approved regulators,
(b) the Scottish Ministers,
(c) the Scottish Legal Aid Board,
(d) the Scottish Legal Complaints Commission, or
(e) the OFT, or any other public body which has functions concerning the application of competition law.

(2) Where an approved regulator has representative functions, its internal governance arrangements must not, in relation to any person who—

(a) is involved in the exercise of its regulatory functions, and
(b) considers that the independence or effectiveness of the approved regulator’s exercise of its regulatory functions is being (or has been) for any reason adversely affected by the furtherance of its representative functions,

prevent the person notifying the Scottish Ministers accordingly.

(3) Subsections (1) and (2) are subject to any overriding prohibition or restriction arising by virtue of any relevant—

(a) enactment or rule of law, or
(b) rule of professional conduct or ethics.
More about governance

(1) The Scottish Ministers may, with the consent of the Lord President, by regulations make further provision about the internal governance arrangements of approved regulators.

(2) However, regulations under subsection (1) must relate to the regulatory functions of approved regulators.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult any approved regulator that would be affected by the regulations.

(4) For the purposes of this Part, the internal governance arrangements of an approved regulator are its own organisational and operational arrangements for the carrying out of its activities.

Regulatory functions etc.

Regulatory and representative functions

(1) For the purposes of this Part, the regulatory functions of an approved regulator are the approved regulator’s functions of regulating its licensed legal services providers including (in particular) its functions—

(a) in relation to its regulatory scheme, or

(b) under section 24.

(2) For the purposes of this Part, the representative functions of an approved regulator are any functions that the approved regulator has, in that or any other capacity, of representing or promoting the interests of the individual persons (taken collectively or otherwise) who form its membership.

(3) Nothing in this Part permits the Scottish Ministers to interfere with an approved regulator’s representative functions (but this does not prevent the Scottish Ministers taking such action under this Part as they consider appropriate for the purpose of ensuring that an approved regulator’s regulatory functions are not prejudiced by its representative functions).

Assessment of licensed providers

(1) An approved regulator must assess the performance of each of its licensed legal services providers at least once in every successive period of 3 years from (in each case) the date on which the approved regulator issued the licensed provider with its licence.

(2) The Scottish Ministers may require an approved regulator to carry out a special assessment of a licensed provider if the Scottish Legal Complaints Commission requests that they do so in a case where the Commission has significant concerns about how a complaint about a licensed provider has been dealt with.

(3) An assessment under this section must (in particular) concern—

(a) the licensed provider’s compliance with section 38(1), and

(b) such other matters as the approved regulator considers appropriate.

(4) When conducting the assessment, the approved regulator may—

(a) require from the licensed provider the production of any—

(i) relevant documents,
(ii) other relevant information,
(b) interview any person within the licensed provider.

(5) The approved regulator must—
(a) prepare a report on the assessment, and
(b) send a copy of the report to the licensed provider (and, if the assessment was
required under subsection (2), also send one to the Scottish Ministers and the
Commission).

(6) But, before finalising the report, the approved regulator must—
(a) send a draft of the report to the licensed provider, and
(b) give it a reasonable opportunity to make representations about—
(i) the findings of the assessment, and
(ii) any recommendations contained in the report.

(7) If the assessment discloses (or appears to disclose) any professional misconduct by a
member of a professional association, the approved regulator must notify that
association accordingly.

(8) An approved regulator may delegate any of its functions under this section to any
suitable person or body.

(9) The Scottish Ministers may by regulations make further provision about the assessment
of licensed providers.

25 Giving information to SLAB
(1) An approved regulator must provide the Scottish Legal Aid Board with such information
as the Board may reasonably require for the purpose mentioned in subsection (2).
(2) The purpose is the Board’s exercise of its function under section 1(2A) of the 1986 Act.

26 Additional powers and duties
(1) The Scottish Ministers may, with the consent of the Lord President, by regulations make
provision conferring on approved regulators such additional functions as they consider
appropriate for the purposes of this Part.
(2) Before making regulations under subsection (1), the Scottish Ministers must consult—
(a) every approved regulator,
(c) such other person or body as they consider appropriate.

27 Guidance on functions
(1) In exercising its functions under this Part, an approved regulator must have regard to
any guidance issued to approved regulators generally by the Scottish Ministers for the
purposes of or in connection with this Part.
(2) Before issuing such guidance, the Scottish Ministers must consult—
(a) every approved regulator,
(b) such other person or body as they consider appropriate.
(3) The Scottish Ministers must publish any such guidance as issued (or re-issued).

Performance

27A Review of own performance

(1) An approved regulator must review annually its performance.

(2) In particular, a review is to cover the following matters—
   (a) the approved regulator’s compliance with section 62,
   (b) the exercise of its regulatory functions,
   (c) the operation of its internal governance arrangements,
   (d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) The approved regulator must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approved regulator’s annual accounts (but only so far as they are relevant in connection with its functions under this Part).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved regulators’ performance,
   (b) reports on reviews of their performance.

28 Monitoring by Ministers

(1) The Scottish Ministers may monitor the performance of approved regulators in such manner as they consider appropriate.

(2) Monitoring the performance of an approved regulator includes (in particular) doing so by reference to—
   (a) its compliance with section 62,
   (b) the exercise of its regulatory functions,
   (c) the operation of its internal governance arrangements,
   (d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) An approved regulator must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

29 Measures open to Ministers

(1) The Scottish Ministers may, in relation to an approved regulator, take one or more of the measures mentioned in subsection (4) if they consider that to be appropriate in the circumstances of the case.
(2) When considering the appropriateness of taking any of those measures, or a combination of them, the Scottish Ministers must (except in the case of a measure mentioned in paragraph (f) of that subsection) have particular regard to the effect that it may have on the approved regulator’s observance of the regulatory objectives.

(3) Schedules 1 to 6 (to which subsection (1) is subject) respectively make provision concerning the measures mentioned in subsection (4).

(4) The measures are—
   (a) setting performance targets,
   (b) directing that action be taken,
   (c) publishing a statement of censure,
   (d) imposing a financial penalty,
   (e) amending an authorisation given under section 7,
   (f) rescinding an authorisation given under that section.

(5) The rescission of an authorisation by virtue of subsection (4)(f) has the effect of terminating the associated approval (of the approved regulator) given under section 6, except where it is stated under paragraph 5(3)(b) of schedule 6 that the approval is preserved.

(5A) The Scottish Ministers may only take the measures mentioned in subsection (4)(a), (b), (e) and (f) with the consent of the Lord President.

(6) The Scottish Ministers may, with the consent of the Lord President, by regulations—
   (a) specify other measures that may be taken by them,
   (b) make further provision about the measures that they may take (including for the procedures to be followed),
   in relation to approved regulators.

(7) Before making regulations under subsection (6), the Scottish Ministers must consult every approved regulator.

Ceasing to regulate

30 Surrender of authorisation

(1) An approved regulator may, with the prior agreement of the Scottish Ministers, surrender the authorisation given to it under section 7.

(2) Schedule 7 (to which subsection (1) is subject) makes provision concerning the surrender of such an authorisation.

(3) An approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of such an authorisation.

(4) The surrender of an authorisation by virtue of subsection (1) has the effect of terminating the associated approval (of the approved regulator) given under section 6.
31 Cessation directions

(1) This section applies where—

(a) an approved regulator amends its regulatory scheme so as to exclude the regulation of particular categories of licensed legal services providers or legal services, or

(b) the authorisation of an approved regulator is to be (or has been)—

(i) amended by virtue of section 29(4)(e) so as to exclude the regulation of certain categories of licensed providers or legal services,

(ii) rescinded by virtue of section 29(4)(f), or

(iii) surrendered by virtue of section 30(1).

(2) The Scottish Ministers may direct the approved regulator to take specified action (or refrain from doing something) if they consider that to be necessary or expedient for the continued effective regulation of a licensed provider.

(3) The approved regulator must (so far as practicable) comply with a direction given to it under subsection (2).

(4) For the purposes of this section, a reference to an approved regulator includes (as the context requires) a former approved regulator.

32 Transfer arrangements

(1) This section applies where—

(a) an approved regulator has amended its regulatory scheme so as to exclude the regulation of particular categories of licensed legal services provider or legal services,

(b) the authorisation of an approved regulator is to be (or has been)—

(i) amended by virtue of section 29(4)(e) so as to exclude the regulation of particular categories of licensed provider or legal services,

(ii) rescinded by virtue of section 29(4)(f), or

(iii) surrendered by virtue of section 30(1), or

(c) the approved regulator is otherwise unable to continue to regulate some or all of its licensed providers.

(2) The approved regulator must (as soon as reasonably practicable)—

(a) notify each of its licensed providers of the relevant situation within subsection (1),

(b) do so by reference to any effective date.

(3) A notification under subsection (2) must inform each licensed provider as to whether it requires, in consequence of the relevant situation, to transfer to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(4) Each licensed provider that is so required to transfer to a new regulator must—

(a) within 28 days beginning with the date of the notification, or failing which as soon as practicable, take all reasonable steps so as to transfer to the regulation of a new regulator, and
(b) where it does so transfer, take (as soon as practicable) such steps as are necessary to ensure that it complies with the new regulator’s regulatory scheme before the end of the changeover period.

(5) For the purpose of subsection (4)(b), the changeover period is the period of 6 months beginning with the date on which the new regulator takes over the regulation of the licensed provider.

(6) On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

33 Extra arrangements

(1) The Scottish Ministers may by regulations make provision in connection with section 32 as to the arrangements for the transfer of licensed providers to the regulation of a different approved regulator (a “new regulator”).

(2) Regulations under subsection (1) may (in particular)—

(a) provide for a licensed provider which has not transferred to the regulation of a new regulator to be regulated by such new regulator as may be appointed by the Scottish Ministers with the new regulator’s consent,

(b) provide for the Scottish Ministers to recover on behalf of the new regulator, or a licensed provider, any fee (or a part of it) paid by the licensed provider to the former approved regulator in connection with the licensed provider’s current licence.

34 Change of approved regulator

(1) A licensed legal services provider may transfer voluntarily to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(2) But the transfer requires the new regulator’s written consent (and its agreement to issue the licensed provider with a licence having effect from the date on which the transfer is to occur).

(3) Where a licensed provider wishes to do so, it must—

(a) give a notice which complies with subsection (4) to—

(i) the current regulator, and

(ii) the Scottish Ministers, and

(b) provide such further information as may reasonably be required by either of them.

(4) A notice complies with this subsection if it—

(a) explains why the licensed provider wishes to transfer to the regulation of a new regulator,

(b) specifies—

(i) the new regulator,
The date on which the transfer is to occur (which must be within 28 days of the date of the notice), and

(c) is accompanied by a copy of the new regulator’s written consent to the transfer.

On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

The Scottish Ministers may by regulations make further provision about the transfer by a licensed provider to the regulation of a new regulator.

35 Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approved regulator.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approved regulator in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Part to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.

CHAPTER 2

LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

(1) For the purposes of this Part, a licensed legal services provider is a business entity which, through the designated and other persons within it—

(a) provides (or offers to provide) legal services—

(i) to the general public or otherwise, and

(ii) for a fee, gain or reward, and

(b) does so under a licence issued by an approved regulator in accordance with the approved regulator’s licensing rules.

(2) An entity is eligible to be a licensed provider only if it has within it, for the provision of legal services, at least one solicitor who holds a valid practising certificate that is free of conditions (such as may be imposed under section 15(1)(b) or 53(5) of the 1980 Act).

(3) A licensed provider may not be regulated by more than one approved regulator at the same time.

(4) In this Part, a reference to a licensed provider is to a licensed legal services provider.

37 Eligibility criteria

(1) This section applies for the purposes of licensing an entity as a licensed legal services provider under this Part.
(2) The following are examples of arrangements which would make an entity eligible to be a licensed provider—

(a) the entity has within it—
   (i) at least one solicitor as mentioned in section 36(2), and
   (ii) at least one individual practitioner of another type,
   for the carrying out of the sort of legal work for which each is qualified,

(b) the entity has within it at least one solicitor as mentioned in section 36(2) but, through also having within it at least one person who is not a solicitor or other type of individual practitioner, additionally provides (or offers to provide)—
   (i) other professional services, or
   (ii) services of another kind,

(c) the entity has within it at least one solicitor as mentioned in section 36(2) but not every person who has ownership or control of the entity, or another material interest in it, is a solicitor (or a firm of solicitors) or an incorporated practice.

(3) But an entity, to be eligible to be a licensed provider—

(a) need not be a body corporate or a partnership,

(b) requires, if it falls—
   (i) under the ownership or control of another entity, or
   (ii) within the structure of another entity,
   to be a separate part of the other entity or otherwise distinct from it.

(4) For the avoidance of doubt, an entity is not eligible to be a licensed provider if it—

(a) consists of—
   (i) a single solicitor practising under the solicitor’s own name, or
   (ii) a solicitor otherwise practising as a sole practitioner,

(b) is a firm of solicitors or an incorporated practice, or

(c) is a law centre as defined in section 65(1) of the 1980 Act.

(5) In subsection (2)(a)(ii) and (b), a type of “individual practitioner” (apart from a solicitor) is—

(a) an advocate,

(b) a conveyancing or executry practitioner,

(ba) a litigation practitioner, or

(d) a confirmation agent or will writer within the meaning of Part 3.

(6) The Scottish Ministers may by regulations—

(a) make—
   (i) provision specifying other categories of entity that are, or are not, eligible to be a licensed provider,
   (ii) further provision about criteria for eligibility to be a licensed provider,
(b) modify—
   
   (i) section 36(2) so as to specify an additional type of legally qualified person
       (as an alternative to a solicitor as mentioned there),
   
   (ii) subsection (5) so as to add a type of legal practitioner to the list there.

5 (7) Before making regulations under subsection (6)(b), the Scottish Ministers must consult
every approved regulator.

37A Majority ownership

(1) An entity is eligible to be a licensed provider only if—
   
   (a) at least 51% of the entity is owned, managed and controlled by the persons or
       bodies specified in any one of more of the following sub-paragraphs—
       
       (i) solicitors,
       (ii) firms of solicitors or incorporated practices, or
       (iii) members of other regulated professions,
   
   (b) it is not wholly owned, managed and controlled by solicitors, firms of solicitors or
       incorporated practices, and
   
   (c) it has within it, for the provision of legal services, at least one solicitor who holds
       a practising certificate that is free from conditions (as construed by reference to
       section 15(1) of the 1980 Act).

20 (2) In subsection (1)(a)(iii), a “regulated profession” means a professional activity or group
of professional activities, access to which, the pursuit of which, or one of the modes of
pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or
administrative provisions to the possession of specific professional qualifications.

38 Key duties

(1) A licensed legal services provider must—
   
   (a) have regard to the regulatory objectives,
   
   (b) adhere to the professional principles,
   
   (c) comply with—
       
       (i) its approved regulator’s regulatory scheme,
       (ii) the terms and conditions of its licence.

30 (2) A licensed provider must seek to ensure that every designated or other person who is—
   
   (a) within the licensed provider, and
   
   (b) subject to a professional code of conduct,
complies with the code of conduct.

35 (3) A licensed provider must have within it—
   
   (a) a Head of Legal Services (see section 39), and
   
   (b) either—
       
       (i) a Head of Practice (see section 40), or


(ii) a Practice Committee (see section 41).

(4) A licensed provider must ensure that the following positions are not left unoccupied—
   (a) that of its Head of Legal Services, and
   (b) that (as the case may be)—
      (i) of its Head of Practice, or
      (ii) within its Practice Committee by virtue of section 41(3).

(5) However, the same person may (at the same time) be a licensed provider’s Head of Legal Services and also its Head of Practice.

**Operational positions**

**39 Head of Legal Services**

(1) It is for a licensed legal services provider to make such administrative arrangements as it considers appropriate in respect of its Head of Legal Services.

(2) A person is eligible for appointment (and to act) as its Head of Legal Services only if the person is a solicitor who holds a valid practising certificate that is free of conditions (such as may be imposed under section 15(1)(b) or 53(5) of the 1980 Act).

(3) But a person becomes disqualified from that position if the person is disqualified from practice as a solicitor by reason of having been—
   (a) struck off (or removed from) the roll of solicitors, or
   (b) suspended from practice.

(4) A Head of Legal Services has the function of securing the licensed provider’s—
   (a) compliance with section 38(1)(a) and (b),
   (b) fulfilment of its other duties under this Part so far as relevant in connection with its provision of legal services.

(5) A Head of Legal Services is to manage the designated persons within the licensed provider with a view to ensuring that they—
   (a) have regard to the Head’s function under subsection (4),
      (aa) adhere to the professional principles,
      (b) meet their professional obligations.

(6) A Head of Legal Services is to take such reasonable steps as may be required for the purposes of subsection (4).

(7) If it appears to a Head of Legal Services that the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment, the Head is to report that fact to the Head of Practice.

(8) Where (and to the extent that) under this section and section 40 a function falls to both—
   (a) a Head of Legal Services, and
   (b) a Head of Practice,
they are jointly and severally responsible for exercising the function.
(9) The Scottish Ministers may by regulations—
   (a) make further provision about—
       (i) Heads of Legal Services,
       (ii) the functions of such Heads (in their capacity as such),
   (b) modify subsection (2) so as to specify an additional type of legally qualified person (as an alternative to a solicitor as mentioned there).

(10) Before making regulations under subsection (9), the Scottish Ministers must consult the Lord President.

40 Head of Practice

(1) It is for a licensed legal services provider to make such administrative arrangements as it considers appropriate in respect of its Head of Practice.

(2) A person is eligible for appointment (and to act) as its Head of Practice only if the person—
   (a) has such qualifications, expertise and experience as are reasonably required, and
   (b) in other respects, is fit and proper for the position.

(3) A Head of Practice has the function of securing the licensed provider’s—
   (a) compliance with section 38(1)(c),
   (b) fulfilment of its other duties under this Part.

(4) A Head of Practice is to manage the designated and other persons within the licensed provider with a view to ensuring that they—
   (a) have regard to the Head’s functions under this Part,
   (b) meet any professional obligations to which they are subject.

(5) A Head of Practice is to take such reasonable steps as may be required for the purposes of subsection (3).

(6) If it appears to a Head of Practice that—
   (a) the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment,
   (b) an investor in the licensed provider is—
       (i) failing (or has failed) to fulfil any of the person’s duties under this Part or another enactment, or
       (ii) contravening (or has contravened) section 51(1) or (2),
   the Head is to report that fact to the licensed provider’s approved regulator.

(7) The Scottish Ministers may by regulations make further provision about—
   (a) Heads of Practice,
   (b) the functions of such Heads (in their capacity as such).

(8) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.
41 Practice Committee

(1) It is for a licensed legal services provider—
   (a) to decide whether to have a Practice Committee (instead of having a Head of Practice),
   (b) if it has one, to make such administrative arrangements as it considers appropriate in respect of it.

(2) A Practice Committee has the functions under this Part that would otherwise be exercisable by a Head of Practice (and the specification of any of those functions is to be read accordingly).

(3) A Practice Committee is to have among its members a person who would be eligible for appointment as its Head of Practice (if there were one).

(4) The members of a Practice Committee are jointly and severally responsible as regards the Committee’s functions.

(5) The Scottish Ministers may by regulations make further provision about—
   (a) Practice Committees,
   (b) the functions of such Committees.

(6) Before making regulations under subsection (5), the Scottish Ministers must consult the Lord President.

20 Notice of appointment

(1) Subsection (2) applies whenever a licensed legal services provider appoints a person as its—
   (a) Head of Legal Services, or
   (b) Head of Practice.

(2) The licensed provider must—
   (a) within 14 days from the date of the appointment—
      (i) notify its approved regulator of that fact,
      (ii) give the approved regulator the name and other details of the person appointed,
   (b) from that date give the approved regulator such further relevant information, and by such time, as it may reasonably require.

(3) Subsections (4) and (5) apply where a licensed provider sets up a Practice Committee.

(4) The licensed provider must—
   (a) within 14 days from the date on which the Committee is set up—
      (i) notify its approved regulator of that fact,
      (ii) give the approved regulator the names and other relevant details of the Committee’s members (including with specific reference to section 41(3)),
(b) from that date give the approved regulator such other relevant information, and by such time, as it may reasonably require.

(5) The licensed provider must also—

(a) whenever there is a change in the membership of the Committee, give the approved regulator—
   (i) notice of the change,
   (ii) the name and other relevant details of any new Committee member, within 14 days from the date on which the change occurs,

(b) if it ever dissolves the Committee (in favour of having a Head of Practice), notify its approved regulator of that fact within 14 days from the date on which the dissolution occurs,

(c) from the date mentioned in paragraph (a) or (b) (as the case may be) give the approved regulator such further relevant information, and by such time, as it may reasonably require.

43 Challenge to appointment

(1) An approved regulator may by written notice challenge the appointment by any of its licensed providers of a person (“P”)—

(a) as its—
   (i) Head of Legal Services, or
   (ii) Head of Practice, or

(b) as a member of its Practice Committee.

(2) A notice of a challenge under subsection (1)—

(a) requires to be given by the approved regulator within 14 days of the relevant notification to it under section 42(2), (4) or (5)(a),

(b) is to specify the grounds for the challenge.

(3) A challenge under subsection (1) may be made only if the approved regulator—

(a) believes that P is (or may be)—
   (i) ineligible, or
   (ii) unsuitable,

for the appointment, or

(b) has other reasonable grounds for the challenge.

(4) If the approved regulator determines (after making a challenge under subsection (1)) that the grounds for the challenge are made out, it may direct the licensed provider to rescind P’s appointment.

(5) Before giving a direction under subsection (4), the approved regulator must give the licensed provider and P 28 days (or such longer period as it may allow) to—

(a) make representations to it,

(b) take such steps as the licensed provider or P may consider expedient.
(6) Practice and licensing rules respectively must—
   (a) explain the basis on which P’s suitability for the appointment is determinable,
   (b) provide that the licensed provider’s licence is to be revoked or suspended if the
       licensed provider does not comply with a direction under subsection (4).

(6A) A licensed provider which or another person who is aggrieved by a direction under
       subsection (4) (or both jointly) may appeal against the direction—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the direction is
       given.

(7) For the purpose of subsections (1) to (6), an example of things relevant as respects P’s
    suitability for the appointment is whether P has a record of misconduct in any
    professional context.

44 Disqualification from position

(1) An approved regulator has the functions exercisable—
   (a) under this section and section 45, and
   (b) by reference to one or more of the conditions specified in section 46,
       in relation to a person (“P”) who holds within any of its licensed providers any of the
       posts to which those sections relate.

(2) If the first condition is met in relation to P, the approved regulator must disqualify P
    from—
   (a) appointment (or acting) as the Head of Practice,
   (b) membership of a Practice Committee.

(3) If the second condition is met in relation to P, the approved regulator—
   (a) must disqualify P from—
       (i) appointment (or acting) as the Head of Legal Services or Head of Practice,
       (ii) membership of a Practice Committee,
   (b) may disqualify P from being a designated person.

(4) If the third condition is met in relation to P, the approved regulator must disqualify P
    from—
   (a) appointment (or acting) as the Head of Legal Services or Head of Practice,
   (b) membership of a Practice Committee.

(5) If the fourth condition is met in relation to P, the approved regulator—
   (a) must disqualify P from—
       (i) appointment (or acting) as the Head of Legal Services or Head of Practice,
       (ii) membership of a Practice Committee,
   (b) may disqualify P from being a designated person.
(6) If the fifth condition is met in relation to P, the approved regulator may disqualify P from—

(a) appointment (or acting) as the Head of Legal Services or Head of Practice,
(b) membership of a Practice Committee,
(c) being a designated person.

45 Effect of disqualification

(1) A disqualification under section 44—

(a) may be—

(i) without limit of time, or
(ii) for a fixed period,
(b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(2) Where a disqualification under section 44 is from being a designated person, the disqualification may be framed so as to be limited by reference to—

(a) particular activities, or
(b) activities carried out without appropriate supervision (for example, that of a senior solicitor).

(3) Before disqualifying P under section 44, the approved regulator must give the licensed provider and P 28 days (or such longer period as it may allow) to—

(a) make representations to it,
(b) take such steps as the licensed provider or P may consider expedient.

(3A) Licensing rules must provide that the licensed provider’s licence may be revoked or suspended if the licensed provider wilfully disregards a disqualification imposed under section 44.

(4) Practice rules must—

(a) set procedure (which the approved regulator is to follow) for imposing a disqualification under section 44,
(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that section.

(5) A person who is disqualified under section 44 may appeal against the disqualification—

(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which the disqualification is imposed.

46 Conditions for disqualification

(1) This section applies for the purposes of section 44.

(2) The first condition is that—

(a) P—
(i) is subject to a trust deed granted by P for the benefit of P’s creditors,
(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay P’s creditors,
(iii) has been adjudged bankrupt and has not been discharged from bankruptcy,
(iv) has been sequestrated (that is, sequestration of P’s estate has been awarded) and the sequestration has not been discharged, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(3) The second condition is that—
(a) P is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation, and
(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(4) The third condition is that—
(a) P—
(i) is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 or corresponding Northern Ireland legislation,
(ii) is disqualified by a court from holding, or otherwise has been removed by a court from, a position of business responsibility (for example, from being a director of a charity), and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(5) The fourth condition is that—
(a) P—
(i) has been convicted of an offence involving dishonesty, or
(ii) in respect of an offence, has been fined the equivalent amount to the maximum on level 3 of the standard scale or more (whether on summary or solemn conviction) or has been sentenced to imprisonment for a term of 2 years or more, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(6) The fifth condition is that—
(a) P (acting in the relevant capacity) has—
(i) failed in a material regard to fulfil any of P’s duties under (or arising by virtue of) this Part, or
(ii) caused, or substantially contributed to, a material breach of the terms or conditions of the licensed provider’s licence, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(7) In subsections (3)(a) and (4)(a)(i), “Northern Ireland legislation” has the meaning given in section 24(5) of the Interpretation Act 1978.
Designated persons

47 (1) In this Part, a “designated person” within a licensed legal services provider is a person who is designated as such under subsection (2).

(2) Designation under this subsection is written designation by the licensed provider to carry out legal work in connection with the licensed provider’s provision of legal services.

(3) For the purposes of subsection (2)—
   (a) designation by the licensed provider means designation on its behalf by its Head of Legal Services or Head of Practice (who has the function accordingly),
   (b) a person is eligible for designation only if the person is—
      (i) an employee of the licensed provider (or otherwise works within it under any arrangement), or
      (ii) an investor in it,
   (c) it is immaterial whether the person is—
      (i) a member of a professional association, or
      (ii) paid for the work.

47A Working context

(1) A Head of Legal Services is, in furtherance of section 39(5)(aa) and (b), responsible for ensuring that there is (by or under the direction of the Head) adequate supervision of the legal work carried out by the designated persons within the licensed provider.

(2) Only a designated person within a licensed provider may carry out legal work in connection with its provision of legal services.

(3) Nothing in this Part affects the operation of—
   (a) section 32 of the 1980 Act or any other enactment which requires that a particular sort of legal work be carried out by an individual of a particular description (or in a particular way), or
   (b) any rule of professional practice, conduct or discipline (whether for solicitors or otherwise) which properly so requires.

48 Listing and information

(1) The Head of Practice of a licensed provider must—
   (a) keep a list of the designated persons within the licensed provider, and
   (b) give its approved regulator a copy of the list whenever the approved regulator requests it.

(2) The Head of Practice must give its approved regulator such information about the designated persons within the licensed provider as the approved regulator may reasonably request.
Non-solicitor investors

49  **Fitness for involvement**

(1) An approved regulator must—
   (a) before issuing a licence to a licensed legal services provider, or renewing it, satisfy itself as to the fitness of every non-solicitor investor in the licensed provider for having an interest in the licensed provider,
   (b) thereafter, monitor as it considers appropriate the investor’s fitness in that regard.

(2) Licensing rules must—
   (a) explain the basis on which a non-solicitor investor’s fitness for having an interest in a licensed provider is determinable,
   (b) provide that, where the approved regulator determines that the investor is unfit in that regard—
      (i) a licence is not to be issued to the licensed provider (or renewed),
      (ii) if issued, the licence is to be revoked or suspended.

(2A) But the approved regulator need not act as required by licensing rules made under subsection (2)(b) if, by such time as it may reasonably appoint, the licensed provider demonstrates to it that (following disqualification as required by section 50A(1) or otherwise) the investor no longer has the relevant interest.

(3) The approved regulator must, before making its final determination as to fitness, give the non-solicitor investor 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the investor may consider expedient.

(4) A person who is determined as unfit under this section may appeal against the determination—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the determination is made.

49A  **Exemption from fitness test**

(1) Section 49(1) is subject to this section.

(2) The approved regulator need not act as required by that section in relation to any exemptible investor in the licensed provider.

(3) Licensing rules must explain—
   (a) any circumstances in which the approved regulator proposes to rely on subsection (2),
   (b) any threshold below the percentage specified in subsection (4) by reference to which it proposes to rely on subsection (2),
   (c) where it proposes to rely on subsection (2), its reasons.

(4) In subsection (2), an “exemptible investor” is an investor who has less than a 10% stake in the total ownership or control of the licensed provider.
50 Factors as to fitness

(1) This section applies for the purposes of section 49.

(2) The following are examples of things relevant as respects a non-solicitor investor’s fitness for having an interest in a licensed provider—

(a) the investor’s—

(i) financial position and business record,

(ii) probity and character,

(iii) family, business or other associations (so far as bearing on character),

(b) whether—

(i) the investor has ever caused, or substantially contributed to, a material breach of the terms or conditions of any licensed provider’s licence,

(ii) the investor’s involvement in the licensed provider may (in the approved regulator’s opinion) be detrimental to the observance of the regulatory objectives or adherence to the professional principles, or to the compliance with this Part or any other enactment, by any person or body,

(iii) the investor has ever contravened section 51(1) or (2) or there is (in the approved regulator’s opinion) a significant risk that the investor will ever contravene that section.

(3) A non-solicitor investor is to be presumed to be unfit for having an interest in a licensed provider if one or more of the following conditions is met—

(a) the first condition is that the investor—

(i) is subject to a trust deed granted by the investor for the benefit of the investor’s creditors,

(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay the investor’s creditors,

(iii) has been adjudged bankrupt and has not been discharged from bankruptcy, or

(iv) has been sequestrated (that is, sequestration of the investor’s estate has been awarded) and the sequestration has not been discharged,

(b) the second condition is that the investor is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation,

(c) the third condition is that the investor—

(i) is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 or corresponding Northern Ireland legislation,

(ii) is disqualified by a court from holding, or otherwise has been removed by a court from, a position of business responsibility (for example, from being a director of a charity),

(d) the fourth condition is that the investor—
(i) has been convicted of an offence involving dishonesty, or
(ii) in respect of an offence, has been fined the equivalent amount to the maximum on level 3 of the standard scale or more (whether on summary or solemn conviction) or has been sentenced to imprisonment for a term of 2 years or more.

(3A) Where a non-solicitor investor is a body, it is relevant as respects the investor’s fitness for having an interest in a licensed provider whether or not the persons having control or substantial influence in the body’s affairs would (if they were investors in the licensed provider in their own right) be held to be fit in that regard.

(5) In subsection (3)(b) and (c)(i), “Northern Ireland legislation” has the meaning given in section 24(5) of the Interpretation Act 1978.

50A Ban for improper behaviour

(1) Where an approved regulator determines that a non-solicitor investor in a licensed legal services provider has contravened section 51(1) or (2), the approved regulator must disqualify the investor from having an interest in the licensed provider.

(2) A disqualification under subsection (1)—
   (a) may be—
      (i) without limit of time, or
      (ii) for a fixed period,
   (b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(3) Before disqualifying an investor under subsection (1), the approved regulator must give the investor 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the investor may consider expedient.

(4) Practice rules must—
   (a) set procedure (which the approved regulator is to follow) for imposing a disqualification under subsection (1),
   (b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that subsection.

(5) A person who is disqualified under subsection (1) may appeal against the disqualification—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the disqualification is imposed.

51 Behaving properly

(1) A non-solicitor investor in a licensed legal services provider must not (in that capacity) act in a way that is incompatible with—
   (a) the regulatory objectives or the professional principles,
(b) the licensed provider’s duties under section 38(1), or
(c) its—
   (i) other duties under this Part,
   (ii) its duties under any other enactment.

(2) A non-solicitor investor in a licensed provider must not (in that capacity)—
   (a) interfere improperly in the provision of legal or other professional services by the
       licensed provider,
   (b) in relation to any designated or other person within the licensed provider—
       (i) exert undue influence,
       (ii) solicit unlawful or unethical conduct, or
       (iii) otherwise behave improperly.

52 More about investors

(1) Schedule 8 provides for other—
   (a) requirements to which licensed legal services providers are subject,
   (b) functions of approved regulators,

in relation to interests in licensed providers.

(2) The Scottish Ministers may by regulations make further provision—
   (a) relating to interests in licensed providers,
   (b) for licensing rules in connection with persons who have an interest in a licensed
       provider.

(2A) The Scottish Ministers with the consent of the Lord President may by regulations—
   (a) amend the percentage specified in section 49A(4) and paragraph 3A(3) of
       schedule 8,
   (b) amend (by addition, elaboration or exception) a definition in subsection (4).

(2B) Regulations under subsection (2)(a) may (in particular)—
   (a) impose requirements to which a licensed provider, or an investor in a licensed
       provider, is subject,
   (b) specify criteria or circumstances by reference to which a non-solicitor investor is
       to be presumed, or held, to be fit (or unfit),
   (c) set out—
       (i) what amounts (to any extent) to ownership, control or another material
           interest,
       (ii) what interest (or type) is relevant as regards a particular percentage stake in
           ownership or control,
       (iii) by reference to a family, business or other association, what other interest
           (or type) also counts towards such a stake.

(4) In this Part—
(a) an “investor” in a licensed provider is any person who has (to any extent)—
   (i) ownership or control of the licensed provider, or
   (ii) any other material interest in it,
(b) a “non-solicitor investor” in a licensed provider is an investor who is not entitled to practise—
   (i) as a solicitor,
   (ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or
   (iii) as a registered European lawyer.

(5) In sections 49 to 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.

Discontinuance of services

53 Duty to warn

(1) Subsection (2) applies where a licensed legal services provider—
   (a) is in serious financial difficulty, or
   (b) for any reason (except revocation or suspension of its licence under this Part)—
      (i) intends to stop providing legal services, or
      (ii) is likely to become unable to continue providing legal services.

(2) The licensed provider must—
   (a) notify (without delay) its approved regulator accordingly,
   (b) provide the approved regulator with such relevant information as the approved regulator may require,
   (c) take all reasonable steps to mitigate such disruption to its clients as is likely to result from the difficulty or (as the case may be) its ceasing to provide legal services.

54 Ceasing to operate

(1) Subsections (2) to (5) apply where—
   (a) because of a vacancy within a licensed legal services provider, the licensed provider has within it no person who is eligible to be (or act as) its—
      (i) Head of Legal Services, or
      (ii) Head of Practice,
   (b) in respect of a licensed provider—
      (i) a provisional liquidator, liquidator, receiver or judicial factor is appointed,
      (ii) an administration or winding up order is made,
      (iii) a resolution is passed by it for its voluntary winding up (except where that resolution is solely to facilitate reconstruction or amalgamation with another licensed provider), or
Part 2—Regulation of licensed legal services
Chapter 2—Licensed legal services providers

(c) for some other reason (except revocation or suspension of its licence under this Part), a licensed provider stops providing legal services.

(2) The licensed provider must—

(a) notify (without delay) its approved regulator accordingly,

(b) provide the approved regulator with such information about the situation as the approved regulator may require.

(3) The approved regulator must revoke the licensed provider’s licence except where the approved regulator is satisfied that—

(a) the situation is temporary, and

(b) there are sufficient arrangements in place to safeguard the interests of the licensed provider’s clients until such time as the situation is rectified.

(4) For the purpose of subsection (3), the approved regulator must review the situation every 14 days (or, if it so chooses, more frequently).

(5) Where a licensed provider has ceased to exist—

(a) its functions under subsection (2)(a) and (b) fall to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, its function under subsection (2)(b) falls to a person nominated by its approved regulator.

(6) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

55 Safeguarding clients

(1) Subsections (2) and (3) apply where—

(a) a licensed legal services provider—

(i) has given (or is required to give) notice to its approved regulator under section 53(2)(a) or 54(2)(a), or

(ii) has had (or is to have) its licence revoked or suspended under this Part, and

(b) the approved regulator has not informed it (or has not had an opportunity to do so) that the approved regulator is satisfied that it has made sufficient arrangements for the safeguarding of its clients’ interests.

(2) The licensed provider must—

(a) prepare—

(i) in the case of revocation, final accounts,

(ii) in the case of suspension, interim accounts,

which (in particular) detail all sums held on behalf of clients,

(b) comply with any directions given under subsection (3).

(3) The approved regulator may direct the licensed provider to take specified action (or refrain from doing something) if the approved regulator considers that to be necessary or expedient for safeguarding the interests of the licensed provider’s legal services clients.
Directions given under subsection (3) may (in particular) require the licensed provider to make available to a relevant person or body any—

(a) document or information (of whatever kind) held in the licensed provider’s possession or control which—

(i) relates to, or is held on behalf of, a client of the licensed provider, or

(ii) relates to any trust of which the licensed provider (or one of the designated persons within it) is sole trustee or co-trustee only with other designated persons in the licensed provider,

(b) sum of money held by the licensed provider—

(i) on behalf of a client,

(ii) subject to any trust of the kind mentioned in paragraph (a)(ii).

For the purposes of subsection (4), a relevant person or body is—

(a) the particular client,

(b) the approved regulator,

(c) a provider of legal services that is properly instructed by the licensed provider, or

the approved regulator, to act in place of the licensed provider.

The Court of Session may, on an application by the approved regulator, make an order—

(a) confirming that the licensed provider is required to comply with any direction given under subsection (3),

(b) varying the direction or imposing such conditions as the Court considers appropriate in the circumstances,

(c) that, without the leave of the Court, no payment be made by any bank, building society or other body named in the order out of any account (or any sum otherwise deposited) in the name of the licensed provider.

Before making such an order, the Court must—

(a) give the licensed provider and any other person with an interest an opportunity to be heard,

(b) be satisfied that the direction (or, as the case may be, freezing of an account) represents an appropriate course of action in all the circumstances of the case.

The approved regulator may recover from the licensed provider any expenditure reasonably incurred by the approved regulator in consequence of its taking action under this section.

Where a licensed provider has ceased to exist, its functions under (or arising by virtue of) this section fall—

(a) to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, to a person nominated by its approved regulator.

The Scottish Ministers may by regulations make further provision about the steps that are, in the circumstances within subsection (1), to be taken to safeguard the interests of clients of licensed providers.
(11) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

56 Distribution of client account

(1) Any sums of the kind to which section 42 of the 1980 Act applies that are held in a client account (as referred to in that section) kept by a licensed provider are, in any of the events mentioned in subsection (2A) of that section, to be distributed in the same way as they would if they were subject to that section.

(2) For the purpose of subsection (1), any reference in that section to an incorporated practice is to be read as if it were a reference to the licensed provider.

57 Employing disqualified lawyer

(1) Subsection (2) applies in relation to—
   (a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,
   (b) a person—
      (i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or
      (ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,
   (c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—
      (i) practising as an advocate,
      (ii) acting as a conveyancing or executry practitioner,
      (iiia) acting as a litigation practitioner, or
      (iv) acting as a confirmation agent or will writer within the meaning of Part 3,
   (d) a body whose certificate of recognition as an incorporated practice has been revoked.

(2) A licensed legal services provider must not employ or remunerate as a designated person—
   (a) the person while the person is so debarred (however described in subsection (1)), or
   (b) the body while the revocation subsists.

(3) But subsection (2) is inoperative in relation to the person or (as the case may be) body if the licensed provider has its approved regulator’s written authority that it is so inoperative in the circumstances of the particular case.

(4) Any authority under subsection (3) may be given—
   (a) for a specified period,
   (b) with conditions attached.
A licensed provider may appeal to the Court of Session if it is aggrieved by—

(a) the withholding of any such authority, or
(b) any conditions attached under subsection (4)(b).

On an appeal under subsection (5)—

(a) the Court may direct the approved regulator on the matter as the Court considers appropriate,
(b) the Court’s determination is final.

If a licensed provider wilfully contravenes—

(a) subsection (2), or
(b) any conditions attached under subsection (4)(b),

its approved regulator may revoke or suspend its licence.

Concealing disqualification

Subsection (2) applies to—

(a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,
(b) a person—
   (i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or
   (ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,
(c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—
   (i) practising as an advocate,
   (ii) acting as a conveyancing or executry practitioner,
   (iii) acting as a litigation practitioner, or
   (iv) acting as a confirmation agent or will writer within the meaning of Part 3.

The person is guilty of an offence if, while the person is so debarred (however described in subsection (1)), the person seeks or accepts employment by a licensed provider without previously informing it of the debarment.

A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Subsection (5) applies to a body whose certificate of recognition as an incorporated practice has been revoked.

The body is guilty of an offence if, while the revocation subsists, the body seeks or accepts employment by a licensed provider without previously informing it of the revocation.

A body which commits an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
59 Pretending to be licensed

(1) A person commits an offence if the person—
   (a) pretends to be a licensed provider, or
   (b) takes or uses any name, title, addition or description implying falsely that the
       person is a licensed provider.

(2) A person who commits an offence under this section is liable on summary conviction to
    a fine not exceeding level 5 on the standard scale.

60 Professional privilege

(1) Subsection (2) applies to any communication made to or by—
   (a) a licensed provider in the course of its acting as such in its provision of legal
       services for any of its clients,
   (b) a designated person (apart from a solicitor or advocate) within the licensed
       provider who is acting—
       (i) in connection with its provision of such legal services, and
       (ii) at the direction, and under the supervision, of a solicitor.

(2) The communication is, in any legal proceedings, privileged from disclosure as if the
    licensed provider or (as the case may be) the person had at all material times been a
    solicitor acting for the client.

(3) Subsection (4) applies to any special provision which—
   (a) is contained in an enactment or otherwise,
   (b) relates to a solicitor, and
   (c) concerns—
       (i) the disclosure of information with respect to which a claim of professional
           privilege could be maintained, or
       (ii) the production, seizure or removal of documents with respect to which such
           a claim could be maintained.

(4) The provision has effect in relation to a licensed provider, and any designated person
    (apart from a solicitor) within a licensed provider, as it does in relation to a solicitor but
    with any necessary modifications.

(5) This section is without prejudice to any other enactment or rule of law concerning
    professional or other privilege from disclosure (in particular, as applicable in relation to a
    solicitor).
CHAPTER 3

FURTHER PROVISION

Achieving regulatory aims

61 Input by the OFT

(1) The Scottish Ministers or (as the case may be) an approved regulator must, whenever consulting the OFT under this Part, request the OFT—

(a) to give such advice as it considers appropriate in relation to the matter concerned,

(b) in considering what advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are or (as the case may be) the approved regulator is to take account of any advice given by the OFT within—

(a) the relevant consultation period, or

(b) otherwise—

(i) in the case of the Scottish Ministers, the period of 90 days beginning with the day on which they request the advice,

(ii) in the case of the approved regulator, the period of 30 days beginning on the day on which it requests the advice or such longer period not exceeding 90 days as it may agree with the OFT.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

62 Role of approved regulators

(1) Subsections (2) to (4) apply in relation to the exercise by an approved regulator of its functions under this Part.

(2) The approved regulator must, so far as practicable, act in a way which—

(a) is compatible with the regulatory objectives, and

(b) it considers most appropriate with a view to meeting those objectives.

(3) The approved regulator must adopt best regulatory practice under which (in particular) regulatory activities should be—

(a) carried out—

(i) effectively (but without giving rise to unnecessary burdens),

(ii) in a way that is transparent, accountable, proportionate and consistent,

(b) targeted only at such cases as require action.

(4) The approved regulator must seek to ensure that its licensed legal services providers have regard to the regulatory objectives.

63 Policy statement

(1) An approved regulator must prepare and issue a statement of policy as to how, in exercising its functions under this Part, it will comply with its duties under section 62.
(2) The approved regulator—
   (a) may revise the policy statement,
   (b) if it does so, must re-issue the policy statement.

(3) The approved regulator may issue (or re-issue) the policy statement only with the approval of the Scottish Ministers.

(4) The approved regulator must publish the policy statement as issued (or re-issued).

(5) In exercising its functions under this Part, the approved regulator must have regard to the policy statement as issued (or re-issued).

Complaints

64 Complaints about regulators

(A1) Any complaint about an approved regulator is to be made to the Scottish Legal Complaints Commission.

(A2) The Commission is to determine whether or not the complaint is—
   (a) one for which section 57D(1) of the 2007 Act makes provision,
   (b) frivolous, vexatious or totally without merit.

(A3) And—
   (a) if the Commission determines that the complaint falls within subsection (A2)(a), the Commission is to proceed by reference to section 57D(1) of the 2007 Act,
   (b) if the Commission determines that the complaint falls within subsection (A2)(b), the Commission—
      (i) must notify the complainer and the approved regulator accordingly (with reasons),
      (ii) is not required to take any further action.
   (c) if the Commission determines that the complaint does not fall within subsection (A2)(a) or (b), the Commission must refer the complaint to the Scottish Ministers.

(1) The Scottish Ministers must investigate any complaint about an approved regulator that is referred to them under subsection (A3)(c).

(3) Where the Scottish Ministers do not uphold the complaint, they must notify the complainer and the approved regulator accordingly (with reasons).

(5) Where the Scottish Ministers uphold the complaint, they must—
   (a) notify the complainer and the approved regulator accordingly (with reasons), and
   (b) decide whether to proceed under section 29.

(6) The Scottish Ministers may delegate to the Commission any of their functions under subsections (1), (3) and (5)(a) (and, if they so delegate their function under subsection (1), they may also waive the referral requirement under subsection (A3)(c)).

(7) The Scottish Ministers may by regulations make further provision about complaints made about approved regulators (and how they are to be dealt with).
Legal Services (Scotland) Bill
Part 2—Regulation of licensed legal services
Chapter 3—Further provision

64A Levy payable by regulators

(1) An approved regulator must pay to the Scottish Legal Complaints Commission—
   (a) in respect of each financial year, an annual levy,
   (b) if arising, a complaints levy.

(2) The amount of the annual levy or complaints levy payable by an approved regulator—
   (a) is to be determined by the Commission,
   (b) may be—
      (i) different from any amount payable as an annual general levy or (as the case
          may be) a complaints levy under Part 1 of the 2007 Act,
      (ii) in either case, of different amounts (including nil) in different circumstances.

(3) The complaints levy arises as respects an approved regulator where—
   (a) the Scottish Ministers delegate to the Commission their function under section
       64(1) in relation to a complaint made about the approved regulator, and
   (b) the Commission upholds the complaint.

(4) Before determining for a financial year the amount of the annual levy or complaints
    levy, the Commission must consult—
    (a) each approved regulator (with particular reference to the proposed amount to be
        payable by it),
    (b) the Scottish Ministers.

65 Complaints about providers

In the 2007 Act, after Part 2 insert—

“PART 2A

SPECIAL PROVISION FOR LICENSED PROVIDERS ETC.

57A Complaints about licensed providers

(1) Parts 1 and 2 apply in relation to complaints made about licensed legal services
    providers as they apply in relation to complaints made about practitioners.

(2) Subsection (1) is subject to—
    (a) subsections (3) and (4), and
    (b) such further modification to the operation of Parts 1 and 2 as the Scottish
        Ministers may by regulations make for the purposes of—
        (i) subsection (1),
        (ii) section 57B(4) and (5).

(3) In relation to a services complaint about a licensed provider, its approved
    regulator is to be regarded as the relevant professional organisation.

(4) A conduct complaint may not be made about a licensed provider, but—
(a) such a complaint may be made about a practitioner within such a
provider,
(b) the provisions relating to such a complaint remain (subject to such
modification as to those provisions as is made under subsection (2)(b))
applicable for the purposes of section 57B(4) and (5).

57B Regulatory complaints
(1) There is an additional type of complaint which applies only in relation to
licensed providers (a “regulatory complaint”).
(2) A regulatory complaint is where any person suggests that a licensed provider is
failing (or has failed) to—
(a) have regard to the regulatory objectives,
(b) adhere to the professional principles,
(c) comply with—
(i) its approved regulator’s regulatory scheme,
(ii) the terms of its licence.
(3) In relation to a regulatory complaint about a licensed provider, its approved
regulator is to be regarded as the relevant professional organisation.
(4) The procedure in respect of a regulatory complaint is (by virtue of section
57A(4)(b)) the same as it would be for a conduct complaint about a licensed
provider, subject to such modification as to that procedure as is made under
section 57A(2)(b).
(5) The Commission and the approved regulator have (by virtue of section
57A(4)(b)) the same functions in relation to a regulatory complaint as they
would have in relation to a conduct complaint about a licensed provider,
subject to such modification as to those functions as is made under section
57A(2)(b).

57C Levy, advice and guidance
(1) A licensed provider must pay to the Commission—
(a) the annual general levy, and
(b) the complaints levy (if arising),
in accordance with Part 1 (and in addition to any levy payable under that Part
by a solicitor or other person within the licensed provider).
(1A) Section 29 applies for the purposes of subsection (1) as it applies for the
purposes of sections 27(1) and 28(1).
(1B) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1)
and (1A)—
(a) an approved regulator is to be regarded as a relevant professional
organisation whose members are its licensed providers,
(b) a licensed provider is to be regarded—
(i) in connection with the annual general levy, as an individual person falling within the relevant category,

(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

(2) But the amount of the annual general levy for a licensed provider may be—

(a) different from the amount to be paid by individuals,

(b) of different amounts (including nil) in different circumstances.

(3) The Commission—

(a) must (so far as practicable) provide advice to any person who requests it as respects the process of making a regulatory complaint to the Commission,

(b) may issue guidance under section 40 to approved regulators and licensed providers as respects how licensed providers are to deal with regulatory complaints.

57CA Recovery of levy

(1) An approved regulator must—

(a) secure the collection by it, from its licensed providers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as it applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57C(1)(a) (including interest) as it applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57C(1)(b) (including interest) as it applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approved regulator is to be regarded as the relevant professional organisation,

(b) each of its licensed providers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57C(1) is subject to subsection (1).
57D Handling complaints

(1) Sections 23 to 25 apply in relation to any complaint made about how an approved regulator has dealt with a regulatory complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those sections as the Scottish Ministers may by regulations make for the purposes of that subsection.

57E Interpretation of Part 2A

For the purposes of this Part—

“approved regulator”,

“licensed legal services provider” (or “licensed provider”),

“professional principles”,

“regulatory objectives”,

“regulatory scheme”,

are to be construed in accordance with Part 2 of the Legal Services (Scotland) Act 2010.”.

Registers and lists

66 Register of approved regulators

(1) The Scottish Ministers—

(a) must keep and publish a register of approved regulators,

(b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approved regulator—

(a) its contact details (including its address, website and telephone number),

(b) the date on which it was given the relevant approval under section 6,

(c) the date on which it was given the relevant authorisation under section 7 (and the duration of that authorisation (unlimited or the fixed period)),

(d) the categories of legal services to which that authorisation relates,

(e) details of any measure taken by the Scottish Ministers under section 29.

67 Registers of licensed providers

(1) An approved regulator must keep and publish a register of its licensed legal services providers.

(2) The register is to include the following information in relation to each licensed provider—

(a) its name and any place of business,
(b) the relevant details about its licence,
(c) the name of every non-solicitor investor in the licensed provider,
(d) the name of every person intimated to the approved regulator under paragraph 3 of schedule 8,
(e) the names and the dates of appointment of—
   (i) its Head of Legal Services, and
   (ii) its Head of Practice or, if applicable, each member of its Practice Committee (including with specific reference to section 41(3)),
(f) whether the licensed provider has been the subject of any disciplinary action and (if so) a description of that action.

(3) In subsection (2)(b), the relevant details about a licensed provider’s licence are—
(a) the date on which the licence was originally granted,
(b) the date on which it was most recently renewed,
(c) whether it is subject to any conditions,
(d) the date on which it will expire.

(4) But, in the case of a former licensed provider, the relevant details are instead—
(a) the date on which the licence was originally granted,
(b) the period for which the licensed provider held a licence,
(c) the reason for the licensed provider ceasing to hold a licence.

(5) The Scottish Ministers may by regulations—
(a) make further provision about the information to be contained in the registers of licensed providers, and
(b) prescribe the manner in which those registers are to be kept and published.

(6) In this section, a reference to a licensed provider includes a former licensed provider.

68 Lists of disqualified persons

(1) An approved regulator must keep a list of the persons whom it has disqualified under section 44 (that is, from holding a certain position in a licensed legal services provider).

(2) The list kept under subsection (1) must include the following information in relation to each person concerned—
(a) the person’s name,
(b) the—
   (i) name of any relevant licensed provider,
   (ii) any relevant position held by the person as at the date of the disqualification,
(c) each position from which the person is disqualified,
(d) the date of disqualification and its duration (unlimited or the fixed period),
(e) the reasons for the disqualification.
(3) An approved regulator must keep a list of the persons whom it has—
   (a) determined as unfit under section 49 (that is, for being a non-solicitor investor in a
       licensed provider), or
   (b) disqualified under section 50A(1) (that is, from having an interest in a licensed
       provider).

(4) The list kept under subsection (3) must include the following information in relation to
    each person concerned—
    (a) the person’s name,
    (b) the name of any relevant licensed provider,
    (c) the date of the determination or (as the case may be) disqualification,
    (d) the grounds for the determination or (as the case may be) disqualification.

(4A) A list kept under this section must not include information relating to a person in respect
      of whom the determination or (as the case may be) disqualification—
      (a) has been reversed on appeal, or
      (b) otherwise, no longer applies.

(5) The approved regulator must—
    (a) publish the lists kept by it under this section, and
    (b) notify the Scottish Ministers of any material alterations made to either of them.

(6) The Scottish Ministers may by regulations—
    (a) make further provision about the information to be contained in the lists kept
        under this section,
    (b) prescribe the manner in which those lists are to be kept and published.

Miscellaneous

69 Privileged material

(1) Subsection (2) applies to the publication under this Part of any—
    (a) advice, report or notice, or
    (b) other material.

(2) For the purposes of the law on defamation, the publication is privileged.

(3) But subsection (2) is ineffective if it is proved that the publication was made with
    malice.

70 Immunity from damages

(1) Neither an approved regulator nor any of its officers, members or employees is liable in
    damages for any act or omission occurring in the exercise (or purported exercise) of its
    functions under this Part.

(2) But subsection (1) is ineffective if it is shown that the act or omission was in bad faith.
70A Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.

(2) The appeal is to be made by way of summary application.

(3) In the appeal, the sheriff may—

(a) uphold, vary or quash the decision that is the subject of the appeal,

(b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.

71 Effect of professional or other rules

(1) Sections 88(5) and 91(3) respectively make provision (in connection with this Part) as to the effect of professional rules to which advocates and solicitors are subject.

(2) Nothing in this Part affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of other persons who provide professional services (in particular, as it may relate to their involvement in or with licensed legal services providers).

(3) This Part is without prejudice to any function of a person or body—

(a) arising by virtue of the application of another enactment (or a regulatory rule made under another enactment), and

(b) to regulate in any respect the provision of any professional or other services by licensed legal services providers.

PART 3
CONFIRMATION AND WILL WRITING SERVICES
CHAPTER 1
CONFIRMATION SERVICES

Regulation of confirmation agents

72 Confirmation agents and services

(1) For the purposes of this Part, confirmation services are services that are—

(a) described in subsection (2), and

(b) provided (or offered)—

(i) to members of the public, and

(ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing papers on which to found or oppose an application for the confirmation of a person as the executor nominate or dative in relation to the estate of a deceased person.
(3) It is immaterial for the description in subsection (2) whether or not the services also involve applying to the sheriff on behalf of the person so as to secure the person’s confirmation as such (or taking other related action).

(4) For the purposes of this Part, a confirmation agent is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide confirmation services is conferred.

73 Approving bodies

(1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section 74.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section 74(1)(b)),

(b) a description of—

(i) the applicant’s constitution and composition (including internal structure),

(ii) its activities.

(4) The applicant—

(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,

(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

74 Certification of bodies

(1) The Scottish Ministers may, with the consent of the Lord President, certify the applicant as an approving body if they are satisfied that—

(a) the applicant is suitable to be an approving body,

(b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 75).

(2) The Scottish Ministers may certify the applicant as an approving body—

(a) either—

(i) without limit of time, or

(ii) for a fixed period,

(b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,

(c) subject to conditions (any of which may be removed or varied by the Scottish Ministers after consulting the approving body).
(2A) The Scottish Ministers may, with the consent of the Lord President, amend, add or delete any conditions imposed under subsection (2)(c).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—

(a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—

(a) must send a copy of the application to the OFT,

(b) may send—

(i) to any other consultee, a copy of the application,

(ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—

(a) refuse to certify it as an approving body, or

(b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,

(b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—

(a) the process for seeking their certification,

(b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

75 Regulatory schemes

(1) An approving body must—

(a) make a regulatory scheme for—

(i) conferring on any of the individual persons within its membership the right to provide confirmation services, and

(ii) regulating the provision of confirmation services by the persons on whom (in accordance with the scheme) that right is conferred, and

(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) describe the training requirements to be met by a prospective confirmation agent,

(b) incorporate a code of practice to which a confirmation agent is subject,

(c) require that a confirmation agent keep in place sufficient arrangements for professional indemnity,
Legal Services (Scotland) Bill
Part 3—Confirmation and will writing services
Chapter I—Confirmation services

(d) include rules about—
   (i) the making and handling of any complaint about a confirmation agent,
   (ii) the measures that may be taken by the approving body, in relation to a
        confirmation agent, if a conduct complaint (as construed by reference to
        section 2(1)(a) of the 2007 Act (and as if the confirmation agent were a
        practitioner to whom that section relates)) about the confirmation agent is
        upheld,
   (e) allow a confirmation agent to make representations to the approving body before
       it takes any of the measures available to it by virtue of paragraph (d)(ii),
   (f) cover such other regulatory matters as the Scottish Ministers may by regulations
       specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—
   (a) set out the standards to be met by confirmation agents,
   (b) make such further arrangements as to the professional practice, conduct or
        discipline of confirmation agents for which provision is (in the approving body’s
        opinion) necessary or expedient,
   (c) allow for—
        (i) the rescission or suspension of, or attaching of conditions to the exercise of,
            the right of a confirmation agent to provide confirmation services if the
            agent contravenes the code of practice,
        (ii) the suspension of that right of a confirmation agent if a complaint,
            suggesting that the agent is guilty of professional misconduct in relation to
            the provision of confirmation services, is made about the agent.

(4) A confirmation agent may appeal against a decision taken under the regulatory scheme
    to rescind or suspend, or attach conditions to the exercise of, the agent’s right to provide
    confirmation services—
    (a) to the sheriff,
    (b) within the period of 3 months beginning with the date on which that decision is
        intimated to the agent.

(5) An approving body must, so far as practicable when exercising its functions under this
    Chapter, observe the regulatory objectives.

76 Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section 75(2)(d)(ii) may provide
    for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the
    maximum amount permitted by the Scottish Ministers when giving their certification
    under section 74.

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers
    (but the approving body may collect it on their behalf).

(4) A confirmation agent may appeal against a financial penalty (or the amount of a
    financial penalty) imposed on the agent by virtue of this section—
Legal Services (Scotland) Bill
Part 3—Confirmation and will writing services
Chapter 1—Confirmation services

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

76A Review of own performance

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approving body’s compliance with section 75(5),

(b) the exercise of its functions in relation to its regulatory scheme,

(c) its compliance with any measures applying to it by virtue of section 81(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

(a) the review of approved bodies’ performance,

(b) reports on reviews of their performance.

77 Pretending to be authorised

(1) A person commits an offence if the person—

(a) pretends to be a confirmation agent (or otherwise pretends to have the right to provide confirmation services under this Part), or

(b) takes or uses any name, title, addition or description implying falsely that the person is a confirmation agent (or otherwise so implying that the person has the right to provide confirmation services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Other regulatory matters

78 Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section 81(3).

(2) The Scottish Ministers may—

(a) revoke the certification given to the approving body under section 74,

(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.
(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

79 **Surrender of certification**

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section 74.

(2) The approving body must—

(a) take all reasonable steps to mitigate such disruption to the clients of its confirmation agents as is likely to result from the surrender,

(b) in particular, take steps for ensuring that any relevant work is—

(i) completed, or

(ii) taken over by a suitably qualified person,

before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—

(a) for the purpose of subsection (2), or

(b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—

(a) subsection (2), and

(b) any directions given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

80 **Register and list**

(1) The Scottish Ministers—

(a) must keep and publish a register of approving bodies,

(b) may do so in a such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—

(a) its contact details (including its address, website and telephone number),

(b) the date on which it was given the relevant certification under section 74.

(3) An approving body must—

(a) keep a list of its confirmation agents,

(b) give the Scottish Ministers a copy of the list whenever they request it.
An approving body must give the Scottish Ministers such information about its confirmation agents as the Scottish Ministers may reasonably request.

Ministerial intervention

An approving body must—

(a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,

(b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

An approving body—

(a) if directed to do so by the Scottish Ministers, must—

(i) review its regulatory scheme (or any relevant part of it), and

(ii) report to them its findings and (if appropriate) inform them of any proposed amendment to the scheme,

(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—

(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,

(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

The Scottish Ministers may—

(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,

(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

An approving body must—

(a) review annually the performance of its confirmation agents,

(b) prepare a report on the review,

(c) send a copy of the report to the Scottish Ministers.

The Scottish Ministers may by regulations make further provision—

(a) about the review of confirmation agents,

(b) so far as it appears to them to be necessary for safeguarding the interests of clients of confirmation agents—

(i) concerning the functions of approving bodies,

(ii) relating to confirmation agents.
Chapter 2
WILL WRITING SERVICES
Regulation of will writers

81A Will writers and services
5 (1) For the purposes of this Part, will writing services are services that are—
(a) described in subsection (2), and
(b) provided (or offered)—
(i) to members of the public, and
(ii) for a fee, gain or reward.

10 (2) The services are those of drawing or preparing wills or other testamentary writings.

(3) For the purposes of this Part, a will writer is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide will writing services is conferred.

81B Approving bodies
15 (1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section 81C.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—
(a) a copy of the applicant’s proposed regulatory scheme (see section 81C(1)(b)),
(b) a description of—
(i) the applicant’s constitution and composition (including internal structure),
(ii) its activities.

(4) The applicant—
(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,
(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

81C Certification of bodies
(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—
(a) the applicant is suitable to be an approving body,
(b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 81D).
(2) The Scottish Ministers may certify the applicant as an approving body—
   (a) either—
      (i) without limit of time, or
      (ii) for a fixed period,
   (b) with reference to a specified date from which the approving body may exercise its
      functions in relation to its regulatory scheme,
   (c) subject to conditions (any of which may be removed or varied by the Scottish
      Ministers after consulting the approving body).

(3) Before deciding whether or not to certify the applicant as an approving body, the
    Scottish Ministers must consult—
    (a) the OFT, and such other organisation (appearing to them to represent the interests
        of consumers in Scotland) as they consider appropriate,
    (b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
    (a) must send a copy of the application to the OFT,
    (b) may send—
        (i) to any other consultee, a copy of the application,
        (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
    (a) refuse to certify it as an approving body, or
    (b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning
    with the date of the notification (or such longer period as the Scottish Ministers may
    allow) to—
    (a) make representations to the Scottish Ministers,
    (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification
    under this section, including (in particular)—
    (a) the process for seeking their certification,
    (b) in relation to capability to act as an approving body, the criteria for their
        certification (including things that applicants must be able to demonstrate).

**81D Regulatory schemes**

(1) An approving body must—
    (a) make a regulatory scheme for—
        (i) conferring on any of the individual persons within its membership the right
            to provide will writing services, and
        (ii) regulating the provision of will writing services by the persons on whom
            (in accordance with the scheme) that right is conferred, and
(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—

(a) describe the training requirements to be met by a prospective will writer,

(b) incorporate a code of practice to which a will writer (and anyone acting on behalf of the will writer in relation to will writing services) is subject,

(c) require that a will writer keep in place sufficient arrangements for professional indemnity,

(d) include rules about—

(i) the making and handling of any complaint about a will writer,

(ii) the measures that may be taken by the approving body, in relation to a will writer, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the will writer were a practitioner to whom that section relates)) about the will writer is upheld,

(e) allow a will writer to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),

(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by will writers (and persons acting on their behalf in relation to will writing services),

(b) except in such circumstances as the approving body considers appropriate, prohibit the drawing or preparation of a will or other testamentary writing by a will writer which provides for the writer to be a beneficiary,

(c) require a will writer who provides the service of storing wills or other testamentary writings to keep in place sufficient arrangements for the storage of such documents (including arrangements in the event of the writer ceasing to provide will writing services),

(d) make such further arrangements as to the professional practice, conduct or discipline of will writers for which provision is (in the approving body’s opinion) necessary or expedient,

(e) provide that it is a breach of the code of practice for a will writer to fail to comply with the writer’s duties under any enactment specified in the code,

(f) provide that a breach of the code of practice by a person acting on behalf of a will writer in relation to will writing services constitutes a breach of the code of practice by the writer,

(g) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a will writer to provide will writing services if the writer contravenes the code of practice,

(ii) the suspension of that right of a will writer if a complaint, suggesting that the writer is guilty of professional misconduct in relation to the provision of will writing services, is made about the writer.
(4) A will writer may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the writer’s right to provide will writing services—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which that decision is intimated to the writer.

(5) An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.

81E Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section 81D(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section 81C.

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

(4) A will writer may appeal against a financial penalty (or the amount of a financial penalty) imposed on the writer by virtue of this section—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the penalty is intimated to the writer.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

81F Review of own performance

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—
   (a) the approving body’s compliance with section 81D(5),
   (b) the exercise of its functions in relation to its regulatory scheme,
   (c) its compliance with any measures applying to it by virtue of section 81K(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved bodies’ performance,
   (b) reports on reviews of their performance.
81G Pretending to be authorised

(1) A person commits an offence if the person—
(a) pretends to be a will writer (or otherwise pretends to have the right to provide will writing services under this Part), or
(b) takes or uses any name, title, addition or description implying falsely that the person is a will writer (or otherwise so implying that the person has the right to provide will writing services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

81H Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section 81K(3).

(2) The Scottish Ministers may—
(a) revoke the certification given to the approving body under section 81C,
(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

81I Surrender of certification

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section 81C.

(2) The approving body must—
(a) take all reasonable steps to mitigate such disruption to the clients of its will writers as is likely to result from the surrender,
(b) in particular, take steps for ensuring that any relevant work is—
(i) completed, or
(ii) taken over by a suitably qualified person, before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
(a) for the purpose of subsection (2), or
(b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
(a) subsection (2), and
(b) any direction given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

### 81J Register and list

(1) The Scottish Ministers—
(a) must keep and publish a register of approving bodies,
(b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
(a) its contact details (including its address, website and telephone number),
(b) the date on which it was given the relevant certification under section 81C.

(3) An approving body must—
(a) keep a list of its will writers,
(b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its will writers as the Scottish Ministers may reasonably request.

### Ministerial functions

### 81K Ministerial intervention

(1) An approving body must—
(a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
(b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
(a) if directed to do so by the Scottish Ministers, must—
(i) review its regulatory scheme (or any relevant part of it), and
(ii) report to them its findings and (if appropriate) inform them of any proposed amendments to the scheme,
(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—
(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.
(3) The Scottish Ministers may—
   (a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,
   (b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(4) An approving body must—
   (a) review annually the performance of its will writers,
   (b) prepare a report on the review,
   (c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—
   (a) about the review of will writers,
   (b) so far as it appears to them to be necessary for safeguarding the interests of clients of will writers—
       (i) concerning the functions of approving bodies,
       (ii) relating to will writers.

81L Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approving body.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approving body in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Chapter to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of will writing services by will writers is regulated effectively.

CHAPTER 3

FURTHER PROVISION

82 Regard to OFT input

(1) The Scottish Ministers, whenever consulting the OFT under section 74(3)(a) or 81C(3)(a), must request the OFT—
   (a) to give such advice as it considers appropriate in relation to the matter concerned,
   (b) in considering what (if any) advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are to take account of any advice given by the OFT within—
(a) the relevant consultation period, or
(b) otherwise, the period of 90 days beginning with the day on which they request the advice.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

83 Complaints about agents and writers

In the 2007 Act, after Part 2A (inserted by section 65) insert—

“PART 2B
SPECIAL PROVISION FOR CONFIRMATION AGENTS AND WILL WRITERS ETC.

57F Complaints about confirmation agents and writers

(1) Parts 1 and 2 apply in relation to complaints made about confirmation agents and will writers as they apply in relation to complaints made about practitioners.

(2) Subsection (1) is subject to—

(a) subsection (3), and
(b) such further modification to the operation of Parts 1 and 2 as the Scottish Ministers may by regulations make for the purposes of subsection (1).

(3) In relation to a services or conduct complaint about a confirmation agent or will writer, its approving body is to be regarded as the relevant professional organisation.

57G Handling complaints

(1) Sections 23 to 25 apply in relation to any complaint made about how an approving body has dealt with a conduct complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those sections as the Scottish Ministers may by regulations make for the purposes of that subsection.

57H Levy payable

(1) A confirmation agent must pay to the Commission—

(a) the annual general levy, and
(b) the complaints levy (if arising),
in accordance with Part 1.

(1A) A will writer must pay to the Commission—

(a) the annual general levy, and
(b) the complaints levy (if arising),
in accordance with Part 1.
(1B) Section 29 applies for the purposes of subsections (1) and (1A) as it applies for the purposes of sections 27(1) and 28(1).

(1C) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) to (1B)—

(a) an approving body is to be regarded as a relevant professional organisation whose members are its licensed providers,

(b) a confirmation agent or (as the case may be) will writer is to be regarded—

(i) in connection with the annual general levy, as an individual person falling within the relevant category,

(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

57J Interpretation of Part 2B

(2) For the purposes of this Part—
“approving body”,
“confirmation agent”,
“will writer”,

are to be construed in accordance with Part 3 of the Legal Services (Scotland) Act 2010.”.

84 Privilege and immunity

(1) For the purposes of the law on defamation, the publication under this Part of any material is privileged unless it is proved that the publication was made with malice.

(2) Neither an approving body nor any of its officers, members or employees is liable in damages for any act or omission occurring in the exercise (or purported exercise) of its functions under this Part unless it is shown that the act or omission was in bad faith.

84A Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.

(2) The appeal is to be made by way of summary application.

(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
   (b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.

85 Consequential modification

(1) In the Confirmation of Executors (Scotland) Act 1858, in section 2 (petition to commissary), after “1990” insert “or by a confirmation agent within the meaning of Part 3 of the Legal Services (Scotland) Act 2010”.

(2) In the 1980 Act—
   (a) in section 32 (offence for unqualified persons to prepare certain documents)—
      (i) in subsection (1), after paragraph (c) insert “or
         (d) any will or other testamentary writing,”,
      (ii) in subsection (2)(a), for “or papers” substitute “, papers, will or testamentary writing”,
      (iii) in subsection (2C), after “1990” insert “or to a confirmation agent within the meaning of Part 3 of the 2010 Act”,
   (iv) after subsection (2C) insert—
      “(2D) Subsection (1)(d) does not apply to a will writer within the meaning of Part 3 of the 2010 Act.”,
   (b) in paragraph 1A of Schedule 4 (constitution, procedure and powers of Tribunal), after head (b)(ii) insert—
“(iia) confirmation agents or will writers within the meaning of Part 3 of the 2010 Act;”.

(3) In section 12A (register of advice organisations) of the 1986 Act, after subsection (2)(b) insert—

“(ba) is a confirmation agent or will writer within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

(4) In paragraph 2 of schedule 1 (the Scottish Legal Complaints Commission) to the 2007 Act, after sub-paragraph (6)(b) insert—

“(ba) confirmation agents or will writers within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

### PART 4

#### THE LEGAL PROFESSION

#### CHAPTER 1

**APPLYING THE REGULATORY OBJECTIVES**

86 **Application by the profession**

(1) Each of the regulatory authorities mentioned in subsection (2) must, so far as practicable when exercising the authority’s regulatory functions (as defined in subsection (3)), act in a way which—

(a) is compatible with the regulatory objectives, and

(b) it considers most appropriate with a view to meeting those objectives.

(2) For the purpose of this section, the “regulatory authorities” are—

(a) the Court of Session,

(b) the Lord President,

(c) the Faculty of Advocates,

(d) the Council of the Law Society,

(e) any other person who or body that has regulatory functions in relation to the provision of legal services by legal practitioners (of any type).

(3) For the purpose of this section, the “regulatory functions” of a regulatory authority—

(a) are its functions of regulating in respect of any matter the professional practice, conduct and discipline of legal practitioners (of any type),

(b) include its functions of making professional or regulatory rules to which legal practitioners (of any type) are subject.

(4) In subsections (2) and (3), “legal practitioners” means—

(a) solicitors (including firms of solicitors) or incorporated practices,

(b) advocates,

(c) conveyancing or executry practitioners, or

(ca) litigation practitioners.
CHAPTER 2

FACULTY OF ADVOCATES

87 Regulation of the Faculty

(1) The Court of Session is responsible—

(a) for—

(i) admitting persons to (and removing persons from) the office of advocate,

(ii) prescribing the criteria and procedure for admission to (and removal from) the office of advocate,

(b) for regulating the professional practice, conduct and discipline of advocates.

(2) The Court’s responsibilities within subsection (1)(a)(ii) and (b) are exercisable on its behalf, in accordance with such provision as it may make for the purpose, by—

(a) the Lord President, or

(b) the Faculty of Advocates.

88 Professional rules

(1) Subsections (2) and (3) apply to any rule which—

(a) prescribes the criteria or procedure for admission to (or removal from) the office of advocate, or

(b) regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(2) If the rule is made by the Faculty, the rule—

(a) is of no effect unless it has been approved by the Lord President (and may not be revoked unless its revocation has been approved by the Lord President),

(b) must be published by the Faculty.

(3) In any other case, the rule—

(a) is of no effect unless the Faculty has been consulted on it (and may not be revoked unless the Faculty has been consulted on its revocation),

(b) requires—

(i) where made by the Lord President, to be published,

(ii) where made by the Court of Session, to be contained in an Act of Sederunt.

(4) Neither this section nor section 89 affects the validity of any rule—

(a) that was in force immediately prior to the commencement of this section, and

(b) which regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(5) Nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of advocates (in particular, as it may relate to their involvement in or with licensed legal services providers).
89  **Particular rules**

   (1) Subsection (2) applies to any rule—

      (a) which regulates in respect of any matter the professional practice, conduct or discipline of advocates, and

      (b) under which an advocate is prohibited from forming a legal relationship with another advocate, or any other person, for the purpose of their jointly offering professional services to the public.

   (2) The rule is of no effect unless it has been approved by the Scottish Ministers after they have consulted the OFT.

   (3) Subsection (2) is without prejudice to section 88(2) and (3).

   (4) In section 31 (rules of conduct etc.) of the 1990 Act, subsection (1) is repealed.

**CHAPTER 3**

**Solicitors and other representatives**

**Removal of practising restrictions**

90  **Qualified persons**

   (1) In section 26 (offence for solicitors to act as agents for unqualified persons) of the 1980 Act, in subsection (3), after “does not include” insert “a licensed legal services provider,”.

   (2) In section 30 (liability for fees of other solicitor) of the 1980 Act—

      (a) after “incorporated practice” in the second place where it occurs insert “or a licensed legal services provider”,

      (b) for “other solicitor or incorporated practice” substitute “employed party”,

      (c) for “other solicitor’s or incorporated practice’s” substitute “party’s”.

   (3) In section 31 (offence for unqualified persons to pretend to be solicitor or notary public) of the 1980 Act—

      (a) the unnumbered block of text (from “In” to “practice.”) between subsections (1) and (2) is repealed,

      (b) after subsection (2) insert—

         “(2A) This section does not apply to an incorporated practice.

         (2B) This section does not apply in relation to the taking or using by a licensed legal services provider of a name, title, addition or description if the licensed provider has the Society’s written authority for using it.

         (2C) For the purpose of subsection (2B), the Council are to make rules which—

            (a) set the procedure for getting the Society’s authority (and specify the conditions that the Society may impose if it gives that authority),

            (b) specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority).”.

(4) In section 32 (offence for unqualified persons to prepare certain documents) of the 1980 Act, after paragraph (e) of subsection (2) insert “; or
   (ea) a licensed legal services provider;”.

(5) In section 33 (unqualified persons not entitled to fees etc.) of the 1980 Act—
   (a) the first unnumbered block of text (from “Subject” to “matter.”) becomes subsection (1) and the second unnumbered block of text (from “This” to “cause.”) becomes subsection (2),
   (b) in subsection (2) (as so numbered), after “incorporated practice” insert “or a licensed legal services provider”.

(6) In section 65(1) (interpretation) of the 1980 Act—
   (a) after the entry for “the 2007 Act” insert—
       “the 2010 Act” means the Legal Services (Scotland) Act 2010;”,
   (b) at the appropriate alphabetical place insert—
       “licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the 2010 Act;”.

(7) In section 17 (qualified conveyancers) of the 1990 Act, in subsection (23)—
   (a) after paragraph (b) insert—
       “(ba) a licensed legal services provider within the meaning of Part 2 of the Legal Services (Scotland) Act 2010;”,
   (b) after the subsequent “incorporated practice” insert “, licensed provider”.

91 Practice rules

(1) After section 33B of the 1980 Act insert—
   “33C Licensed legal services providers

   (1) Subsection (2) applies to any rule made under section 34 which prohibits or unduly restricts the—
       (a) involvement of solicitors in or with, or employment of solicitors by, licensed legal services providers,
       (b) provision of services by licensed providers, or
       (c) operation of licensed providers in other respects.

   (2) The rule is of no effect in so far as it does so (and for this purpose it is immaterial when the rule was made).

   (3) The reference in subsection (1)(a) to solicitors does not include a solicitor who is disqualified from practice by reason of having been—
       (a) struck off (or removed from) the roll, or
       (b) suspended from practice.”.

(2) In addition—
   (a) in section 34 (rules as to professional practice, conduct and discipline) of the 1980 Act—
(i) in subsection (1A)(f), for “or incorporated practices which, are partners in or directors of multi-disciplinary practices” substitute “have an interest in or are employed by (or otherwise within) licensed legal services providers”,

(ii) subsection (3A) is repealed,

(b) in section 64A(1) of that Act, paragraph (b) and the word “; or” immediately preceding it are repealed,

(c) in section 64B of that Act, the words “or such as is mentioned in section 34(3A)” are repealed,

(d) in section 64D(6) of that Act, for “sections 25A(9) or (10) and 34(3A)” substitute “section 25A(9) or (10)”,

(e) in section 65(1) of that Act—

(i) the definition of “multi-disciplinary practice” is repealed,

(ii) in the definition of “unqualified person”, the words “, other than a multi-disciplinary practice,” are repealed,

(f) in section 17(23) of the 1990 Act—

(i) paragraph (c) is repealed,

(ii) the subsequent words “, multi-disciplinary practice” are repealed,

(g) in paragraph 29(15) of Schedule 8 to that Act—

(i) in head (c), the insertion (into section 65(1) of the 1980 Act) of the definition of “multi-disciplinary practice” is repealed,

(ii) head (f) and the word “and” immediately preceding it are repealed.

(3) Subject to section 33C of the 1980 Act, nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of solicitors.

91A Citizens advice bodies

(1) In section 26 of the 1980 Act, in subsection (2), after “law centre” insert “or a citizens advice body”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

“citizens advice body” means an association which is formed (and operates)—

(a) otherwise than for the purpose of making a profit, and

(b) with the sole or primary objective of providing legal and other advice (including information) to the public for no fee, gain or reward;”.

(3) The Scottish Ministers may by regulations modify the definition of “citizens advice body” in section 65(1) of the 1980 Act.

(4) Before making regulations under subsection (3), the Scottish Ministers must consult—

(a) the Lord President,
(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate.

Lay representation

91B  Court of Session rules

In the Court of Session Act 1988—

(a) in section 5 (power to regulate procedure), after paragraph (ee) insert—

“(ef) to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf.”,

(b) after section 5 insert—

“5A Rules for lay representation

(1) Rules under section 5(ef)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 5(ef) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 5(ef) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or

(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

91C  Sheriff court rules

In the Sheriff Courts (Scotland) Act 1971—

(a) in section 32 (power of Court of Session to regulate civil procedure), in subsection (1), after paragraph (m) insert—

“(n) permitting a lay representative, when appearing at a hearing in any category of civil proceedings along with a party to the proceedings, to make oral submissions to the sheriff on the party’s behalf.”,

(b) after section 32 insert—

“32A Rules for lay representation

(1) Rules under section 32(1)(n)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 32(1)(n)—
(a) does not restrict the operation of section 36(1),
(b) is subject to any enactment (apart from section 36(1)) under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 32(1)(n) and this section, a “lay representative” is a person who is not—
(a) a solicitor,
(b) an advocate, or
(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

Guarantee Fund

91D Use of Guarantee Fund

In section 43 (Guarantee Fund) of the 1980 Act—

(a) in subsection (2)—

(i) the word “or” immediately preceding paragraph (b) is repealed,
(ii) after paragraph (b) insert “; or
(c) any licensed legal services provider or any person within it, even if—

(i) the Society is not its approved regulator, or
(ii) subsequent to the act concerned it has ceased to operate.”,

(b) in subsection (3), after paragraph (cc) insert—
“(cd) to a licensed provider or an investor therein in respect of a loss suffered by reason of dishonesty to which subsection (2)(c) relates in connection with the licensed provider’s provision of legal services (with the same meaning as for Part 2 of the 2010 Act);”,

(c) in subsection (7)(c), after “incorporated practice” insert “or a licensed provider”,
(d) after subsection (7) insert—
“(8) In the case of licensed providers, this section and Part I of Schedule 3 apply in relation to (and only to) such licensed providers as are regulated by an approved regulator that in furtherance of section (Choice of arrangements)(4) of the 2010 Act does not maintain a compensation fund as referred to in that section.

(9) In this section and paragraph 1 of Schedule 3—

“approved regulator”,
“investor”,
are to be construed in accordance with Part 2 of the 2010 Act.”.
91E Contributions to the Fund

(1) In Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act, in paragraph 1—

(a) in sub-paragraph (2A)—

(i) the words “directors of incorporated practices” become head (a),

(ii) after that head (as so numbered) insert “, or

(b) investors in licensed legal services providers.”,

(b) in sub-paragraph (2B)—

(i) the words from “by every” to the end become head (a),

(ii) in that head (as so numbered), for “scale of such” substitute “relevant scale of annual corporate”,

(iii) after that head (as so numbered) insert “, and

(b) by every licensed provider, in respect of each year during which or part of which it operates as such under the licence issued by its approved regulator, a contribution (also an “annual corporate contribution”) in accordance with the relevant scale of annual corporate contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) for “scale” in the first place where it occurs substitute “scales”,

(ii) the words from “, which scale” to the end are repealed,

(d) after sub-paragraph (3) insert—

“(3A) The scales of annual corporate contributions—

(a) are to be fixed under sub-paragraph (3) by reference to all relevant factors, including—

(i) in the case of incorporated practices, the number of solicitors that they have as directors or employees,

(ii) in the case of licensed providers, the number of solicitors that they have as investors or employees,

(b) may otherwise make different provision as between incorporated practices and licensed providers.”,

(e) in sub-paragraph (4), after “incorporated practice” insert “or a licensed provider”,

(f) in sub-paragraph (5), after “incorporated practice” insert “and licensed provider”,

(g) in sub-paragraph (8), after “incorporated practice” insert “or a licensed provider”.

(2) In Schedule 3 to the 1980 Act, in paragraph 3(2)—

(a) for “and incorporated practices” substitute “, incorporated practices and licensed providers”,

(b) for “or incorporated practice or practices” substitute “, incorporated practice or practices or licensed provider or providers”.  

1096
91F Cap on individual claims

In Schedule 3 to the 1980 Act—

(a) in paragraph 4, after sub-paragraph (3) insert—

“(3A) The amount of an individual grant from the Guarantee Fund may not exceed £1.25 million.”,

(b) after paragraph 4 insert—

“5(1) The Scottish Ministers may by regulations amend the sum specified in paragraph 4(3A).

(2) Before making regulations under sub-paragraph (1), the Scottish Ministers must consult the Council (and take account of sections 4 and 4A of the 2010 Act).

(3) The power to make regulations under sub-paragraph (1) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.

The Law Society

91G Acting as approved regulator

After section 1 of the 1980 Act insert—

“1A Power to act as statutory regulator

The Society may—

(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,

(b) do anything that is necessary or expedient for the purposes of doing so.”.

92 Council membership

(1) In section 3 (establishment and functions of Council of Law Society) of the 1980 Act, in subsection (1), after “elected” insert “, co-opted or appointed”.

(2) In Schedule 1 to the 1980 Act—

(a) in paragraph 2 (the Council’s scheme)—

(i) in head (a), the word “, election,” is repealed,

(ii) after head (a) insert—

“(aa) election, co-option and appointment to the Council;”,

(b) in paragraph 3 (detail of the scheme), after head (b) insert—

“(bza)shall make provision for—

(i) the election or co-option of solicitor members to the Council,

(ii) the appointment of non-solicitor members to the Council;”,

(c) after paragraph 3 insert—

“3A(1) This paragraph applies for the purpose of paragraph 3(bza).
(2) Persons are electable, or eligible to be co-opted as, solicitor members if they are members of the Society.

(3) Persons are appointable as non-solicitor members if they appear to the Council—

(a) to be qualified to represent the interests of the public in relation to the provision of legal services in Scotland, or

(b) having regard to the Society’s functions, to be suitable in other respects.”.

### Regulatory committee

1. In section 3A (discharge of functions of Council of the Law Society) of the 1980 Act, in subsection (11), for “is” substitute “is—

(a) subject to section 3B, and

(b)”.

2. After section 3A of the 1980 Act insert—

“3B Regulatory committee

(1) The Council must, for the purpose mentioned in subsection (2), arrange under section 3A(1)(a) for their regulatory functions to be exercised on their behalf by a regulatory committee.

(2) The purpose is of ensuring that the Council’s regulatory functions are exercised—

(a) independently of any other person or interest,

(b) properly in other respects (in particular, with a view to achieving public confidence).

(2A) Accordingly, the Council (acting in any other capacity) must not interfere unduly in the regulatory committee’s business.

(3) The following particular rules apply as respects the regulatory committee—

(za) the committee’s membership may include persons who are not members of the Council,

(a) at least 50% of the committee’s membership is to comprise lay persons,

(aa) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1),

(b) the committee is to appoint one of its lay members as its convener,

(c) if the convener is not present at a meeting of the committee, another of its lay members is to chair the meeting,

(d) a sub-committee—

(i) is also subject to those rules,

(ii) may be formed without the Council’s approval.
(4) But nothing done by the regulatory committee (or a sub-committee of it) is invalid solely because of a temporary shortfall in the number of its lay members.

(5) The Scottish Ministers may by regulations—

   (za) prescribe a maximum number of members that the regulatory committee may have,

   (a) make further provision about the Council’s regulatory functions if they believe that such provision is necessary for ensuring that those functions are exercised in accordance with the purpose stated in subsection (2),

   (b) modify (by elaboration or exception) the definition in subsection (9) if they believe that such modification is appropriate.

(6) Before making regulations under subsection (5), the Scottish Ministers must consult the Council (and take account of sections 4 and 4A of the 2010 Act).

(7) The power to make regulations under subsection (5) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

(8) In subsection (3)(a), “lay persons” are persons who are not—

   (a) solicitors,

   (b) advocates,

   (c) conveyancing or executry practitioners as defined in section 23 of the 1990 Act,

   (d) those having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act, or

   (e) confirmation agents or will writers within the meaning of Part 3 of the 2010 Act.

(9) For the purposes of this section, the Council’s “regulatory functions”—

   (a) are their functions of regulating in respect of any matter the professional practice, conduct and discipline of solicitors (including firms of solicitors) and incorporated practices,

   (b) include their functions of—

      (i) setting standards of qualification, education and training,

      (ii) keeping the roll,

      (iii) administering the Guarantee Fund,

      (iv) making rules under sections 34 and 35.”.

---

**The 1980 Act: further modification**

### 93A Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—
“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.

93B Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—

(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.

(2) In section 12C (removal of name from register on request) of the 1980 Act—

(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “, on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.

94 Restoration to the roll

(1) In section 10 (restoration of name to roll on request) of the 1980 Act—

(a) after subsection (1) insert—

“(1ZA) Where the restoration of a solicitor’s name to the roll has been prohibited under section 53(2)(aa), the solicitor is entitled to have the solicitor’s name restored to the roll if (but only if) the Tribunal so orders—

(a) on an application made to it by the solicitor, and
(b) after such enquiry as it thinks proper.”,

(b) in subsection (1A), after “section 9” insert “(except where subsection (1ZA) applies),”;
(c) in subsection (2), after “subsection (1)” insert “or (1ZA)”.

1100
(2) In section 53 (powers of Tribunal) of the 1980 Act, in subsection (2)—
   (a) after paragraph (a) insert—
   “(aa) if the solicitor’s name has been removed from the roll under section 9, by
   order prohibit the restoration of the solicitor’s name to the roll;”,
   (b) the word “or” where it occurs immediately after any of paragraphs (a) to (e) is
   repealed.

94A Notification if suspension lifted

(1) In section 19 (further provisions relating to suspension of practising certificates) of the
1980 Act, after subsection (5A) insert—
   “(5B) On the occurrence of any of the circumstances mentioned in subsections (4) to
   (5A), the solicitor concerned must notify the Council in writing (and without
   delay).”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of
the 1980 Act, after subsection (4) insert—
   “(4A) On the occurrence of any of the circumstances mentioned in subsections (2) to
   (4), the lawyer concerned must notify the Council in writing (and without
delay).”.

CHAPTER 4
OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance

In section 31 (solicitors and counsel) of the 1986 Act—
   (a) in subsections (3), (4) and (5), for “relevant body” wherever appearing substitute
   “Board”,
   (b) subsections (6) and (10) are repealed.

96 Availability of legal services

In the 1986 Act—
   (a) in section 1 (the Scottish Legal Aid Board), after subsection (2) insert—
   “(2A) The Board also has the general function of monitoring the availability and
   accessibility of legal services in Scotland (including by reference to any
   relevant factor relating particularly to rural or urban areas).”,
   (b) in section 2 (powers of the Board), after subsection (2)(d) insert—
   “(da) to give the Scottish Ministers such advice as it may consider appropriate
   in relation to the availability and accessibility of legal services in
   Scotland;”,
   (c) in section 3 (duties of the Board), after subsection (2) insert—
“(2A) The Board is, 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.”.

97 Information about legal services

After section 35A of the 1986 Act insert—

“35AA Information about legal services
(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—
(a) each of the bodies mentioned in subsection (3)(a) and (b) must—
(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and
(ii) give the Board a summary of the relevant facts.
(b) the body mentioned in subsection (3)(d) must—
(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and
(ii) give the Board a summary of the relevant facts.

(3) The bodies are—
(a) the Law Society,
(b) the Faculty of Advocates,
(c) the Scottish Court Service,
(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—
(a) section 1(2A),
(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.”.

98 Minor amendments

In the 2007 Act—
(a) in section 29—
(i) in subsection (4), after “members” insert “, and the Scottish Ministers,”,
(ii) in subsection (9), for “subsection (1)” substitute “subsection (8)”.
(b) in section 46(1), in paragraph (e) in the definition of “unsatisfactory professional conduct”, for “section 27 of this Act” substitute “section 27 of the 1990 Act”,

Scottish Legal Complaints Commission
(c) in paragraph 13(2)(a) of schedule 1—
   (i) for “the function of deciding” substitute “a decision”,
   (ii) for “whether” substitute “that”,
   (iii) for “exercised” substitute “taken”,
(d) in paragraph 1(h)(iii) of schedule 3 for “whether” substitute “that”.

98A The 2007 Act: further provision

(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—
   “(1A) The Scottish Ministers may make such further provision as, having regard to
   the effect of the Legal Services Act 2007 so far as concerning the subject
   matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider
   necessary or expedient in connection with this Act or any related provisions of
   the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after “section 78(1)” insert “or (1A)”.

PART 5
GENERAL

99 Regulations

(1) Any power of the Scottish Ministers to make regulations under the preceding Parts of this Act is exercisable by statutory instrument.

(2) The regulations may—
   (a) make different provision for different purposes,
   (b) include such incidental, consequential, transitional, transitory or saving provision
       as the Scottish Ministers consider necessary or expedient for the purposes or in
       connection with the regulations.

(3) But—
   (a) a statutory instrument containing regulations under—
       (i) section 8(2)(c) or (5),
       (ii) section 26(1),
       (iii) section 29(6),
       (iv) section 35(1),
       (iva) section 37(6)(a)(i),
       (ivb) section 52(2A),
       (v) section 55(10),
       (vi) section 75(2)(f),
       (vii) section 81(5)(b),
       (viii) section 81D(2)(f),
(ix) section 81K(5)(b), or
(x) section 81L(1),

is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament,

(b) a statutory instrument containing any other regulations under the preceding Parts of this Act is subject to annulment in pursuance of a resolution of the Parliament.

99A Further modification

(1) The Scottish Ministers may by regulations made by statutory instrument—
   (a) amend the percentage specified in section 37A(1)(a), or
   (b) repeal section 37A.

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe that the effect of the amendment or (as the case may be) repeal would be—
   (a) compatible with the regulatory objectives, and
   (b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—
   (a) the Lord President,
   (b) the Law Society,
   (c) every approved regulator,
   (d) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

100 Ancillary provision

(1) The Scottish Ministers may by regulations made by statutory instrument make such—
   (a) supplemental provision, or
   (b) incidental, consequential, transitional, transitory or saving provision,

   as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) But—
   (a) a statutory instrument containing regulations under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament,

   (b) a statutory instrument containing any other regulations under that subsection is subject to annulment in pursuance of a resolution of the Parliament.
Definitions

(1) In this Act (unless the context otherwise requires)—

“the 1980 Act” means the Solicitors (Scotland) Act 1980,
“the 1986 Act” means the Legal Aid (Scotland) Act 1986,
“the 1990 Act” means the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
“the 2007 Act” means the Legal Profession and Legal Aid (Scotland) Act 2007,
“Faculty” means Faculty of Advocates,
“Law Society” means Law Society of Scotland,
“Lord President” means Lord President of the Court of Session,
“OFT” means Office of Fair Trading.

(2) In this Act (unless the context otherwise requires)—

(a) the following expressions are to be construed in accordance with section 65(1) (interpretation) of the 1980 Act—

“advocate”,
“incorporated practice”,
“practising certificate”,
“registered European lawyer”,
“registered foreign lawyer”,
“solicitor”,
(b) the following expressions are to be construed in accordance with section 23 (interpretation) of the 1990 Act—

“conveyancing practitioner”,
“executry practitioner”,
(c) a reference to a litigation practitioner is to a person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act.

(3) In this Act (unless the context otherwise requires), a reference to a professional association or body includes—

(a) the Law Society,
(b) any other organisation which serves a profession (for example, the Institute of Chartered Accountants of Scotland).

(4) Schedule 9 is an index of expressions introduced for—

(a) the whole Act,
(b) Parts 2 and 3.

Commencement and short title

(1) This section and sections 99 to 101 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on the day that the Scottish Ministers by order made by statutory instrument appoint.

(3) An order under subsection (2) may appoint different days for different provisions.

(4) An order under subsection (2) may—

(a) make different provision for different purposes,

(b) include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the commencement of this Act.

(5) The short title of this Act is the Legal Services (Scotland) Act 2010.
SCHEDULE 1
(introduced by section 29(3))
PERFORMANCE TARGETS

Application

1 This schedule applies where the Scottish Ministers—
   (a) are satisfied that an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or
   (b) consider that, for any other reason, it is necessary or expedient for one or more performance targets to be set as respects an approved regulator.

Power to set targets

2 (1) The Scottish Ministers may—
   (a) set one or more performance targets for the approved regulator in relation to its regulatory functions,
   (b) require the approved regulator to set one or more performance targets in relation to its regulatory functions.

   (2) The approved regulator must (so far as practicable) comply with a performance target set for it under sub-paragraph (1)(a) or (b).

Notice of intention

3 (1) Before setting a performance target, or requiring the approved regulator to do so, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

   (2) The notice of intention must—
      (a) state that the Scottish Ministers intend to—
         (i) set a performance target, or
         (ii) require that the approved regulator set such a target,
      (b) describe the proposed target (including the period within which it would have to be met),
      (c) specify—
         (i) the act or omission (or series of acts or omissions) to which the proposed target relates,
         (ii) any other facts which, in their opinion, justify the intended target-setting.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed target.
(2) The Scottish Ministers must—
   (a) give a copy of the notice of intention to such persons or bodies as they consider appropriate,
   (b) consult them accordingly.

5 Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2), when deciding whether to proceed with the target-setting.

(2) The Scottish Ministers must—
   (a) send to the approved regulator a notice (a “decision notice”) of their decision,
   (b) notify the consultees under paragraph 4(2) of their decision,
   (c) publish any target set, or requirement made by them, under paragraph 2(1)(a) or (b) in such manner as they consider most appropriate to bring it to the attention of any relevant person or body.

10 (3) If the Scottish Ministers’ decision is in favour of target-setting, the decision notice must contain the target.

(4) An approved regulator must publish any target set by it following a requirement under paragraph 2(1)(b) in such manner as it considers most appropriate for bringing it to the attention of any relevant person or body.

20 (5) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

SCHEDULE 2
(introduced by section 29(3))

APPLICATION

1 This schedule applies where the Scottish Ministers are satisfied that—

30 (a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives,

(b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act (including a direction imposed in accordance with this schedule),

35 (c) an approved regulator has failed to adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
(d) an approved regulator has made a material amendment to its regulatory scheme under section 8(4).

**Power to direct**

2 (1) The Scottish Ministers may direct the approved regulator to take—

(a) in a case falling within paragraph 1(a), such action as they consider will counter the adverse impact, mitigate its effect or prevent its recurrence,

(b) in a case falling within paragraph 1(b) or (c), such action as they consider will remedy the failure, mitigate its effect or prevent its recurrence,

(c) in a case falling within paragraph 1(d), such action as they consider necessary or expedient in relation to such transitional matters as may arise from the amendment.

(2) A direction under sub-paragraph (1) may require the approved regulator to modify any part of its regulatory scheme.

(3) A direction under sub-paragraph (1) must not be framed by reference to—

(a) a specific disciplinary case, or

(b) other specific regulatory proceedings.

(4) A direction under sub-paragraph (1) may require the approved regulator to refrain from doing something.

(5) The approved regulator must (so far as practicable) comply with a direction given to it in accordance with this schedule.

**Notice of intention**

3 (1) Before giving a direction to an approved regulator under this schedule, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to give a direction,

(b) indicate the terms of the proposed direction (including the date by which it would have to be complied with),

(c) explain why the Scottish Ministers are satisfied as mentioned in paragraph 1.

**Consultation**

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed direction.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to such person or body as they consider appropriate,
(c) after the expiry of the period for representations—

(i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,

(ii) consult them accordingly in relation to the appropriateness of giving the direction.

(3) Where the Scottish Ministers consider that the proposed direction may have the effect of preventing competition within the legal services market, or significantly restricting or distorting such competition, they must (additionally)—

(a) send to the OFT—

(i) a copy of the notice of intention,

(ii) a copy of any representations received from the approved regulator,

(b) consult the OFT accordingly.

**Decision**

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c) or (3), when deciding whether to proceed with giving a direction.

(2) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 4(2)(c) and (3) of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to give the direction, the decision notice must contain the direction.

(4) For the purposes of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

**Extension of time to comply**

6 (1) The Scottish Ministers may, on an application by an approved regulator made at any time after the giving of a direction, allow an approved regulator additional time to comply with the direction.

(2) Where such additional time is allowed, the Scottish Ministers must publicise that fact in such manner as they consider most likely to bring it to the attention of any relevant person or body.
Enforcement

7 (1) If at any time it appears to the Scottish Ministers that an approved regulator has failed to comply with a direction given under this schedule, they may make an application to the Court of Session for an order as described in sub-paragraph (2).

(2) On an application under sub-paragraph (1), the Court may (if it decides that the approved regulator has failed to comply with the direction) order the approved regulator to take such steps as the Court thinks fit for securing that the direction is complied with.

SCHEDULE 3
(introduced by section 29(3))

Censure

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

(a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or

(b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act.

Power to censure

2 The Scottish Ministers may, with the consent of the Lord President, make and publish a statement censuring the approved regulator for—

(a) the act or omission (or series of acts or omissions), or

(b) the failure.

Preliminary advice

3 Before making the statement, the Scottish Ministers must consult such person or body as they consider appropriate about the proposed statement.

Notice of intention

4 (1) If, after consulting under paragraph 3, the Scottish Ministers intend to proceed with making the statement, they must give the approved regulator a notice (a “notice of intention”) of that intention.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to publish the statement,

(b) specify the date on which they intend to publish the statement (which must be after the expiry of the period mentioned in paragraph 5(1)),

(c) set out the terms of the proposed statement,

(d) specify—
(i) the act or omission (or series of acts or omissions), or
(ii) the failure,
to which the proposed statement relates.

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed statement.

(2) The Scottish Ministers must—

(a) provide the consultees under paragraph 3 with a copy of any representations received from the approved regulator,
(b) seek their further views in light of the representations.

Decision

6 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 3, when deciding whether to proceed with publishing the statement.

(2) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,
(b) notify the consultees under paragraph 3 of their decision,
(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to publish the statement, the decision notice must contain the statement (and the statement need not be published separately).

(4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,
(b) providers of legal services,
(c) organisations representing the interests of consumers,
(d) members of the public.

SCHEDULE 4
(introduced by section 29(3))

FINANCIAL PENALTIES

Application

1 This schedule applies where the Scottish Ministers are satisfied that an approved regulator has failed to—

(a) adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
Power to impose penalty

2 (1) The Scottish Ministers may impose on the approved regulator a penalty, in respect of a failure mentioned in paragraph 1, of an amount not exceeding the prescribed maximum.

5 (2) Here, the prescribed maximum is the maximum amount that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.

3 (3) A financial penalty imposed under this paragraph is payable to the Scottish Ministers.

Amount of penalty

3 (1) When considering the appropriate amount of a penalty to be imposed under paragraph 2, the Scottish Ministers must have regard to—

10 (a) the seriousness of the failure,

(b) the nature of the failure in other respects.

(2) It is material for the purpose of sub-paragraph (1)—

15 (a) whether the failure was deliberate,

(b) if the failure is attributable to recklessness or negligence, the degree involved.

(3) The Scottish Ministers may consult such person or body as they consider appropriate when considering—

20 (a) whether to impose a penalty,

(b) the appropriate amount of the penalty.

Notice of intention

4 (1) Before imposing a financial penalty, the Scottish Ministers must give the approved regulator a notice (a “notice of intention”) of their intention to do so.

25 (2) The notice of intention must—

(a) state—

(i) that the Scottish Ministers intend to impose a financial penalty,

(ii) the amount of the proposed penalty,

(b) by reference to the failure concerned and any other relevant facts, explain why the Scottish Ministers consider that—

(i) it is appropriate to impose a penalty,

(ii) the amount of the proposed penalty is appropriate.

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed penalty.

35 (2) The Scottish Ministers must—
(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of that notice, and a copy of any representations received from the approved regulator, to any person whom or body that they consult under sub-paragraph (3).

(3) After the expiry of the period for representations, the Scottish Ministers may consult such person or body as they consider appropriate about the appropriateness of—

(a) imposing the penalty,

(b) its amount.

Decision

6 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, and any consultee under paragraph 5(3), when deciding whether to proceed with imposing the penalty.

(2) The Scottish Ministers must—

(a) give a notice to the approved regulator (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 5(3) of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) The decision notice must—

(a) state whether or not a financial penalty is being imposed,

(b) give the reason for the imposition (or otherwise) of a penalty,

(c) if a penalty is being imposed—

(i) state the amount of the penalty (and mention any allowance made for payment by instalments),

(ii) explain why the Scottish Ministers consider that amount to be appropriate,

(iii) specify the date by which the penalty requires to be paid in full.

(4) That date must not be within the 3 months beginning with the day on which the decision notice is given to the approved regulator (but this does not preclude earlier payment at the initiative of the approved regulator).

(5) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

Variation of penalty

7 (1) The Scottish Ministers may, on an application from an approved regulator received within 21 days beginning with the day on which the decision notice is given to the approved regulator—
(a) vary the date by which the penalty requires to be paid,
(b) allow for the penalty to be paid by—
   (i) instalments (if not already allowed), or
   (ii) different instalments (if allowed).

(2) Where an application is made under sub-paragraph (1), no part of the penalty is required to be paid before the Scottish Ministers notify the approved regulator of their determination of the application.

Appeal

(1) An approved regulator on which a financial penalty is imposed under paragraph 2 may appeal to the Court of Session against the penalty on one or more of the appeal grounds.

(2) On an appeal under this paragraph—
   (a) the Court may—
      (i) uphold, vary or quash the decision that is the subject of the appeal,
      (ii) make such further order as is necessary in the interests of justice,
   (b) the Court’s determination is final.

Appeal grounds

The grounds for an appeal under paragraph 8 are—

(a) that, in the circumstances of the case—
   (i) it was not appropriate to impose the penalty, or
   (ii) the amount of the penalty is excessive,
(b) that the date specified under paragraph 6(3)(c)(iii) is unreasonable,
(c) that the other arrangements for payment are unreasonable, including—
   (i) the absence of any provision for payment by instalments, or
   (ii) any provision for payment by instalments that has been allowed,
(d) that—
   (i) the penalty was imposed otherwise than in accordance with this schedule, and
   (ii) the approved regulator’s interests have been substantially prejudiced as a result.

Time for appeal

(1) An appeal under paragraph 8 is to be made—
   (a) within the 3 months beginning with the day on which the decision notice is given to the approved regulator, or
   (b) where the ground of appeal is referable to something done under paragraph 7(1), within the 3 months beginning with the day on which the approved regulator is notified of the thing done.
Where an appeal is made under paragraph 8, no part of the penalty requires to be paid before the appeal is determined or withdrawn.

**Interest**

11 (1) If the whole or part of a penalty is not paid as required in accordance with this schedule the unpaid amount carries interest at the prescribed rate.

(2) Here, the prescribed rate is the rate that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.

**Default**

12 (1) Sub-paragraph (2) applies where the whole or part of a penalty is not paid as required in accordance with this schedule.

(2) The Scottish Ministers may recover from the approved regulator, as a debt due to them—

(a) the penalty or (as the case may be) the part of it, and

(b) the interest that it carries.

**SCHEDULE 5**

*(introduced by section 29(3))*

**AMENDMENT OF AUTHORISATION**

**Application**

1 This schedule applies where the Scottish Ministers are satisfied that—

(a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, and

(b) the matter cannot be addressed adequately by the Scottish Ministers taking any of the measures mentioned in section 29(4)(a) to (d).

**Power to amend**

2 (1) The Scottish Ministers may amend the authorisation of the approved regulator (given under section 7).

(2) In particular, the Scottish Ministers may—

(a) impose restrictions as respects the authorisation by reference to particular categories of—

(i) licensed provider,

(ii) legal services,

(b) alter the duration of the authorisation (including by imposing a limit of time),

(c) impose new conditions, or vary any existing conditions, to which the authorisation is subject.
Notice of intention

3 (1) Before amending the approved regulator’s authorisation, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to amend the approved regulator’s authorisation,

(b) specify the proposed amendments to the authorisation, and

(c) explain why they are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed amendments.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to—

(ii) the OFT,

(iii) such other person or body as they consider appropriate,

(c) after the expiry of the period for representations—

(i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,

(ii) consult them accordingly in relation to the proposed amendments.

(3) When consulted under sub-paragraph (2)(c), the Lord President is to—

(a) give the Scottish Ministers such advice in respect of the proposed amendments as the Lord President thinks fit,

(b) in deciding what advice to give, have regard (in particular) to the likely impact of the proposed amendments on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

(a) the approved regulator, or

(b) any other person who holds information relevant in relation to proposed amendments,

must provide the Lord President with such information about the proposed amendments (or their likely consequences) as the Lord President may reasonably require.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with amending the authorisation.
(2) The Scottish Ministers must—
   (a) give a notice of their decision (a “decision notice”) to the approved regulator,
   (b) give reasons in the decision notice for their decision,
   (c) notify the consultees under paragraph 4(2)(c) of their decision,
   (d) publish the decision notice in such manner as they consider most appropriate for
       bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to amend the authorisation, the decision notice must
     specify the date from which the amendments are to be effective (which may be the date
     on which that notice is given).

(4) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

SCHEDULE 6
(introduced by section 29(3))
RESCISSION OF AUTHORISATION

Application
1 This schedule applies where the Scottish Ministers are satisfied that—
   (a) an act or an omission of an approved regulator (or a series of acts or omissions)
       has had, or is likely to have, an adverse impact on the observance of any of the
       regulatory objectives, and
   (b) the matter cannot be adequately addressed by the Scottish Ministers taking any of
       the measures mentioned in section 29(4)(a) to (e).

Power to rescind
2 The Scottish Ministers may rescind the authorisation of the approved regulator (given
   under section 7).

Notice of intention
3 (1) Before rescinding the approved regulator’s authorisation, the Scottish Ministers must
     give it a notice (a “notice of intention”) of their intention to do so.

   (2) The notice of intention must—
       (a) state that the Scottish Ministers intend to rescind the approved regulator’s
           authorisation,
       (b) explain why they are satisfied as mentioned in paragraph 1.
Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed rescission.

(2) The Scottish Ministers must—
   (a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,
   (b) give a copy of the notice of intention to—
       (ii) the OFT,
       (iii) such other person or body as they consider appropriate,
   (c) after the expiry of the period for representations, the Scottish Ministers must—
       (i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,
       (ii) consult them accordingly in relation to the proposed rescission.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with rescinding the authorisation.

(2) The Scottish Ministers must—
   (a) give a notice of their decision (a “decision notice”) to the approved regulator,
   (b) give reasons in the decision notice for their decision,
   (c) notify the consultees under paragraph 4(2)(c) of their decision,
   (d) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to rescind the authorisation, the decision notice must—
   (a) specify the date from which the rescission is to be effective (which may be the date on which that notice is given),
   (b) state, for the purpose of section 29(5), whether or not the approval of the approved regulator (given under section 6) is preserved.

(4) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.
SCHEDULE 7
(introduced by section 30(2))
SURRENDER OF AUTHORISATION

Application

1 This schedule applies where an approved regulator proposes to surrender its authorisation under section 30.

Surrender notice

2 (1) The approved regulator must give the Scottish Ministers a notice (a “surrender notice”) of its proposal to do so.

(2) The notice must—

(a) specify the approved regulator’s reasons for proposing to surrender its authorisation,

(b) be published (by the approved regulator) in such manner as the approved regulator considers most appropriate for bringing it to the attention of any relevant person or body.

Consultation

3 (1) The Scottish Ministers must, as soon as reasonably practicable after receipt of a surrender notice—

(a) send a copy of the notice to—

(i) the Lord President,

(ii) the OFT,

(iii) each of the approved regulator’s licensed providers,

(iv) such other person or body as they consider appropriate,

(b) consult them accordingly.

(2) The consultees under sub-paragraph (1) have 6 weeks beginning with the day on which they are sent the copy of the notice to make representations to the Scottish Ministers about the proposed surrender.

(3) When consulted under sub-paragraph (1), the Lord President is to—

(a) give the Scottish Ministers such advice in respect of the proposed surrender as the Lord President thinks fit,

(b) in deciding what advice to give, have regard to the likely impact of the proposed surrender on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

(a) the approved regulator, or

(b) any other person who holds information relevant to the proposed surrender,

must provide the Lord President with such information about the proposed surrender (or its likely consequences) as the Lord President may reasonably require.
Decision

4 (1) The Scottish Ministers must, within 28 days beginning with the day after the period mentioned in paragraph 3(2) ends, decide whether to agree to the proposed surrender.

(2) In making their decision, the Scottish Ministers must have regard to—

(a) any advice given to them by the Lord President,

(b) any representations made to them by the other consultees under paragraph 3(1),

(c) any further representation made to them by the approved regulator.

(3) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 3(1) of their decision,

(c) publish the decision notice in such manner as they consider appropriate for bringing it to the attention of any relevant person or body.

(4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

Date of surrender

5 (1) If the Scottish Ministers agree to the surrender of the authorisation, the decision notice must specify the date from which the surrender is to be effective (which must be within the period of 6 months beginning with the date of the decision notice).

(2) That date—

(a) is to be fixed having taken account of the wishes of the approved regulator,

(b) must allow a reasonable amount of time for the carrying out of such transitional arrangements as are necessary in connection with the surrender.

SCHEDULE 8
(introduced by section 52(1))
INVESTORS IN LICENSED PROVIDERS

Initial notification requirements

1 (1) An applicant for a licence (issuable in accordance with an approved regulator’s licensing rules) must give the approved regulator the standard information about non-solicitor investors when applying for the licence.

(2) The applicant must also—

(a) give (as soon as practicable) the approved regulator any standard information subsequently coming to light,
(b) notify (as soon as practicable) the approved regulator of any other change in the standard information.

(3) The standard information is—

(a) the name and other details of—

(i) every non-solicitor investor in the applicant,

(ii) any other person whom the applicant expects to be a non-solicitor investor in the applicant at such time as the licence may be issued,

(b) in each case, a description of the nature of the person’s interest.

2 (1) It is an offence for a person to fail to comply with a requirement imposed on the person by paragraph 1.

(2) A person who commits an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) It is a defence for a person prosecuted for an offence under sub-paragraph (1) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

Continuing notification requirements

3 (1) This paragraph applies where—

(a) a person takes, or proposes to take, a step to acquire such an interest as would result in the person becoming a non-solicitor investor in a licensed provider,

(b) a non-solicitor investor takes, or proposes to take, a step which would—

(i) significantly change the investor’s interest in the licensed provider, or

(ii) acquire an additional kind of interest in the licensed provider, or

(c) a person becomes a non-solicitor investor in a licensed provider—

(i) as a new investor, or

(ii) because the person, having ceased to be entitled to practise as mentioned in section 52(4)(b) (while remaining as an investor), comes within the definition there.

(2) In a case falling within sub-paragraph (1)(a) or (b), the licensed provider must (as soon as practicable) notify the approved regulator of the proposal including by giving it—

(a) the name and other details of the person concerned,

(b) the details of the interest concerned.

(3) In a case falling within sub-paragraph (1)(c)(i), the licensed provider must (as soon as practicable) notify the approved regulator of the acquisition including by giving it the name and other details of the investor.

(3A) In a case falling within sub-paragraph (1)(c)(ii), the licensed provider must (as soon as practicable) notify the approved regulator of the fact.

(4) Sub-paragraph (3) does not apply where sub-paragraph (2) has been complied with in relation to the acquisition.

(5) It is an offence for a person to fail to comply with a requirement imposed on the person by sub-paragraph (2), (3) or (3A).
(6) A person who commits an offence under sub-paragraph (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7) It is a defence for a person prosecuted for an offence under sub-paragraph (5) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

Exemption from notification requirements

3A (1) An approved regulator may in relation to any exemptible investor in a licensed provider waive the requirements to give it information (or notification) under paragraphs 1 and 3.

(2) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on sub-paragraph (1),

(b) any threshold below the percentage specified in subsection (3) by reference to which it proposes to rely on sub-paragraph (1),

(c) where it proposes to rely on sub-paragraph (1), its reasons.

(3) In sub-paragraph (1), an “exemptible investor” is (as the case may be)—

(a) an investor who has less than a 10% stake in the total ownership or control of the licensed provider, or

(b) a person whose intended acquisition of an interest in the licensed provider is of less than a 10% stake in the total ownership or control of the licensed provider.

Requirement to notify investors

4 (1) Where an applicant gives information under paragraph 1, the applicant must notify any person whom the information concerns—

(a) of—

(i) the making of the application, and

(ii) the fact that the identity of the person has been disclosed to the approved regulator,

(b) of the effect of paragraph 5.

(2) Where a licensed provider gives notification under paragraph 3(2) or (3), the licensed provider must notify any person whom the notification concerns—

(a) of—

(i) the giving of that notification, and

(ii) the fact that the identity of the person has been disclosed to the approved regulator,

(b) of the effect of paragraph 5.

(3) It is an offence for a person to fail without reasonable excuse to comply with a requirement imposed on the person by sub-paragraph (1) or (2).

(4) A person who commits an offence under sub-paragraph (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
Approved regulator may obtain information

5 (1) An approved regulator may require a person whose identity has been disclosed to it under paragraph 1 or 3 to provide it with such documents and other information as it may reasonably require.

(2) It is an offence for a person who is required to provide information by virtue of sub-paragraph (1)—

(a) to fail without reasonable excuse to comply with the requirement, or
(b) knowingly to provide false or misleading information.

(3) A person who commits an offence under sub-paragraph (2) is liable—

(a) on summary conviction to a fine not exceeding the statutory maximum,
(b) on conviction on indictment to a term of imprisonment not exceeding 2 years or a fine (or both).
### SCHEDULE 9
*(introduced by section 101(4))*

**INDEX OF EXPRESSIONS USED**

<table>
<thead>
<tr>
<th>Whole Act expressions</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 <em>particular expressions</em></td>
<td></td>
</tr>
<tr>
<td>regulatory objectives</td>
<td>all in Part 1</td>
</tr>
<tr>
<td>professional principles</td>
<td></td>
</tr>
<tr>
<td>legal services</td>
<td></td>
</tr>
<tr>
<td><em>other expressions</em></td>
<td></td>
</tr>
<tr>
<td>10 the 1980 Act, the 1986 Act, the 1990 Act &amp; the 2007 Act</td>
<td>all in section 101(1) to (3)</td>
</tr>
<tr>
<td>advocate</td>
<td></td>
</tr>
<tr>
<td>conveyancing practitioner</td>
<td></td>
</tr>
<tr>
<td>executry practitioner</td>
<td></td>
</tr>
<tr>
<td>15 Faculty</td>
<td></td>
</tr>
<tr>
<td>incorporated practice</td>
<td></td>
</tr>
<tr>
<td>Law Society</td>
<td></td>
</tr>
<tr>
<td>litigation practitioner</td>
<td></td>
</tr>
<tr>
<td>Lord President</td>
<td></td>
</tr>
<tr>
<td>20 OFT</td>
<td></td>
</tr>
<tr>
<td>professional association or body</td>
<td></td>
</tr>
<tr>
<td>registered European lawyer</td>
<td></td>
</tr>
<tr>
<td>registered foreign lawyer</td>
<td></td>
</tr>
<tr>
<td>solicitor</td>
<td></td>
</tr>
</tbody>
</table>
### Part 2 expressions

<table>
<thead>
<tr>
<th>Expression</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approved regulator (of licensed provider)</td>
<td>section 5</td>
</tr>
<tr>
<td>approval and authorisation (of approved regulator)</td>
<td>sections 6 and 7</td>
</tr>
<tr>
<td>designated person (within licensed provider)</td>
<td>section 47</td>
</tr>
<tr>
<td>Head of Legal Services, Head of Practice and Practice Committee (of licensed provider)</td>
<td>sections 39 to 41</td>
</tr>
<tr>
<td>internal governance arrangements (of approved regulator)</td>
<td>section 20</td>
</tr>
<tr>
<td>investor and non-solicitor investor (in licensed provider)</td>
<td>section 52</td>
</tr>
<tr>
<td>licensed legal services provider (and licensed provider)</td>
<td>section 36</td>
</tr>
<tr>
<td>licensing and practice rules (in regulatory scheme)</td>
<td>sections 10 and 14</td>
</tr>
<tr>
<td>regulatory and representative functions (of approved regulator)</td>
<td>section 23</td>
</tr>
<tr>
<td>regulatory scheme (of approved regulator)</td>
<td>section 8</td>
</tr>
</tbody>
</table>

### Part 3 expressions

<table>
<thead>
<tr>
<th>Expression</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approving body (of confirmation agent)</td>
<td>section 73</td>
</tr>
<tr>
<td>approving body (of will writer)</td>
<td>section 81B</td>
</tr>
<tr>
<td>confirmation agent and confirmation services</td>
<td>section 72</td>
</tr>
<tr>
<td>regulatory scheme (of approving body)</td>
<td>sections 75 and 81D</td>
</tr>
<tr>
<td>will writer and will writing services</td>
<td>section 81A</td>
</tr>
</tbody>
</table>
Legal Services (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; and for connected purposes.

Introduced by: Kenny MacAskill
On: 30 September 2009
Bill type: Executive Bill
1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, this document is published to accompany the Legal Services (Scotland) Bill (introduced in the Scottish Parliament on 30 September 2009) as amended at Stage 2.

Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF BILL PROVISIONS

4. The principal effect of the Legal Services (Scotland) Bill ("the Bill") is to liberalise the legal services market in Scotland by allowing solicitors who offer legal services to operate using certain business models which are currently prohibited. It will do this by making amendments to the Solicitors (Scotland) Act 1980 ("the 1980 Act") to remove restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership (see sections 90 and 91), and by creating a regulatory framework in which the new types of business will operate (see Parts 1 and 2). It is enabling rather than prescriptive legislation, as the traditional business models will remain an option for those solicitors who choose to carry on practising within those structures.

5. The Bill will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators ("approved regulators"), who in turn will regulate licensed legal services providers ("licensed providers"), as shown below:

- Firstly, the Scottish Ministers will license and regulate approved regulators.
- Secondly, the approved regulators will license and regulate licensed providers.
- Thirdly, a licensed provider, as a regulated body, will have obligations to manage and oversee people in the entity – including lawyers, other professionals and non-professionals – in a way which is compatible with the regulatory regime imposed by the approved regulator.

6. The Bill also includes:

- regulatory objectives and professional principles which will apply to legal professionals, whether or not they choose to join licensed providers;
- measures to reflect changes in the governance of the Law Society of Scotland ("the Society");
- statutory codification of the framework for the regulation of the Faculty of Advocates ("the Faculty");
- provisions enabling the Scottish Legal Aid Board ("the Board") to monitor the availability and accessibility of legal services in Scotland, with assistance from approved regulators and others;
This document relates to the Legal Services (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

• a new regulatory complaint that will be dealt with by the Scottish Legal Complaints Commission (“SLCC”);
• provisions to allow others to apply for rights to obtain confirmation to the estates of deceased persons;
• a new scheme for the regulation of non-lawyer will writers; and
• provisions to allow lay representatives to make oral submissions in civil cases

OVERVIEW OF STRUCTURE OF BILL

7. This Bill has 102 sections and 9 schedules. Section 101 contains definitions used in the Bill and schedule 9 is an index of expressions used in the Bill. The Bill is structured into 5 Parts, and these Explanatory Notes are divided into 5 Parts reflecting that structure. A brief overview is set out below which is followed by a detailed description of the sections of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces the schedule.

8. Part 1 sets out the regulatory objectives and principles that will govern regulators, the professional principles that will be required of practitioners, and a definition of legal services.

9. Part 2 establishes the regulatory framework within which approved regulators and licensed providers will operate.
   • Chapter 1 sets out the requirements to be met by any organisation seeking to become an approved regulator, and the role of the Scottish Ministers in approving and authorising regulators and in overseeing the regulatory system thereafter.
   • Chapter 2 sets out the requirements and duties placed on licensed providers.
   • Chapter 3 contains further details of the regulatory framework, including the application of the regulatory objectives and professional principles to approved regulators, the role of the OFT, how complaints against licensed providers and approved regulators should operate, and various registers and lists which must be maintained.

10. Part 3 contains provisions relating to confirmation agents and non-lawyer will writers
    • Chapter 1 creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation – part of the process of winding up the estate of a deceased person.
    • Chapter 2 creates a new process by which bodies may apply to authorise non-lawyer will writers, and amends the Solicitors (Scotland) Act 1980 to make it an offence for non-lawyers to provide will writing services for fee, gain or reward without such authorisation
11. Part 4 contains provisions affecting the regulation of individual legal professionals (as opposed to licensed providers) and modifying the duties of other public bodies.

- Chapter 1 imposes duties on the Society, the Faculty and others involved in the regulation of legal professionals with regard to the regulatory objectives in Part 1.
- Chapter 2 creates a statutory basis for the regulation of the Faculty.
- Chapter 3 makes various amendments to the 1980 Act. Amendments are also made to the Court of Session Act 1988 and the Sheriff Courts (Scotland) Act 1971 to allow rules of court to be made to permit lay representatives to make oral submissions to the Court.
- Chapter 4 creates new responsibilities for the Board and makes adjustments to the legislation governing the SLCC.

12. Part 5 contains general and ancillary provisions.

- Schedules 1 to 6 set out how various powers and sanctions open to the Scottish Ministers in respect of approved regulators should operate.
- Schedule 7 sets out the procedure for surrender of authorisation of an approved regulator.
- Schedule 8 makes provision in relation to investors in licensed providers.
- Schedule 9 contains an index of expressions used in the Bill.

COMMENTARY ON SECTIONS

PART 1 – THE REGULATORY OBJECTIVES ETC.

Section 1 – Regulatory objectives

Section 2 – Professional principles

13. Section 1 provides for the six regulatory objectives which the Scottish Ministers, approved regulators, approving bodies, and other regulators of legal services must comply with and promote in exercising their functions. Section 4 sets out the responsibilities of the Scottish Ministers in relation to the regulatory objectives. Section 62 does the same for approved regulators, section 75 for approving bodies for confirmation agents, section 81D for approving bodies of non-lawyer willwriters, and section 86 for other legal services regulators.

14. The regulatory objectives include promoting and maintaining adherence to the professional principles (set out in section 2). There are six such principles to which persons providing legal services should adhere. These principles do not differ substantially from the professional principles by which solicitors and other legal professionals act, and are intended to ensure that the current standard of quality in the delivery of legal services is safeguarded. Licensed providers would be expected to “act in the best interests of their clients” meaning that they should, for example, avoid conflicts of interest and safeguard a client’s money and property. Licensed providers would be expected to maintain good standards of work, meaning that they should act competently, communicate effectively, be diligent and show respect and courtesy. Under section 38 licensed providers must have regard to the regulatory objectives and adhere to
the professional principles. The Head of Legal Services is responsible for securing that adherence (section 39).

15. The regulatory objectives also include encouraging equal opportunities within the legal profession. While equal opportunities is a topic which is generally reserved to the UK Government (Section L2 of Part II of Schedule 5 to the Scotland Act 1998), there is a exception to this and that is the encouragement of equal opportunities, and in particular of the observance of the equal opportunity requirements. The Scottish Parliament may impose duties on the Scottish Government and Scottish public bodies to make arrangements to secure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.

16. The Bill does not rank these objectives or the principles in order of importance, so there is no hierarchy within them. The Scottish Ministers, the approved regulators and the other legal service regulators (section 86(2)) will need to consider how they balance these competing objectives in any particular circumstances.

Section 3 – Legal services

17. This section defines legal services for the purposes of this Bill. The definition is broad, and includes services currently provided by people other than solicitors and advocates (for example, tax and planning specialists, and voluntary bodies providing advice on social welfare issues). However, the Bill does not seek to regulate all these various service providers. Apart from Part 3 (confirmation and will writing services), the Bill is restricted to legal services provided by businesses involving legal professionals (meaning solicitors, advocates, licensed conveyancers and executry practitioners, and those with rights to conduct litigation and/or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”)). In particular, a body can only be a licensed provider if a solicitor is involved (see section 36).

18. Subsection (2) sets out exclusions from the definition of legal services for the purposes of this Bill. Judges are excluded as are persons who exercise judicial functions. Arbitrators also fit within this exclusion as do chairs of tribunals.

Section 4 – Ministerial oversight

19. Section 4 provides that the Scottish Ministers, in relation to their functions under this Bill, must, as far as practicable, act in a way which is compatible with the regulatory objectives and which they consider most appropriate with a view to meeting those objectives. The phrase “so far as is practicable” is added because it is recognised that the duties are broad and compliance may not be able to be objectively measured. In particular, there may be tensions between objectives, and a reasonable balance will need to be struck between them.

20. The Scottish Ministers must also have regard to the principles of best regulatory practice under which (in particular) regulatory activities should be carried out effectively and in a way that is transparent, accountable, proportionate, consistent, and targeted. These are the “five
principles of good regulation” first laid out in a report by the UK Better Regulation Task Force in 2005. These guidelines state that regulation should be:

- proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
- accountable: regulators must be able to justify decisions, and be subject to public scrutiny;
- consistent: Government rules and standards must be joined-up and implemented fairly;
- transparent: regulators should be open, and keep regulations simple and user friendly; and
- targeted: regulators should be focused on the problem, and minimise side effects.

Section 4A – Consultation by Minister

21. Section 4A places a general requirement on the Scottish Ministers to consult in relation to the exercise of any of their functions under the Bill. Where they consider it appropriate to do so, Ministers are required to consult with such persons or bodies that appear to them to have a significant interest in the subject matter to which the exercise of the function relates. This general consultation requirement applies whether or not there is any other particular consultation requirement.

PART 2 – REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1 – APPROVED REGULATORS

Approved regulators

Section 5 – Approved regulators

22. This section sets out how a professional or other body can become an approved regulator. This is framed as a two-stage process – the first stage is to obtain approval and the second to obtain authorisation. Essentially this is by application to the Scottish Ministers and this section details what information an application must include. If an application for approval is granted, then this means that the body can now call itself an approved regulator. It is only after successfully being granted an application for authorisation that the approved regulator can regulate its licensed providers.

23. Subsection (6) gives the Scottish Ministers a regulation making power to prescribe fees they can charge. This could allow a charge for each application or an annual regulatory charge or both.

Section 6 – Approval of regulators

24. Section 6 provides the criteria in relation to which the Scottish Ministers must be satisfied before approving an applicant as an approved regulator. These include, among others, that the
applicant has the necessary expertise as regards the provision of legal services, a thorough knowledge and understanding of the regulatory objectives and professional principles and is adequately resourced. Scottish Ministers must also be satisfied that the applicant would always exercise its regulatory functions independently of any other person or interest and otherwise properly, that the applicant’s regulatory scheme is adequate (with reference to section 8) and that its internal governance arrangements (how it is structured and managed) are suitable (with reference to section 20). The Scottish Ministers must have the consent of the Lord President before approving a body.

25. The Scottish Ministers, with the consent of the Lord President, can approve a body as an approved regulator subject to conditions. Conditions may, for example, restrict an approving body to regulating a particular type of licensed provider, and can be imposed indefinitely or for a period of at least 3 years. Provision is made for the amendment, addition or deletion of approval conditions with the consent of the Lord President. Subsections (2A) refers to a provision that was not ultimately inserted at stage 2.

26. Scottish Ministers are required to consult the OFT and any other person or body that they consider appropriate before approving an applicant as an approved regulator.

27. Where the Scottish Ministers indicate that an application might not be approved, or if conditions are attached, the applicant can make representations within a 28-day period or take such other steps as it considers necessary (for example, by modifying its application or scheme).

28. The Scottish Ministers have the power to make regulations regarding the approval process, including the approval criteria. This power, which must relate to the applicants’ capability to act as approved regulators, can only be exercised after consultation with the Lord President.

Section 7 – Authorisation to act

29. Authorisation is the second stage of the process. Having been approved by the Scottish Ministers as an approved regulator, the body may not exercise any of its regulatory functions unless authorised so to do by the Scottish Ministers (subsection (1)). The section also makes provision in relation to the restrictions and conditions that may be placed on authorisation.

30. Subsection (2) provides that the Scottish Ministers can only give their authorisation if they are satisfied or continue to be satisfied as to the matters mentioned in section 6(1) and that it continues to meet any criteria provided for in regulations made under section 6(7)(b).

31. Authorisation may be with or without conditions, may be subject to a time limitation and may also be restricted to particular types of legal services or legal service provider. A restriction in relation to a particular type of legal services may be appropriate where an approved regulator has expertise in a specialised area. One example is a body which regulates accountants which might seek to regulate mixed practices of accountants and lawyers, but not other forms of multi-disciplinary practice.
32. The Scottish Ministers have the power to make regulations regarding the authorisation process. This power could be used to set out the process for authorisation in more detail, and to address any issues which arise with regard to the criteria used.

Section 7A – Request

33. This section allows requests for authorisation to be made at any reasonable time and to be withdrawn. It requires the Scottish Ministers to notify the applicant and to give reasons if they intend to withhold authorisation or impose conditions. If such notification is given, the applicant, or the approved regulator, may within 28 days make representations and take any other steps it considers expedient. There is a duty on the approved regulator or applicant to provide the Scottish Ministers with any information they reasonably require.

Regulatory schemes

Section 8 – Regulatory schemes

34. Section 8 sets out the approved regulator’s responsibility to create and implement a regulatory scheme for its licensed providers, and describes what must be included in the scheme. (This is regulation of licensed providers as entities – individuals within the entities who are regulated by professional bodies will continue to be so regulated by them. For example, solicitors will be regulated by the Society).

35. The Scottish Ministers have the power to specify by regulations additional matters which the regulatory schemes must cover. This power could be used to address unforeseen issues with the regulatory schemes which may arise once the system is in operation.

36. The scheme should relate to the provision of legal services, as defined in section 3, however, the Scottish Ministers have the power to make regulations which authorise regulatory schemes to deal with other services in addition to legal services (subsection (5)).

37. Subsection (2) requires the scheme to include details about two sets of rules – the licensing rules (that is, rules relating to the application process and the issuing or renewal of licences – see sections 10 to 12) and the practice rules (governing how licensed providers operate – see sections 14 to 19).

38. Subsection (4) allows the approved regulator to amend fully or in part its regulatory scheme but any material change requires prior approval of the Scottish Ministers, who must have the consent of the Lord President and consult any other person or body they consider appropriate. If prior approval is not given, the changes are invalid.

Section 9 – Reconciling different rules

39. Section 9 provides that the approved regulator’s regulatory scheme must include appropriate provision which prevents or resolves regulatory conflicts, as well as avoids unnecessary duplication of regulatory rules. Regulatory conflict is conflict between the regulatory scheme and any professional or regulatory rules of any other body which regulates the provision of legal or other services. For example, conflict between a regulatory scheme and the Society’s rules or professional regulatory code of an accountant.
40. The Bill does not prescribe that one set of rules would automatically “trump” another in the event of any conflict. It will be for approved regulators to identify and address any potential conflicts, and for the Scottish Ministers to consider whether this has been done adequately in assessing any application for approval or authorisation under sections 6 and 7. However, it will be possible for the Scottish Ministers with the consent of the Lord President to make regulations about regulatory conflict under subsection (3).

**Licensing rules**

**Section 10 – Licensing rules: general**

**Section 11 – Initial considerations**

41. Sections 10 and 11 give details about what the licensing rules, that are to be contained in an approved regulator's regulatory scheme, cover. Licensing rules cover areas such as the procedure and requirements involved in making an application to become a licensed provider (including fees payable to the approved regulator).

42. The general approach of the Bill is to set out a broad framework and allow approved regulators the flexibility to devise an appropriate set of rules as best fits the services being regulated and which follows best regulatory practice. However, in some instances the Bill requires certain mandatory provisions to be contained in the licensing rules. The rules must include provision for consultation with the OFT (see section 11(2)) where there may be an effect of preventing or restricting or distorting competition within the legal services market, and must set out how the regulator would deal with an application where it believes there would be a material and adverse effect on the provision of legal services (section 11(1)(b)).

**Section 12 – Other licensing rules**

43. This section provides for the possibility of provisional licences to allow a licensed provider to operate in anticipation of the full licence application being granted. This may be used, for example, in a situation where a licensed provider is transferring from one approved regulator to another. This section also requires licensing rules to make provision in relation to non-compliance with, or breaches of, the regulatory scheme.

**Section 13 – Licensing appeals**

44. This section provides for an appeal by a licensed provider (or an applicant to be a licensed provider) to the sheriff against a refusal of its application for a licence or to renew its licence, attach conditions or restrictions to its licence, or to suspend or revoke its licence.
Practice rules

Section 14 – Practice rules: general

Section 15 – Financial sanctions

Section 16 – Enforcement of duties

45. Section 14 gives details about what the practice rules, that are to be contained in the approved regulator’s regulatory scheme, cover. Section 15 allows practice rules to make specific provision for the financial penalties which may be imposed on licensed providers by approved regulators in relation to a breach of the regulatory scheme by, or a complaint about, a licensed provider and for appeals against their imposition. Section 16 states that practice rules must specify that failure to comply with section 38 (setting out the key duties of licensed providers), any other duties under this Part, or duties under any other enactment, all constitute a breach of the regulatory scheme. Section 16 also sets out requirements for licensed providers to report on and review their performance, and to have their performance and the report assessed by the approved regulator.

Section 17 – Performance report

46. This section provides that the practice rules on reviewing and reporting on the performance of licensed providers must require the Head of Practice (or Practice Committee) of a licensed provider carry out an annual review and send a report to its approved regulator. The section also sets out certain matters that must be examined in the review.

Section 18 – Accounting and auditing

47. This section provides that practice rules must require licensed providers to have proper accounting and auditing procedures in place, and include equivalent provisions to the accounts rules in sections 35 to 37 of the 1980 Act for solicitors operating in an incorporated practice. Sections 35 to 37 require the Society to make rules regarding the separate holding of clients’ funds, and the provision of an accountant’s certificate to demonstrate compliance with those rules.

Section 19 – Professional indemnity

48. Under this section, practice rules must require licensed providers to have certain professional indemnity arrangements and must include equivalent provision to that on professional indemnity in section 44 of the 1980 Act in relation to an incorporated practice.

49. Section 44 provides for the Council of the Society (“the Council”) to make rules concerning indemnity for solicitors and incorporated practices against any class of professional liability (for example, for negligence in the delivery of a legal service). The rules may provide for a fund held by the Society, or for insurance with an authorised insurer held by the Society, or require solicitors to take out insurance. Currently, the Society’s rules provide that all solicitors acting as principals in private practice must be insured under a single “master policy” held by the Society (Solicitors (Scotland) Professional Indemnity Insurance Rules 2005).
Internal governance

Section 20 – Internal governance arrangements

50. The section requires the internal governance arrangements of an approved regulator to make provision to ensure that it acts properly and with independence, that it provides sufficient resources for its regulatory functions in relation to licensed providers and that it reviews regularly how effectively it is exercising its regulatory functions. The section sets out relevant factors (in subsection (2)) which approved regulators must have regard to in connection with the independent exercise of their regulatory functions. One of these is the need to avoid conflicts of interest where possible. In order to mitigate conflicts, there is a need for a clear demarcation of regulatory functions from any representative functions the approved regulator may have (for example, as a professional body). In relation to the Society, section 93 of the Bill provides that the Society must set up a regulatory committee.

51. Internal governance arrangements are defined for the purposes of Part 2 of the Bill in section 22(4), and the distinction between regulatory and representative functions is defined in section 23.

Section 21 – Communicating outside

52. Section 21 provides that internal governance arrangements cannot prevent consultation and communications with persons or bodies outside the approved regulator. This section makes it clear that individuals exercising regulatory functions within an approved regulator can communicate with others involved in the regulation of legal services, and that they can notify the Scottish Ministers of any adverse impact on regulatory independence arising from the representative role of the regulator.

Section 22 – More about governance

53. Section 22 provides that the Scottish Ministers with the consent of the Lord President may make regulations including further provision about the internal governance arrangements of approved regulators, but only in relation to their regulatory functions. Before so doing they must consult any approved regulators that would be affected.

Regulatory functions etc.

Section 23 – Regulatory and representative functions

54. Section 23 defines the regulatory and representative functions of an approved regulator under the Bill.

55. Subsection (3) makes clear that the Scottish Ministers are not authorised to exercise any of their functions under the Bill in relation to an approved regulator’s representative functions.

Section 24 – Assessment of licensed providers

56. Section 24 provides that approved regulators (or person who or body that has been delegated this function) are required to carry out reviews of the performance of licensed providers at least once in every 3-year period. The 3-year period starts with the date that the

11
particular licensed provider was issued the licence (subsection (1)). This is an external
evaluation which complements the annual self-assessment carried out under section 17. The
assessment must consider how well the licensed provider has had regard to the regulatory
objectives, adhered to the professional principles, complied with the approved regulator’s
regulatory scheme and the licence conditions, and any such matters as the approved regulator
considers appropriate (subsection (3)).

57. Subsection (2) provides that the Scottish Ministers may require an approved regulator to
assess a licensed provider at other times if requested to do so by the SLCC. The SLCC may only
make the request if it has significant concerns over the handling of a complaint by a licensed
provider.

58. The approved regulator is required to inform the relevant professional association if the
assessment of the licensed provider in question reveals professional misconduct (or potential
professional misconduct) by any of its members (subsection (7)). For example, if there were
indications of misconduct by a solicitor or a chartered accountant employed by the licensed
provider, the approved regulator would have to notify the Society or the Institute of Chartered
Accountants of Scotland respectively. This could happen whether or not the person in question
is involved in the provision of legal services within the licensed provider.

59. Under subsection (9), the Scottish Ministers can make further provisions about the
assessment of licensed providers by regulations. This could be used to deal with any unforeseen
circumstances, or to elaborate on the assessment procedure and requirements should this be
necessary.

Section 25 – Giving information to SLAB

60. The Board has been given the additional duty of monitoring the availability and
accessibility of legal services in Scotland, as inserted into the Legal Aid (Scotland) Act 1986
(“the 1986 Act”) as section 1(2A) by section 96 of the Bill. This section provides that an
approved regulator must provide the Board with information in relation to this function.

Section 26 – Additional powers and duties

61. This section gives a power to the Scottish Ministers to make regulations conferring
additional functions on approved regulators. Before making such regulations, the Scottish
Ministers must have the consent of the Lord President and must consult with certain persons.

Section 27 – Guidance on functions

62. The Scottish Ministers are given a power to issue guidance to approved regulators, and all
regulators must have regard to this guidance. Where the Scottish Ministers issue guidance, this
section also provides that they are required to publish it.
Performance

Section 27 – Review of own performance

63. Section 27A requires an approved regulator to review its own performance annually and provides for the matters to be covered by the review. A report on the review must be submitted to the Scottish Ministers, who must lay a copy before the Scottish Parliament. It also allows the Scottish Ministers to make further provision by regulations relating to both the review and the report.

Section 28 – Monitoring performance

64. This section gives the Scottish Ministers a power to monitor performance of approved regulators. It sets out matters which may be included in the monitoring (section 28(2)) and requires an approved regulator to provide information in relation to its regulatory scheme to the Scottish Ministers (section 28(3)).

Section 29 – Measures open to Ministers

65. Section 29 describes the options open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Subsection (4) sets out the measures which can be taken, which include the rescission of a regulator’s authorisation to regulate. The measures in (4)(a), (b), (c), (e) and (f) can only be applied by the Scottish Ministers if they have the consent of the Lord President.

66. More detail as to when these measures will apply and on the procedures relating to these measures can be found in schedules 1 to 6 to this Bill.

67. The Scottish Ministers, with the consent of the Lord President, have the power under subsection (6) to make further provisions by regulations regarding the measures that may be taken in relation to approved regulators. This could be used to give further detail around the specifics of the measures, and the procedure involved. This subsection also gives the Scottish Ministers the power to specify, by regulations, additional measures which can be taken should this be considered necessary.

Schedule 1 – Performance targets

68. This schedule gives details and the procedures to be followed when the Scottish Ministers set performance targets for an approved regulator and also provides a procedure for representations to the Scottish Ministers by the approved regulator.

Schedule 2 – Directions

69. This schedule gives details about the procedures to be followed (including consultation and representations) when the Scottish Ministers exercise their power to give directions to an approved regulator.
Schedule 3 – Censure

70. This schedule gives further details about the procedures to be followed when the Scottish Ministers, with the consent of the Lord President, use their power to censure an approved regulator for any act or omission (including the procedures for representations).

Schedule 4 – Financial penalties

71. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to impose a financial penalty on an approved regulator (including the procedures for representations, amounts of financial penalties, appeals, and interest).

Schedule 5 – Amendment of authorisation

72. This schedule gives further details about the procedures to be followed when the Scottish Ministers amend the authorisation of an approved regulator (including the procedures for representations).

Schedule 6 – Rescission of authorisation

73. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to rescind an approved regulator’s authorisation (including the procedures for representations).

Ceasing to regulate

Section 30 – Surrender of authorisation

74. Section 30 deals with the situation where an approved regulator ceases to regulate. It allows an approved regulator to surrender its authorisation, with the prior agreement of the Scottish Ministers, under the procedure in schedule 7. Subsection (3) provides that an approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of its authorisation. For example, this may involve ensuring that the licensed providers have sufficient time to find and transfer to an alternative approved regulator before authorisation is surrendered.

75. Subsection (4) states that if an approved regulator surrenders its authorisation to regulate, it also loses its status as an approved regulator. This reflects the two-stage process involved in a body becoming a functioning approved regulator – it must first be approved (section 6), and then given authorisation to regulate by the Scottish Ministers (section 7). In giving up authorisation, both authorisation and approval are removed.

Section 31 – Cessation directions

76. Section 31 applies where an approved regulator’s regulatory scheme is amended so as to exclude its regulation of certain categories of licensed provider or legal services, or its authorisation is (or is to be) amended under section 29(4)(e), rescinded under section 29(4)(f), or surrendered under section 30(1).
77. Section 31(2) gives the Scottish Ministers a wide power to direct an approved regulator to take such action as they consider necessary or expedient for the purpose of providing continued effective regulation of affected licensed providers. This might include, for example, requiring an approved regulator to alter the timing of its surrender of authorisation to ensure that another approved regulator was in a position to accept its former licensed providers.

Section 32 – Transfer arrangements

Section 33 – Extra arrangements

78. These sections cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded, or amended an authorisation so it was no longer regulating particular categories of licensed provider or legal services. In such circumstances, the approved regulator must inform its licensed providers of the situation, and notify those which will have to transfer to another approved regulator (section 32(2) and (3)).

79. Subsections (4) and (5) of section 32 set out the process and timescales involved in moving from one approved regulator to another. The changeover period refers to the period of time during which a licensed provider which has been forced to transfer may continue to operate according to the regulatory scheme of its previous regulator, whilst being regulated by the new regulator. There is a requirement on the licensed provider to comply with the new regulator’s rules within the 6-month changeover period.

80. For example, suppose an approved regulator “X” notifies a licensed provider that it is ceasing to exist as an approved regulator, and that a transfer is therefore necessary. The licensed provider would identify a new approved regulator “Y”, and arrange to transfer to it within 28 days (or as soon as was practicable). Starting from the date on which Y took over responsibility for regulating the licensed provider in question, it would have 6 months in which to adopt Y’s regulatory scheme. During the 6-month “changeover” period, the licensed provider is free to continue to comply with only X’s regulatory scheme, but on the day that the changeover period is completed, it must comply fully with Y’s scheme.

81. This process requires the new approved regulator to regulate the licensed provider using the previous approved regulator’s regulatory scheme for the duration of the changeover period.

82. Section 33 gives the Scottish Ministers the power to make regulations relating to transfer arrangements.

83. This power can be used to address any unforeseen circumstances which might occur in the transfer process described in section 32. However, regulations may be used in two particular cases, described in subsection (2).

84. The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their choice (subject to that approved regulator’s consent). This may be necessary to ensure
continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.

85. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the former approved regulator, in relation to the current licence of the licensed provider. This may be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to its former regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.

Miscellaneous

Section 34 – Change of approved regulator

86. Section 34 provides for a voluntary transfer by a licensed provider to a new regulator, and sets out the timescale and requirements involved.

87. The new approved regulator must consent for the transfer to take effect. The licensed provider must give notice to the former approved regulator and to the Scottish Ministers. The licensed provider must explain why it is transferring and specify the new regulator. It must also specify the date on which the transfer will occur (which must be within 28 days of the notice) and provide a copy of the new approved regulator’s consent to the transfer.

88. The Scottish Ministers have the power (under subsection (6)) to make, by regulations, further provisions relating to such transfers.

Section 35 – Step-in by Ministers

89. Section 35 makes provision to allow the Scottish Ministers to ensure that licensed providers are regulated in the absence of a suitable approved regulator. The Scottish Ministers may by regulations either establish a new regulator (subsection (1)) or set themselves up as an approved regulator (subsection (2)) where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by licensed providers. No regulations may be made unless the Scottish Ministers believe that their intervention under this section is necessary as a last resort.

CHAPTER 2 – LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

Section 36 – Licensed providers

90. Section 36 provides the definition of a licensed provider. Any such body is a business entity which provides legal services for a fee, gain or reward under a licence issued by an approved regulator. In order to be eligible to be a licensed provider a body must have within it a practising solicitor (with a valid practising certificate that is free from conditions).

91. Subsection (3) states that a licensed provider may not be regulated by more than one approved regulator at the same time.
Section 37 – Eligibility criteria

92. This section describes some possible models of licensed provider and gives details of what criteria make and do not make an entity eligible to be a licensed provider.

93. Licensed providers need not have any particular business structure and need not be a body corporate, but they must be a recognisable business entity (such as a company). It is possible that a business which is involved in matters with no link to legal services might in future have a stake in a licensed provider. In such a situation, subsection (3)(b) requires that there should be a distinct business entity within that organisation which operates as the licensed provider. This will prevent approved regulators from having to regulate matters which are not related to the broad definition of legal services in section 3.

94. The definition of licensed provider excludes existing forms of legal business structure. These will continue to be regulated as now (primarily by the Society and Faculty). The existing “traditional” forms of business structure for solicitors are set out in section 37(4).

95. The first is a solicitor operating as, in effect, a sole trader.

96. The second, the traditional practice, means either a partnership made up only of solicitors, or an “incorporated practice”. An incorporated practice is a form of solicitors’ practice with no non-solicitor ownership or control, which trades as a body corporate, and which may benefit from limited liability. Such practices are governed by the Solicitors (Scotland) (Incorporated Practices) Practice Rules 2001.

97. The third, law centres, are also already provided for in the 1980 Act. Section 65 of the 1980 Act defines “law centre” as “a body (a) established for the purposes of providing legal services to the public generally as well as to individual members of the public, and (b) which does not distribute any profits made either to its members or otherwise, but reinvests any such profits for the purposes of the law centre”. Such law centres typically have an arrangement with a solicitors’ firm which provides the legal services for the centre. Section 26(2) of the 1980 Act provides that the offence of acting as agents for unqualified persons does not apply to solicitors, registered foreign lawyer or registered European lawyer pursuing professional activities within the meaning of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000 who are employed full-time on a fixed salary by a body corporate or employed by a law centre.

98. The Scottish Ministers have the power to make regulations about eligibility to be a licensed provider (subsection (6)). Those regulations may specify other types of entity that are or are not eligible to become licensed providers and make further provision about the criteria for eligibility to be a licensed provider. This subsection also gives the Scottish Ministers power to modify by regulations section 36(2) (licensed providers) which currently requires an entity to include at least one solicitor in order to be eligible to be a licensed provider, so that in future it may be possible for a licensed provider to be eligible if it includes a different type of practitioner. Scottish Ministers also have the power to modify the list of legal practitioners in subsection (5). This power could be used to add any types of legal practitioner which are created in the future, thus keeping the provision up to date.
Section 37A – Majorityownership

99. Section 37A provides that an entity is only eligible to be a licensed provider if it is at least 51% owned, managed or controlled by solicitors, firms of solicitors or incorporated practices or members of other regulated professions. Such an entity must also have at least one solicitor in possession of a practising certificate free of conditions. An entity is not eligible to become a licensed provider if it is wholly owned, managed or controlled by solicitors, firms of solicitors or incorporated practices.

Section 38 – Key duties

100. Section 38 sets out the key duties applicable to all licensed providers, including their obligations with respect to the regulatory objectives, professional principles, their approved regulator’s regulatory scheme and licence terms and conditions. Licensed providers must also ensure compliance with any professional code of conduct applicable to persons within the licensed provider – whether or not such codes are directly incorporated within the approved regulator’s scheme.

101. Because a licensed provider is an intangible entity, the Bill provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services and either a Head of Practice (see section 40) or Practice Committee (see section 41). The two posts have distinct but overlapping duties. Broadly, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles, while the Head of Practice is responsible for the broader compliance with the relevant regulatory scheme, and licence terms and conditions.

Operational positions

Section 39 – Head of Legal Services

102. Section 39 describes the position of Head of Legal Services, along with the requirements, duties and responsibilities associated with the role. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 54). As stated above, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles. The Scottish Ministers have the power to make further provision about this position and its function by regulations (subsection (9)(a)).

103. Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that he or she has a valid practising certificate, free of conditions. The relevant legislation on practising certificates and conditions is to be found in sections 4, 15(1) and 53(5) of the 1980 Act. The Scottish Ministers, following consultation with the Lord President, have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsections (9)(b) and (10)).

104. The Head of Legal Services is personally responsible for securing the licensed provider’s compliance with the regulatory objectives, its adherence to the professional principles, and its fulfilment of its other duties, and to take such reasonable steps (such as issuing of instructions, establishing appropriate arrangements for training, monitoring and supervision of staff, and internal audit) for these purposes. The Head of Legal Services is also responsible for managing
This document relates to the Legal Services (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

designated persons (subsections (4) to (6)). This section also provides for the action to be taken by the Head of Legal Services where it appears to him or her that the licensed provider is failing to fulfil its duties.

105. Subsection (8) provides that where any function falls to both the Head of Legal Services and the Head of Practice they are jointly and severally responsible for exercising the function. It will be noted that the Bill gives a “whistle blowing duty” to both the Head of Legal Services (section 39(7)) and Head of Practice (section 40(6)), the difference being that the Head of Legal Services is required to report to the Head of Practice and the Head of Practice to the approved regulator. Another joint function is to ensure that designated persons in the licensed provider meet their professional obligations (sections 39(5)(b) and 40(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 39(9) and 40(7).

Section 40 – Head of Practice

106. Section 40 describes the position of Head of Practice, along with the eligibility requirements, and the duties and responsibilities associated with the role. As stated above, the Head of Practice is responsible for broader compliance with the relevant regulatory scheme. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 54).

107. Subsection (2) gives details of the criteria that are required for a person’s appointment as its Head of Practice. Unlike the Head of Legal Services, no particular qualification is stipulated, although it is possible for the Scottish Ministers, following consultation with the Lord President, to add specific requirements by regulations under subsection (7). Such regulations may also make further provision about the functions of the Head of Practice.

108. Subsection (3) states the Head of Practice has the function of securing the licensed provider’s compliance with its approved regulator’s regulatory scheme and the terms and conditions of its licence. The duty is both to ensure compliance by the organisation as a whole, and to manage those working within the organisation to ensure they take account of the regulatory scheme. Whereas the Head of Legal Services managerial oversight is restricted to designated persons (i.e. those involved in the delivery of legal services – see section 47), the Head of Practice has oversight of everyone in a licensed provider.

109. Subsection (6) creates a “whistle blowing” duty. It provides that, if it appears to the Head of Practice that the licensed provider or any person having an interest in the licensed provider is failing (or has failed) to fulfil any of its duties, or that any such person is behaving (or has behaved) improperly in relation to the licensed provider or to any person within it, the Head of Practice must report the matter to the licensed provider’s approved regulator.

Section 41 – Practice Committee

110. Section 41 describes the composition and responsibilities of the Practice Committee, which licensed providers can choose to have instead of the Head of Practice. They have the same functions under the Bill. The Practice Committee must have as one of its members a person who would be eligible to be the Head of Practice (if the licensed provider had decided to have a Head of Practice). The members of a Practice Committee are to be jointly and severally
responsible as regards the Committee’s functions. The Scottish Ministers, following consultation with the Lord President, have the power to make further provision by regulations relating to Practice Committees and their functions (subsections (5) and (6)).

Appointment to position etc.

Section 42 – Notice of appointment

111. This section contains requirements for notification by licensed providers to approved regulators of the details of the appointment of a Head of Legal Services and Head of Practice or Practice Committee, or any changes to these appointments.

Section 43 – Challenge to appointment

112. Section 43 gives an approved regulator the power to challenge any appointment to the posts of Head of Legal Services, Head of Practice or as a member of a Practice Committee. The section sets down the specific grounds of challenge: a challenge can only be made if an approved regulator believes that person to be ineligible or unsuitable, or on other reasonable grounds. After allowing representations, it is open to an approved regulator to direct that an appointment be rescinded. Under subsection (6A), the licensed provider or the aggrieved person may appeal to the sheriff within 3 months of the date of the direction.

Section 44 – Disqualification from position

Section 45 – Effect of disqualification

113. Disqualification may be limited in terms of the time period (for all disqualified persons) or the activities which may not be carried out, or carried out without supervision (in the case of designated persons). However, a disqualification does not only apply to the particular position – it applies to the same position in every licensed provider, including licensed providers who may operate under a different approved regulator.

114. Subsection (3A) requires licensing rules to stipulate that a licensed provider’s licence may be revoked or suspended if it wilfully disregards the disqualification of someone from the position of Head of Legal Services or Head of Practice, or from being a member of the Practice committee or from being a designated person.

115. Because of the potentially serious consequences of disqualification from a particular post, representations must be allowed before a disqualification occurs; there must be a procedure for review within the practice rules; and there is also a subsequent right of appeal to the sheriff.

Section 46 – Conditions for disqualification

116. Section 44(1) indicates that sections 45 and 46 should be read in conjunction with section 44. Section 46 lists conditions which may or will result in the disqualification of someone from the positions of Head of Legal Services, or Head of Practice, or from being a member of the Practice Committee, or from being a designated person (see section 47 for the definition of a designated person).
In all cases, disqualification depends on a decision by the approved regulator that the matter which gives rise to the disqualification makes the person unsuitable for the appointment. In other words, although specific grounds in any of the conditions in section 46 may be met, the disqualification is never automatic since the approved regulator must be also satisfied that the person is unsuitable for the position. Further, before any disqualification occurs, the approved regulator must allow the licensed provider and the person to take such steps as are expedient or to make representations (section 45(3)).

Section 44(2) indicates that an approved regulator must disqualify a person from being Head of Practice or member of the Practice Committee if that person is insolvent and the approved regulator is satisfied that this makes that person unsuitable (the first condition in section 46(2)).

Section 44(3) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services or Head of Practice or Practice Committee member if that person is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985 (or corresponding legislation) and the approved regulator is satisfied that this makes that person unsuitable (the second condition in section 46(3)). The approved regulator may disqualify someone from being a designated person on the same grounds.

Section 44(4) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 (or corresponding legislation) or has been disqualified by a court from holding a position of business responsibility and the approved regulator is satisfied that this makes that person unsuitable (the third condition in section 46(4)).

Section 44(5) indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person has been convicted of an offence involving dishonesty or has been fined for an offence a sum equivalent to the maximum of level 3 on the standard scale or has been sentenced to imprisonment for a term of two years or more and the approved regulator is satisfied that this makes that person unsuitable (the fourth condition in section 46(5)). The approved regulator may disqualify someone from being a designated person on the same grounds.

Section 44(6) indicates that an approved regulator may disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member, or designated person if that person has failed to fulfil any of his or her duties as stated in this Part of the Bill, or has caused (or substantially contributed to a breach) of the terms or conditions relating to the licensed provider’s licence, and the approved regulator is satisfied that this makes that person unsuitable (the fifth condition in section 46(6)).
Designated persons

Section 47 – Designated persons

Section 47A – Working context

123. Section 47A makes the Head of Legal Services responsible for ensuring that designated persons carrying out legal work are adequately supervised in doing so, and ensures that only designated persons can carry out legal work within a licensed provider. It also provides that nothing in this Part of the Bill affects the provisions in any other enactment as to who may (or may not) carry out any particular sort of legal work. See, for example, the restrictions in section 32 of the 1980 Act which make it an offence for unqualified persons to draw or prepare certain writs in relation to property, court action, and executries. Also, it does not affect rules of professional practice, conduct or discipline to which those in licensed providers might be subject.

Section 48 – Listing and information

124. Section 47 defines what is meant by “designated person” and indicates who designates such a person. A designated person is a person (whether or not a legal professional, and whether or not paid) who carries out legal work in connection with the provision of legal services by a licensed provider. In order to be eligible to be a designated person the person must be an employee of the licensed provider (or work in it under another arrangement) or an investor in it. The designation is made in writing by the Head of Legal Services or the Head of Practice (or Practice Committee).

125. The Head of Practice must keep a list of all such persons and provide a copy to the approved regulator if requested to do so. The procedures for disqualification in sections 44 to 46 allow approved regulators to take action against persons who should not be involved in the provision of legal services.

Outside investors

Section 49 – Fitness for involvement

126. This section provides that an approved regulator must be satisfied that all non-solicitor investors are fit to have an interest in the licensed provider at the licensing and renewal stages. The approved regulator must monitor the fitness of all investors at other times. Fitness to be an investor is to be determined in all these cases with reference to the factors set out in section 50.

127. The approved regulator’s licensing rules in relation to applications and renewals for, terms of, and revocation and suspension of, licences may relate to any non-solicitor investor (as well as to a licensed provider) and the rules must explain how a non-solicitor investor’s fitness for having an interest in a licensed provider is to be determined.

128. An entity must not be licensed (or a licensed provider must have its licence revoked or suspended) if the approved regulator determines that an investor is unfit to have an interest. This does not apply, however, where the licensed provider can demonstrate within a reasonable time appointed by the approved regulator, that the investor no longer has a relevant interest in the entity. There is provision for an alleged unfit investor to make representations or take other steps before the approved regulator makes its final determination and also for an appeal to the sheriff.
Section 49A – Exemption from the fitness test

129. Section 49A provides that an approved regulator is not required to satisfy itself as to the fitness of an investor where that investor is an “exemptible investor”. Investors are exemptible if they have less than a 10% stake in the ownership or control of a licensed provider. Licensing rules must explain the circumstances in which the approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator will apply which is lower than 10%.

Section 50 – Factors as to fitness

130. Section 50 provides examples of relevant factors when determining a non-solicitor investor’s fitness, such as financial position and business record, and family business and other associations. Subsection (3) sets out in what circumstances a non-solicitor investor is presumed to be unfit. These conditions are similar to those found in the first, second, third and fourth conditions in section 46(2) to (5) in relation to disqualification from positions within a licensed provider. It also sets out that if the non-solicitor investor is a body, the approved regulator should consider the fitness of that body and of those having substantial influence in or controlling its affairs. It means that the fitness for involvement test cannot be avoided by investors within a company.

Section 50A – Ban for improper behaviour

131. This section requires the approved regulator to disqualify a non-solicitor investor from acting in that capacity should he or she contravene section 51(1) or (2) of the Bill. It sets out that such disqualification can be permanent, or for a fixed period and that it extends to every licensed provider, not just those regulated by the same approved regulator. The approved regulator must allow the investor in question to make representations to it and there is provision for a disqualified person to appeal to the sheriff. An approved regulator must make provision in practice rules in relation to the procedure for disqualification and for review of a disqualification.

Section 51 – Behaving properly

132. Subsection (1) forbids a non-solicitor investor from acting in a way which is incompatible with the regulatory objectives and the professional principles in the Bill, the licensed provider's duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of the licence, and its other duties under Part 2 of the Bill and under any other legislation.

133. Subsection (2) provides that a non-solicitor investor in a licensed provider must not interfere improperly in the provision of legal or other professional services by the licensed provider. Moreover he or she must not seek to exert undue influence over, or solicit unlawful or unethical conduct by, or otherwise behave improperly in relation to any designated or other person within the licensed provider.

Section 52 – More about investors

134. Section 52 introduces schedule 8 which contains more provision about non-solicitor investors. Subsection (2) gives the Scottish Ministers power to make further provision by
regulations in relation to interests in licensed providers and to make licensing rules in relation to
persons with such interests. Subsection (2B) gives further detail about the provision that may be
made in these regulations, including provision about the requirements to which a licensed
provider or an investor in it is subject, provision specifying when an investor it presumed to be
fit, and provision about what counts as an interest or stake in a licensed provider including
further provision about family, business, and other associations.

135. Subsection (2A) gives the Scottish Ministers further regulation making powers, with the
consent of the Lord President, to amend the percentage threshold for exemption from the fitness
for involvement test in section 49A(4) and the notification requirements in paragraph 3A(3) of
schedule 8, and to amend a definition in subsection (4).

136. Subsection (4) defines an “investor” and a “non-solicitor investor” in a licensed provider.

Discontinuance of services

Section 53 – Duty to warn

137. Section 53 requires that the licensed provider gives as much warning as possible to the
approved regulator where it is in serious financial difficulty or in the case that it is likely to or
intends to stop providing legal services (except in the cases of revocation or suspension, when
the approved regulator would already be aware). The licensed provider must also take steps to
prevent disruption to clients.

Section 54 – Ceasing to operate

138. This section covers certain situations (as described in subsection (1)) where the approved
regulator must revoke a licensed provider’s licence, unless the approved regulator is satisfied
that the conditions described in subsection (3) are met. These are situations where the business
is in the process of being wound up, or does not have someone who can be a Head of Legal
Services or Head of Practice, or for some other reason a licensed provider stops providing legal
services.

139. Unless the situation is temporary and there are sufficient arrangements in place to
safeguard the interests of clients, a licence will be revoked. The situation will be reviewed
every 14 days (or more frequently) to ensure that a decision on whether or not to revoke the
licensed provider’s licence is made promptly to minimise the period of uncertainty for the
licensed provider’s clients. In connection with a revocation, the licensed provider must notify
without delay its approved regulator and provide information that the regulator requires.

Section 55 – Safeguarding clients

140. Section 55 makes provision to safeguard the interests of clients of a licensed provider
which is ceasing, or has already ceased (see subsection (11)) to provide legal services. It sets out
the requirements placed on the licensed provider in question, and allows the approved regulator
to issue directions (subsection (3)) to it in order to protect the interests of clients. Such
directions may concern making certain documents and information, or money held on behalf of
clients or in trust, available. For example, where the licensed provider has ceased to exist,
clients may find it difficult or time consuming to gain access to documents, information, or
money, not least if the former point of contact is no longer available. The approved regulator’s ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could be used therefore to mitigate the impact on clients.

141. Subsection (6) allows recourse to the Court of Session should the licensed provider fail to comply with any directions given by the approved regulator. The Court may make various orders to preserve the clients’ positions, such as varying the approved regulator’s directions as it sees fit, or impose conditions, or freezing bank accounts. The Court, following consideration of the circumstances must be satisfied that the action is appropriate and must consider any relevant input from those with an interest in the situation before making an order (see subsection (7)).

142. Subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps to be taken to safeguard the interests of clients in the circumstances described in subsection (1).

Section 56 – Distribution of client account

143. This section indicates that, should a licensed provider go into administration, or be wound up, or have a provisional liquidator, liquidator, receiver or judicial factor appointed, or should it pass a winding up order (unless it does so simply for the purposes of reconstruction or amalgamation with another licensed provider), any client’s monies of the kind indicated in section 42 of the 1980 Act must be distributed in the way that section 42 of that Act requires. Section 42 deals with the distribution of sums in client bank account kept by a solicitor or an incorporated practice.

Professional practice etc.

Section 57 – Employing disqualified lawyer

144. Section 57 applies to:
- a solicitor who has been struck off the roll or suspended from practice;
- a European or foreign lawyer who has been suspended or whose registration has been withdrawn;
- an individual practitioner (as defined in section 37(5)) who has been either struck off, or suspended or disqualified from practising; or
- an incorporated practice whose certificate of recognition has been revoked.

145. The licensed provider, knowing that a person is so disqualified, must not employ or pay that person (subsection (2)), unless the approved regulator has given permission so to do (subsection (3)), which it may do for a specified period and with conditions attached (subsection (4)). Subsections (5) and (6) provide for appeals to the Court of Session in certain situations. Subsection (7) provides that if a licensed provider knowingly and deliberately employs a disqualified person, or wilfully contravenes any conditions, its licence may be revoked or suspended.
Section 58 – Concealing disqualification

146. Section 58 applies to the same persons as in section 57. It provides that a person (or incorporated practice) who has been disqualified will be guilty of an offence if, while disqualified, that person seeks or accepts employment by a licensed provider without informing it of the disqualification. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

Section 59 – Pretending to be licensed

147. Section 59 provides that a person commits an offence if that person pretends to be a licensed provider, or takes or uses any name, title, addition or description falsely implying that the person is a licensed provider. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

Section 60 – Professional privilege

148. Legal professional privilege protects the confidentiality of communications between a solicitor and the solicitor’s client that were conducted for the purpose of receiving legal advice, both oral and in writing, and of documents that are created for the main purpose of gathering evidence for use in legal proceedings. This section ensures that the clients of licensed providers have essentially the same legal professional privilege as they would have had if they had instructed a traditional sole practitioner, or law firm or incorporated practice. Such a communication is to be treated as if it were a communication made by a solicitor for the purposes of disclosure. This reproduces the effect which exists under common law in relation to clients of solicitors and which exists in statute for incorporated practices and registered foreign lawyers in, respectively, sections 33A and 33B of the 1980 Act.

CHAPTER 3 – FURTHER PROVISION

Achieving regulatory aims

Section 61 – Input by the OFT

149. Section 61 concerns the occasions when the Scottish Ministers and approved regulators consult with the OFT and sets out what they must do. Such consultation should be in relation to competition issues. The Scottish Ministers and approved regulators must take into consideration any advice given by the OFT.

Section 62 – Role of approved regulators

Section 63 – Policy statement

150. Section 62 sets out the responsibilities of approved regulators with regard to the regulatory objectives and the adoption of best regulatory practice. Section 63 provides that an approved regulator must prepare and issue (and may revise and re-issue) a policy statement detailing how it will meet these responsibilities. It must obtain the approval of the Scottish Ministers for any version and also must publish it.
Complaints

Section 64 – Complaints about regulators

151. Section 64 requires that complaints against approved regulators must be made to the Scottish Legal Complaints Commission (“the SLCC”). The SLCC is responsible for determining the nature of the complaint and whether it is “frivolous, vexatious or totally without merit”. If the Commission determines that a complaint is frivolous, vexatious or totally without merit it is not required to take further action and must notify the complainer and the approved regulator. Complaints about how an approved regulator has dealt with a regulatory complaint are to be investigated by the Commission by virtue of section 57D(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 (as inserted by section 65 of the Bill). All other categories of complaint must be referred by the Commission to the Scottish Ministers and the Scottish Ministers must investigate any complaint that is referred to them.

152. Subsection (3) requires the Scottish Ministers to notify the complainers and the approved regulator if the complaint is not upheld and give reasons for their decision. Subsection (5) requires the Scottish Ministers to notify both parties concerned if the complaint is upheld and give reasons for their decision. They may decide to take any of the measures or sanctions open to them (see section 29), including direction, censure or ultimately rescinding authorisation. Subsection (6) allows the Scottish Ministers to delegate the function of investigating a complaint to the SLCC. Subsection (7) allows the Scottish Ministers to make further provision about complaints by regulations.

Section 64A – Levy payable by regulators

153. Section 64A provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator (having had this function delegated to it under subsection (6) of section 64) and that complaint is upheld. The amount of the annual and complaints levy is set by the SLCC, following consultation with every approved regulator and the Scottish Ministers.

Section 65 – Complaints about providers

154. Section 65 amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by inserting a new Part 2A making special provision for licensed providers in respect of complaints.

155. The basic approach of the 2007 Act, which the Bill retains, is that all complaints about legal professionals or law firms are initially considered by the SLCC, but the only complaints which are investigated by the SLCC are those found to be about inadequate professional services (“services complaints”) or about how other complaints have been handled (“handling complaints”). Complaints which are found to be about the professional conduct of a legal professional (“conduct complaints”) are referred to the relevant professional organisation (e.g. the Society or Faculty) for investigation and possible disciplinary action.

156. New section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers, although they can be made about legal professionals working in the
licensed provider. Services complaints may be made about either the licensed provider or individual practitioners within the provider.

157. Various duties apply to the relevant professional organisation in the 2007 Act, for example, to liaise with the SLCC if a complaint being dealt with as a conduct complaint appears on investigation to be a services complaint (section 15 of the 2007 Act), and to provide the SLCC with information (section 37 of the 2007 Act). These duties are also imposed on approved regulators by sections 57A and 57B of the 2007 Act in relation to services complaints against licensed providers and the new regulatory complaints.

158. New section 57B of the 2007 Act introduces a new type of complaint – a “regulatory complaint” which can be made about a licensed provider alleging that it has not acted in accordance with the regulatory objectives, the professional principles, the approved regulator’s regulatory scheme, or the conditions of its licence. These complaints will be referred by the SLCC to the approved regulator to deal with, in accordance with the regulatory scheme. The procedures and functions of the SLCC are essentially the same as in respect of a conduct complaint.

159. New section 57C(1) and (2) of the 2007 Act deal with the levy to be paid by a licensed provider to the SLCC. In addition to any levy paid by individual practitioners in the entity, the licensed provider must itself pay an annual general levy, which might be a different amount from that paid by individual practitioners and might differ depending on the type of licensed provider. This gives the SLCC the discretion to impose an additional levy on licensed providers if the cost of regulating complaints against such providers is disproportionately high. However, it is possible for this annual levy to be set at nil – meaning only the legal professionals in the licensed provider would pay the normal general levy. It would also be possible for the SLCC to reduce the levy in respect of professionals in a licensed provider under the provisions of section 29(2) of the 2007 Act. The SLCC is required to consult with approved regulators and licensed providers each year in relation to its budget for the next financial year. Approved regulators are required to provide the SLCC with an estimate of the number of licensed providers it regulates and which should be liable to pay the levy in the relevant financial year.

160. New section 57C(3) of the 2007 Act requires the SLCC to provide advice about making a regulatory complaint if requested and gives the SLCC power to issue guidance to approved regulators and licensed providers about how the latter should deal with regulatory complaints.

161. New section 57CA of the 2007 Act requires approved regulators to collect the annual general levy due to the SLCC from its licensed providers (under new section 57C of the 2007 Act, inserted by section 65 of the Bill), and to pay the total amount of the levies collected to the SLCC. This requirement is equivalent to that placed on professional organisations (i.e. the Law Society of Scotland, the Faculty of Advocates, and the Association of Commercial Attorneys) under section 27 of the 2007 Act.

162. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by licensed providers (section 57CA(2) to (5)).
163. New section 57D of the 2007 Act indicates that a handling complaint about a regulatory
complaint is dealt with in the same way as a handling complaint about a conduct complaint (see
sections 23 to 25 of the 2007 Act).

164. New section 57E of the 2007 Act ensures that certain terms used in the new Part 2A of
the 2007 Act have the same meanings as in the Bill.

Registers and lists

Section 66 – Register of approved regulators

Section 67 – Registers of licensed providers

165. Section 66 provides that the Scottish Ministers must keep and publish a register of
approved regulators and that it should include information such as contact details, the date on
which the regulator was given approval under section 6, the date on which it was given the
relevant authorisation (see section 7), the categories of legal services covered by each
authorisation, and details of any measures or sanctions taken by the Scottish Ministers (section
29).

166. Similarly, section 67 provides that approved regulators must keep and publish a register
of their licensed providers, and lists the information which is to be included. In section 67(5) the
Scottish Ministers have the power by regulations to make further provision about the information
which must be held in the registers of licensed providers and set out how these registers are to be
kept and published.

Section 68 – Lists of disqualified persons

167. Section 68 provides that an approved regulator must keep and publish lists of the persons
it has disqualified from holding a position in a licensed provider (see section 44) and of those it
has determined to be unfit to be an investor in a licensed provider (see section 49) or disqualified
from being an investor (see section 50A). These provisions may, for example, assist in ensuring
that disqualified persons do not seek similar positions in businesses regulated by another
approved regulator. Subsections (2) and (4) list the information to be recorded in those lists.
Subsection 4A provides that the lists must not contain information relating to persons who have
had their determination or disqualification reversed on appeal or in respect of whom the
determination or disqualification no longer applies. The Scottish Ministers must be notified of
any alterations made to either list (subsection (5)).

168. Subsection (6) gives the Scottish Minsters a regulation-making power to make further
provision regarding the information to be contained in the lists and to prescribe how these are
kept and published.

Miscellaneous

Section 69 – Privileged material

169. Section 69 provides that any publication of any advice, report, or notice or of other
material under Part 2 of this Bill is privileged in relation to the law on defamation unless there
was malicious intent in publishing the material.
Section 70 – Immunity from damages

170. Section 70 provides that an approved regulator is (and those who work in it are) not liable for any damages for any act or omission in the exercise of their functions, provided the act or omission was not in bad faith.

Section 70A – Appeal procedure

171. This section deals with appeals to the sheriff under Part 2 of the Bill (regulation of licensed legal services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff’s determination is final.

Section 71 – Effect of professional or other rules

172. This section makes it clear that the Bill does not affect any professional rules which regulate professional practice, conduct or discipline of persons (other than solicitors and advocates) who provide professional services. In other words, if the rules of any other profession contain provisions which would forbid or restrict their operating in a business alongside legal professionals, they would not be able to participate in licensed providers unless and until those rules were changed. Sections 88(5) and 91(3) of the Bill deal with the effect of professional rules of solicitors and advocates.

PART 3 – CONFIRMATION AND WILL WRITING SERVICES

CHAPTER 1 – CONFIRMATION SERVICES

173. Currently, the power to prepare papers on which to found or oppose an application for grant of confirmation in favour of executors, in the winding up of a deceased person’s estate, is restricted to solicitors, by virtue of section 32 of the 1980 Act. However it is possible for others to seek to be granted such rights by virtue of an application for the right to conduct litigation and have a right of audience by virtue of section 27 of the 1990 Act. Part 3 of this Bill provides a more direct route by which other professional groups (such as accountants) might be authorised to deal with executries, without seeking a wider power to conduct litigation.

Regulation of confirmation agents

Section 72 – Confirmation agents and services

174. Section 72 defines “confirmation services” and “confirmation agent” for the purposes of this Bill.

Section 73 – Approving bodies

Section 74 – Certification of bodies

175. Approving bodies are able to authorise individuals to provide confirmation services, and are responsible for regulating those individuals which they have so authorised (see section 75).
176. These sections set out the process and criteria for becoming an approving body of confirmation agents. Section 73 covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant’s proposed regulatory scheme. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. It also requires that the Lord President’s consent is required before the Scottish Ministers certify a body. This certification may be subject to conditions which the Scottish Ministers may, with the consent of the Lord President, amend, add or delete after consultation with the approving body.

177. The Scottish Ministers have a regulation making power (under section 73(6)) to prescribe fees that they may charge applicants for the position of approving body.

178. The Scottish Ministers also have the power (under section 74(7)) to make regulations regarding the application process and, in relation to capability to act as an approving body, the criteria for certification. This power may be used to set out the application process in more detail.

Section 75 – Regulatory schemes

179. Section 75 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide confirmation services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for confirmation agents, sufficient arrangements for professional indemnity, rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the confirmation agent to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide confirmation services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Bill.

Section 76 – Financial sanctions

180. Section 76 makes specific provision allowing rules under section 75(2)(d)(ii) to provide for financial penalties which may be imposed by an approving body on confirmation agents and about appeals against their imposition. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf.

Section 76A – Review of own performance

181. Section 76A requires an approving body to review its own performance annually. The review is to cover its compliance with section 75(5) (observing the regulatory objectives), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 81(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies’ performance, and reports on reviews of their performance.
Section 77 – Pretending to be authorised

182. This section makes it an offence for a person to pretend to be a confirmation agent and specifies the penalty for that offence.

Other regulatory matters

Section 78 – Revocation of certification

183. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification if it fails to comply with a direction (under section 81(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.

184. Under subsection (3), such revocation means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the revocation takes effect.

Section 79 – Surrender of certification

185. Section 79 deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its confirmation agents caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified agent prior to the surrender taking effect.

186. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.

187. As with revocation, surrender means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the surrender takes effect.

Section 80 – Register and list

188. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of confirmation agents. Approving bodies must provide a copy of the list and information on confirmation agents to the Scottish Ministers on request.

Ministerial functions

Section 81 – Ministerial intervention

189. Subsection (1) requires an approving body to provide, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.

190. Subsection (2)(a) requires an approving body to review its regulatory scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish
Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers’ approval before any amendment takes effect. Without approval, the amendment is invalid.

191. Subsection (3A) requires the approving body to review annually the performance of its confirmation agents and send a report to the Scottish Ministers.

192. Subsection (5) gives the Scottish Ministers powers to make further provision in regulations about the performance review and about the functions of approving bodies and confirmation agents if they deem it necessary for safeguarding the interests of clients of confirmation agents.

CHAPTER 2 – WILL WRITING SERVICES

193. Under the 1980 Act, will writing is an unreserved activity by virtue of section 32(3)(a), which provides that wills do not count as “writs”. As a result, unqualified individuals are currently able to provide will writing services with no requirements for training, professional indemnity insurance or other safeguards. This chapter introduces regulation of such non-lawyer will writers.

Regulation of will writers

Section 81A – Will writers and services

194. Section 81A defines “will writing services” and “will writer” for the purposes of the Bill. Will writers are persons who have been authorised to provide will writing services by an approving body, in accordance with that body’s regulatory scheme. This term does not include solicitors, who provide the same services but are regulated by the Law Society of Scotland.

Section 81B – Approving bodies

Section 81C – Certification of bodies

195. Approving bodies are able to authorise individuals to provide will writing services, and are responsible for regulating those individuals which they have so authorised (see section 81D).

196. These sections set out the process and criteria for becoming an approving body of will writers. Section 81B covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant’s proposed regulatory scheme. Section 81C sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. This certification may be subject to conditions which the Scottish Ministers may amend, add or delete after consultation with the approving body.

197. The Scottish Ministers have a regulation making power (under section 81B(6)) to prescribe fees that they may charge an applicants to be approving body.

198. The Scottish Ministers also have the power (under section 81C(7)) to make regulations regarding the application process and, in relation to their capability to act as an approving body,
the criteria for certification. This power may be used to set out the application process in more detail.

Section 81D – Regulatory schemes

199. Section 81D requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide will writing services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for will writers (and persons acting on their behalf), sufficient arrangements for professional indemnity, and rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the will writer to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide will writing services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Bill.

Section 81E – Financial sanctions

200. Section 81E makes specific provision allowing rules made under section 81D(2)(d)(ii) to provide for the imposition of a financial penalty by an approving body on a will writer. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf. Provision is also made in relation to appeals against such financial penalties.

Section 81F – Review of own performance

201. Section 81F requires an approving body to review its own performance annually, with particular reference to its compliance with section 81D(5) (observing the regulatory objectives), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 81K(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies’ performance, and reports on reviews of their performance.

Section 81G – Pretending to be authorised

202. This section makes it an offence to pretend to be a will writer, and specifies the penalty for such an offence.

Other regulatory matters

Section 81H – Revocation of certification

203. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification if it fails to comply with a direction (under section 81K(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.
204. Under subsection (3), such revocation means that the approving body’s will writers will no longer be authorised to provide will writing services from the date the revocation takes effect.

Section 81I – Surrender of certification

205. Section 81I deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its will writers caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified will writer prior to the surrender taking effect.

206. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.

207. As with revocation, surrender means that the approving body’s will writers will no longer be authorised to provide will writing services from the date the surrender takes effect.

Section 81J – Register and list

208. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of their will writers. Approving bodies must provide a copy of the list and information on will writers to the Scottish Ministers on request.

Ministerial functions

Section 81K – Ministerial intervention

209. Subsection (1) requires an approving body to provide, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.

210. Subsection (2)(a) requires an approving body to review its regulatory scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers’ approval before any amendment takes effect. Without approval, the amendment is invalid.

211. Subsection (4) requires an approving body to review annually the performance of its nonlawyer will writers and send a report to the Scottish Ministers.

212. Subsection (5) gives the Scottish Ministers powers to make provision about the performance review and about the functions of approving bodies and non-lawyer will writers if they deem it necessary for safeguarding the interests of clients of such will writers.
Section 81L – Step-in by Ministers

213. Section 81L provides that the Scottish Ministers may, if they believe that intervention is necessary as a last resort in order to ensure that the provision of will writing services is regulated effectively, make regulations to establish a body with a view to its becoming an approving body, or make regulations to allow them to act as an approving body themselves.

Section 82 – Regard to OFT input

214. This section provides that there is an obligation on the Scottish Ministers to take account of any advice given by the OFT within the relevant timescale when they consult the it in respect of an application to be an approving body of either confirmation agents or will writers.

Related provision

Section 83 – Complaints about agents and writers

215. Section 83 makes provision for complaints by inserting a new Part 2B into the 2007 Act making special provision for confirmation agents and will writers.

216. New section 57F of the 2007 Act provides for Parts 1 and 2 of that Act to apply to complaints about confirmation agents. If they consider it necessary, the Scottish Ministers may modify the way these Parts operate in relation to complaints about confirmation agents and will writers. If there is either a services or a conduct complaint about a confirmation agent or will writer, the approving body is to be regarded as the relevant professional organisation.

217. New section 57G of the 2007 Act provides for the sections in the 2007 Act relating to complaints about the handling of conduct complaints (sections 23 to 25) to be applied to approving bodies (with whatever modification the Scottish Ministers may make by regulation should they consider it necessary).

218. New section 57H of the 2007 Act makes provision for the payment of the annual general levy and, if arising, the complaints levy to the SLCC. It also applies provisions of the 2007 Act so that the SLCC is required to consult with approving bodies, confirmation agents and will writers each year in relation to its budget for the next financial year and so that approving bodies are required to provide the SLCC with an estimate of the number of confirmation agents or will writers it regulates and which should be liable to pay the levy in the relevant financial year.

219. New section 57I in the 2007 Act requires approving bodies to collect the annual general levy due to the SLCC from their confirmation agents or will writers. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by confirmation agents and will writers (section 57I(2) to (5)).

Section 84 – Privilege and immunity

220. Section 84 provides that any publication of any material under Part 3 of this Bill is privileged in relation to the law on defamation unless there was malicious intent in publishing the material. An approving body (and those who work in them) are not liable for any damages
for any act or omission in the exercise of their functions unless the act or omission was in bad faith.

Section 84A – Appeals procedure

221. This section deals with appeals to the sheriff under Part 3 of the Bill (confirmation and will writing services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff’s determination is final.

Section 85 – Consequential modification

222. These changes to the provision of services relating to confirmation require modification to other legislation (specifically, the Confirmation of Executors (Scotland) Act 1858, the 1980 Act, the 1986 Act, and the 2007 Act) and the Bill makes such provision in this section.

PART 4 – THE LEGAL PROFESSION

CHAPTER 1 – APPLYING THE REGULATORY OBJECTIVES

Section 86 – Application by the profession

223. This section requires regulators of the legal profession (as listed in subsection (2)) when carrying out their regulatory functions (as defined in subsection (3)) to act in a way which is compatible with the regulatory objectives of the Bill.

CHAPTER 2 – FACULTY OF ADVOCATES

Section 87 – Regulation of the Faculty

224. Section 87 sets out in statute the existing position regarding regulation of advocates, namely that the Court of Session is responsible for admitting and removing persons from the public office of advocates (including setting the criteria for admission and prescribing the procedure) and for regulating the professional practice, conduct and discipline of advocates. It can delegate any of this except the actual admitting and removal to the Lord President or the Faculty. In practice, the bulk of regulation is currently delegated to the Faculty and the Dean, including rules of professional conduct and disciplinary procedures.

Section 88 – Professional rules

225. Subsection (2) requires that all rules or changes to rules made by the Faculty relating to the criteria or procedure for admission or removal of advocates, and relating to regulating the professional practice, conduct and discipline of advocates must be approved by the Lord President and be published by the Faculty. If these requirements are not met then the rule is of no effect. Where a rule is made otherwise than by the Faculty of Advocates, it is of no effect unless the Faculty has been consulted on it (subsection (3)). If the Court of Session makes or changes these rules it must be by Act of Sederunt. If the Lord President makes or changes these rules, he must publish them.
Subsections (4) and (5) make it clear that this section does not change any rule relating to the professional practice, conduct and discipline of advocates that was in force at the time this section comes into force and that those rules regulating the professional practice of advocates (particularly relating to their involvement in and with licensed providers) still apply unless some other necessary step is taken, such as revocation of a rule.

Section 89 – Particular rules

Section 89 requires that the Scottish Ministers must consult the OFT and approve a change in any professional practice, conduct or disciplinary rule which prevents advocates from forming legal relationships, such as partnerships, before such a rule can have effect. It supersedes a similar rule in section 31 of the 1990 Act (which is repealed by section 89(4) of the Bill).

CHAPTER 3 – SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

Section 90 – Qualified persons

Section 90 makes various amendments to the 1980 Act to remove certain practising restrictions so as to allow the formation of licensed providers and remove particular offences

Subsection (1) amends section 26 of the 1980 Act (offence for solicitors to act as agents for unqualified persons) to ensure that a licensed provider is not deemed to be an “unqualified person”.

Subsection (2) amends section 30 the 1980 Act (liability for fees of other solicitor) so that when a solicitor (or incorporated practice) acting on behalf of a client employs a licensed provider, the solicitor (or incorporated practice) is responsible for the licensed provider’s fees unless other arrangements to the contrary have been made.

Subsection (3) amends section 31 of the 1980 Act (offence for unqualified persons to pretend to be solicitor or notary public) to require that a licensed provider has the Law Society’s written permission before they can call themselves solicitors or a firm of solicitors. The Council of the Law Society is required to make rules setting out the procedure for obtaining permission and the grounds on which it may be refused.

Subsection (4) amends section 32 of the 1980 Act (offence for unqualified persons to prepare certain documents) so that it is clear that a licensed provider can prepare writs relating to moveable or heritable estate, writs relating to actions or proceedings in court, and papers relating to an application for grant of confirmation in favour of executors.

Subsection (5) amends section 33 of the 1980 Act (unqualified persons not entitled to fees, etc.) which deals with unqualified persons not being entitled to fees or other reward or expenses to ensure that this section does not apply to licensed providers.
Subsection (6) adds certain definitions to section 65(1) (interpretation) of the 1980 Act in relation to the amendments made by the Bill.

Subsection (7) amends section 17 of the 1990 Act (qualified conveyancers) to ensure that independent qualified conveyancers can provide conveyancing services upon the account of, or for the profit of, licensed providers.

**Section 91 – Changes as to practice rules**

As with section 90 of the Bill, this section amends the 1980 Act to remove restrictions which would prevent the formation of licensed providers.

Section 34 of the 1980 Act is concerned with the practice rules made by the Council in respect of the professional practice, conduct and discipline of solicitors.

Subsection (1) inserts a new section 33C into the 1980 Act to ensure that any rules made under section 34 of that Act do not unduly restrict the involvement of solicitors in or with a licensed provider, or the employment of solicitors by a licensed provider. Subsection (2) makes various amendments to the 1980 Act consequential on subsection (1).

Subsection (2) also amends the 1980 Act and the 1990 Act to remove references to multi-disciplinary practices. Multi-disciplinary practices will be an available business option for licensed providers under this Bill.

**Section 91A – Citizens advice bodies**

Section 91A amends section 26 of the 1980 Act so that it is not an offence for solicitors to be employed by citizens advice bodies to give legal advice to third parties. This is similar to the exemption given to law centres in the same section of that Act. A “citizens advice body” is defined in section 65(1) of the 1980 Act as a non-profit making body that has the sole or primary objective of providing legal and other advice (including information) to the public without charge. There is also provision of a power for the Scottish Ministers to modify the definition of “citizens advice body” by regulations after consulting with the Lord President, the OFT, and other appropriate organisations.

**Section 91B – Court of Session Rules**

Section 91B adds a section 5(ef) to the Court of Session Act 1988. This extends the Court of Session’s power to make rules to include rules permitting a lay representative, when appearing along with a party at a hearing in any type of case to make oral submissions to the Court on the party’s behalf. It also inserts new section 5A after section 5 of the 1988 Act, which defines the term “lay representative” and provides that the new rules:

- only apply if the party is not otherwise represented;
- may specify conditions as to when the rules apply; and
- are subject to any other enactment that makes special provision about lay representation in a particular type of case.
Section 91C – Sheriff court rules

242. Section 91C adds a new section 32(1)(n) to the Sheriff Courts (Scotland) Act 1971. This gives the Court of Session the power to make rules to permit a lay representative, when appearing along with a party at a hearing in any type of civil case to make oral submissions to the sheriff on the party’s behalf. It also inserts new section 32A after section 32 of the 1971 Act, which defines the terms “lay representative” and provides that the new rules

- only apply if the party is not otherwise represented;
- may specify conditions as to when the rules apply;
- does not affect the operation of section 36(1) (procedure in summary causes) of the 1971 Act; and
- are subject to any other enactment other than section 36(1) that makes special provision about lay representation in a particular type of case.

Section 91D – Use of Guarantee Fund

243. This section amends section 43 of the 1980 Act to allow licensed providers to be covered by the Guarantee Fund, so that the clients of licensed providers have the same protection in the event of loss owing to fraud whilst in receipt of legal services as clients of traditional firms. This section was inserted by amendment at Stage 2 of the Bill. It refers to other related amendments which were not inserted.

Section 91E – Contributions to the Fund

244. This section amends Schedule 3 to the 1980 Act to require licensed providers to contribute to the Guarantee Fund on the same entity-based model as incorporated practices. The scales for incorporated practices must take into account the number of solicitors that the entity has as directors or employees. The scales for licensed providers must take into account the number of solicitors that the entity has as investors or employees.

Section 91F – Cap on individual claims

245. Section 91F amends Schedule 3 to the 1980 Act by making provision for a cap on individual claims on the Guarantee Fund and giving the Scottish Ministers power, by regulations, to vary the cap after consultation with the Council of the Law Society of Scotland. The cap on each claim on the Guarantee Fund is £1.25 million.

The Law Society

Section 91G

246. This section inserts a new section 1A into the 1980 Act which allows the Law Society of Scotland to act as an approved regulator within the meaning of Part 2 of the Bill and to do anything that is necessary or expedient for the purposes of so doing.
Section 92 – Council membership

247. This section amends section 3 and Schedule 1 to the 1980 Act in order to allow the co-option (as well as election) of solicitor members and the appointment of non-solicitor members to the Council. It provides the criteria for such election, co-option, or appointment.

Section 93 – Regulatory committee

248. This section amends the 1980 Act by inserting a new section 3B to establish that the regulatory functions of the Council must be carried out on its behalf by an independent regulatory committee, at least 50% of the membership of which must be lay persons.

249. Subsection (3) of the new section 3B provides some rules that apply to the regulatory committee, in particular, rules relating to its composition regarding solicitors and lay members (lay members are defined in subsection (8)). It also provides that sub-committees of the regulatory committee are subject to the same rules as the regulatory committee itself (set out in new section 3B (3)) and that sub-committees may be formed without the approval of the Council.

250. Subsection (4) of the new section 3B ensures that the regulatory committee can still function where the number of lay members is temporarily lower than it should be and no decisions are invalid because of such a temporary shortfall.

251. The Scottish Ministers are given a regulation-making power in subsection (5) of the new section 3B to prescribe the maximum size of the regulatory committee, to make further provision about the Council’s regulatory functions if necessary to ensure the regulatory functions are exercised independently and properly, and also to modify in certain respects the definition of the Council’s “regulatory functions”. Before making such regulations, the Scottish Ministers must consult the Council (subsection (6)).

252. Subsection (9) defines the Council’s regulatory functions.

Section 93A – Keeping the solicitors roll etc.

253. Section 93A inserts new subsections after section 7(2) and section 12A(2) of the 1980 Act. These require the Council of the Law Society to enter on the roll of solicitors, the address of the place of business of every enrolled solicitor and registered European lawyer.

Section 93B – Removal from the roll etc.

254. Section 93B amends sections 9 and 12C of the 1980 Act so that the Council of the Law Society must be satisfied that the solicitor or registered European lawyer has made adequate arrangements for any outstanding business before removing his or her name from the roll/register.
Section 94 – Removal from solicitors roll

255. Section 94 amends sections 10 and 53 of the 1980 Act. The effect of these two amendments is that the Scottish Solicitors’ Discipline Tribunal has the power to order that a solicitor, who has voluntarily removed his or her name from the roll, is prohibited from having his or her name restored to the roll except by order of that Tribunal.

Section 94A – Notification if suspension lifted

256. Section 94A of the Bill inserts new subsections into sections 19 and 24G of the 1980 Act that require a solicitor or registered European lawyer to notify the Council when:

- their practising/registration certificate, which had ceased to have effect because they were bankrupt or they had granted a trust deed, comes back into effect again on their discharge; or
- their practising/registration certificate, which had ceased to have effect because they have been detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or a guardian is appointed under the Adults with Incapacity (Scotland) Act 2000, comes back into effect again on their discharge;
- their practising/registration certificate, which had ceased to have effect because a judicial factor had been appointed on their estate under section 41 of the 1980 Act comes back into effect again on the judicial factor being granted his discharge.

CHAPTER 4 – OTHER BODIES

Scottish Legal Aid Board

Section 95 – Exclusion from giving legal assistance

257. This section amends section 31 of the 1986 Act. Currently, the Society and the Faculty have the power to prevent solicitors and advocates respectively (on the grounds of their conduct) from being instructed by a client to whom legal aid or advice and assistance is available. This amendment transfers the current powers of the Society and the Faculty to the Board. There is an appeal under the 1986 Act to the Court of Session.

Section 96 – Availability of legal services

258. Section 96 amends the 1986 Act in order to give the Board responsibility for monitoring the availability and accessibility of legal services in Scotland, including by reference to any relevant factors relating particularly to rural or urban areas, and for giving advice to the Scottish Ministers regarding this. This is linked to the regulatory objective of promoting access to justice, as well as the objectives of promoting the interests of consumers, competition in the provision of legal services, and an independent, strong, varied and effective legal profession.
Section 97 – Information about legal services

259. Section 97 requires the Society, the Faculty, and the Scottish Courts Service to provide information that the Board might reasonably require in monitoring the availability and accessibility of legal services in Scotland. This is similar to the duty placed on approved regulators (section 25(1)). In addition, for the purposes of the Board’s functions of excluding legal practitioners from giving legal assistance under section 31(3) of the 1986 Act, the Law Society, the Faculty of Advocates and the Scottish Legal Complaints Commission must inform the Board when they uphold conduct or services complaint about a solicitor or an advocate, and give it a summary of the relevant facts.

260. For the purposes of the Board’s functions of excluding legal practitioners from giving legal assistance under section 31(3) of the 1986 Act, the Law Society, the Faculty of Advocates and the Scottish Legal Complaints Commission must inform the Board when they uphold conduct or services complaint about a solicitor or an advocate, and give it a summary of the relevant facts.

Scottish Legal Complaints Commission

Section 98 – Minor amendments

261. This section makes several minor amendments to the 2007 Act.

Section 98A – The 2007 Act: further provision

262. Section 98A amends section 78 of the 2007 Act which provides for the power of the Scottish Ministers to make ancillary provision by order in relation to the provisions of that Act. The scope of the existing power was limited following changes made by the Legal Services Act 2007 which affected the 2007 Act. This section inserts a new subsection (1A) into section 78 of the 2007 Act, and a reference to that new subsection in section 79 of the 2007 Act, which allows the order making power to be used as intended, including in areas altered by the Legal Services Act 2007.

PART 5 – GENERAL

Section 99A – Further modification

263. Section 99A allows the Scottish Ministers by regulations to vary the percentage specified in section 37A(1)(a) (majority ownership), or to repeal the section. In exercising this function, the Scottish Ministers must believe that the amendment or repeal is compatible with the regulatory objectives and otherwise appropriate. Before making regulations, they must consult, amongst others, the Lord President and the Law Society of Scotland. Furthermore, the regulations are subject to the affirmative resolution procedure.
LEGAL SERVICES (SCOTLAND) BILL  
[AS AMENDED AT STAGE 2]

SUPPLEMENTARY FINANCIAL MEMORANDUM

INTRODUCTION

1. This supplementary Financial Memorandum has been prepared by the Scottish Government to accompany the Legal Services (Scotland) Bill following Stage 2 consideration of the Bill. It has been produced in accordance with Rule 9.7.8B of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Explanatory Notes and other accompanying documents published to accompany the Bill (As Introduced) (SP Bill 32A-EN).

2. The purpose of this Supplementary Financial Memorandum is to set out the expected costs associated with the new provisions included in the Bill following Stage 2 amendments. The majority of the amendments are technical and do not significantly affect the assumptions in the original Financial Memorandum. This document therefore only addresses the amendments relating to:

   - the enhanced role for the Lord President;
   - financial penalties;
   - the regulation of non-lawyer will writers;
   - complaints;
   - citizens advice bodies;
   - lay representation in court; and
   - compensation arrangements for licensed providers and the Guarantee Fund.

ENHANCED ROLE FOR THE LORD PRESIDENT

3. The Stage 2 amendments to the Bill considerably enhanced the Lord President’s role.

   - In respect of approved regulators there is amendment to:
     - section 6 requiring the Lord President’s consent before approval of an approved regulator by the Scottish Ministers (whether or not subject to conditions) and before any change in the conditions imposed (if any);
section 8 requiring the Lord President’s consent before approval by the Scottish Ministers of a regulatory scheme and of any amendment to a regulatory scheme;
- section 9 requiring the Lord President’s consent before the Scottish Ministers make further provision about regulatory conflicts;
- section 22 requiring the Lord President’s consent before the Scottish Ministers make further provision about the internal governance arrangements of approved regulators;
- section 26 requiring the Lord President’s consent before the Scottish Ministers make further provision about conferring additional functions on approved regulators; and
- section 29 and schedule 3 requiring the Lord President’s consent before the Scottish Ministers set performance targets for, direct or censure the approved regulator, and amend or rescind their authorisation.

- In respect of licensed providers amendment to:
  - sections 39 to 41 requiring the Lord President’s consent before the Scottish Ministers make regulations making further provision about Heads of Legal Services, Heads of Practice, and Practice Committees;
  - section 52A requiring the Lord President’s consent before the Scottish Ministers amend the threshold for exemptible investors; and
  - section 99A requiring the Lord President’s consent before the Scottish Ministers amend or rescind the requirement for majority solicitor and regulated professional ownership.

- In respect of approving bodies for confirmation agents, there is amendment to section 74 requiring the Lord President’s consent before certification and before emendation of conditions (if any) by the Scottish Ministers.

**Costs on the Scottish Courts Service**

4. Only the Scottish Courts Service is affected by these amendments. The Scottish Courts Service has indicated that the enhanced role will have no significant resource implications.

**FINANCIAL SANCTIONS**

5. Section 15(3) was amended so that financial penalties imposed by approved regulators would not be paid to the approved regulator, but to the Scottish Ministers. A similar amendment was made to section 76(3) and occurs in section 81E(3) in respect of financial penalties imposed by approving bodies on confirmation agents and non-lawyer will writers respectively.

6. It is not possible to estimate how often financial penalties will be imposed or what monies will be paid to the Scottish Ministers. Any such penalties will be paid into the Scottish Consolidated Fund.
REGULATION OF NON-LAWYER WILL WRITERS

7. Part 3 of the Bill was amended by the insertion of Chapter 2 which provides for the regulation of non-lawyer will writers.

Costs on the Scottish Government

8. Financial implications for the Scottish Ministers are expected to be minimal. As with the proposed regulatory scheme for confirmation agents, the role of the Scottish Ministers will be to assess applications from potential regulators (known as approving bodies), and to exercise continuing oversight over those approving bodies.

9. Detailed estimated costs can be found in tables 1 and 2.

Table 1 – Estimated cost per annum of processing applications

<table>
<thead>
<tr>
<th>1-2 applications</th>
<th>3-4 applications</th>
<th>5-6 applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (10%)</td>
<td>£2,150</td>
<td>1 x A3 (20%)</td>
</tr>
<tr>
<td>1 x A3 (20%)</td>
<td>£4,300</td>
<td>1 x A3 (25%)</td>
</tr>
<tr>
<td>1 x B1 (20%)</td>
<td>£6,000</td>
<td>1 x B1 (24%)</td>
</tr>
<tr>
<td>1 x B1 (25%)</td>
<td>£9,021</td>
<td>1 x B1 (37.5%)</td>
</tr>
<tr>
<td>1 x B2 (25%)</td>
<td>£9,021</td>
<td>1 x B2 (50%)</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
<td>1 x C1 (4.5%)</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
<td>1 x C1 (6%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£18,989</strong></td>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

Table 2 – Estimated cost per annum of ongoing monitoring and oversight

<table>
<thead>
<tr>
<th>1-2 regulators</th>
<th>3-4 regulators</th>
<th>5-6 regulators</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (5%)</td>
<td>£1,075</td>
<td>1 x A3 (10%)</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>£3,000</td>
<td>1 x B1 (20%)</td>
</tr>
<tr>
<td>1 x B2 (20%)</td>
<td>£7,300</td>
<td>1 x B2 (30%)</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
<td>1 x C1 (3%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£13,193</strong></td>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

10. The initial assessment of applications from potential approving bodies is estimated to take 1-2 years, with resulting staff costs set out in figure 1. The costs for ongoing monitoring of the approving bodies are set out in figure 2. These are based on the estimates in the financial memorandum for the Bill as introduced in relation to approving bodies for confirmation agents. The costs are based on the Scottish Government pay scales for August 2009, with a mid-range figure taken for each grade and band with 33% added for pensions and national insurance.

11. In summary, costs for processing applications will range from £18,989 over one year to £70,906 over two years, depending on the number and timing of applications. Ongoing costs
will range from £13,193 to £24,648 per annum. However, based on the number of existing bodies which are likely to apply, we estimate that there will be 3-4 applications over a one year period, costing around £27,759 in total, with an ongoing cost of around £18,921 per annum. We consider that these costs can be met within the existing Legal System Division budget.

Costs on local authorities

12. None.

Costs on other bodies, individuals and businesses

13. Any body seeking to regulate non-lawyer will writers will incur the costs of an application to the Scottish Ministers and, if successful, the regulation of non-lawyer will writers. Three existing professional bodies have indicated interest:

- The Scottish Society of Will Writers (part of the Society of Will Writers).
- The Institute of Scottish Professional Willwriters (part of the Institute of Professional Willwriters).
- The Fellowship of Profession Willwriters and Probate Practitioners.

These bodies already bear the costs of regulation of their members and those costs are met from the subscriptions paid by the individual will writers. It is unlikely that, if they become approving bodies, there will be a significant rise in the cost of the individual subscription fee.

14. However, there will be non-lawyer will writers who are not members of any of the professional bodies. In order to continue to offer will writing services, any such will writer will have to become a member of an approving body and this will involve the payment of a subscription fee.

Potential payments to the Scottish Government

15. Under section 81B(6), the Scottish Ministers have the power to impose a fee on applicants for the position of approving body. However, it is not the intent of the Scottish Government to charge such bodies in the first instance – the power will only be used if required to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. If such fees were to be charged, they would only be set at such a level to recover the administrative costs of processing applications.

16. Any fees will be paid into the Scottish Consolidated Fund.

COMPLAINTS

17. Section 83 of the Bill amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by making provision for complaints about confirmation agents and, as a result of Stage 2 amendments, non-lawyer will writers. New section 57H of the 2007 Act has been amended to require non-lawyer will writers, in addition to confirmation agents, to pay the annual
general levy and (if arising) a complaints levy to the Scottish Legal Complaints Commission (“the SLCC”).

**Costs on the Scottish Government and local authorities**

18. None.

**Costs on other bodies, individuals and businesses**

19. The levies will be an additional financial burden on non-lawyer will writers. It is not known at present at what levels the annual general levy will be set by the SLCC. The complaints levy, which only arises if there is a complaint, is set out in the following table.

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation levy</td>
<td>£0</td>
</tr>
<tr>
<td>No complaint upheld</td>
<td>£0</td>
</tr>
<tr>
<td>Complaint accepted - first settlement</td>
<td>£500</td>
</tr>
<tr>
<td>Complaint accepted - second and further settlements</td>
<td>£700</td>
</tr>
<tr>
<td>Formal determination - first</td>
<td>£800</td>
</tr>
<tr>
<td>Formal determination - second</td>
<td>£1,200</td>
</tr>
<tr>
<td>Formal determination - third and further determination</td>
<td>£2,000</td>
</tr>
</tbody>
</table>

20. As far as the SLCC is concerned, the cost of investigation of complaints against will writers will be met from the levies and not from the public purse.

**CITIZENS ADVICE BODIES**

21. Section 91A of the Bill amends section 26 of the Solicitors (Scotland) Act 1980 to make provision for citizens advice bodies to be able to employ solicitors to give legal advice to third parties.

**Costs on the Scottish Government and local authorities**

22. None.

**Costs on other bodies, individuals and businesses**

23. Any citizens advice body employing a solicitor will have to bear the cost of that employment. However, the provision is entirely permissive, and simply allows such bodies to employ solicitors if they so choose.
LAY REPRESENTATION IN COURT

24. Section 91B of the Bill inserts a new section into the Court of Session Act 1988 to make provision for rules to be made allowing lay representatives to make oral submissions in the Court of Session under certain circumstances. Section 91C amends section 32 of the Sheriff Courts (Scotland) Act 1971 to allow similar oral submissions from lay representatives in the sheriff courts.

Costs

25. There are no significant resource or financial implications for the Scottish Government nor any other authority, body, business, or individual.

GUARANTEE FUND

26. Sections 91D to 91F amend section 43 of and Schedule 3 to the Solicitors (Scotland) Act 1980 (“the 1980 Act”) and make provision relating to the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”). Section 91D amends section 43 of the 1980 Act and provides that the Guarantee Fund may be used by all licensed providers. Section 91E amends Schedule 3 to the 1980 Act, and provides for contributions to be made to the Guarantee Fund by all licensed providers. Section 91F amends Schedule 3 to the 1980 Act and provides for a cap on each individual grant made from the Guarantee Fund.

Costs on the Scottish Government and local authorities

27. None.

Costs on other bodies, individuals and businesses

28. Each licensed provider will be required to pay into the Guarantee Fund. The contribution will be set at entity level. The Law Society of Scotland will set various scales for payment under the provisions of section 91E which amends paragraph 1 of Schedule 3 to the 1980 Act. The scales will be set considering all relevant factors (such as size of the entity and turnover) including the number of solicitors that are investors in or employees of the licensed provider. It is not known at present at what levels the scales will be set.

29. The cap on any single grant made from the Guarantee Fund has possible financial implications for the Law Society, all principals who pay into the fund, incorporated practices, and licensed providers. Without the cap, it would be possible for a large claim or a number of large claims to exceed the amount of money in the fund and the cover provided by stop-loss insurance. Should this unlikely event occur, these individuals and entities would be required to make up any shortfall in the grant made. This provision considerably reduces this risk.
LEGAL SERVICES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration of the Legal Services (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 6(7) - Approval of regulators

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

2. Section 6 provides the criteria which an applicant must meet before the Scottish Ministers can approve it as an approved regulator of licensed providers. This is the first stage of a two-stage process for becoming an approved regulator.

3. The powers in section 6(7) were in the Bill as introduced and, as originally drafted, gave the Scottish Ministers the power to make further provision about approval of approved regulators by regulations, including the process for seeking approval, the criteria for approval (including things that applicants must be able to demonstrate), and what categories of bodies may (or may not) be an approved regulator. The Subordinate Legislation Committee ("the Committee") raised some concerns about these powers, noting in particular that the power to make further provision about criteria for approval in 6(7)(b) “goes beyond matters of detail and administration and into matters of substance”.

4. As amended at Stage 2, the power in section 6(7)(b) to make further provision about criteria for approval is limited to criteria which relate to the body’s capability to act as an approved regulator, in order to prevent the addition of substantive criteria which are unrelated or irrelevant to the performance of the functions of an approved regulator.
5. The power in 6(7)(c) to make further provision about what categories of bodies may or may not be approved regulators has been removed. As noted in previous correspondence with the Committee, this power was very widely drafted. On further consideration, it was felt that this power was in fact unnecessary. The Scottish Ministers are able to exclude unsuitable candidates by reference to their application, and it seems extremely unlikely that it would ever be desirable to exclude an entire class of bodies without consideration on an individual basis.

6. In addition, section 6(8) was added at Stage 2 and this requires that the Scottish Ministers must have the consent of the Lord President before making regulations under section 6(7).

Reason for taking power

7. The details of the approval process and criteria for approval are considered best addressed through subordinate legislation, as they are likely to involve a significant amount of detailed procedural provisions. They may also require revision at short notice in order to refine the process or to deal with any unforeseen issues. The Bill already spells out the main factors which should inform the decision of the Scottish Ministers on an application, but it is possible that other issues will emerge as significant to the performance of the functions of approved regulators, and the power to add to the criteria will allow this to be taken into account.

Reason for choice of procedure

8. As this power will be used to set out the operational details of a process already outlined in the Bill, and as there is the additional safeguard of the Lord President’s consent, the negative resolution procedure is considered appropriate.

Section 7(10) – Authorisation to act

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

9. Section 7 sets out the criteria which must be met before the Scottish Ministers can give an approved regulator authorisation to undertake regulatory functions. This is the second stage in the process of allowing a body to act as an approved regulator, approval (section 6) being the first.

10. The powers in section 7(10) were in the Bill as introduced and, as originally drafted, gave the Scottish Ministers a regulation making power to make further provision regarding the process for authorising an approved regulator to exercise its regulatory functions. In particular, this included the process and criteria for authorisation.

11. The Committee expressed concern at the power in section 7(10)(b) to make further provision about criteria for authorisation, and recommended that this power be reconsidered. It is now felt that this power is unnecessary, as the criteria for authorisation are linked to the criteria for approval in section 6. Any additional criteria which are required can be added under
6(7)(b), and will then apply to the authorisation process under 7(2)(b). The ability to make further provision regarding criteria for authorisation has therefore been removed.

Reason for taking power

12. As with the approval process in section 6, the details of the authorisation process are considered best addressed through subordinate legislation, as they concern matters of operational detail. They may require revision at short notice in order to refine the process or deal with any unforeseen issues which arise.

Choice of procedure

13. As this power will be used to set out the operational details of a process already outlined in the Bill, the negative resolution procedure is considered appropriate.

Section 9(3) - Reconciling different rules

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

14. In the Bill as introduced, section 8(2)(b) provides that the approved regulator’s regulatory scheme must include appropriate provision for dealing with regulatory conflict between it and any professional or regulatory rules of any other body which regulates the provision of legal or other services. Section 9(3) gives the Scottish Ministers a regulation-making power to make further provision about regulatory conflicts which may involve an approved regulator.

Amendment at Stage 2

15. At Stage 2, this provision was amended to require that the Scottish Ministers have the consent of the Lord President before making regulations.

Choice of procedure

16. The negative resolution procedure is considered most appropriate in this instance, as the power addresses a narrow area which is well defined in the Bill. In addition, there is now the additional safeguard of the Lord President’s required consent.

Section 22(1) - More about governance

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

17. In the Bill as introduced, section 22 relates to the provisions on the internal governance arrangements of approved regulators, as covered in sections 20 and 21. Section 22(1) gives the Scottish Ministers a regulation-making power to make further provision regarding these internal
governance arrangements. This is limited to arrangements relating to the regulatory function of the approved regulators.

Amendment at Stage 2

18. At Stage 2, this provision was amended to require that the Scottish Ministers have the consent of the Lord President before making regulations.

Choice of procedure

19. As there is provision in the Bill for consultation with the affected parties (approved regulators), and the underlying principles relating to internal governance arrangements are stated clearly in sections 20(1) and 21(1), and the power would only be used to add further detail to this, the negative resolution procedure is considered appropriate. In addition, there is now the additional safeguard of the Lord President’s required consent.

Section 26(1) - Additional powers and duties

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

20. Section 26 relates to the regulatory functions of approved regulators, as set out in sections 23, 24 and 25. The power in section 26(1) was in the Bill as introduced, and gives the Scottish Ministers the power to make regulations giving approved regulators additional functions as are considered necessary or expedient for them to have for the purposes of regulating licensed providers. As amended at Stage 2, the Scottish Ministers must have the consent of the Lord President before making such regulations.

Reason for taking power

21. This is so that if an omission is discovered, or if in the light of experience the Scottish Ministers consider additional functions to be necessary or expedient, they can require approved regulators to take on those functions.

Choice of procedure

22. This power has a potentially significant impact, in that it can require approved regulators to take on functions which are not set out in the Bill. This is reflected by the requirement for the consent of the Lord President to be obtained, and for consultation with all approved regulators plus others as considered appropriate, prior to use of the power. It is also considered appropriate that any regulations made using this power be subject to the affirmative resolution procedure, in order to ensure a proper level of parliamentary scrutiny.
Section 27(1) – Guidance on Functions

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

Provision

23. In the Bill as introduced, section 27(1) provided that, in exercising its functions under Part 2, an approved regulator must have regard to any guidance issued to it or to approved regulators generally, by the Scottish Ministers. The Committee raised a question relating to the wording of this section, as it implies that guidance may be issued to either an individual approved regulator, or to all approved regulators. The intention behind this section is that the same guidance should be issued to every approved regulator, and that every approved regulator should be consulted on the guidance. Section 27(1) was amended appropriately at Stage 2.

Reason for taking power

24. Once the provisions in the Bill are operational, it may on occasion be useful to issue guidance to approved regulators in order to clarify or advise on the operation of the regulatory framework.

Choice of procedure

25. No Parliamentary procedure is required for the issuing of guidance.

Section 27A(6) – Review of own performance

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

26. Section 27A requires approved regulators to carry out an annual internal review of their operation as such, and send a report to the Scottish Ministers. This is to support the Scottish Ministers’ oversight role in the regulatory framework, and to ensure that approved regulators are operating effectively.

27. The Scottish Ministers are given a power in section 27A(6) to make regulations about what is to be covered in the review and report (including both elaboration of existing areas and addition of new areas), and setting out additional details of the report (including how, when and in what format it is to be submitted).

Reason for taking power

28. The operational details of the report and its submission (for example format and timing) are considered best set out in subordinate legislation, rather than on the face of the Bill. In addition, it may be necessary or desirable in light of experience to elaborate on, or add to, the areas which are covered by the report, in order to facilitate effective oversight of the performance of approved regulators.
Choice of procedure

29. This power will be used to set out the operational details around the performance report, and to make further provision about the performance review. While this power can be used to specify new areas which are to be covered by the review, these will still be related to the approved regulator’s performance as such, and so would not be substantive alterations. Therefore, the negative procedure is considered appropriate.

Section 29(6) - Measures open to Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

30. In the Bill as introduced, section 29 set out the measures open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Section 29(6) gives the Scottish Ministers a regulation-making power to specify other measures which may be taken by them (subsection (6)(a)), and to make further provisions relating to measures that they can take, including the procedures to be used when taking them (subsection (6)(b)).

Amendment at Stage 2

31. At Stage 2, amendments were made that require that every approved regulator must be consulted before regulations are made, and that those regulations cannot be made unless the Lord President has given his consent.

Choice of procedure

32. The power in section 29(6) is one which creates new sanctions on approved regulators, which will be defined in the regulations themselves. Given the potential impact of these sanctions on approved regulators, and the breadth of the power, the affirmative resolution procedure is considered appropriate.

Section 35(1) - Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

33. Section 35(1) gives Scottish Ministers a regulation-making power to make provision allowing them to establish a body with a view to it becoming an approved regulator. As amended at Stage 2, this power cannot be used unless the Scottish Ministers believe their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.
Reason for taking power

34. In the unlikely event that no bodies apply to become approved regulators, or none pass the application process, or an approved regulator ceases to operate and there is no other regulator to which licensed providers can transfer, a new regulatory body would be required in order to implement the provisions of Part 2 of the Bill.

35. This is a fallback provision which we do not envisage being used. Given that the remit of the new body would be limited to those regulatory functions described in this Bill, it would not be an effective use of the Scottish Parliament’s time to create such a body by subsequent primary legislation. It is also possible that such provision will be required urgently to deal with a regulatory gap, particularly if an existing regulator has ceased to operate. Therefore, it is considered appropriate to address this through subordinate legislation.

Choice of procedure

36. The power is, as section 35(4) makes clear, only to be used as a last resort where necessary to ensure that licensed providers can continue to be effectively regulated. It is likely that the provisions will require to be implemented urgently if there is a regulatory gap, but given the financial and policy implications of creating an entirely new public body, affirmative resolution is considered appropriate.

Section 35(2) - Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

37. Section 35(2) gives the Scottish Ministers a regulation-making power to allow them to act as an approved regulator in circumstances set out in those provisions. As amended at Stage 2, this power cannot be used unless the Scottish Ministers believe their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.

Reason for taking power

38. This power ensures that there is always an approved regulator in place. For example, should an approved regulator fail, or no body applies to become an approved regulator, the Scottish Ministers can take on the regulatory duties until such time as an appropriate body can be found, or established using section 35(1). Such a step would likely be required at short notice to plug a regulatory gap, and is a safeguard rather than something which is anticipated will be needed, so subordinate legislation is considered appropriate.

Choice of procedure

39. This is a fall-back provision and is only intended to be used as a last resort, if the Government’s policy intention of providing for the regulation of licensed providers might otherwise be frustrated. As the Scottish Ministers would be regulating in accordance with the various details set out for approved regulators in the Bill, and the matter may require urgent
resolution, the negative resolution procedure seems to offer an appropriate level of scrutiny without adding in undesirable delay.

**Section 37(6) - Eligibility criteria**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative/affirmative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

**Provision**

40. Section 37 sets out which types of entity would, and would not, be eligible to become a licensed provider. The power in section 37(6) was in the Bill as introduced, and gave the Scottish Ministers a regulation-making power to make further provisions around the criteria for eligibility (subsection (6)(a)). It also allowed them to expand the list of persons who are classed as “legal practitioners” for the purposes of this section (subsection (6)(b)(i)), and to add an additional type of legally qualified person to section 36(2) (subsection (6)(b)(ii)).

41. Section 37(6)(a) was amended at Stage 2 in light of concerns expressed by the Committee regarding the width of the power and the Parliamentary procedure proposed, and now consists of two distinct powers which narrow the scope of the Scottish Ministers’ powers to make further provision about eligibility to be a licensed provider. The first, in section 37(6)(a)(i), allows the Scottish Ministers to make further provision by regulations specifying other categories of entity that are, or are not, eligible to be licensed providers. This power is subject to the affirmative procedure. The second power, in section 37(6)(a)(ii), allows the Scottish Ministers to make further provision by regulation about criteria for eligibility to be a licensed provider.

42. The intention behind the amendments to section 37(a) is that the Scottish Ministers should be able to clarify or elaborate on the criteria for eligibility and add further criteria if necessary to deal with unforeseen problems or unusual business structures, but that any additional criteria should not substantially alter the essence of the eligibility criteria already described within section 37.

43. The powers in section 37(6)(b) remain unaltered, but following an amendment at Stage 2 the Scottish Ministers must now consult every approved regulator before making regulations under this provision.

**Reason for taking power**

44. Subsection (6)(a) gives the Scottish Ministers the flexibility to add further detail around the conditions of eligibility, as may be necessary once the provisions of the Bill are in force. This allows refinement of the current provisions – an example might be to provide further specification of the nature of separation required between a licensed provider and the larger entity of which it forms part, for section 37(3). It also provides the ability to address any unforeseen circumstances and to make provision in light of experience about categories of entity which are, or are not, eligible to become licensed providers.

45. Subsection (6)(b)(i) relates to section 36(2), which provides that an entity is only eligible to be a licensed provider if it employs at least one solicitor providing legal services. Subsection
(6)(b)(i) is intended to be used should an additional type of legally qualified individual seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, section 36(2) could be changed to give advocates the same status as solicitors – section 36(2) would then require that either a solicitor or an advocate must be employed in order to be eligible to be a licensed provider.

46. Subsection (6)(b)(ii) allows an additional type of legal practitioner to be added to the list in subsection (5). This is to allow the addition, if appropriate, of any new types of legal practitioner which might be created in the future, thus keeping the Bill up to date.

47. Subordinate legislation is deemed appropriate in this case, as all the cases described above in subsection (6) will require action once the Bill comes into force, and are consequent on changes which may or may not happen. The changes do not undermine the essential safeguard provided for in section 36(2), that a legally qualified professional must be involved in every licensed provider.

Choice of procedure

48. Given the limited nature of the powers in section 37(6)(a)(ii) and (b), which are likely to be used, if at all, for clarification and technical additions to the requirements of section 37, the negative resolution procedure is considered appropriate.

49. However, the power in section 37(6)(a)(i) does have the potential to significantly alter the eligibility criteria in section 37 by setting out additional categories of bodies which may or may not be licensed providers. Therefore, the additional parliamentary scrutiny offered by the affirmative procedure is considered appropriate for this power.

Section 39(9) - Head of Legal Services

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

50. The power in section 39(9), which was in the Bill as introduced, gives the Scottish Ministers the power to make further provision about Heads of Legal Services of licensed providers, and the functions of such Heads (subsection (9)(a)). It also allows the Scottish Ministers to modify subsection (2) to add an additional type of legally qualified person who would then be eligible to become a Head of Legal Services (subection (9)(b)).

51. This power remains essentially unaltered. Amendments at Stage 2 simply clarified that any further provision made about the functions of Heads of Legal Services must relate to that position, and provided that the Scottish Ministers must consult the Lord President before making regulations under this section.
Reason for taking power

52. The operational details around the position of Head of Legal Services may require to be expanded (under subsection (9)(a)) as it is determined how the position operates in practice, or in response to any unforeseen circumstances. This may provide, for example, for further responsibilities to be specified for the Head of Legal Services to ensure an identifiable individual in the licensed provider takes personal responsibility for ensuring the business is complying with regulatory requirements.

53. The power in subsection (9)(b) is intended to be used where an additional class of legally qualified individuals seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, subsection (2) could be changed to give advocates the same status as solicitor, allowing them to take the position of Head of Legal Services.

Choice of procedure

54. This power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. In addition, the Lord President will be consulted before any regulations are made. Therefore, the negative resolution procedure is considered appropriate.

Section 40(7) - Head of Practice

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

55. Section 40 describes the position of Head of Practice, along with the requirements, duties and responsibilities associated with the role. Section 40(7) gives the Scottish Ministers the power to make further provisions about Heads of Practice of licensed providers, and the functions of such Heads.

56. This power remains essentially unaltered. Amendments at Stage 2 simply clarified that any further provision made about the functions of Heads of Practice must relate to that position, and provided that the Scottish Ministers must consult the Lord President before making regulations under this section.

Reason for taking power

57. The operational details around the position of Head of Practice may require to be expanded as it is determined how the position operates in practice, or in response to any unforeseen circumstances. As this is an operational matter, subordinate legislation is considered appropriate.

Choice of procedure

58. As with section 39(9), this power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. In addition,
the Lord President will be consulted before any regulations are made. Therefore, the negative resolution procedure is considered appropriate.

Section 41(5) - Practice Committee

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

59. In the Bill as introduced, section 41(5) gave the Scottish Ministers the power to make further provisions relating to the Practice Committees of licensed providers, and the functions of such Committees.

Amendment at Stage 2

60. At Stage 2, an amendment was made that requires the Scottish Ministers to consult the Lord President before making regulations.

Choice of procedure

61. As with the powers relating to the other named positions within licensed providers in sections 39 and 40, being concerned with the details of a position which is described in some depth in the Bill. In addition, the Lord President will be consulted before any regulations are made. Therefore, the negative resolution procedure is considered appropriate.

Section 52(2), (2A) and (2B) - More about investors

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative/affirmative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

62. Section 52 relates to sections 49-51 which address non-solicitor investors in licensed providers (for example, setting out the criteria which must be met by such investors in terms of financial position and behaviour). Most of the powers in this section were present in the Bill as introduced and give the Scottish Ministers power to make regulations to make further provision about such investors, and for licensing rules about individuals who have an interest in a licensed provider.

63. Such provision may include imposing requirements on licensed providers or those with an interest in licensed providers, defining or clarifying the terminology, specifying the criteria or circumstances by reference to which an outside investor is presumed or held to be fit or unfit, and modifying the definition of investor or non-solicitor investor as described in section 52(4).

64. The Committee raised some concerns about the level of scrutiny proposed for the powers in this section, given their potential reach. In light of this, an amendment was made at Stage 2 to make the power to amend the definition of investor or non-solicitor investor in section 52(4)
subject to the affirmative procedure, given its potential to make substantive changes. The other powers in this section which were in the Bill as introduced remain substantially unaltered (though their position has changed).

65. Three further powers were added to section 52 at Stage 2. The first of these, in section 52(2A)(a), relates to the definition of “exemptible investor”, which is introduced in section 49A. Exemptible investors are investors who have less than a 10% stake in the total ownership or control of a licensed provider, and approved regulators have the discretion to not apply the fitness for involvement test to such investors. This power allows the Scottish Ministers to amend the percentage ownership or control relating to the definition of “exemptible investor” in section 49A(4) and paragraph 3A(3) of schedule 8.

66. The remaining powers (in section 52(2B)(c)(ii) and (iii)) relate to the power of the Scottish Ministers to set out what amounts to ownership, control, or any other material interest, which was in the Bill as introduced. These powers allow the Scottish Ministers to also set out what interest of type is relevant as regards a particular percentage stake in ownership or control, and to what other interest or type also counts towards such a stake, by reference to family, business or other associations.

Reason for taking power

67. The powers relating to the fitness for involvement test allow the Scottish Ministers to set out further detail on what must be covered in the “fitness for involvement” test which must be applied by approved regulators to any non-solicitor investor in a licensed provider (as described in sections 49 and 50), or in how non-solicitor investors should behave.

68. The Bill provides the framework and key issues to be addressed in the fitness for involvement test, and provides for the detail to be addressed in regulatory schemes, particularly the licensing rules (see section 49(2) which requires that licensing rules relating to outside investors must explain the basis on which an outside investor’s fitness is determinable). It also sets out in section 51 the behaviour required of non-solicitor investors.

69. The safeguards to ensure that outside investors are suitable and behave properly are highly important in ensuring that the public interest and professional standards are protected. It may prove desirable to add further specification to these safeguards, to ensure consistency between the approaches taken by different regulators, or to reflect further qualifying tests which are identified in future.

70. The power to amend the percentage set out in section 49A(4) and paragraph 3A(3) may be required if, once the relevant provisions are operational, it appears to the Scottish Ministers that the figure of 10% is unsuitable. Without the benefit of experience, it is difficult to ensure in advance that this figure is correct, and it may require to be changed at short notice. Therefore, subordinate legislation is considered appropriate.

Choice of procedure

71. The powers in section 52(2B) apply to a restricted class of people (non-solicitor investors) and are essentially provided to clarify or expand on provisions which are already in
This document relates to the Legal Services (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

the Bill, so as to maximise public protection. Negative resolution procedure is therefore considered appropriate.

72. The powers in section 52(2A) allow changes to be made to the Bill itself. Given the potential to make substantive changes through such powers, the additional scrutiny offered by the affirmative procedure is considered appropriate.

Section 68(6) - Lists of disqualified persons

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

73. In the Bill as introduced, section 68 in the Bill provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider (see section 44), and those it has determined to be unfit to be an investor in a licensed provider (see section 49).

Amendment at Stage 2

74. At Stage 2, section 50A (“Ban for improper behaviour”) was inserted into the Bill to provide for disqualification of those who contravene sections 51(1) or (2). The regulations under section 68(6) could affect the lists of those disqualified under section 50A.

Reason for taking power

75. The Scottish Ministers may wish to provide more detail on the exact content of such lists and the procedure to be used in keeping and publishing them and amend such details as necessary once the regulatory framework is in operation. As this power relates to a largely administrative function, it is considered appropriate for the details to be set out in subordinate legislation.

Choice of procedure

76. The negative resolution procedure is still considered appropriate in view of the non-contentious and administrative nature of the power.

Section 74(7) - Certification of bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

77. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body for confirmation agents. In the Bill as introduced, the powers in section 74(7) gave the Scottish Ministers power to make regulations to make further
provision regarding the process for seeking certification, the criteria for certification, and what
categories of bodies may or may not be an approving body.

78. The Committee indicated some concern with the width of the powers in this section. In
light of this concern, amendments were made at Stage 2. The power in section 74(7)(b) to make
further provision about criteria for certification is now limited to criteria which relate to the
body’s capability to act as an approving body, in order to prevent the addition of substantive
criteria which are unrelated or irrelevant to the performance of the functions of an approving
body.

79. In addition, the power in 74(7)(c) to make further provision about what categories of
bodies may or may not be approving bodies has been removed. As noted in previous
correspondence with the Committee, this power was very widely drafted. On further
consideration, it was felt that this power was in fact unnecessary. The Scottish Ministers are able
to exclude unsuitable candidates by reference to their application, and it seems extremely
unlikely that it would ever be desirable to exclude an entire class of bodies without consideration
on an individual basis.

80. The intention behind the amendments made to section 74(7) at Stage 2, is that the
Scottish Ministers should have the power to make regulations regarding the certification process
and, in relation to their capability to act as approving body, the criteria for certification, but that
any additional criteria should not substantially alter the essence of the criteria already described
within section 74.

Reason for taking power

81. The details of the certification process are considered best addressed through subordinate
legislation, as they may require revision at short notice in order to refine the process, or deal with
any unforeseen issues which arise.

Choice of procedure

82. This power will be used to set out the operational details of a process already outlined in
the Bill. Where criteria for certification are added, these will be limited by reference to the
performance of the functions of an approving body, which are also set out in detail in the Bill.
Therefore, the negative resolution procedure is considered appropriate.

Section 76A(6) – Review of own performance

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

83. Section 76A sets out the requirement that an approving body for confirmation agents
review its own performance annually. In so doing, the approving body must provide the Scottish
Ministers with a report; a copy of which the latter must lay before Parliament. Section 76A(6)
gives the Scottish Ministers a regulation making power to make further provision about the annual review and the report.

Reason for taking power

84. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report, are likely to require some elaboration, once the Bill provisions come into force. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

Reason for choice of procedure

85. Further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

Section 81(5) - Ministerial intervention

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative/negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

86. In the Bill as introduced, section 81(5) gave the Scottish Ministers power to make regulations to make further provision about approving bodies and confirmation agents. The Committee expressed concern at the wide nature of this power, and the lack of any indication as to when it might be used. Following further consideration, it was felt that, given the other powers available in Part 3, this power is most likely to be used where, owing to unforeseen circumstances, the regulation in place is felt to be insufficient for the adequate protection of client interests. An amendment was therefore made at Stage 2 to link the power in section 81(5)(b) to this purpose, ensuring that the Scottish Ministers are able to make further provision about the functions of approving bodies and confirmation agents only where they consider this to be necessary to safeguard the interests of the clients of confirmation agents.

87. A further amendment was made at Stage 2 in relation to reviews of confirmation agents. In the Bill as introduced, section 81(4) allowed the Scottish Ministers to require approving bodies to carry out annual reviews of the performance of their confirmation agents, and send a report to the Scottish Ministers. In previous correspondence with the Committee, it was indicated that an amendment would be lodged at Stage 2 to remove this power, and insert the requirement for annual reviews on the face of the Bill. This amendment was passed, and such a requirement is provided for in section 81(3A). A new power to allow the Scottish Ministers to make further provision about this review has also been inserted, at section 81(5)(a).

Reason for taking power

88. As with the operational details of any new regulatory framework, the processes and requirements of this review process are likely to require some elaboration once the Bill provisions come into force. The ability to do this through subordinate legislation, as provided
This document relates to the Legal Services (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

for in section 81(5)(a), gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

89. The power in section 81(5)(b) allows the Scottish Ministers to prescribe further safeguards in relation either to those who grant powers to deal with confirmation, or those who carry out this work. Given that the work involved is of a specialist nature, may involve potentially vulnerable clients, and is currently restricted to solicitors, it is felt appropriate to retain a reserve power to create further regulatory safeguards, should they prove desirable.

Choice of procedure

90. Further provision made using the power in section 81(5)(a) will deal with the operational details of the review process. Given this, the negative resolution procedure is considered appropriate.

91. The power in section 81(5)(b) has a potentially wide scope, despite the changes made at Stage 2. Therefore, the affirmative resolution procedure is considered appropriate.

Section 81B(6) - Approving bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

92. Section 81B sets out the requirements of the application to the Scottish Ministers to become an approving body of non-lawyer will writers. Section 81B(6) gives the Scottish Ministers a regulation-making power to prescribe fees which they may charge applicants to become approving bodies.

Reason for taking power

93. While the Scottish Government does not intend to charge applicants to become approving bodies when the Bill is implemented, this may become necessary to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. Subordinate legislation is considered a suitable way of introducing fees in such a case.

Choice of procedure

94. As this power is narrow in scope, and intended only to be used to recoup costs, the negative resolution procedure is considered to offer sufficient parliamentary scrutiny.
Section 81C(7) - Certification of bodies

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

95. Section 81C sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body for non-lawyer will writers. Section 81C(7) gives the Scottish Ministers power to make regulations to make further provision regarding the process for seeking certification and, in relation to their capability to act as an approving body, the criteria for certification.

**Reason for taking power**

96. The details of the certification process are considered best addressed through subordinate legislation, as they may require revision at short notice in order to refine the process, or deal with any unforeseen issues which arise.

**Choice of procedure**

97. This power will be used to set out the operational details of a process already outlined in the Bill. Where criteria for certification are added, these will be limited by reference to the performance of the functions of an approving body, which are also set out in detail in the Bill. Therefore, the negative resolution procedure is considered appropriate.

Section 81D(2)(f) - Regulatory schemes

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

**Provision**

98. Section 81D requires the approving body for non-lawyer will writers to have a regulatory scheme which allows for individuals who meet the qualifying criteria to provide will writing services, and which regulates those members in the provision of those services. It also sets out what must be included in such schemes.

99. Section 81D(2)(f) gives the Scottish Ministers a regulation-making power to require approving bodies to cover such regulatory matters in their regulatory schemes as the Scottish Ministers specify, in addition to those already listed in section 81D.

**Reason for taking power**

100. As with section 8(2)(c) in respect of approved regulators, this gives the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory schemes for non-lawyer will writing services, if this proves necessary (for example, to add clarity, or to address unforeseen issues).
Choice of procedure

101. The level of parliamentary scrutiny offered by the affirmative resolution procedure is considered appropriate in this case, as the power has the potential to significantly alter the focus of the regulatory schemes of approving bodies, and to impact on the regulatory burden on approving bodies and will writers.

Section 81F(6) – Review of own performance

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

102. Section 81F(6) sets out the requirement that an approving body for non-lawyer will writers review its own performance annually. In so doing, the approving body must provide the Scottish Ministers with a report; a copy of which the latter must lay before Parliament. Section 76A(6) gives the Scottish Ministers a regulation making power to make further provision about the annual review and the report.

Reason for taking power

103. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report are likely to require some elaboration once the Bill provisions come into force. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

Reason for choice of procedure

104. Further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

Section 81K(5) - Ministerial intervention

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by statutory instrument  
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

105. Section 81K(5) gives the Scottish Ministers power to make regulations about the annual review of non-lawyer will writers’ performance, as required under section 81(4), and to make further provision about approving bodies and non-lawyer will writers where this appears necessary to safeguard the interests of the clients of will writers.
Reason for taking power

106. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report are likely to require some elaboration once the Bill provisions come into force. Section 81K(5)(a) provides for this. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

107. In section 81K(5)(b), a broad power has been taken to allow the Scottish Ministers to prescribe further safeguards in relation either to those who grant powers to deal with non-lawyer will writers, or those who carry out this work. Given that the work involved is of a specialist nature and may involve significant amounts of money and potentially vulnerable clients, it is felt appropriate to retain a reserve power to create further regulatory safeguards, should they prove desirable.

Reason for choice of procedure

108. In the case of section 81K(5)(a), further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

109. In the case of section 81K(5)(b), given the potentially wide scope of this power, affirmative resolution procedure is considered appropriate.

Section 81L(1) – Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

110. Section 81L(1) gives Scottish Ministers a regulation-making power to make provision allowing them to establish a body with a view to it becoming an approved regulator.

Reason for taking power

111. This power is similar to that in section 35(1). In the unlikely event that no existing bodies successfully apply to become approving bodies for non-lawyer will writers, or an approving body ceases to operate and there is no other regulator to which non-lawyer will writers can transfer, a new regulatory body would be required in order to implement the provisions of Part 3, Chapter 2 of the Bill.

112. This is a fallback provision which we do not envisage being used. Given that the remit of the new body would be limited to those regulatory functions described in this Bill, it would not be an effective use of the Scottish Parliament’s time to create such a body by subsequent primary legislation. It is also possible that such provision will be required urgently to deal with a regulatory gap, particularly if an existing regulator has ceased to operate. Therefore, it is considered appropriate to address this through subordinate legislation.
Choice of procedure

113. The power is, as section 81L(4) makes clear, only to be used as a last resort to ensure that non-lawyer will writers can continue to be effectively regulated. It is likely that the provisions will require to be implemented urgently if there is a regulatory gap, but given the financial and policy implications of creating an entirely new public body, affirmative resolution is considered appropriate.

Section 81L(2) - Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

114. Section 81L(2) gives the Scottish Ministers a regulation-making power to allow them to act as an approved regulator in circumstances set out in those provisions.

Reason for taking power

115. This power is similar to that in section 35(2) and ensures that there is always an approving body for non-lawyer will writers in place. For example, should an approving body fail, or no body applies to become an approving body, the Scottish Ministers can take on the regulatory duties until such time as an appropriate body can be found, or established using section 81L(1). Such a step would likely be required at short notice to plug a regulatory gap, and is a safeguard rather than something which is anticipated will be needed, so subordinate legislation is considered appropriate.

Choice of procedure

116. This is a provision of last resort and is only intended to be used if the Government’s policy intention of providing for the regulation of non-lawyer will writers might otherwise be frustrated. As the Scottish Ministers would be regulating in accordance with the various details set out for approved regulators in the Bill, and the matter may require urgent resolution, the negative resolution procedure seems to offer an appropriate level of scrutiny without adding in undesirable delay.

Section 91A(2) – Citizens advice bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

117. New section 91A amends section 26 of the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to provide for a citizens advice body to employ a solicitor directly, to give advice to third parties, without the necessity of being approved and authorised as a licensed provider. Section 91A(3) allows the Scottish Ministers to amend the definition of “citizens advice body”, which is inserted into section 65(1) of the 1980 Act.
Reason for taking power

118. This power allows the Scottish Ministers to amend the definition of “citizens advice body” if there are any difficulties in practice caused by it either being too tight or too loose a definition. Should this be the case, this would need to be resolved without delay and so subordinate legislation is considered appropriate.

Reason for choice of procedure

119. This power is narrow in scope and will only be used if there are difficulties that come to light in practice. Given this, the negative resolution procedure is considered appropriate.

Section 91F(b) – Cap on individual claims

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
</tbody>
</table>

Provision

120. Section 91F is a new provision that amends Schedule 3 to the Solicitors (Scotland) Act 1980 to provide for a limit on an individual grant payable from the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”).

Reason for taking power

121. Section 91F provides for a limit on an individual grant of £1.25 million. It is possible that this figure may, in the light of experience, have been set too high and that multiple claims threaten to empty the Guarantee Fund despite the stop loss insurance in place. In this situation, the Scottish Ministers might consider revising the cap. More likely, inflationary pressures will in time reduce the monetary value in real terms of the cap and the Scottish Ministers might consider it appropriate to raise the value of the cap. Section 91F(b) allows for a decrease or increase in the cap.

Reason for choice of procedure

122. We consider that there are important issues relating to this cap and any amendment to either decrease or increase it, including ensuring that consumers of legal services are adequately protected. Given this, we consider that the affirmative resolution procedure is appropriate.

Section 92 - Council membership

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Not applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

Provision

123. In section 92(2)(c) of the Bill as introduced, there was a provision (3A(4)) inserted into the Solicitors (Scotland) Act 1980 giving the Scottish Ministers the power to specify either the minimum number or the proportion of members of the Council of the Law Society of Scotland (“the Council”) who must be non-solicitors.
Stage 2 amendment

124. Further consideration of this matter resulted in the conclusion that as the Bill will set up a regulatory committee (see section 93) which will discharge the regulatory functions of the Council, and as that regulatory committee must have a non-solicitor chair and at least 50% non-solicitor membership, there is no longer a need to have a statutory requirement that the Council include a certain proportion of non-solicitor members. Consequently, a Stage 2 amendment removed section 3A(4), (5), and (6).

Section 93 - Regulatory committee

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

125. In the Bill as introduced, section 93(2) adds a provision (section 3B(5)) to the Solicitors (Scotland) Act 1980, giving the Scottish Ministers the power to make further provisions about the Council’s regulatory functions. The power can also be used to modify the definition of “regulatory functions”, as given in subsection (9), if it is believed that such modification is appropriate.

126. At Stage 2, section 3B(5)za was inserted which provides for the Scottish Ministers to prescribe by regulations the maximum number of members that the regulatory committee may have.

Reason for taking power

127. This provision was considered advisable to ensure that the regulatory committee does not grow to a size where it is unable to act effectively.

Choice of procedure

128. As this power is narrow in scope, relates to operational matters, and would only be used in consultation with the Law Society, the negative resolution procedure is considered appropriate.

Section 98A(1) – The 2007 Act: further provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

129. Section 98A provides that the Scottish Ministers can make further provision in connection with the Legal Profession and Legal Aid (Scotland) Act 2007 or related provisions of the Solicitors (Scotland) Act 1980, including with regard to the effect that the Legal Services Act 2007 has on the subject matter of Parts 1 and 2 of the Legal Profession and Legal Aid (Scotland) Act 2007.
Reason for taking power

130. Section 98A(1) relates to the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007. This provision is currently limited in scope owing to changes made by the Legal Services Act 2007 which affect the Legal Profession and Legal Aid (Scotland) Act 2007. This amendment allows the ancillary provision to be used as intended, including in areas altered by the Legal Services Act 2007.

Reason for choice of procedure

131. As this power is intended only to allow the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007 to be used as intended, negative resolution is considered appropriate.

Section 99A(1) – Further modification

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument

Provision

132. Section 37A(1) provides that an entity would only be eligible to be a licensed provider if at least 51% of the entity is owned, managed or controlled by solicitors, firms of solicitors or incorporated practices or other regulated professionals. Section 99A(1) provides that the threshold of 51% can be increased, decreased, or removed. In exercising this power, the Scottish Ministers must act in a way which is compatible with the regulatory objectives and, before making regulations, they must consult, amongst others, the Lord President and the Law Society of Scotland.

Reason for taking power

133. This power does not represent an attempt to negate the provision for majority ownership of licensed providers by solicitors or regulated professionals in section 37A(1). It is rather a measure to ensure that flexibility is retained. An unforeseen change in circumstances may require an increase or decrease in the percentage stated. Similarly, if the protection offered by a cap on external ownership becomes an obstacle to commercial development by firms or to the way services are available to consumers instead of an aid, it may be considered necessary to revisit it and remove it altogether.

Reason for choice of procedure

134. The issue of non-solicitor ownership of licensed providers has been a contentious one with widely differing views expressed within the legal profession, and indeed in the Justice Committee. Consequently, it is considered appropriate that any change that results in an increase or decrease of the percentage of non-solicitor ownership of a licensed provider should be subject to the affirmative procedure.
Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

(iii) Pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Bob Doris
Helen Eadie
Rhoda Grant
Alex Johnstone
Ian McKee (Deputy Convener)
Elaine Smith
Jamie Stone (Convener)
Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Jake Thomas

Support Manager
Lori Gray
The Committee reports to the Parliament as follows—

1. At its meeting on 21 September 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Legal Services (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill ("the supplementary DPM")¹.

Delegated Powers Provisions

3. The Committee considered the supplementary DPM and other delegated powers in the Bill and is content with the powers contained in sections 6(7), 7(10), 9(3), 22(1), 26(1), 27(1), 27A(6), 29(6), 35(1), 35(2), 39(9), 40(7), 41(5), 52(2A), 68(6), 76A(6), 81(5), 81B(6), 81D(2)(f), 81F(6), 81K(5), 81L(1) and (2), 91A(2), 91F(b), 92, 93, 98A(1) and 99A(1).

4. All of these are noted as being powers introduced or amended at Stage 2. So far as the provisions concerned amend earlier provisions, in response to the Committee’s Stage 1 Report, the Committee welcomes the amendments which have been made.

Section 37(6) – eligibility criteria for legal services providers

5. At stage 1 the Committee reported that the power to make further provision about the eligibility to be a licensed legal service provider ("LLSP") was too widely drawn since this related to matters of substance not administrative detail. The Scottish Government agreed to amend this provision to address the Committee’s concerns.

¹ Supplementary Delegated Powers Memorandum
6. The power has been restructured. There is now a separate power in section 37(6)(a)(i) to make further provision about the categories of entity which are eligible to be an LLSP and which is subject to affirmative procedure. The power to make further provision about criteria for eligibility remains in section 37(6)(a)(ii). It is subject to negative procedure.

7. The Committee notes the Scottish Government’s comment in the supplementary DPM that the intention is “that any additional criteria should not substantially alter the essence of the eligibility criteria already described within section 37”. The Committee notes that this is a statement as to how it intends to use the power rather than how it interprets the width of the power.

8. However, the Committee takes the view that the effect of the change appears to be that any provision relating to restrictions on the nature of bodies which will be eligible to be LLSPs, or which may otherwise affect entitlement, fall under the affirmative power. The scope of the power subject to negative procedure is therefore to be read as inherently limited to making further provision at a more detailed level about eligibility criteria which is not inconsistent with the existing provisions in the bill (or in regulations made under the affirmative power). On that basis the Committee is content with the amendments made to section 37(6).

Section 52(2) & (2B) - regulation of investors

9. At stage 1, the Committee reported that it considered the power to make further provision concerning eligibility of investors in LLSPs too broad to be subject to the lower level of scrutiny afforded by negative procedure. The power would enable substantive provision and not just administrative detail. Amendments made at stage 2 make the power to change the level of investment which may be considered exempt from the “fitness test” set out in section 49 and the power to change the definition of investor subject to affirmative procedure. Otherwise the power remains as broad in scope and subject to negative procedure.

10. In particular the Committee notes that the power in section 52(2B)(a) and (b) engages the important issue of how an investor is to be judged fit or unfit and may impose further requirements to which investors are to be subject. The Committee therefore considers that its concerns as to the appropriate level of scrutiny of these powers have not been fully addressed by the amendments made at stage 2.

Section 74(7) – certification of approving bodies for confirmation agents and section 81C(7) – certification of approving bodies for will writers

11. At stage 1, the Committee reported that it was not content with the breadth of this power. The Committee welcomes the removal of the power to make further provision about what categories of body may, or may not be an approving body which appeared in section 74(7)(c) of the Bill as introduced. It remains concerned that, because the specific types of provision set out in paragraphs (a) and (b) of section 74(7) are only illustrative examples, there is still considerable breadth to the overall power. The Committee also notes that despite the width of the power it remains subject to negative procedure.
12. However, the Committee reads the power as inherently restricted to the ability to make further provision which is not inconsistent with the existing provisions on certification contained in the Bill. On this basis it is content with the amendments made.

13. The Committee considers that the same considerations arise in relation to the new provision introduced at section 81C(7), concerning certification relative to the regulation of will writing services. It reports that the powers are widely drawn, and are subject only to negative procedure. Again, it reports that it is content on the basis of a narrow reading of the scope of the power.

Schedule 4 Paragraph 2 – power to impose financial penalty on approved regulator; negative procedure

14. Schedule 4 makes further provision with respect to the financial penalties which the Scottish Ministers can impose on an approved regulator. Paragraph 2(2) of the schedule provides for regulations to prescribe the maximum penalty which the Scottish Ministers can impose on an approved regulator.

15. In the Committee’s Stage 1 report, the Committee expressed the view that the maximum penalty should be specified on the face of the Bill, and that it is not satisfactory to provide for the maximum penalty to be specified in regulations which are subject to negative (rather than affirmative) procedure. Responding to this matter, the Scottish Government’s position was that there was a need to retain a flexibility to adjust the amount as necessary, which flexibility would be lost in the event of an amount being specified on the face of the Bill. The Scottish Government also stated, under reference to examples in other legislation, that it was not a new proposition for maximum financial penalties to be prescribed in subordinate legislation or by other means.

16. The Committee, while noting the Scottish Government’s response, recommended that a ceiling be specified on the face of the Bill on the maximum penalty which may be prescribed in regulations made under paragraph 2(2) of Schedule 4. It further recommended that, in the event that the Scottish Government did not specify a ceiling on the maximum penalty which may be prescribed in such regulations, the Scottish Government specify affirmative procedure for those regulations.

17. The Committee notes that the Scottish Government remains of the view that this power and the parliamentary procedure selected are appropriate, and that no amendment has been made at Stage 2.

18. The Scottish Government indicated in its letter of 25 May 2010, that specifying a maximum penalty on the face of the Bill would take away the flexibility to adjust that amount as may be required once the regulatory framework is operational. It also stated that the maximum penalty would be set at a reasonable level and that it is not believed that the extra scrutiny offered by affirmative procedure is necessary.
19. The Scottish Government wrote to the Committee again on this matter on 14 September. That letter provides significant further information about the manner in which the maximum financial penalty is to be calculated. The Scottish Government intends that the maximum financial penalty should not be a fixed sum but should be set as a percentage of the income derived from an approved regulator’s regulatory functions in respect of the most recent financial year for which the approved regulator has audited accounts. An indication is given that this is likely to be set at no more than 5%. It is stated that there will be a requirement for a transitional arrangement for the first year or so of an approved regulator’s operation when there will be no suitable audited accounts.

20. The Committee, while welcoming the further information provided concerning the intended approach concerning the maximum financial penalty, notes that there currently remains uncertainty as what the potential financial implications for an approved regulator may be under the Bill and related subordinate legislation. It also notes that the exercise of the power remains subject to the lesser form of scrutiny afforded by negative procedure. It would of course be possible for the Bill to provide that the penalty is to be set by reference to income with the power restricted to setting and adjusting the percentage figure as may be necessary to reflect conditions over time.

21. The Committee remains of the view that it is generally accepted that it is for primary legislation to set the maximum penalty for contravention of statutory provisions, or at least the principles by reference to which a particular figure is to be set. It is not clear to the Committee why the Government cannot subject those principles to full parliamentary scrutiny in this case. While these are not criminal penalties, Ministers have a considerable discretion as to when it is appropriate for them to be imposed.

22. The Committee therefore remains of the view that it is unsatisfactory that the power to specify the maximum financial penalty which Ministers have a discretion to impose is subject only to scrutiny by the Parliament under the negative resolution procedure.
Letter from the Minister for Community Safety to the Convener

During the Stage 2 sessions, I made a number of commitments to give certain matters further consideration before Stage 3, and to meet with Committee members where appropriate. I thought it might be useful to set out the various issues which I will be considering over the summer, along with my current position. I am happy to meet with any members who may wish to discuss these, or other, matters relating to the Bill.

Automatic suspension of practising certificate
Amendments 359 to 361, which were proposed by the Law Society of Scotland (“the Society”) provide that a solicitor’s practising certificate must be automatically suspended under certain conditions. As I set out on 22 June, I consider this to be a substantial policy change with significant implications for the profession, and so I welcomed your decision not to move the amendments. However, I am willing to consider any evidence that such amendments are necessary, and this will be discussed with the Society before Stage 3. I will then update the Committee.

Compensation fund for licensed providers
As I have made clear, I believe that the only viable option to provide robust protection against fraud for clients of licensed providers, as is enjoyed by clients of traditional practices, is to utilise the Guarantee Fund. I welcome the Committee’s approval of my amendments to permit the use of the Guarantee Fund by all licensed providers, but do understand the concerns raised by the Society. I will discuss this in detail with the Society in advance of Stage 3, and am confident that a satisfactory agreement can be reached which will ensure that the protection of the Guarantee Fund extends to clients of all licensed providers. I will, of course, keep the Committee informed of progress on this vital issue.

Regulation of claims management companies
As I stated on 8 June, I am willing to consider any evidence of problems with claims management companies, and to discuss whether any action needs to be taken. However, although I am not against regulation of claims management companies in principle, I suspect that introducing such regulation in this Bill would be difficult.

Annual reports to Parliament
Robert Brown withdrew amendment 286, which would require Scottish Ministers to report annually to the Scottish Parliament any influence that the existence of approved regulators and licensed providers was having on competition and the quality of legal services in the market, in favour of my amendment 32. He did this on the understanding that we would have further discussions about the detailed operation of the annual review and reporting process which approved regulators will be required to undergo. I maintain
that amendment 32, in conjunction with the rest of the regulatory scheme, does satisfy Mr. Brown’s concerns, but I am happy to discuss this matter further with him and will report back to the Committee in due course.

**Designated persons and suitability to be an outside investor**

On 22 June, Robert Brown agreed to not move his amendments 330 and 110A, but suggested that further discussions were necessary in relation to designated persons and the suitability of outside investors. I am happy to meet with Mr. Brown to discuss these issues, and to report back to the Committee.

**Internet provision of will writing services**

During the debate on the regulation of will writing services on 22 June, Robert Brown and Stewart Maxwell raised some questions about how the new regulatory regime will cope with firms offering will writing services over the internet, and whether discussions with the UK Government will be required. As I stated at the time, anyone offering will writing services in Scotland will require to be regulated, and I believe that the provisions we have proposed will be sufficient regardless of exactly how such services are offered. However, I am happy to look at this again, to ensure that there are no loopholes which might be exploited. I also think it would be useful to discuss this issue, and the regulation of will writing in general, with the UK Government, not least because Scotland will be the first part of the UK to implement such regulation.

**Branding issues**

There was some discussion of the “branding” of licensed providers on 22 June, in relation to my amendment 72 and Robert Brown’s amendment 365. As Mr. Brown pointed out, the key issue is to determine exactly how wide any provision about branding should be. I consider that the main concern is around the use of the term “solicitor”, which is why my amendment 72 prevents licensed providers from using this term unless authorised by the Law Society. However, I do appreciate concerns which have been raised about the lack of protection for other terms, such as “lawyer”, and around ensuring that licensed providers do not brand themselves in a way which is misleading to consumers. While I suspect that it may be difficult to resolve this issue entirely before Stage 3, I do intend to discuss this further with the Law Society, and will report back to the Committee in due course.

**Further cap on the Guarantee Fund**

On 22 June, Robert Brown mentioned the Law Society suggestion of an annual cap on the Guarantee Fund, in addition to a per claim cap (as introduced by my amendment 212). While such an amendment has not been lodged, I am aware of the proposal. As I stated to the Committee, I share Mr. Brown’s concerns about such a cap. Whether or not an individual receives compensation for fraud carried out by a solicitor should be determined solely by the merits of the case, not by the amount of money which has already been paid out of the Guarantee Fund that year. However, I will be discussing this matter further with the Law Society, and am happy to keep the Committee informed of any developments.
Safeguarding interests of clients
Amendment 367, in your name, sought to give the Council of the Law Society, instead of the Court of Session, the power to prevent any payment being made out of a solicitor’s account in the event that the solicitor in question has ceased to practice and the Council is not satisfied that they have made all relevant documents and money available to clients. I have some concerns about such a change, and do not think it appropriate without further consideration of the implications. I therefore welcomed your decision to withdraw this amendment on 29 June. However, as I stated to the Committee, I am happy to discuss this with the Law Society, and to consider whether there is a legitimate issue to be addressed. Again, I will report back to the Committee following these discussions.

Law Society subscriptions and funding
Amendments 368 and 369, in your name, would have allowed entity level charging by the Law Society, and charging for specific services. Although I resisted these amendments, and welcomed your decision to respectively withdraw and not move them, I do think this issue is worthy of consideration. I am attracted to the idea of allowing some measure of differential charging by the Law Society, but I think that further discussion and consideration of the impact on the profession is necessary. Therefore, I will pursue this with the Law Society over the summer, and will report back to the Committee in due course.

Scottish Solicitors’ Discipline Tribunal
Amendments 374 and 375, in your name, related to the operation of the Scottish Solicitors’ Discipline Tribunal. I maintain that these amendments are unnecessary, and the Law Society has so far not provided any evidence to the contrary. I therefore welcomed your decision to respectively withdraw and not move them, but will have further discussions with the Law Society to determine if any real issues exist, and will keep the Committee informed.

As far as I am aware, these are all the issues on which I committed to providing information to the Committee, or to discussing further. I am happy to meet with any members who wish to discuss these or other matters in advance of Stage 3 and, as I have said, I will report back to the Committee in due course.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
2 July 2010
During Stage 2 of the Legal Services (Scotland) Bill ("the Bill"), I committed to giving a number of issues further consideration before Stage 3. These issues have been examined in detail over the summer and, where relevant, we have worked with the Law Society of Scotland ("the Society") to try to resolve any outstanding concerns. Discussions with the Society have been very constructive, and agreement has been reached on a number of important issues, including on the general principles behind giving licensed providers access to the Guarantee Fund.

With only a short time remaining before Stage 3, I thought it might be useful to set out our final position on these issues, including an explanation where we have decided not to proceed with further amendments to the Bill.

**Automatic suspension of practising certificate**
You proposed amendments at Stage 2 to provide that a solicitor’s practising certificate must be automatically suspended under certain conditions. Following productive discussions with the Society, it has been agreed that the Council should have a discretionary power to suspend practicing certificates under certain circumstances, and that there should be a right of appeal to the Court. An amendment has been drafted, and the Society has indicated its support for this.

**Compensation fund for licensed providers**
Following Stage 2, the Bill did not fully provide for a compensation fund for licensed providers, due to the defeat of certain Government amendments. In addition, the Society expressed serious concerns about the use of the Guarantee Fund by licensed providers which it does not regulate, and suggested an oversight role to ensure compliance with relevant accounts rules.

Amendments have now been drafted which require approved regulators to either establish a compensation fund, or to utilise the Guarantee Fund. These are similar to the amendments lodged at Stage 2. I understand that the Society is now content for the Guarantee Fund to be used by other approved regulators, so long as it has an oversight role and the ability to inspect licensed providers if it suspects any difficulties. ICAS (the only other body which has expressed an interest in becoming an approved regulator) is also content for the Society to have this role.

I am content for the Society to have an inspection role, although I consider that this should only be used as a last resort. Furthermore, to maintain consistency with the regulatory model, I feel that such a function should not be used without the consent of the Scottish Ministers. Therefore, amendments have been prepared to give the Society an oversight and inspection role in relation to the Guarantee Fund, subject to the consent of the Scottish Ministers.
**Regulation of claims management companies**

As I have stated previously, we are not against regulation of claims management companies in principle, and are happy to consider evidence of any problems with such firms. Indeed, I recently received correspondence from Richard Baker on this subject. However, I believe that this matter does require further consideration, and more scrutiny than would be possible at Stage 3 of a Bill. I therefore do not intend to introduce such regulation in this Bill.

**Annual reports to Parliament**

Amendment 286, in the name of Robert Brown, would have required the Scottish Ministers to report annually to the Scottish Parliament any influence that the existence of approved regulators and licensed providers was having on competition and the quality of legal services. Mr. Brown withdrew this amendment in favour of my amendment 32, on the understanding that we would have further discussions about the operation of the annual review and reporting process which approved regulators will be required to undergo under that amendment.

The intent with amendment 286 was, as I understand it, to ensure that the regulatory framework is adequately monitored, including with regard to any impact on the legal services market. As I said at the time, I think such a specific requirement is unnecessary. Section 27A of the Bill, which was inserted by my amendment 32, requires approved regulators to review their performance annually, and send a report to the Scottish Ministers. As with the proposed amendment, this report must be laid before the Scottish Parliament. I believe this report will give a good overview of how the regulatory framework is operating.

Of more direct relevance to Mr. Brown’s amendment is the new duty placed on the Scottish Legal Aid Board under section 96 to monitor the availability and accessibility of legal services in Scotland, and to give relevant advice to the Scottish Ministers. This provision will ensure that the Scottish Ministers are made aware of any negative impact that the introduction of ABS has, and allow them to act should there be any difficulties. In my view, the combination of sections 27A and 96, as well as the general oversight duties of the Scottish Ministers, will more than adequately address the concerns suggested by Mr. Brown’s amendment. I have written to Mr. Brown setting out our position on this matter, and on the relevant matters below, and am meeting with him this week to discuss any outstanding concerns.

**Designated persons**

During Stage 2, Robert Brown raised a number of concerns relating to designated persons. In particular, he sought (through amendment 330) to remove the reference in section 47 to investors being eligible for designation. At the time, I argued against this amendment, as I was concerned that it would prevent investors who were also legitimately working within the licensed provider from being designated, such as a solicitor or paralegal with a stake in the business.

However, on further consideration, I believe that the wording in section 47(3)(b)(i) is, in fact, sufficiently wide to allow those legitimately providing legal services within a licensed provider to also invest in it, without the explicit reference to investors in section 47(3)(b)(ii). This being the case, I now agree that removing this subsection is desirable. As Mr. Brown pointed out, there is no reason that simply being an investor
should make one eligible for designation, and if one is also working within the licensed provider, then the preceding subsection is sufficient to allow investment to take place. I appreciate Mr. Brown bringing this issue to my attention, and intend to lodge an amendment with the same effect as amendment 330 at Stage 3.

Suitability to be an outside investor
Robert Brown’s amendment 110A related to the suitability of outside investors, and sought to qualify amendment 110 by stating that “family, business or other associations” are only relevant so far as bearing on an individual’s suitability to be an investor. As I stated at the time, this is unnecessary. All of the provisions in section 50(2) are focussed on the suitability of persons to be investors, as is stated explicitly at the beginning of that subsection. There is therefore no need to state this explicitly for this one provision.

Internet provision of will writing services
During the debate on the regulation of will writing services, both Robert Brown and Stewart Maxwell raised questions about how the new regulatory regime will deal with firms offering will writing services over the internet. Under the regulatory system inserted into Part 3 of the Bill, anyone offering will writing services in Scotland will require to be regulated, regardless of how such services are provided. Therefore, an unregulated person based in Scotland who offers will writing services over the internet will be committing an offence, and action will be taken against them.

Unfortunately, as will writing is an unregulated activity in the rest of the UK, someone based outside Scotland could still offer will writing services over the internet without committing an offence. I suspect this was the scenario which Mr. Brown and Mr. Maxwell had in mind, and it is certainly not an ideal situation. My officials have been in contact with the Legal Services Board in England, which is currently conducting a preliminary examination of the issues involved. I will continue to monitor the situation, and to encourage the introduction of appropriate regulation in the rest of the UK.

Branding issues
There were some suggestions at Stage 2 that further consideration should be given to the width of any provisions around the “branding” of legal services providers. This has been discussed with the Society, which has indicated that it is content with the existing provision relating to the use of the term “solicitor” by licensed providers which was inserted at Stage 2. I therefore do not intend to put forward any further amendments relating to this matter.

Further cap on the Guarantee Fund
The Society made some suggestions prior to Stage 2 that there should be an annual cap on grants from the Guarantee Fund, in addition to a per claim cap. I am not in favour of such a cap, for reasons set out in detail previously, and understand that, following further internal discussions, the Society no longer intends to promote this matter.

Safeguarding interests of clients
At Stage 2, the Society sought to give the Council, instead of the Court of Session, the power to prevent any payment being made out of a solicitor’s account in the
event that the solicitor in question has ceased to practice and the Council is not satisfied that they have made all relevant documents and money available to clients.

I had serious concerns about this at Stage 2, and did not think it appropriate to make such a change without further consideration of the implications. Following further discussions, however, I understand that the Society does not intend to pursue this matter further, and so no amendments are planned.

**Law Society subscriptions and funding**
The Society indicated at Stage 2 that it wishes to introduce entity level and differential charging. This has been discussed with the Society over the summer and, while its arguments are not without merit, I believe that the changes proposed are too significant to be put in place without a far more extensive consultation than that which the Society has carried out to date.

The most fundamental change proposed is that Society be able to charge traditional firms a new fee at an entity level (in addition to individual solicitors paying the practising certificate fee). This additional fee could be based on the size of the firm in question, with turnover suggested as a viable option. The Society has suggested that this dual fee would be fairer to its members, as the actual cost of regulating firms could be reflected in the fees which they pay, rather than having to be covered by a flat rate practising fee as at present.

The Society also wants the power to be able to charge for services which are not currently part of the practising certificate fee, such as training courses for paralegals, and to be able to require firms of solicitors to register with it, despite existing provision in the Solicitors (Scotland) Act 1980 (“the 1980 Act”) which requires solicitors to notify the Society of their place of business (and any changes to that).

These proposals are not merely administrative changes to enable more effective gathering of fees, but rather significant alterations of the fee structure, with no clear data available on who would pay more (or less) under the new system. I have repeatedly stressed the permissive nature of this legislation, and that traditional firms will not be affected by it if they do not choose to adopt the new business structures.

Despite whatever further votes would be required amongst the Society’s membership to implement these changes, the Bill would still be the enabling mechanism for them. I therefore do not think it appropriate to make these changes without far greater examination of the possible consequences, and so do not intend to lodge amendments in relation to this matter.

**Scottish Solicitors’ Discipline Tribunal**
The Society has suggested certain changes to section 51 of the 1980 Act, and to the operation of the Scottish Solicitors’ Discipline Tribunal (“the Tribunal”). These proposals were contained in amendments 374 and 375 at Stage 2. As I stated at Stage 2, most of these changes are unnecessary. This has been discussed in detail with the Society, and it now agrees that the majority of the changes do not need to be made. However, it has been agreed that minor changes should be made to the 1980 Act to allow the Tribunal to require former practitioners and incorporated practices to pay compensation in certain circumstances. Therefore, I intend to lodge amendments to this effect at Stage 3.
This covers all the issues which I committed to considering before Stage 3, and the amendments mentioned above will be lodged this week, along with various other amendments. Please note that where these relate to successful opposition amendments, our changes (in most cases) do not seek to overturn the effect of these, but rather to improve the consistency and clarity of the Bill.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
27 September 2010
Te Bill will be considered in the following order—

Sections 1 to 102  Schedules 1 to 9
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Fergus Ewing
1 In section 1, page 1, line 11, at end insert—
   <( ) the interests of justice,>

Fergus Ewing
2 In section 1, page 1, leave out line 13

Section 2

Fergus Ewing
3 In section 2, page 2, line 4, at end insert <(and keep clients’ affairs confidential)>

Fergus Ewing
4 In section 2, page 2, line 11, leave out <treat the affairs of their clients as confidential and>

Section 4

Fergus Ewing
5 In section 4, page 2, line 33, leave out <arising by virtue of Part 4> and insert—
   <( ) under section 91A(3) or otherwise arising by virtue of Part 4 (except sections
   96(c) and 98A(1))>

Section 4A

Fergus Ewing
6 In section 4A, page 3, line 9, leave out <arising by virtue of Part 4> and insert—
   <( ) under section 91A(3) or otherwise arising by virtue of Part 4 (except sections
   96(c) and 98A(1))>
Section 5

Richard Baker

In section 5, page 4, line 6, leave out subsection (5) and insert—

(5) No more than 3 approved regulators may exist at any time.

(5A) The Scottish Ministers may—

(a) with the agreement of the Lord President, and

(b) after consulting such other person or body as they consider appropriate,

by regulations amend the number specified in subsection (5).>

Section 6

Fergus Ewing

In section 6, page 4, line 11, leave out <, with the consent of the Lord President,>

Fergus Ewing

In section 6, page 4, line 17, leave out <knowledge and understanding> and insert <understanding of the application>

Fergus Ewing

In section 6, page 4, line 18, leave out <contained in sections 1 and 2>

Fergus Ewing

In section 6, page 4, line 29, leave out <, with the consent of the Lord President, approve the applicant as an approved regulator> and insert <give their approval>

Fergus Ewing

In section 6, page 4, line 31, leave out subsections (2A) and (2B)

Fergus Ewing

In section 6, page 4, line 39, leave out from beginning to <applicant> in line 1 on page 5 and insert <Their approval may be given—

(a) with restrictions imposed>

Fergus Ewing

In section 6, page 5, line 4, leave out <be given>

Fergus Ewing

In section 6, page 5, line 7, leave out <with the consent of the Lord President, amend, add or delete> and insert <after consulting the approved regulator, vary (including by addition or deletion)>

Fergus Ewing

In section 6, page 5, line 41, leave out <contains information about the applicant's understanding of the application> and insert <understanding of the application>
In section 6, page 5, line 8, leave out <imposed under subsection (2)> and insert <or restrictions imposed under subsection (2) or (2C)>.

In section 6, page 5, line 9, leave out subsections (3) to (6).

After section 6,

After section 6, insert—

<Pre-approval consideration>

(1) Before deciding whether or not to approve the applicant as an approved regulator under section 6, the Scottish Ministers must consult—

(a) the Lord President,
(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
(c) such other person or body as they consider appropriate.

(2) In consulting under subsection (1), the Scottish Ministers—

(a) must send a copy of the application to the consultees,
(b) may send a copy of any revised application to any (or all) of them.

(3) The Scottish Ministers must, with reasons, notify the applicant if they intend to—

(a) refuse to approve it as an approved regulator, or
(b) impose conditions or restrictions under section 6(2) or (2C).

(4) If notification is given to the applicant under subsection (3), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.>

After section 6, insert—

<Lord President’s agreement>

(1) Despite section 6(1), the Scottish Ministers must not approve the applicant as an approved regulator unless the Lord President agrees to its being approved as such.

(2) The Scottish Ministers are to impose under section 6(2) such particular conditions relating to the expertise mentioned in section 6(1)(a)(i) as are reasonably sought by the Lord President when (and if) notifying them of the Lord President’s agreement for the purpose of subsection (1).

(3) The Lord President’s agreement is required for—
(a) the imposition of any—
   (i) conditions under section 6(2) (apart from conditions to which subsection
       (2) relates),
   (ii) restrictions under section 6(2C),
(b) the variation of any such conditions or restrictions under section 6(2D).>

Section 7

Fergus Ewing
19 In section 7, page 6, line 10, leave out <remove or vary> and insert <vary (including by addition
or deletion)>

Fergus Ewing
20 In section 7, page 6, line 11, leave out <conditions imposed under subsection (4)(b)> and insert
<restrictions or conditions imposed under subsection (3) or (4)(b)>

Section 8

Fergus Ewing
21* In section 8, page 7, line 7, at end insert—
   <( ) the compensation rules (see sections (Compensation rules: general) and
       (More about compensation arrangements)(1)),>

Fergus Ewing
22 In section 8, page 7, line 19, leave out from <before> to <consulted> in line 21 and insert
<without—
   (i) the Lord President’s agreement, and
   (ii) consulting>

Section 9

Fergus Ewing
23 In section 9, page 8, line 1, leave out <, with the consent of the Lord President,>

Fergus Ewing
24 In section 9, page 8, line 3, at end insert—
   <( ) Before making regulations under subsection (3), the Scottish Ministers must have the
       Lord President’s agreement.>
Section 14

Fergus Ewing

25 In section 14, page 10, leave out line 3

Section 17

Fergus Ewing

26 In section 17, page 11, line 7, leave out <legal services>

After section 19

Fergus Ewing

27 After section 19, insert—

<Compensation arrangements

Choice of arrangements

(1) An approved regulator must proceed with either option A or option B as regards a compensation fund from which to make good such relevant losses as may be suffered by reason of dishonesty on the part of its licensed legal services providers.

(2) Option A is for the approved regulator to maintain its own compensation fund (separate from the Guarantee Fund) in relation to its licensed providers.

(3) If option A is proceeded with, the compensation fund is to be—

(a) held by the approved regulator for such purpose as corresponds to the purpose for which the Guarantee Fund is held under section 43(2)(c) of the 1980 Act in relation to licensed providers,

(b) administered by it in such way as corresponds to the administration of the Guarantee Fund in accordance with section 43(3) to (7) of, and Part I of Schedule 3 to, the 1980 Act (so far as applicable in relation to licensed providers).

(4) Option B is for the approved regulator, by not maintaining its own compensation fund as mentioned in option A, to cause the Guarantee Fund to be administered as respects its licensed providers.

(5) For the purpose of option B, see section 43(2)(c) to (8) of, and Part I of Schedule 3 to, the 1980 Act.

(6) As soon as it has decided which of options A and B to proceed with, the approved regulator (where not the Law Society) must inform the Law Society of its decision.>

Robert Brown

27A As an amendment to amendment 27, line 6, at end insert—

<( ) Subsection (1) does not apply where the approved regulator is the Law Society as respects its licensed providers but section 43 of, and Part 1 of Schedule 3 to, the 1980 Act apply to those licensed providers by virtue of section 43(2)(c) of that Act.>
Robert Brown

27B As an amendment to amendment 27, line 21, leave out subsection (6) and insert—

<( ) An approved regulator must—

(a) decide which of Options A and B to proceed with as respects its licensed providers,
(b) if it decides to proceed with Option A, set up its compensation fund, and
(c) notify the Law Society of those decisions and of the details of any such compensation fund before licensing any entity as a licensed legal services provider under section 36.>

Fergus Ewing

28 After section 19, insert—

<Compensation rules: general

(1) For the purposes of this Part, the compensation rules are rules in pursuance of (as the case may be)—

(a) option A in section (Choice of arrangements), or
(b) option B in that section.

(2) In pursuance of option A, the rules must—

(a) state—

(i) the purpose of the approved regulator’s compensation fund,
(ii) as a minimum, the monetary amount to be contained in that fund,
(b) describe the way in which that fund is to be administered by the approved regulator,
(c) specify the criteria for qualifying for payment out of that fund,
(d) provide for the procedure for—

(i) making claims for such payment,
(ii) determining such claims,
(e) require the making of contributions to that fund by a licensed provider in accordance with the relevant scale of annual contributions fixed by virtue of section (Choice of arrangements)(3)(b),
(f) make provision for the destination (or distribution) of that fund in the event that the approved regulator ceases to operate.

(3) In pursuance of option B, the rules must require the making of contributions to the Guarantee Fund by a licensed provider in accordance with the relevant scale of annual contributions fixed under paragraph 1(3) of Schedule 3 to the 1980 Act.>

Robert Brown

28A As an amendment to amendment 28, line 24, at end insert—
Where the Law Society is the approved regulator it must make rules requiring its licensed providers to make contributions to the Guarantee Fund in accordance with paragraph 1(2B)(b) and (3) of Schedule 3 to the 1980 Act.

Fergus Ewing

29 After section 19, insert—

<More about compensation arrangements>

(1) Compensation rules may include such further compensation arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(2) The Scottish Ministers may by regulations make further provision about compensation arrangements as to licensed providers, including (in particular)—

(a) for the content of compensation rules,

(b) in connection with a compensation fund, for functions of approved regulators and licensed providers.

(3) In sections (Choice of arrangements) and (Compensation rules: general) and this section, the references to the Guarantee Fund are to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).

Section 22

Fergus Ewing

30 In section 22, page 13, line 2, leave out <with the consent of the Lord President,>

Fergus Ewing

31 In section 22, page 13, line 6, after <must> insert—

<(  ) have the Lord President’s agreement, and

(  )>

Section 24

Fergus Ewing

32 In section 24, page 13, line 28, leave out <legal services>
<Reporting to Law Society>

(1) This section applies in relation to any licensed legal services provider (whose approved regulator is not the Law Society) that is required, by compensation rules made by reference to section *(Compensation rules: general)(3)*, to make contributions to the Guarantee Fund.

(2) The approved regulator must report to the Law Society any—

(a) breach of the regulatory scheme by the licensed provider that the approved regulator discovers as regards the procedures arising under practice rules made by reference to section 18,

(b) suspicion held by the approved regulator that there is engagement in such financial impropriety as may (in the approved regulator’s opinion) give rise to the risk of a claim being made on the Guarantee Fund.

(3) The approved regulator must make available to the Law Society any report prepared by the approved regulator about an inspection carried out by it as regards compliance with—

(a) the procedures arising under practice rules made by reference to section 18,

(b) any other financial procedure as regards which the approved regulator has functions under this Part.

(4) The approved regulator must inform the Law Society of any further action that it intends to take (or has taken) in relation to any of the matters mentioned in subsections (2) and (3).

(5) In this section and section *(Steps open to Society)*, the references to the Guarantee Fund are to it as defined in section *(More about compensation arrangements)(3).*

Fergus Ewing

34 After section 25, insert—

<Steps open to Society>

(1) Where—

(a) section *(Reporting to Law Society)* applies, and

(b) the Law Society suspects that the approved regulator is failing to enforce under this Part any financial procedure to which that section relates,

the Society may refer the circumstances to the Scottish Ministers.

(2) But the Society may make a referral under subsection (1) only if—

(a) it has made representations to the approved regulator in respect of its suspicion, and

(b) in light of any response to them (or where none is received timeously), its suspicion is not relieved.

(3) In a referral under subsection (1), the Society may—

(a) request that the Scottish Ministers take such action under this Part as they consider appropriate,

(b) seek their consent to the Society’s taking of the step mentioned in subsection (5).

(4) That consent may be—
(a) sought only if the Society suspects that the suspected failure may be facilitating to any extent engagement in such financial impropriety as may (in the Society’s opinion) give rise to the risk of a claim being made on the Guarantee Fund,

(b) given only if the Scottish Ministers are satisfied (on information provided by the Society) that—
   (i) the Society’s suspicions are reasonable, and
   (ii) it is necessary (by way of investigation) that the step be taken.

(5) The step is that the Society inspect, at the licensed provider’s premises, any document, record or other information (in any form) found there which—
   (a) relates to—
      (i) the licensed provider’s client account, or
      (ii) any other financial account held by it, and
   (b) is relevant in relation to any financial procedure to which section (Reporting to Law Society) relates.

Fergus Ewing

35 After section 25, insert—

<Financial inspection by Society>

(1) If the relevant consent is given under subsection (4)(b) of section (Steps open to Society), the Law Society may take the step mentioned in subsection (5) of that section.

(2) The licensed provider must co-operate with the Society in connection with the taking of the step.

(3) But the Society does not have authority to take the step (or enter the premises) unless the Society has—
   (a) consulted the approved regulator about the taking of it, and
   (b) given the licensed provider at least 48 hours notice of the taking of it.

(4) Following the taking of the step, the Society—
   (a) must report its findings to—
      (i) the approved regulator, and
      (ii) the Scottish Ministers,
   (b) in the report to the Scottish Ministers, may request that they take such action (or further action) under this Part as they consider appropriate.

(5) In this section, the references to taking the step mentioned in section (Steps open to Society)(5) are to its being taken by the Society’s representatives as appointed for the purpose of this section.

Section 26

Fergus Ewing

36 In section 26, page 14, line 25, leave out <, with the consent of the Lord President.>
In section 26, page 14, line 28, after <must> insert—

<(<  ) have the Lord President’s agreement, and
(  )>

Move section 26 to after section 35

Move section 27 to after section 35

In section 29, page 16, line 18, leave out subsection (5A) and insert—

<(5A) The Lord President’s agreement is required for the taking of any of the measures mentioned in subsection (4) except paragraph (d).>

In section 29, page 16, line 20, leave out <, with the consent of the Lord President.>

In section 29, page 16, line 25, after <must> insert—

<(<  ) have the Lord President’s agreement, and
(  )>

In section 31, page 17, line 4, leave out <legal services>

In section 32, page 17, line 21, leave out <legal services>
Section 35

Robert Brown  
Supported by: James Kelly

122 In section 35, page 19, line 15, after <(2)> insert—

<(  ) without the Lord President’s agreement, and

(  )>

Section 37

Fergus Ewing

45 In section 37, page 19, line 37, at end insert—

<(  ) does so in conjunction with section 37A.>

Section 37A

Fergus Ewing

46* In section 37A, page 21, leave out lines 9 to 22 and insert <the qualifying investors in it (taken together) have at least a 51% stake in the total ownership or control of the entity.>

(1A) For the purpose of subsection (1), a “qualifying investor” is—

(a) a solicitor investor, or

(b) an investor who is a member of another regulated profession.

(1B) In subsection (1A)(b), a “regulated profession” is a profession the professional activities of whose members (and qualifications for membership of which) are, under statutory or administrative arrangements, regulated by a professional association.

(1C) Despite the generality of subsections (1A)(b) and (1B), the Scottish Ministers may by regulations specify in connection with those subsections what is, or is not, to be regarded as a regulated profession, a professional association, professional activities (or qualifications) or membership of a profession.>

Richard Baker

46A As an amendment to amendment 46, line 1, leave out from <<the> to end of line 5 and insert—

<(a) solicitor investors have (taken together) at least a 51% (but not a 100%) stake in the total ownership or control of the entity, and

(b) non-solicitor investors who are not members of another regulated profession have (taken together) no more than a 25% stake in the total ownership or control of the entity.>

Richard Baker

46B As an amendment to amendment 46, line 6, leave out <(1A)(b)> and insert <(1)(b)>
Richard Baker

46C As an amendment to amendment 46, line 9, leave out <(1A)(b)> and insert <(1)(b)>

Fergus Ewing

46D* As an amendment to amendment 46, line 9, leave out <may by regulations> and insert—

\(<( \text{ )} \text{ are by regulations to}>\)

Fergus Ewing

46E* As an amendment to amendment 46, line 11, after <profession,> insert—

\(<( \text{ )} \text{ may by regulations specify in connection with those subsections what is, or is not, to be regarded as}>\)

Fergus Ewing

46F* As an amendment to amendment 46, line 12, at end insert—

\(<( \text{ )} \text{ Before making regulations under subsection (1C), the Scottish Ministers must—}\>

(a) have the Lord President’s agreement, and

(b) consult—

(i) the Law Society,

(ii) every approved regulator,

(iii) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(iv) such other person or body as they consider appropriate.>

Robert Brown

123 In section 37A, page 21, leave out lines 9 to 22 and insert <solicitor investors have (taken together) at least a 51% stake (but not a 100% stake) in the total ownership or control of the entity.>

Section 39

Fergus Ewing

47 In section 39, page 22, line 11, leave out <legal services>

Section 40

Fergus Ewing

48 In section 40, page 23, line 10, leave out <legal services>
Section 41

Fergus Ewing
49 In section 41, page 24, line 2, leave out <legal services>

Section 46

Fergus Ewing
50 In section 46, page 28, line 26, leave out <the equivalent amount to the maximum on level 3 of> and insert <an amount equivalent to level 4 on>

Fergus Ewing
51 In section 46, page 28, line 28, leave out <has been sentenced to imprisonment for a term of 2 years> and insert <sentenced to imprisonment for a term of 12 months>

Section 47

Bill Aitken
Supported by: James Kelly
124 In section 47, page 29, line 6, leave out <carry out legal work> and insert <provide legal services>

Bill Aitken
Supported by: James Kelly
125 In section 47, page 29, line 11, at end insert <not disqualified under section 44(2), (3)(a), (4), (5)(a), (6)(a) or (6)(b) and is>

Fergus Ewing
52 In section 47, page 29, line 13, leave out from <or> to end of line 14

Bill Aitken
Supported by: James Kelly
127 In section 47, page 29, line 17, leave out <work> and insert <services>

Section 50

Bill Aitken
Supported by: James Kelly
128 In section 50, page 32, line 1, after <dishonesty> insert <or violence>

Fergus Ewing
53 In section 50, page 32, line 2, leave out <the equivalent amount to the maximum on level 3 of> and insert <an amount equivalent to level 4 on>
In section 50, page 32, line 4, leave out <has been sentenced to imprisonment for a term of 2 years> and insert <sentenced to imprisonment for a term of 12 months>.

In section 50, page 32, line 7, leave out <control or substantial influence in the body’s affairs> and insert <(to any extent)—
(a) ownership or control of the body, or
(b) any other material interest in it,>.

Section 50A

In section 50A, page 32, line 13, leave out <legal services>.

Section 51

In section 51, page 32, line 37, leave out <legal services>.

Section 52

In section 52, page 33, line 21, leave out <with the consent of the Lord President>.

In section 52, page 33, line 36, at end insert—
<(  ) for circumstances where an interest is held by a body, set out—
(i) what interest (or type) in the body counts towards the interest held by it,
(ii) the extent to which the interest in it so counts.>.

Before making regulations under subsection (2A), the Scottish Ministers must have the Lord President’s agreement.

In section 52, page 34, line 6, at end insert <a firm of solicitors or an incorporated practice,>.

In section 52, page 34, line 9, after <European> insert <or foreign>.
In section 52, page 34, line 9, at end insert—

< ( ) the reference to a “solicitor investor” in a licensed provider is to be construed accordingly.>

Section 54

In section 54, page 34, line 27, at end insert—

< ( ) through the application of section 37 or 37A or otherwise, a licensed provider is no longer eligible to remain as such,>

In section 54, page 34, line 28, leave out <legal services>

In section 54, page 35, line 4, after <delay> insert <and no later than 7 days after an event referred to in subsection (1)>

In section 54, page 35, line 11, at end insert—

<(3A) Even if the exception mentioned in subsection (3) is made out, the approved regulator may suspend the licence pending rectification of the situation.>

In section 54, page 35, line 12, leave out <subsection (3)> insert <subsections (3) and (3A)>

In section 54, page 35, line 13, at end insert—

<( ) For so long as the licensed provider’s licence is not revoked or suspended under subsection (3) or (3A) in connection with the situation, the situation alone does not prevent the licensed provider from continuing (or recommencing) to provide legal services.>

In section 54, page 35, line 13, at end insert—

<( ) Where within 28 days of subsection (1) first applying to a licensed provider that subsection no longer applies and—

(a) having complied with subsection (2), and

(b) the licensed provider satisfies the approved regulator that subsection (1) no longer applies,
the licensed provider will continue to be licensed or, as the case may be, have its licence reinstated.

Section 55

Fergus Ewing

69 In section 55, page 35, line 23, leave out <legal services>

Section 65

Bill Aitken
Supported by: James Kelly

131* In section 65, page 43, line 2 after <provider> insert <and, for this purpose, a practitioner includes a designated person within the meaning of section 47>

Fergus Ewing

70 In section 65, page 43, line 5, at end insert—

<(  ) Where an approved regulator receives (from a person other than the Commission) a complaint about the conduct of, or any services provided by, a practitioner within one of its licensed providers, the approved regulator must without delay send to the Commission the complaint and any material that accompanies it.>

Fergus Ewing

71 In section 65, page 43, line 15, after <terms> insert <and conditions>

Fergus Ewing

72 In section 65, page 45, line 2, leave out <Sections 23 to 25> and insert <Parts 1 and 2>

Fergus Ewing

73 In section 65, page 45, line 6, leave out <sections> and insert <Parts>

Fergus Ewing

74 In section 65, page 45, line 8, at end insert—

<57DA Effectiveness of compensation fund

(1) Section 39 also applies in relation to a compensation fund of its own that is maintained by an approved regulator in furtherance of section (Choice of arrangements)(2) of the Legal Services (Scotland) Act 2010.

(2) For the application of section 39 by virtue of subsection (1)—

(a) any such compensation fund is to be regarded as falling within subsection (1)(c) of that section,

(b) the approved regulator is to be regarded as the relevant professional organisation.>
Bill Aitken
Supported by: James Kelly

In section 65, page 45, line 11, at end insert—

<“designated person”,>

After section 70A

Fergus Ewing

After section 70A, insert—

<Corporate offences

(1) Subsection (2) applies where—

(a) an offence under this Part is committed by a relevant organisation, and
(b) the commission of the offence—

(i) involves the connivance or consent of, or
(ii) is attributable to the neglect of,

a responsible official of the organisation.

(2) The official (as well as the organisation) commits the offence.

(3) For the purpose of this section—

(a) a “relevant organisation” is—

(i) a company,
(ii) a limited liability partnership,
(iii) an ordinary partnership, or
(iv) any other body or association,

(b) a “responsible official” is—

(i) in the case of a company, a director, secretary, manager or other similar officer,
(ii) in the case of a limited liability partnership, a member,
(iii) in the case of an ordinary partnership, a partner,
(iv) in the case of another body or association, a person who is concerned in the management or control of its affairs,

but in each case also extends to a person purporting to act in such a capacity.>

Section 74

Fergus Ewing

In section 74, page 49, line 25, leave out <, with the consent of the Lord President,>

Fergus Ewing

In section 74, page 49, line 36, leave out from <(any)> to end of line 37
Fergus Ewing

78 In section 74, page 50, line 1, leave out <with the consent of the Lord President, amend, add or delete> and insert <after consulting the approving body, vary (including by addition or deletion)>

Section 81C

Fergus Ewing

79 In section 81C, page 56, line 7, leave out from <(any) to end of line 8 and insert—

< ( ) The Scottish Ministers may, after consulting the approving body, vary (including by addition or deletion) any conditions imposed under subsection (2)(c).>

Section 83

Fergus Ewing

80 In section 83, page 62, line 18, leave out <its> and insert <the relevant>

Fergus Ewing

81 In section 83, page 62, line 21, leave out <Sections 23 to 25> and insert <Parts 1 and 2>

Fergus Ewing

82 In section 83, page 62, line 25, leave out <sections> and insert <Parts>

Fergus Ewing

83 In section 83, page 63, line 6, leave out <licensed providers> and insert <confirmation agents or (as the case may be) will writers>

After section 84A

Fergus Ewing

84 After section 84A, insert—

<Corporate offences

(1) Subsection (2) applies where—

(a) an offence under this Part is committed by a relevant organisation, and

(b) the commission of the offence—

(i) involves the connivance or consent of, or

(ii) is attributable to the neglect of,

a responsible official of the organisation.

(2) The official (as well as the organisation) commits the offence.

(3) For the purpose of this section—

(a) a “relevant organisation” is—
(i) a company,
(ii) a limited liability partnership,
(iii) an ordinary partnership, or
(iv) any other body or association,

(b) a “responsible official” is—

(i) in the case of a company, a director, secretary, manager or other similar officer,
(ii) in the case of a limited liability partnership, a member,
(iii) in the case of an ordinary partnership, a partner,
(iv) in the case of another body or association, a person who is concerned in the management or control of its affairs,

but in each case also extends to a person purporting to act in such a capacity.

After section 85

Richard Baker

133 After section 85, insert—

<Regulation of estate administrators

(1) The Scottish Ministers may by regulations make provision in relation to estate administrators which is equivalent to the provision made in relation to confirmation agents by Chapter 1 (whether by amending that Chapter to include reference to estate administrators or otherwise).

(2) For the purposes of this section, an estate administrator is a person who provides services (other than the services mentioned in section 72(2)) relating to the administration of the estate of a deceased person (for example, investigating and establishing the assets and liabilities contained within the estate of a deceased person, establishing the executors’ title to the deceased person’s assets, administering and handling the assets of a deceased person or accounting for the executor’s receipts and payments with the deceased person’s assets).

After section 91

Bill Aitken

134* After section 91, insert—

<Practice rules: registered firms of solicitors

(1) In section 34(1A) of the 1980 Act—
(a) after paragraph (e)(ii) insert—

“(iia) that any recognition granted under this section shall have effect from the date it bears but shall expire on 31 October next after it is issued;”

(b) paragraph (e)(iii) is repealed.

(2) After section 34(1A) (Rules as to professional practice etc) of the 1980 Act insert—
“(1AA) Rules under this section may make provision requiring firms of solicitors to register with the Council and providing for their regulation and subsection (1A) shall apply for the purpose of regulating and registering such firms as it applies for the purpose of regulating and recognising incorporated practices, subject to any necessary modifications (and firms of solicitors when registered and for as long as they are registered are in this Act referred to as “registered firms of solicitors”).

(1AB) In subsection (1AA), a “firm of solicitors” includes—

(a) a single solicitor practising under the solicitor’s own name; and

(b) a solicitor otherwise practising as a sole practitioner.”

(3) In section 65(1) of the 1980 Act, after the definition of “registered European lawyer” insert—

““Registered firms of solicitors” shall be construed in accordance with section 34(1AA);”

(4) In Schedule 1 to the 1980 Act (the Law Society of Scotland), after paragraph 6A insert—

“6B (1) Every practice shall, for each year, pay to the Society such subscription as may be fixed from time to time by the Society in general meeting and different subscriptions may be fixed for different kinds of practices.

(2) The subscription shall be payable by the practice at the time of its application for registration or recognition.

(3) If a practice is first registered or recognised after the beginning of any year, the subscription payable by it shall be calculated by reference to the number of months remaining in that year after it is registered or recognised.

(4) In this paragraph and in paragraph 6C,

“practice” means a registered firm of solicitors or an incorporated practice; and

“year” means the period of 12 months commencing on 1 November or such other day as may be fixed by the Council.

6C (1) The Society may, in addition to the subscription imposed in paragraph 6B(1), impose in respect of any year a special subscription on all practices of such amount and payable at such time and for such specified purposes as the Society may determine in general meeting.

(2) The Society may determine in general meeting that different special subscriptions may be imposed under sub-paragraph (1) in respect of different kinds of practices or that the special subscription shall not be payable by a kind of practice.

(3) No imposition may be made under sub-paragraph (1) unless a majority of members voting at the general meeting at which it is proposed has, whether by proxy or otherwise, voted in favour of its being made.”>
Section 91D

Fergus Ewing
85 In section 91D, page 71, line 16, at end insert—

<(  ) in paragraph (b), after “director” insert “, member”,> 

Fergus Ewing
86 In section 91D, page 71, line 18, after <it> insert <in connection with its provision of legal services (with the same meaning as for Part 2 of the 2010 Act)> 

Fergus Ewing
87 In section 91D, page 71, line 21, after <(3),> insert—

<(  ) in paragraph (cc), after “director” in the second place where it occurs insert “, member”,

( )> 

Bill Aitken
Supported by: James Kelly
135 In section 91D, page 71, leave out lines 22 to 25 and insert—

<“(cd) to a licensed provider or any investor or person who owns, manages or controls or is within the licensed provider in respect of a loss suffered by it or any such person in connection with the licensed provider’s provision of legal services by reason of dishonesty on the part of any such persons;”;> 

Fergus Ewing
88 In section 91D, page 71, line 23, leave out from <in> to end of line 25 

Bill Aitken
Supported by: James Kelly
136* In section 91D, page 71, line 25, at end insert—

<(  ) the word “or” immediately preceding paragraph (g) is repealed,

(  ) after paragraph (g) insert “; or

(h) in respect of any default of a licensed legal services provider or any person within it unless the Council is satisfied—

(i) that the act of default is closely connected with the provision of legal services (within the meaning of the 2010 Act) by that provider; and>
(ii) that the provider and any investor in it and any person who owns, manages or controls it shall have submitted to the Council an irrevocable undertaking it or they will, jointly and severally (as the case may be), reimburse to the Society the amount of any grants and that to the extent to which the Society is unable to recover that amount from that provider or any liquidator, administrator or trustee in bankruptcy of it.”

Fergus Ewing

89 In section 91D, page 71, line 31, leave out <a> and insert <its own>

Bill Aitken

137 In section 91D, page 71, line 32, at end insert—

<(8A) In the case where the Council is not the approved regulator of the licensed legal services provider and without prejudice to any action which that approved regulator may take, the Council may take action to—

(a) enable the Council to ascertain—

(i) whether the rules made under section 18 of the 2010 Act are being complied with by that provider; and

(ii) whether any provider which has failed to comply with those rules has remedied that failure and is complying with those rules; and

(b) recover from that provider any costs incurred by the Council in so doing as the Council may do in relation to a licensed legal services provider regulated by them in accordance with account rules made under section 35.>

Fergus Ewing

90 In section 91D, page 71, line 36, at end insert—

<( ) In section 43 of the 1980 Act—

(a) in subsection (2), after paragraph (a) insert—

“(aa) any conveyancing or executry practitioner or an employee of the practitioner in connection with the practitioner’s practice as such, even if subsequent to the act concerned the practitioner has ceased to provide conveyancing or executry services;”,

(b) in subsection (3), after paragraph (c) insert—

“(ca) to a conveyancing or executry practitioner in respect of a loss suffered by reason of dishonesty on the part of a partner or employee of the practitioner in connection with the practitioner’s practice as such;”.

( ) Section 21C of the 1990 Act is repealed, but—

(a) the fund maintained under subsection (1) of that section immediately before its repeal by this subsection continues to be vested in the Council, and

(b) the Council is to apply that fund to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).>
Section 91E

Fergus Ewing
Supported by: James Kelly

91 In section 91E, page 72, line 5, at end insert—

<(  ) after “directors” (in that head), insert “or members”.,>

Bill Aitken
Supported by: James Kelly

138 In section 91E, page 72, line 7, after “providers” insert <, or—

(c) partners in a registered firm of solicitors, or
(d) in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practising under the solicitor’s own name or a solicitor otherwise practising as a sole practitioner.”.>

Fergus Ewing

92 In section 91E, page 72, line 26, after <directors> insert <, members>

Fergus Ewing

93 In section 91E, page 72, line 33, at end insert—

<(  ) In Schedule 3 to the 1980 Act, after paragraph 1B insert—

“1C (1) Paragraph 1 applies to a conveyancing or executry practitioner as it applies to a solicitor.
(2) But it does so with the following of its provisions to be disregarded—
(a) the reference in sub-paragraph (1) to an application for a practising certificate,
(b) sub-paragraphs (2), (2A), (6) and (9).
(3) If a conveyancing or executry practitioner fails to pay an annual contribution due by virtue of this paragraph, the Council may suspend (pending payment) the relevant entry in the register maintained by them under section 17(1) or 18(1) of the 1990 Act.
(4) For the purposes of section 43 and this paragraph, the references to a conveyancing or executry practitioner (or conveyancing or executry services) are to be construed in accordance with section 23 of the 1990 Act.”.>

Bill Aitken
Supported by: James Kelly

139 In section 91E, page 72, line 33, at end insert—

<(  ) In Schedule 3 to the 1980 Act, in paragraph 1—
(a) after sub-paragraph (2B) insert—
“(2BB) Subject to the provisions of this Act, there shall be paid to the Society on behalf of the Guarantee Fund by every registered firm of solicitors in respect of each year during which, or part of which, it is registered under section 34(1AA) a contribution (hereafter referred to as an “annual practice contribution”) in accordance with the relevant scale of such contributions referred to in sub-paragraph (3).”,

(b) in sub-paragraph (3), after “corporate contributions” insert “and the annual practice contributions”,

(c) after sub-paragraph (3) insert—

“(3B) The scales of annual practice contributions—

(a) are to be fixed by reference to all relevant factors including the number of solicitors who are partners, members or employees of the registered firm of solicitors; and

(b) may make different provision for different classes of registered firms of solicitors.”,

(d) in sub-paragraph (4), after “provider” insert “and no annual practice contribution by a registered firm of solicitors”,

(e) in sub-paragraph (5)—

(i) the words from “every” in the first place it occurs to “upon” in the second place it occurs become head (a),

(ii) the words from “upon” in the second place it occurs to “contribution”)” become head (b),

(iii) after head (b) (as so numbered) insert—

“(c) every registered firm of solicitors a contribution (hereafter referred to as a “special practice contribution”),

(iv) after “scale” insert “or scales”,

(v) for the word “(3)” substitute “(3A) and (3B)”, and

(vi) after “contribution” where it second occurs insert—

“(d) and a special practice contribution”,

(f) in sub-paragraph (8), after “provider” insert “or of a registered firm of solicitors”.

After section 91G

Bill Aitken

141* After section 91G, insert—

<Membership of the Society

(1) In section 2 (membership of the Society) of the 1980 Act—

(a) in subsection (2)—

(i) after “Society” insert—

“(a) any solicitor who by virtue of section 24 is exempted from taking out a practising certificate;
(2)

In Schedule 1 to the 1980 Act (the Law Society of Scotland)—

(a) in paragraph 2, before head (a) insert—

“(za) the constitution, membership and classes of members, management and proceedings of the Society;”

(b) in paragraph 3—

(i) heads (a) and (b) are repealed; and

(ii) in head (c), after “contain” insert “, or may authorise the Council to make standing orders which contain,”.

Section 92

Bill Aitken

142 In section 92, page 73, line 34, leave out <solicitor members to the Council> and insert <members of the Society who are solicitors to be “solicitor members of the Council”>

Bill Aitken

143 In section 92, page 73, line 35, leave out <non-solicitor members to the Council> and insert <persons who are not members of the Society and who satisfy paragraph 3A(3) to be “non-solicitor members of the Council”>
Bill Aitken
144 In section 92, page 74, leave out lines 1 and 2

Section 93

Fergus Ewing
94 In section 93, page 74, line 12, leave out <section 3B> and insert <sections 3B to 3G>

Fergus Ewing
95 In section 93, page 74, line 18, at end insert <, and

( ) ensure that the committee continues so to exercise those functions (in particular, for the discharge of the Council’s responsibility as mentioned in section 3A(9)(a)).>

Bill Aitken
145 In section 93, page 74, line 24, leave out <(acting in any other capacity)>

Fergus Ewing
96 In section 93, page 74, line 24, after <not> insert—

<(a) exercise their regulatory functions through any other means, or
(b)>

Fergus Ewing
97 In section 93, page 74, line 25, at end insert—

<(2B) Subsection (2A)(a) is subject to—

(a) any determination made by the regulatory committee in a particular case that it is necessary, for ensuring that something falling within the Council’s regulatory functions is achieved appropriately, that specific action be taken otherwise than through the regulatory committee, and

(b) such directions as the regulatory committee gives the Council (acting in any other capacity) in connection with the determination.>

Robert Brown
146 In section 93, page 74, line 25, at end insert—

<( ) Subsection (2A) does not prevent the Council setting performance targets, standards and timescales for the conduct of the work of the regulatory committee.>

Robert Brown
147 In section 93, page 74, line 25, at end insert—

<( ) Subsection (2A) does not prevent the Council removing a member of the regulatory committee from office as such if the member—
(a) becomes insolvent,
(b) has been absent from meetings of the committee without permission for longer than 6 consecutive months,
(c) has been convicted of an offence, or
(d) is otherwise unable or unfit to discharge the functions of a member of the committee.

Fergus Ewing
98 In section 93, page 74, line 25, at end insert—

<3C Particular rules applying

Robert Brown
148 In section 93, page 74, line 33, leave out from <committee> to end of line and insert <Council is to appoint one of its non-solicitor members as convener of the committee,>

Bill Aitken
149 In section 93, page 74, line 35, insert—

<( ) the committee may arrange for any of its functions to be discharged by a sub-committee of it,>

Fergus Ewing
99 In section 93, page 74, leave out lines 36 to 38 and insert—

<( ) Any sub-committee of the regulatory committee (formed under section 3A(2)(a)) is subject to the particular rules applying as respects the regulatory committee, except that—

(a) a meeting of the sub-committee need not be chaired by one of its lay members,
(b) it may co-opt members from outside the membership of the regulatory committee.>

Fergus Ewing
100 In section 93, page 75, line 1, leave out <But>

Fergus Ewing
101 In section 93, page 75, leave out lines 4 to 17

Fergus Ewing
102 In section 93, page 75, leave out lines 27 to 35

Fergus Ewing
103 In section 93, page 75, line 35, at end insert—
Resolving regulatory disputes

(1) This section applies in relation to any dispute arising between the regulatory committee and the Council (acting in any other capacity) with respect to the application of section 3B.

(2) If the dispute cannot be settled by the parties, it is to be submitted to (and resolved by) arbitration.

(3) The arbitrator is to be appointed—
   (a) jointly by the parties, or
   (b) in the absence of agreement for joint appointment, by the Lord President on a request made by either (or both) of them.

(4) The arbitrator’s resolution of the dispute is final and binding on the parties.

Further provision for section 3B etc.

(1) The Scottish Ministers may by regulations—
   (a) prescribe a maximum—
      (i) number of members that the regulatory committee, or any sub-committee of it, may have,
      (ii) proportion of the membership (of either) that may comprise co-opted members,
   (b) make further provision about the Council’s regulatory functions if they believe that such provision is necessary for ensuring that those functions are exercised in accordance with the purpose stated in section 3B(2),
   (c) modify (by elaboration or exception) the definition in sections 3F and 3G if they believe that such modification is appropriate.

(2) Before making regulations under subsection (1), the Scottish Ministers must consult the Council (and take account of sections 4 and 4A of the 2010 Act).

(3) The power to make regulations under subsection (1) is exercisable by statutory instrument; but—
   (a) a statutory instrument containing regulations under subsection (1)(a) is subject to annulment in pursuance of a resolution of the Scottish Parliament,
   (b) a statutory instrument containing regulations under subsection (1)(b) or (c) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament.

Meaning of “regulatory functions”

(1) For the purposes of sections 3B to 3E, the Council’s “regulatory functions” are their functions of regulating in respect of any matter the professional practice, conduct and discipline of—
   (a) solicitors (including firms of solicitors) and incorporated practices,
   (b) other legal practitioners, for example—
(i) registered European or foreign lawyers,
(ii) conveyancing or executy practitioners.

(2) Those functions include (in particular) their functions as to—
(a) setting standards of qualification, education and training,
(b) admission of persons to the profession,
(c) keeping the roll and other registers,
(d) administering the Guarantee Fund,
(e) making regulatory rules under any relevant enactment.

(3) In subsection (1)(b)(ii), the reference to conveyancing or executy practitioners
is to be construed in accordance with section 23 of the 1990 Act.

3G Extended meaning under section 3F

If the Society acts as an approved regulator as mentioned in section 1A, the
Council’s “regulatory functions” for the purposes of sections 3B to 3E also
comprise such regulatory functions as—
(a) fall within the meaning of that expression as given for the purposes of
Part 2 of the 2010 Act (by section 23(1) of that Act), and
(b) are exercisable under that Part of that Act by the Society in its capacity
as an approved regulator as so mentioned.”.

Fergus Ewing

104 In section 93, page 75, line 35, at end insert—
<(  ) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

“regulatory committee” means the regulatory committee formed in
accordance with section 3B(1);”.

Section 94A

Fergus Ewing

105 In section 94A, page 77, line 7, at end insert—
<(  ) In section 18 (suspension of practising certificates) of the 1980 Act—
(a) after subsection (1) insert—
“(1ZA)The Council may suspend from practice a solicitor who—
(a) has been convicted of an offence involving dishonesty, or
(b) in respect of an offence, has been—
(i) fined an amount equivalent to level 4 on the standard scale or more
(whether on summary or solemn conviction), or
(ii) sentenced to imprisonment for a term of 12 months or more.”,
(b) in subsection (2), after “subsection (1)” insert “or (1ZA)”.
>
Fergus Ewing

106 In section 94A, page 77, line 10, leave out from beginning to <(5A)> in line 11 and insert—

<“(5B) A suspension from practice arising by virtue of section 18(1ZA) expires if the
grounds for it no longer apply.

(5C) On the occurrence of any of the circumstances mentioned in subsections (4) to
(5B)>>

Fergus Ewing

107 In section 94A, page 77, line 12, at end insert—

<(  ) in subsection (6), after “section 18(1)” insert “or by virtue of section 18(1ZA)”>>

Fergus Ewing

108 In section 94A, page 77, line 12, at end insert—

<(  ) In section 24F (suspension of registration certificate) of the 1980 Act—

(a) after subsection (1) insert—

“(1A) The Council may suspend from practice a registered European lawyer who—

(a) has been convicted of an offence involving dishonesty, or

(b) in respect of an offence, has been—

(i) fined an amount equivalent to level 4 on the standard scale or more
(whether on summary or solemn conviction), or

(ii) sentenced to imprisonment for a term of 12 months or more.”,

(b) in subsection (2), after “subsection (1)” insert “or (1A)”.)>

Fergus Ewing

109 In section 94A, page 77, line 15, leave out from beginning to <(4)> in line 16 and insert—

<“(4A) A suspension from practice arising by virtue of section 24F(1A) expires if the
grounds for it no longer apply.

(4B) On the occurrence of any of the circumstances mentioned in subsections (2) to
(4A)>>

Fergus Ewing

110 In section 94A, page 77, line 17, at end insert—

<(  ) in subsection (5), after “section 24F(1)” insert “or by virtue of section 24F(1A)”>>

After section 94A

Fergus Ewing

111 After section 94A, insert—

<Accounts rules fee

(1) After section 37 of the 1980 Act insert—
“37A Accounts fee

(1) An annual fee set in accordance with this section (the “accounts fee”) is to be paid by each—
   (a) solicitor who is required by paragraph 1 of Schedule 3 (as read with section 43(7)) to pay an annual contribution on behalf of the Guarantee Fund,
   (b) incorporated practice that is required by that paragraph of that Schedule to pay an annual corporate contribution on that behalf.

(2) The accounts fee is also to be paid by each—
   (a) registered European lawyer or registered foreign lawyer who is required by virtue of paragraph 1A or 1B of that Schedule to pay an annual contribution on that behalf,
   (b) multi-national practice to which the accounts rules apply by virtue of an enactment.

(3) The accounts fee is to be set by the Council for the purpose of funding the exercise of their function of securing compliance (by the categories specified in subsections (1) and (2)) with the accounts rules.

(4) The accounts fee is to be—
   (a) set—
      (i) no later than 30 September each year in respect of the 12 month period beginning with 1 November that year, or
      (ii) by reference to such other dates as the Council may fix,
   (b) paid to the Council by such date as they may fix.

(5) The accounts fee may be set—
   (a) so as to involve different amounts (including nil) for different—
      (i) categories (as specified in subsections (1) and (2)),
      (ii) circumstances (by reference to all relevant factors),
   (b) in the case of incorporated practices, by particular reference to the number of solicitors that they have as directors, members or employees.

(6) The Council may take such steps as they consider necessary for recovering the accounts fee due in accordance with this section.”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““accounts fee” has the meaning given by section 37A(1);”.>
(a) in subsection (1)(b), for “sentenced to a term of imprisonment of not less than 2 years” substitute “fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction) or sentenced to imprisonment for a term of 12 months or more”.

(b) in subsection (2), after paragraph (bb) insert—

“(bc) where—

(i) an incorporated practice has been convicted, or has been found to have failed, as referred to in subsection (1)(c) or (d), and

(ii) the Tribunal consider that the complainer has been directly affected by any misconduct by the practice to which the conviction or failure is (to any extent) attributable,

direct the practice to pay to the complainer compensation (for loss, inconvenience or distress resulting from the misconduct) of such amount not exceeding £5,000 as the Tribunal may specify;”;

(c) in subsection (3A), for “subsection (2)(c), (d) and (e)” substitute “subsection (2)(bb) to (e),

(d) in subsection (7C), after “paragraph (bb)” insert “or (bc),

(e) in subsection (9), after “subsection (2)(bb)” insert “and (bc)”.

(2) In section 54 (Appeals from decisions of Tribunal) of the 1980 Act, in subsections (1C), (1D) and (1E), after “section 53(2)(bb)” in each place where it occurs insert “or (bc)”.>
“(vi) a registered European or foreign lawyer, professional services that are in any respect not of the quality which could reasonably be expected of a competent lawyer of that type;”;

(b) in the definition of “practitioner”, after paragraph (g) insert—

“(h) a registered European or foreign lawyer, whether or not registered at that time and notwithstanding that subsequent to that time the lawyer’s registration has ceased to have effect or the lawyer has stopped practising;”;

(c) after the definition of “practitioner” insert—

““registered European or foreign lawyer” is to be construed in accordance with section 65(1) of the 1980 Act;”;

(d) in the definition of “relevant professional organisation”, after paragraph (d) insert—

“(e) a registered European or foreign lawyer, the Council;”;

(e) in the definition of “unsatisfactory professional conduct”, after paragraph (d) insert—

“(e) a registered European or foreign lawyer, conduct that is not of the standard which could reasonably be expected of a competent and reputable lawyer of that type;”.

After section 98

Bill Aitken

151* After section 98, insert—

<Further amendments to the 1980 Act

Schedule (Amendments to the 1980 Act consequential upon, or supplementary to, the 2007 Act) amends the 1980 Act in connection with the 2007 Act which makes consequential and supplemental provision to that Act for the purposes, or in consequence, of or in connection with, the 2007 Act.>

Section 99

Richard Baker

152 In section 99, page 79, line 26, at end insert—

<( ) section 5(5A),>

Fergus Ewing

114 In section 99, page 79, line 31, at end insert—

<( ) section 37A(1C),>

Richard Baker

153 In section 99, page 80, line 2, at end insert—
<(  ) section (Regulation of estate administrators),>

Section 99A

Richard Baker

154 In section 99A, page 80, line 9, leave out <percentage specified in section 37A(1)(a)> and insert—

<(  ) first of the two percentages specified in subsection (1)(a) of section 37A,
(  ) percentage specified in subsection (1)(b) of that section,>

Robert Brown

155 In section 99A, page 80, line 9, leave out <percentage specified in section 37A(1)(a)> and insert <first of the two percentages specified in section 37A(1),>

Fergus Ewing

115 In section 99A, page 80, line 9, leave out <37A(1)(a)> and insert <subsection (1) of section 37A>

Fergus Ewing

116 In section 99A, page 80, line 10, at end insert <(and consequentially the references in this Act to that section)>

Schedule 3

Fergus Ewing

117 In schedule 3, page 87, line 19, leave out <, with the consent of the Lord President,>

After schedule 8

Bill Aitken

156* After schedule 8, insert—

<SCHEDULE
(introduced by section (Further amendments to the 1980 Act))

AMENDMENTS TO THE 1980 ACT CONSEQUENTIAL UPON, OR SUPPLEMENTARY TO, THE 2007 ACT

1 (1) The 1980 Act is amended as follows.
(2) In section 13(3) and 24A(3), for “by him for the purposes of Part IV” substitute “or unsatisfactory professional conduct”.
(3) In section 23(2), 23A and 23B(3), for “for the purposes of Part IV” substitute “or unsatisfactory professional conduct”.
(4) In section 15, after subsection (2)(c) insert—
“(ea) without having paid in full any amount owed by him to the Commission under section 27 or 28 of the 2007 Act; or
(eb) without having paid in full any compensation awarded by the Council under section 42ZA(4)(c) or by the Tribunal under section (53(2)(bb) or by the Commission under section 10(2)(d) of the 2007 Act; or”.

(5) In section 42ZA, after subsection (15) insert—

“(16) In this section and in sections 42ZB to 42ZD, “solicitor” shall be construed in the same way as references to a “solicitor” are construed for the purposes of Part IV by virtue of section 51(1A).”

(6) In section 52, after subsection (3) insert—

“(4) For the avoidance of doubt, rules made by the Tribunal under subsection (2) may provide for the functions of the Tribunal to be exercised on behalf of the Tribunal, in relation to a particular case or part of a case—

(a) by any particular tribunal constituted in accordance with paragraph 5 of Schedule 4 to deal with that case or part;

(b) by the chairman or vice-chairman of the Tribunal other than the functions of hearing and determining the merits of any case.”.

(7) In section 53—

(a) in subsection (2), after paragraph (bb) insert—

“(bc) where the Tribunal considers that the solicitor does not have sufficient competence in relation to any aspect of the law or legal practice, to direct the solicitor to undertake such education or training as regards the law or legal practice as the Tribunal considers appropriate in that respect.”,

(b) subsection (3A) is repealed.

(8) In section 54—

(a) after subsection (1B), insert—

“(1BA) In any case where the Tribunal has found the solicitor guilty of professional misconduct and has made certain decisions under section 53(2) or (5) but has not determined whether any amount of compensation is payable to the complainant under section 53(2)(bb)—

(a) any appeal by the solicitor against any of those decisions of the Tribunal shall not prevent the Tribunal from making a decision under section 53(2)(bb), but

(b) this is without prejudice to any appeal being made under section 54(1A) against any decision made by the Tribunal under that section.”,

(b) in subsection (1C), after “53” insert “(1)”.

(9) In section 54A, after subsection (3) insert—

“(3A) The Council may, before the expiry of 21 days beginning with the day on which the decision by the Tribunal under section 53ZB(1) and (2) is intimated to them, appeal to the Court against the decision, but the Council may not appeal to the Court against a decision of the Tribunal under section 53ZA(1)(f) or (2)(b).”

(10) After section 54A, insert—

“54B Appeals from decisions of Tribunal in other cases

(1) Where a decision of the Tribunal under—
(a) section 10(1),
(b) section 12D(1), or
(c) section 60A(4D)

is that the solicitor, registered European lawyer or foreign lawyer is not to have his name restored to the roll or register (as the case may be), the solicitor, registered European lawyer or foreign lawyer may, before the expiry of the period of 21 days beginning with the day on which the decision is intimated to him, appeal to the Court against the decision.

(2) On an appeal under subsection (1), the Court may give such directions in the matter as it thinks fit, including direction as to the expenses of the proceedings before the Court and as to any order by the Tribunal relating to expenses.

(3) A decision of the Court under subsection (2) shall be final.”,

(11) In section 65(1), in the definition of “solicitor” insert at the end “but for the purposes of sections 42ZA to 42ZD and Part IV shall be construed in accordance with section 51(1A).”.

Schedule 9

Fergus Ewing

118 In schedule 9, page 102, line 9, leave out <and non-solicitor investor> and insert <, non-solicitor investor and solicitor investor>

Long Title

Fergus Ewing

119 In the long title, page 1, line 3, after <persons;> insert <to regulate will and other testamentary writing by non-lawyers;>

Fergus Ewing

120 In the long title, page 1, line 4, after <subject;> insert <to allow court rules to permit the making of oral submissions by lay representatives in civil cases;>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

**Groupings of amendments**

**Group 1: Regulatory objectives etc.**
1, 2, 3, 4, 5, 6

**Group 2: Limit on the number of approved regulators**
121, 152

**Group 3: Approval and conditions etc.**
7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 76, 77, 78, 79

Debate to end no later than 20 minutes after proceedings begin

**Group 4: Compensation arrangements**

*Notes on amendments in group*
Amendment 135 pre-empts amendment 88

**Group 5: Areas where Lord President’s agreement required**
22, 23, 24, 30, 31, 36, 37, 40, 41, 42, 122, 58, 60, 117

**Group 6: References to licensed legal services providers**
26, 32, 43, 44, 47, 48, 49, 56, 57, 65, 69

**Group 7: Law Society’s inspection role etc.**
33, 34, 35, 38, 39, 137

Debate to end no later than 55 minutes after proceedings begin
Group 8: Majority ownership rule
45, 46, 46A, 46B, 46C, 46D, 46E, 46F, 123, 63, 114, 154, 155, 115, 116, 118

Notes on amendments in group
Amendments 46 and 123 are direct alternatives
Amendments 154 and 155 are direct alternatives
Amendments 154 and 155 both pre-empt amendment 115

Group 9: References to penalties and offences
50, 51, 128, 53, 54, 75, 84

Group 10: Designated persons
124, 125, 52, 127

Debate to end no later than 1 hour 35 minutes after proceedings begin

Group 11: Investors
55, 59, 61, 62

Group 12: Ineligibility to be a licensed provider etc.
64, 129, 66, 67, 68, 130

Group 13: Complaints against licensed providers etc.
131, 70, 71, 72, 73, 74, 132, 80, 81, 82, 83

Group 14: Regulation of estate administrators
133, 153

Debate to end no later than 2 hours after proceedings begin

Group 15: Firm-level regulation
134, 138, 139

Group 16: Guarantee fund contributions
85, 87, 90, 91, 92, 93

Group 17: Operation of Law Society
141, 142, 143, 144, 150

Debate to end no later than 2 hours 20 minutes after proceedings begin

Group 18: Regulatory committee
94, 95, 145, 96, 97, 146, 147, 98, 148, 149, 99, 100, 101, 102, 103, 104

Group 19: Disciplinary provision
105, 106, 107, 108, 109, 110, 112, 113

Group 20: Accounts fee
111
Group 21: Amendments to the 1980 Act
151, 156

Group 22: Long title
119, 120

Debate to end no later than 2 hours 55 minutes after proceedings begin
EXTRACT FROM MINUTES OF PROCEEDINGS

Vol. 4, No. 25   Session 3

Meeting of the Parliament

Wednesday, 6 October 2010

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-7149—That the Parliament agrees that, during Stage 3 of the Legal Services (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

- Groups 1 to 3: 20 minutes
- Groups 4 to 7: 55 minutes
- Groups 8 to 10: 1 hour 35 minutes
- Groups 11 to 14: 2 hours
- Groups 15 to 17: 2 hours 20 minutes
- Groups 18 to 22: 2 hours 55 minutes.

The motion was agreed to.

Legal Services (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 122, 45, 46D, 46E, 46F, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 129, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 and 120.

The following amendments were agreed to (by division)—

121 (For 89, Against 29, Abstentions 0)
8 (For 102, Against 15, Abstentions 0)
135 (For 67, Against 44, Abstentions 0)
145 (For 70, Against 43, Abstentions 0)
97 (For 85, Against 29, Abstentions 0)
152 (For 85, Against 28, Abstentions 0).

The following amendments were disagreed to (by division)—
27A (For 57, Against 62, Abstentions 0)
27B (For 56, Against 62, Abstentions 0)
28A (For 57, Against 62, Abstentions 0)
46A (For 40, Against 76, Abstentions 0)
123 (For 56, Against 61, Abstentions 0)
133 (For 40, Against 69, Abstentions 0)
136 (For 29, Against 82, Abstentions 0)
146 (For 13, Against 100, Abstentions 0)
147 (For 14, Against 100, Abstentions 0)
148 (For 14, Against 100, Abstentions 0)
156 (For 15, Against 99, Abstentions 0).

The following amendments were moved and, with the agreement of the Parliament, withdrawn: 124, 131, 134, 141 and 151.

The following amendments were not moved: 46B, 46C, 125, 127, 128, 130, 132, 137, 138, 139, 142, 143, 144, 149, 150, 153, 154 and 155.

Amendment 88 was pre-empted.

The Presiding Officer and Deputy Presiding Officer extended time limits under Rule 9.8.4A (a) and (c).

**Legal Services (Scotland) Bill - Stage 3:** The Minister for Community Safety (Fergus Ewing) moved S3M-7105—That the Parliament agrees that the Legal Services (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Business Motions

14:06

The Presiding Officer (Alex Fergusson): Our next item of business is consideration of business motion S3M-7156, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a revised business programme for today.

Motion moved,

That the Parliament agrees the following revision to the programme of business for Wednesday 6 October 2010—
delete
5.00 pm Decision Time
followed by
Members’ Business
and insert
6.00 pm Decision Time
followed by
Members’ Business—[Bruce Crawford.]

Motion agreed to.

The Presiding Officer: The next item is consideration of business motion S3M-7149, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 consideration of the Legal Services (Scotland) Bill.

Motion moved,

That the Parliament agrees that, during Stage 3 of the Legal Services (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

Groups 1 to 3: 20 minutes
Groups 4 to 7: 55 minutes
Groups 8 to 10: 1 hour 35 minutes
Groups 11 to 14: 2 hours
Groups 15 to 17: 2 hours 20 minutes
Groups 18 to 22: 2 hours 55 minutes.—[Bruce Crawford.]

Motion agreed to.

Legal Services (Scotland) (Bill): Stage 3

14:07

The Presiding Officer (Alex Fergusson): We come now to stage 3 proceedings on the Legal Services (Scotland) Bill. Members should have the bill as amended at stage 2, the revised marshalled list and the groupings, which I have agreed as Presiding Officer. The division bell will sound and proceedings will be suspended for five minutes before the first division. The period of voting for that first division will be 30 seconds. Thereafter, we will allow a voting period of one minute for the first division after a debate, and 30 seconds for all other divisions.

Section 1—Regulatory objectives

The Presiding Officer: We come now to consideration of amendments, starting with group 1, on regulatory objectives, et cetera. Amendment 1, in the name of the Minister for Community Safety, is grouped with amendments 2 to 6.

The Minister for Community Safety (Fergus Ewing): I can say without fear of contradiction that this will be a very long afternoon. I am grateful, however, to my colleagues in various parties with whom discussions have taken place, especially over the past fortnight, which I hope will help to smooth proceedings to some extent this afternoon. For that I thank them all.

Amendments 1 to 4 are drafting amendments that adjust some ordering in the lists of regulatory objectives and professional principles in sections 1 and 2 in order to keep things that were added at stage 2 within the structure of those sections, but without changing their effect.

Amendments 5 and 6 ensure that the requirements that are placed on the Scottish ministers to act in a way that is compatible with the regulatory objectives and to consult in relation to their functions under part 4 do not extend to their functions under sections 96(c) and 98A(1). Those functions are not of the same regulatory character as the Scottish ministers’ other functions in the rest of part 4, as they relate, respectively, to receiving information from the Scottish Legal Aid Board and to making orders under the Legal Profession and Legal Aid (Scotland) Act 2007. It would not be appropriate to require the Scottish ministers to be bound by the regulatory objectives or to consult in relation to those functions.

I move amendment 1.

Bill Aitken (Glasgow) (Con): I concur with the minister. It will be a lengthy afternoon, but matters have been facilitated and truncated to some extent
by the discussions that have taken place, which is to everyone’s benefit.

The amendments in group 1 are straightforward. It is important that “the interests of justice” are set out as the primary aim.

One might have thought that amendments 3 and 4 were unnecessary, given that I think that all members would expect any solicitor or legal practitioner to treat their clients’ business as confidential. That should be regarded as a principal requirement. However, it does no harm to stipulate it in the bill.

Amendments 5 and 6 demonstrate the Government’s view that amendments to the Legal Aid (Scotland) Act 1986 in section 96 and to the Legal Profession and Legal Aid (Scotland) Act 2007 in section 98 do not sit comfortably with the regulatory requirements that are outlined in sections 4 and 4A. After consideration, I concur that there is merit in that view. The Government is correct to amend the bill in that regard.

Fergus Ewing: We thought carefully about whether it was necessary to make explicit in the bill a duty of confidentiality. Members such as Mr Brown and me, who were practising solicitors in a former life, have the duty of confidentiality to clients ingrained in our DNA, so at first sight it appeared that the duty was so basic that it did not require to be explicitly incorporated into legislation.

However, there is the obvious fact that the bill sets out and makes explicit the other duties, principles and objectives. Therefore, it occurred to us that to omit the duty of confidentiality might be regarded by some people as a failure to make clear that there is such a duty. That is why we lodged amendments 3 and 4. I am grateful that they appear to enjoy support in the Parliament.

The Presiding Officer: We move to the question. I remind members that if they do not agree to an amendment they should make it very obvious that that is the case.

Amendment 1 agreed to.

Amendment 2 moved—[Fergus Ewing]—and agreed to.

Section 2—Professional principles

Amendments 3 and 4 moved—[Fergus Ewing]—and agreed to.

Section 4—Ministerial oversight

Amendment 5 moved—[Fergus Ewing]—and agreed to.

Section 4A—Consultation by Ministers

Amendment 6 moved—[Fergus Ewing]—and agreed to.

Section 5—Approved regulators

The Presiding Officer: Group 2 is on limit on the number of approved regulators. Amendment 121, in the name of Richard Baker, is grouped with amendment 152.

Richard Baker (North East Scotland) (Lab): Regulation has been at the heart of the debate on the bill. We have considered how to ensure that there is a robust regulatory regime in order to enable the new alternative business structures to work effectively and to ensure that they are properly regulated. The need for robust regulation is clear if we are to ensure that the provisions on access to legal services and fit and proper persons in relation to investors work.

Ministers did not support the idea of a legal services board such as has been established in England and Wales to oversee regulation, but suggested that it will be sufficient for there to be a small number of regulators. Indeed, they said that they expect only the Law Society of Scotland and the Institute of Chartered Accountants of Scotland to apply.

On that basis, I hope that amendments 121 and 152 will not cause difficulty for the minister. It is important to allay concern that the bill could allow for a multiplicity of regulators. If it transpired that a significantly larger number of regulators than two or three were to be appointed, there would be legitimate concerns about consistency and uniformity of regulation in all parts of the legal services industry. Some regulators might be less stringent than others, and the context would be one in which only limited funds were available to support regulation.

To address the matter, I suggest that we limit the number of regulators to no more than three. However, I understand that the new approach to the legal services industry will develop all the time, so I have sought to give the Scottish ministers the ability to approve additional regulators by statutory instrument, should there be a good argument for their doing so. The approach would give the Parliament the ability to take a view on whether it would be appropriate to appoint a larger number of regulators. That is a more robust approach to developing the regulatory framework than an approach that simply works on the assumption that only two bodies will apply. On that basis, I hope that the minister and members will support amendments 121 and 152.

I move amendment 121.
Bill Aitken: I concede that Richard Baker’s argument contains a degree of logic, but we are to some extent talking in a vacuum, in that the number of potential regulators is very restricted. I cannot imagine that there would be more than two: the Law Society of Scotland and the Institute of Chartered Accountants of Scotland. We will not see potential regulators queuing outside St Andrews house to lodge applications if the bill is passed at decision time. Even if that were to happen, I do not think that the Scottish ministers would appoint an unnecessary number of regulators. I question the necessity of amendment 121, and, consistent with lines that I have taken in the past, I do not believe that we should have unnecessary things in legislation.

Robert Brown (Glasgow) (LD): I agree with Bill Aitken. Amendment 121 is interesting, but it does not fulfil a purpose. I am not a fan of the principle of regulatory competition, which in a small jurisdiction such as Scotland is a bit of a nonsense. Legal firms and firms that provide legal services should be regulated by the Law Society of Scotland. That is not the framework that the bill sets out, but it is difficult to conceive—as Bill Aitken rightly says—of anyone else materialising as a regulator; ICAS is perhaps the only possibility.

The one body that I would not want to be allowed in is the Solicitors Regulation Authority in England and Wales. That is not for nationalist or protectionist reasons, but because it could sound the death knell of the independent profession in Scotland. I understand that the authority is not statutorily empowered to be a Scottish regulator as such, but I hope that the minister can assure us in his reply that any necessary steps have been or would be taken to prevent that situation from arising.

There is neither magic nor logic in restricting the number of regulators to three, as Richard Baker’s amendment seeks to do, particularly if that can easily be changed under the second part of the amendment. I oppose amendment 121.

Fergus Ewing: Sections 5 to 35, in part 2 of the bill, deal with the provisions on approved regulators, as part of a peculiarly Scottish approach to the issue. As Robert Brown mentioned, a different approach has been taken south of the border, which involved setting up a body that requires staff and premises and is costly to run; the costs extend to several million pounds.

The system that the Government has set out in the bill avoids that expense: the expense detailed in the financial memorandum, to which I will come in a moment, is relatively modest in comparison. We will not go down the route that has been taken south of the border, although, to take up Mr Brown’s language, to characterise that body coming in as sounding a “death knell” is unduly cataclysmic and not in keeping with the usual moderation that we expect from the Liberal Democrat approach to politics.

Turning to the text of amendment 121, one reason for opposing it is that there should be no impediment to appropriate “professional or other” bodies, to which section 5(1) refers, seeking to be regulators. Nonetheless, having reached this stage, it does not seem that there will be a long queue waiting outside St Andrews house, Drumsheugh Gardens or anywhere else to take on the role. It is difficult to see how there could be any regulatory competition, because it is hard to see how any financial gain could be made; that is a new Liberal Democrat oxymoron that has been brought into the debate today.

I therefore see no reason to oppose Richard Baker’s amendment, because it provides for no more than three regulators and we do not expect at present that there will be more than three, although if there are that can be dealt with under the second part of amendment 121.

For that reason, in the interests of following a consensual approach whenever possible in relation to the bill, and in light of the arguments that Mr Baker put to me in private in a series of meetings—

Members: Oh!

Fergus Ewing: With his colleagues, I hasten to say. For those reasons, we are happy to support the amendment.

The Presiding Officer: I call Mr Baker to wind up. I can give you only one minute, I am afraid.

Richard Baker: I will not need it, Presiding Officer.

Suffice it to say that I welcome the minister’s support for amendment 121. It will allay any potential concerns about the regulatory framework. I acknowledge the points that Bill Aitken and Robert Brown made, but I think that they are working on the basis of supposition. Amendment 121 gives certainty, and I am pleased with the minister’s comment that we can proceed on that basis.

The Presiding Officer: The question is, that amendment 121 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division. As it is the first division of the afternoon, there will be a five-minute suspension.
14:27

On resuming—

The Presiding Officer: Now that everyone is in the chamber, I remind all members that when we come to any vote, it is up to members to let the Presiding Officer know when they do not agree with the question that has been put. The question was that amendment 121 be agreed to. It was not agreed to, so there will be a division. Please vote now.

For

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
LIVINGSTONE, MARY (KIRKCALDY) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pirie, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
The Presiding Officer: The result of the division is: For 89, Against 29, Abstentions 0.

Amendment 121 agreed to.

Section 6—Approval of regulators

The Presiding Officer: Group 3 is on approval and conditions etc. I must exercise my power under rule 9.8.4A to extend the first time limit to allow those who have a right to speak to do so. In this instance, I am afraid that that applies only to the minister.

Amendment 7, in the name of the minister, is grouped with amendments 8 to 20 and 76 to 79.

Fergus Ewing: Following various amendments at stage 2, section 6, which provides for the approval of regulators, was left in a slightly confusing and inconsistently drafted state. Amendments 7 and 9 to 18 seek to improve the drafting and to ensure internal consistency in the section without overturning the effect of Opposition changes that were made at stage 2.

Amendment 8 seeks to ensure that potential approved regulators have an understanding of the application of the regulatory objectives and professional principles, rather than just an understanding of the objectives and principles. Amendment 19 is a drafting amendment.

Amendment 20 seeks to correct an omission at stage 2, whereby the bill does not provide for the restrictions relating to the categories of licensed provider or legal services to be varied.

Amendments 76 and 78 seek to remove the requirement for the Lord President’s consent to be given in relation to the certification of applicants as approved regulators, was left in a slightly confusing and inconsistently drafted state. Amendments 7 and 9 to 18 seek to improve the drafting and to ensure internal consistency in the section without overturning the effect of Opposition changes that were made at stage 2.

Amendment 8 seeks to ensure that potential approved regulators have an understanding of the application of the regulatory objectives and professional principles, rather than just an understanding of the objectives and principles. Amendment 19 is a drafting amendment.

Amendment 20 seeks to correct an omission at stage 2, whereby the bill does not provide for the restrictions relating to the categories of licensed provider or legal services to be varied.

Amendments 76 and 78 seek to remove the requirement for the Lord President’s consent to be given in relation to the certification of applicants as approved regulators, and to the addition or variation of conditions that are attached during that process. I resisted the amendments at stage 2, and noted that Robert Brown was, in his words, slightly less than convinced that the area requires the Lord President’s involvement. Although I am not seeking to reverse the similar requirements that have been inserted into part 2, I maintain that the Lord President’s having such a role in relation to certification is unnecessary. Furthermore, the Lord President has indicated that he has no strong views in relation to his role under part 3, as opposed to part 2. The Lord President noted that there is no requirement for his consent in respect of the regulation of non-lawyer will writers, so removing the requirement for certification agents is consistent with those provisions.

Amendments 77 and 79 are drafting amendments.

I move amendment 7.
either to establish their own compensation fund or to have the role.

The Law Society of Scotland is the only other body that has thus far expressed an interest in becoming an approved regulator, and it is also content for the Law Society of Scotland to have the role.

Regulatory schemes

Fergus Ewing: Amendments 21, 25, 27, 28 and 29 relate to compensation arrangements for licensed legal services providers. At stage 2, there was broad agreement that clients of licensed providers should be given the same protection against fraud as the Scottish solicitors guarantee fund gives to clients of traditional law firms, and that that is one of the most crucial issues to resolve if alternative business structures are to be successful. However, following stage 2, the bill did not fully provide for a compensation fund for licensed providers because of the defeat of certain Government amendments following concerns that were expressed by the Law Society of Scotland about the use of the guarantee fund by licensed providers that it did not regulate.

I committed to discussing the matter with the Law Society during the summer and I am glad to be able to report that those discussions were extremely constructive. The Law Society of Scotland is now content for the guarantee fund to be used by other approved regulators as long as it has an oversight role and can inspect licensed providers in certain circumstances.

The Institute of Chartered Accountants of Scotland is the only other body that has thus far expressed an interest in becoming an approved regulator, and it is also content for the Law Society to have the role.

I have therefore lodged amendments 21, 25, 27, 28 and 29, which will require approved regulators either to establish their own compensation fund or...
to use the guarantee fund. I have also lodged amendments to give the Law Society a monitoring and inspection role in relation to the guarantee fund, which will be discussed in a later group of amendments.

My amendments requiring approved regulators to choose the guarantee fund or to set up their own compensation fund apply equally to all approved regulators. However, Robert Brown's amendment 27A would exclude the Law Society from the provisions and makes specific provision for it that includes denying it the option of establishing an alternative compensation fund. I do not fully understand the rationale behind the amendment and see absolutely no reason for making separate provision for the Law Society when the general provisions are fit for purpose.

Robert Brown's amendment 27B is also unnecessary. In addition, I do not think it appropriate to state in the bill what details must be supplied to the Law Society; instead, I intend to set out any necessary details in regulations that will be made under proposed new subsection (2) of my amendment 29.

Robert Brown's amendment 28A would require the Law Society to make rules requiring its licensed providers to make contributions to the guarantee fund. My amendment 28 already requires that approved regulators that choose to use the guarantee fund make rules requiring their licensed providers to make contributions to it. Amendment 28A would be necessary only if the Law Society were treated differently from all other regulators.

It is vital that the clients of licensed providers have the same protection against dishonesty as the clients of traditional firms. Our provisions are designed to achieve that. Nevertheless, it is important to ensure that those arrangements, which allow a licensed provider to use the guarantee fund, do not extend to the provision of non-legal services, such as accountancy, that are provided by a licensed provider. That would put a disproportionate burden on the guarantee fund and would not be consistent with its purpose. Therefore, amendment 86 ensures that licensed providers are covered by the guarantee fund only in connection with their provision of legal services. Amendment 88 is consequential on that change.

The Presiding Officer: I am afraid that I must hurry you, minister.

Fergus Ewing: Bill Aitken's amendment 135 would extend the list of persons to whom grants cannot be made. I will listen with interest to what Mr Aitken has to say on his amendments 135 and 136. Since my time is short, I will foreshorten the four remaining pages of my speech. I am bound to say, though, that there are difficulties of a technical nature regarding the amendments that would, I fear, cause problems.

I move amendment 21.

Robert Brown: As has been said, section 8 relates to the compensation arrangements and the Law Society's guarantee fund. In principle, it seemed to me entirely wrong that the Government should require the Law Society to give access to the benefits of a fund that has been built up by the contributions of solicitors, with some millions of pounds in it, to other entities over which the Law Society has no regulatory power. I was surprised that the Law Society did not seem to be prepared to defend against that proposition further.

I do not understand why the minister does not understand amendment 27A. The Law Society already has a guarantee fund arrangement and does not need to set up another one to deal with any new bodies that it might regulate beyond the existing ones. Therefore, the intention is, under the section that amendment 27 would insert, to disapply the other arrangements because neither option A nor option B would be appropriate to the Law Society. Amendment 28A is a consequential amendment.

Amendment 27B covers the other situation, in which an outside regulator opts to access the guarantee fund. It seems entirely reasonable that the Law Society should be notified of that before the entity is licensed, leaving it to make such further inquiries as are reasonable.

I am sympathetic to Bill Aitken's amendments 135 and 136, which seem to narrow matters down sensibly and to provide the cover that the guarantee fund is intended to provide. An obvious and equitable arrangement seems to be being proposed in that regard.

Bill Aitken: The minister is correct in stating that all members are concerned to ensure that, when things go wrong, clients have an opportunity of a recovery. My amendment 135 requires a bit of further explanation and an answer from the minister. It appears that the minister is of the view that amendments 86 and 88 deal with the issue. However, under amendment 135, there would be a greater provision for a grant from the guarantee fund, which may not be made to compensate a licensed provider, or investors who control the licensed provider, for dishonesty by the licensed provider. Clearly, we cannot allow a situation to arise in which people benefit from their own dishonesty. If the minister is able to convince me that his amendments deal with the matter, I will not move amendment 135.

Amendment 136 would insert a provision into section 43 of the Solicitors (Scotland) Act 1980 to ensure that a claim on the guarantee fund can arise only in the event of loss from dishonesty
when the licensed provider is providing legal services. On the face of it, I consider that to be more comprehensive than the Government’s amendment 86, but I am open to persuasion in that respect, and will listen to the minister’s summing-up speech carefully.

James Kelly (Glasgow Rutherglen) (Lab): I agree with Bill Aitken when he stresses the importance of the guarantee fund, and I recognise the work that the minister and the Law Society have done to improve the bill as it has proceeded to stage 3 by ensuring that the guarantee fund and the compensation fund are in place in relation to wholly owned solicitors and licensed legal services providers. Obviously, the Government amendments seek to effect that.

On Robert Brown’s amendments, I am sympathetic to amendment 27A. It is entirely logical that, as the Law Society currently operates the guarantee fund, it would not need to choose between option A and option B. Similarly, on amendment 27B, it is appropriate that the Law Society should be advised by licensed providers about whether they are opting for the guarantee fund or the compensation fund. It has to understand the position if people are applying to access the fund. I am also sympathetic to amendment 28A, which makes it clear that the Law Society must produce rules to clarify how licensed providers would make contributions to the guarantee fund. Clearly, we are entering a new set of circumstances, and the amendments would bring greater clarity.

Bill Aitken’s amendments 135 and 136 would provide extensions to cover licensed providers and put in place a formal link to legal services. I am sympathetic to the amendments, but will listen to what the minister says in his summing-up speech.

Fergus Ewing: On Robert Brown’s amendments, I point out that the guarantee fund is not the Scottish solicitors guarantee fund—it is a statutory fund. It is perceived to be the solicitors fund, but it was set up by statute for Scotland. Therefore, it would be wrong for the bill to make separate provision for solicitors as a regulator as opposed to any other regulator. There must be a uniform system.

I can assure Bill Aitken that there is no question of anyone benefiting from their own dishonesty by virtue of the provisions of the bill: quite the opposite is the case. The bill contains a robust regulatory regime that will ensure that any such conduct is most stringently dealt with.

My answer to Bill Aitken’s advocacy of amendments 135 and 136 is that they are not necessary, because the matters that they deal with are dealt with and fully covered in my amendments. Amendment 86 will limit the use of the guarantee fund to losses that are suffered by reason of dishonesty on the part of licensed providers. Amendment 136 would essentially have the same effect, but my amendment 86 will insert the provision in the correct place in the bill. In addition to that technical argument, there is a substantive argument, which is that Mr Aitken’s amendment 136 refers to those who manage or control a fund having given an “irrevocable undertaking” that, in the event of a grant being made out of the guarantee fund, they will reimburse the Law Society the amount that was paid out. It has not been made clear at all why such an amendment to the Solicitors (Scotland) Act 1980 is thought to be necessary, as no equivalent provision is present in that act in relation to solicitors or incorporated practices. Because of that, I feel that there are ambiguities and uncertainties in the amendment, although I entirely accept Mr Aitken’s aims and purposes.

I respectfully invite Mr Brown and Mr Aitken not to move their amendments.

Amendment 21 agreed to.

14:45

The Presiding Officer: Group 5 is on areas where the Lord President’s agreement is required. Amendment 22, in the name of the minister, is grouped with the amendments 23, 24, 30, 31, 36, 37, 40 to 42, 122, 58, 60 and 117.

Fergus Ewing: As I mentioned earlier, I do not intend to seek to overturn the stage 2 amendments to the bill that require the Lord President’s consent before the Scottish ministers can take various actions under part 2. However, my amendments in group 5 will make slight drafting changes to the provisions. In particular, they will require the Lord President’s “agreement” rather than “consent”. That is more appropriate wording in the context of the primary role for the Scottish ministers, but it does not change the intended effect. In my view, the provisions are also worth restructuring a little for the sake of readability.

Robert Brown’s amendment 122, which is supported by James Kelly, relates to the step-in powers in section 35, which allow the Scottish ministers by regulations to create a body to act as an approved regulator, or to act as one themselves if that is necessary for the continued effective regulation of licensed providers. Before stage 2, the Justice Committee and the Law Society raised concerns about those powers and when they might be used. That was absolutely appropriate. Consequently, I lodged an amendment that provided that such regulations are not to be made unless ministerial intervention is necessary as a last resort. That clarification was
provided in order to respond to the committee’s clear invitation and, indeed, to the cross-party arguments on the matter.

As I stated in relation to a similar amendment at stage 2, I question the need for the Scottish ministers to be required to have the Lord President’s consent before taking action. Stepping in would be a matter of last resort in accordance with the regulatory principles. The key argument is that it might require to be done very quickly in an emergency situation. We are talking about a last resort. The situation is unlikely to occur, but if it did, it would be an emergency. In an emergency, one needs to act quickly. I therefore have some concerns about amendment 122, but of course I will listen to what Mr Brown has to say.

I move amendment 22.

The Presiding Officer: I call Robert Brown to speak to amendment 122 in a minute and a half, if he can.

Robert Brown: I will be quicker than that.

I am not sure that the minister explained the workings of section 35 correctly. What we are talking about is the making of regulations rather than the stepping-in per se. The process of making regulations would take a certain amount of time in any event, so I am not overly persuaded by that point. When we are dealing, as we are in other sections, with a body that becomes an approved regulator, with what happens in that context, and with the step-in by ministers, it seems to me that, in principle, the arrangements surrounding that ought to be at least partly the responsibility of the Lord President, who should therefore be involved in the decision-making process.

I am not impressed by the point about speed, which arises after the regulations have been made when step-in occurs, rather than at the time of making the regulations.

James Kelly: After consideration at stage 2, the committee felt that it was appropriate for ministers to have step-in powers to create a regulator of last resort in appropriate circumstances. I support Robert Brown’s amendment 122, which would give the Lord President a say in that process. On the minister’s point about speed and emergencies, we live in a modern technological age, when people are available via mobile phones, e-mail, the internet and so on. We can quickly contact people on the other side of the world, so it is surely not beyond us to get hold of the Lord President when he is only on the other side of Edinburgh.

Fergus Ewing: I listened carefully to what Mr Brown and Mr Kelly said. In the light of their arguments, and given that the bill elsewhere—indeed, throughout part 2—provides a role for the Lord President and requires him to be approached for his agreement, in the interests of both consensus and verisimilitude, I will accept the course of action that is proposed.

Amendment 22 agreed to.

Section 9—Reconciling different rules
Amendments 23 and 24 moved—[Fergus Ewing]—and agreed to.

Section 14—Practice rules: general
Amendment 25 moved—[Fergus Ewing]—and agreed to.

Section 17—Performance report
The Presiding Officer: Group 6 is on references to licensed legal services providers. Amendment 26, in the name of the minister, is grouped with amendments 32, 43, 44, 47 to 49, 56, 57, 65 and 69.

Fergus Ewing: All the amendments in the group are minor drafting changes that will abbreviate the term “licensed legal services provider” to “licensed provider”.

I move amendment 26.

Amendment 26 agreed to.

After section 19
Amendment 27 moved—[Fergus Ewing].

Amendment 27A moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 27A be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, lain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)

Against
Alexander, Ms Cheryl (Cumbernauld) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Amendment 27B moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 27B be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Barnhill and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Gorbals) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 57, Against 62, Abstentions 0.

Amendment 27A disagreed to.

Amendment 27B moved—[Robert Brown].
The Presiding Officer: The result of the division is: For 56, Against 62, Abstentions 0.

Amendment 27B disagreed to.

Amendment 27 agreed to.

Amendment 28 moved—[Fergus Ewing].

Amendment 28A moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 28A be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glascgow) (LD)
Butler, Bill (Glascgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glascgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glascgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillion, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glascgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, lain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glascgow Rutherlegen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glascgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
McLaughlin, Anne (Glascgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Patseller, Giff (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Barr and Buchan) (SNP)
Surgeon, Nicola (Glascgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glascgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 56, Against 62, Abstentions 0.

Amendment 27B disagreed to.

Amendment 27 agreed to.

Amendment 28 moved—[Fergus Ewing].

Amendment 28A moved—[Robert Brown].

The Presiding Officer: The question is, that amendment 28A be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glascgow) (LD)
Butler, Bill (Glascgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glascgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glascgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillion, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glascgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, lain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glascgow Rutherlegen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glascgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)

McLaughlin, Anne (Glascgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Patseller, Giff (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Barr and Buchan) (SNP)
Surgeon, Nicola (Glascgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glascgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)
Amendments 33 to 35 will require approved providers that it does not regulate to contribute to the guarantee fund. I expressed concerns about plans to allow licensed providers to cover some of those functions to the Law Society. That suggestion that giving limited monitoring and other oversight functions to the Law Society may impose a greater burden on providers and be covered by the guarantee fund. I}

The Presiding Officer: The result of the division is: For 57, Against 62, Abstentions 0.

Amendment 28A disagreed to.

Amendment 28 agreed to.

Amendment 29 moved—[Fergus Ewing]—and agreed to.

Section 22—More about governance

Amendments 30 and 31 moved—[Fergus Ewing]—and agreed to.

Section 24—Assessment of licensed providers

Amendment 32 moved—[Fergus Ewing]—and agreed to.

After section 25

The Presiding Officer: Group 7 is on the Law Society’s inspection role etc. Amendment 33, in the name of the minister, is grouped with amendments 34, 35, 38, 39 and 137.

Fergus Ewing: During stage 2, the Law Society expressed concerns about plans to allow licensed providers that it does not regulate to contribute to and be covered by the guarantee fund. I suggested that giving limited monitoring and oversight functions to the Law Society may provide some comfort, and had extensive discussions with it over the summer to resolve that important matter. Those discussions were useful in setting out what that role should involve.

Amendments 33 to 35 will require approved regulators to report to the Law Society any breaches of the practice rules relating to accounting and auditing. They must also make available to the Law Society any financial compliance inspection reports. If the society has concerns that are not resolved following
discussions with the approved regulator, it can report the matter to the Scottish ministers, who will take action, if necessary. The Law Society can seek permission from the Scottish ministers to inspect documents relating to financial matters that are held by the licensed provider if it thinks that that is necessary to ensure that the relevant accounts rules are being complied with. The Scottish ministers will, of course, treat such requests with urgency where necessary.

Those inspections would be a last resort. I certainly do not expect them to be commonplace, but it is appropriate to make provision to allow them. I hope that that reassures those who still have doubts about allowing licensed providers to be covered by the guarantee fund.

Amendment 137, in the name of Bill Aitken, also makes provision for an oversight inspection function for the Law Society. However, unlike in my amendments, there is no role for the Scottish ministers in relation to any action that is taken by the Law Society, and there is no requirement for the society to consult the approved regulator.

My proposed model is the result of extensive discussions with the Law Society and the Institute of Chartered Accountants of Scotland over the summer. It will confer a monitoring and inspection function that is consistent with the framework in the bill, and will allow the society to minimise risks to the guarantee fund while not interfering unduly in the business of other approved regulators that have the primary role in monitoring compliance with their accounts rules.

In the light of those assurances, I will listen to Mr Aitken with interest, but hope that he will consider not moving amendment 137.

I move amendment 33.

**Bill Aitken:** When the Justice Committee was dealing with the matter in question, there was a unanimous view that things should be kept as tight as possible. I question whether proposed new subsection (2) in amendment 33 is adequate. That subsection will, of course, require an approved regulator to report to the Law Society instances in which things have either been proven to have gone wrong or there are significant suspicions. However, it seems that, historically, reports under those headings are normally made by third parties. The whistleblower is frequently a member of staff or the police.

In respect of proposed new subsection (3) in amendment 33, should not there be a requirement that the approved regulator provide information on the regulator’s proposed action following a report to the Law Society?

On amendment 35, does the minister believe that giving the licensed provider 48 hours’ notice of an inspection is prudent? I fully accept that I may have a fairly devious mind, but does not that simply provide the provider, who may be under suspicion, with a warning that a potential fraud is being investigated?

On amendment 34, I would be grateful for the minister’s reassurance that there would be no unnecessary delay in the Scottish ministers’ granting consent for any proposed action under proposed new subsection (5).

I will listen carefully to what the minister has to say before I decide what to do with respect to amendment 35.

**The Presiding Officer:** I call Robert Brown, who has two minutes.

**Robert Brown:** Twenty seconds will probably do, Presiding Officer.

I speak in general support of Bill Aitken’s amendment 137. It seems reasonable to me that the Law Society should have the power that is suggested to investigate the circumstances of an entity that it is obliged to indemnify but does not regulate. However, I confess to concerns about whether the amendment would convey effective powers to do that, as it appears that it contains no enforcement provisions, nor any duty to comply on the entity. Perhaps the Government’s rule-making powers are wide enough to cope with that. I think that the provision is also supported by the Law Society, which regards it as necessary. There may be issues to do with the suggested wording, but the matter is important and I hope that the minister can, at the very least, give some reassurance about the interrelation between the Law Society’s position and the arrangements around the regulated entity.

**Fergus Ewing:** I am happy to respond to points that have been made in the debate.

It is plain that ensuring that there are appropriate arrangements to protect the public and clients of licensed service providers is one of the more serious issues in the bill. The Scottish Government’s proposed amendments were discussed at length with the Law Society and ICAS over the summer, and a great deal of thought has gone into the question of their efficacy.

I am happy to give Bill Aitken the assurance that the Scottish ministers would act swiftly in the event that their permission was sought to invoke the powers. I emphasise that we do not anticipate that the powers are likely to be used frequently: they will not be used as a matter of common practice. The history of claims to guarantee funds does not suggest that the powers are likely to be used frequently, but it is nonetheless important that the provisions are thorough and sufficient.
Mr Aitken’s proposed measures are, for the reasons that I outlined, technically infelicitous. The amendments that we have lodged, with considerable thought, address the necessary aspects of regulation without being disproportionate, and they cover the need for proper enforcement. Therefore, I encourage members to support the Government amendments and I invite Mr Aitken, in the light of those assurances, to consider not pressing amendment 137.

Amendment 33 agreed to.

Amendments 34 and 35 moved—[Fergus Ewing]—and agreed to.

15:00

Section 26—Additional powers and duties

Amendments 36 to 38 moved—[Fergus Ewing]—and agreed to.

Section 27—Guidance on functions

Amendment 39 moved—[Fergus Ewing]—and agreed to.

Section 29—Measures open to Ministers

Amendments 40 to 42 moved—[Fergus Ewing]—and agreed to.

Section 31—Cessation directions

Amendment 43 moved—[Fergus Ewing]—and agreed to.

Section 32—Transfer arrangements

Amendment 44 moved—[Fergus Ewing]—and agreed to.

Section 35—Step-in by Ministers

Amendment 122 moved—[Robert Brown]—and agreed to.

Section 37—Eligibility criteria

The Deputy Presiding Officer (Alasdair Morgan): Group 8 is on the majority ownership rule. Amendment 45, in the name of the minister, is grouped with amendments 45, 46, 46A to 46F, 123, 63, 114, 154, 155, 115, 116 and 118. I draw members’ attention to the pre-emption information on the groupings sheet.

Fergus Ewing: Amendment 45 will clarify that sections 37 and 37A, which deal with eligibility criteria and majority ownership by regulated professionals, both apply for the purposes of licensing a licensed provider.

My amendments 46, 46D to 46F and 114, Richard Baker’s amendments 46A to 46C and 154, and Robert Brown’s amendments 123 and 155 all relate to external ownership of licensed providers. As many members will be aware, external ownership has been the subject of much discussion and deliberation in the past few years. The legal profession has been split by the issue, with a series of impassioned debates and votes taking place before stage 2. However, a measure of consensus has been achieved, with the Law Society council now supporting the compromise position that was inserted at stage 2.

I argued strongly against that compromise, which requires 51 per cent of any licensed provider to be owned by solicitors or other regulated professionals. My preference was for the greater opportunities that would be provided by 100 per cent external ownership. However, given the support of the Law Society and the Opposition parties for the compromise, I have decided not to pursue further amendments on that at stage 3.

Amendment 46 will simply improve the drafting and ensure that the definition of “regulated profession” and other related terms can be further specified by regulations that will be subject to affirmative procedure.

I believe that the compromise, which was achieved at no small cost to those involved, should not be thrown away lightly, and I suggest with great respect that Richard Baker’s amendments 46A to 46C risk doing that. They would require 51 per cent solicitor ownership and limit ownership by those who are not regulated professionals to 25 per cent. That would be a fundamental shift from the compromise that was agreed at stage 2 and would perpetuate unnecessary restrictions on the business models that solicitors can adopt. For example, the amendments would prevent business models that would otherwise be likely to form, such as firms of accountants or surveyors that employ a number of solicitors to offer legal services.

Amendments 46A to 46C would severely restrict access to external capital, which would reduce the ability of Scottish firms to expand and compete with firms in England, which are soon to benefit from the full implementation of the Legal Services Act 2007. The model would fail to increase competition significantly in the legal services market, which would be to the detriment of the legal profession, consumers and the Scottish economy. Furthermore, the 25 per cent model was not supported at stage 2, nor was it supported by the legal profession at the latest special general meeting of the Law Society.

The current provisions on external ownership were supported by all Opposition parties at stage 2, the Law Society, four of the largest law firms in
Scotland, ICAS and various consumer groups, all of which have expressed reservations about Richard Baker’s amendments. For those reasons, I strongly urge members to continue to support the compromise, which was so difficult to achieve, and not to impose further restrictions that have not been debated properly, are not supported by the Law Society, ICAS or consumer groups, and which degrade significantly the potential benefits of the bill.

Robert Brown’s amendment 123 would require 51 per cent of any licensed provider to be owned by solicitors, but proposes no restrictions on the remaining 49 per cent. That would still rule out many potential business models, such as an accountancy firm employing solicitors and sharing ownership with them to provide legal services to its clients. Again, I strongly urge members to reject amendment 123.

My amendments 46D to 46F are an attempt to provide comfort to those who still have concerns about the ability of regulated professionals to own licensed providers. As it stands in my amendment 46, section 37A allows but does not compel Scottish ministers to make regulations about what is to be regarded as a “regulated profession” and the other related terms. Concerns were raised that if Scottish ministers were not to set out what is meant by “regulated profession”, it would be unclear which persons were covered by that definition and so could have a controlling share in a licensed provider.

Amendment 46D ensures that Scottish ministers must make regulations about what is or is not a regulated profession. Amendment 46E retains the optional nature of the power in relation to the other related terms that are less crucial. Amendment 46F requires the Scottish ministers to have the Lord President’s agreement and to have consulted various bodies before making such regulations. That amendment was lodged after representations by Mr Baker and, in particular, Ms Craigie, for which I am grateful.

Amendment 63 indicates how the term “solicitor investor” is to be interpreted in part 2. The other amendments make minor changes.

I strongly urge Mr Baker and Mr Brown not to move their amendments.

I move amendment 45.

Richard Baker: The most important debate that we will have in these proceedings is on majority ownership of the new businesses that will be created through the establishment of alternative business structures. I understand that the minister has moved from his original position, whereby businesses could have been owned entirely by investors from outwith the legal profession or any other regulated profession, to the position currently in the bill, whereby 51 per cent of the business must be owned by solicitors or members of other regulated professions.

Dave Thompson (Highlands and Islands) (SNP): Will the member give way?

Richard Baker: I apologise to Mr Thompson, but I do not have time.

The minister has lodged amendments to provide further definition of regulated professions, which is welcome. Despite the Law Society’s current view, as outlined by the minister, anyone who has followed the passage of the bill will recognise that the issue has been bitterly contested in the society. It is also important to know that those with significant reservations about the bill have sought to make constructive proposals so that consensus can be reached. For our part, we have moved from our stage 2 position, where we advanced the proposal for no more than 25 per cent ownership by non-solicitors, to my amendments today, in which we propose that 49 per cent of a firm could be owned by other regulated professionals and up to 25 per cent could be owned by investors who are not from regulated professions.

There are still those who have great concerns about what the reforms will mean for their profession. The bill brings with it a comprehensive new regulatory structure, but not the new Legal Services Board that we have seen in England and Wales and not the same level of investment in regulation either—the financial memorandum indicates that investment in regulation by the Scottish Government could amount to just £100,000.

We understand that in the proposed structure there are a number of provisions on fit and proper persons to invest. Nevertheless, fear remains about possible attempts by those who are involved in criminal activities to invest in firms. Although we are told that the reforms will bring benefits to consumers, with one-stop shops for legal advice, accountancy advice and other services, concerns have been expressed about how that will affect small legal firms that serve small and rural communities.

The problem that we come back to again and again is that the argument that this reform will be of clear benefit to our legal services industry, however well intentioned, is based on supposition. Indeed, my understanding is that, currently, external ownership of legal services providers in England is at no more than 20 per cent—a lower percentage than the percentage proposed in my amendment—and that proposals to move to 100 per cent external ownership south of the border are scheduled not to come in for a year.

If the bill is passed, the structure for regulation will be in place and the opportunity will exist to
make changes to the percentages of ownership. We favour an incremental approach, which will allow for more evidence to be presented to show that the system will be beneficial to both the legal services industry and consumers. Our amendment 46A would allow that approach to be taken.

At stage 2, an amendment was agreed to to allow ministers to vary by regulation the percentages of ownership. We are sure that that could be done expeditiously.

I do not believe that requiring 51 per cent majority ownership for solicitors would prevent the one-stop-shop model, such as a small firm of one solicitor and an accountant, as the firm could be constructed to be in line with the provisions of our amendment 46A.

I have received representations that some law firms that support the change might deregister in Scotland if other investors and regulated professionals are not allowed to have a majority ownership. However, we have to realise that in any event, the changes raise the potential for firms to be bought by businesses outwith Scotland.

If amendment 46A is agreed to, it will introduce a provision that takes us to where England and Wales are, the new regulatory structure will be introduced and ministers will have the power to bring forward regulations to change the percentages, should that be shown to be desirable. I do not see what significant delay would be caused by agreeing to amendment 46A.

Should my amendment not be agreed to, we will support amendment 123 in the name of Robert Brown, but we believe that our amendment 46A presents the most sensible and logical approach, and we will press it.

Robert Brown: As Richard Baker said, this is the single most important group of amendments, which go to the heart of the purpose of the bill. The argument has also been at the heart of the Law Society’s protracted and rather confusing wrangles about the bill. The position that we have heard the minister take is very strange, as he vehemently opposed the 51 to 49 per cent ownership share at stage 2, but now supports it as a compromise.

There are issues with multidisciplinary partnerships, which I think are familiar to existing solicitors. However, those are different to situations where a legal entity is owned or controlled by outside investors. We might describe this as not so much Tesco law but the Robert Maxwell situation. That option is favoured by most but not all of Scotland’s largest legal firms, because they think that it provides a level playing field for access to the lucrative English legal market, which dominates the continent, because so many commercial contracts are expressed in English law or subject themselves to the jurisdiction of the English courts.

Much play is made of the potential for a solicitor in a rural town to partner an accountant to provide a viable entity and a local one-stop shop. That might happen, but there is no bar at present to their sharing office or back-office functions and it is not a common situation. It seems to me that each of the two professionals still has to have a living income for themselves, regardless. I cannot help but conclude that the advantages for the rural town, solicitor and public are to some extent a fig leaf.

The purpose and core of the bill is aimed at the large firms, and it is designed primarily to enable them to become larger by buying other firms here or south of the border. I am not sold on the idea that that is necessarily in the public interest. It seems to me that it is just as possible that they will instead be bought by even larger English firms.

Fergus Ewing: Will the member give way?

Robert Brown: Not just now.

However, the large firms tell us that the bill is needed to keep them in Scotland to support a growing legal services market that is headquartered here, trains a large number of Scots lawyers and contributes a large whack to the master policy.

At stage 2, I successfully lodged the Law Society compromise, which I hoped might be the basis of a legal consensus. That has not really proved to be the case, and we need to look again at the issue. Amendment 123 is designed not, as the Law Society suggests, to reverse the stage 2 compromise but to develop it.

It should also be said that the issue should be judged not entirely on whether the Law Society of Scotland is supportive—important though that is, its support has been a rather moveable commodity over time—but on whether it is in the public interest. The bill as amended at stage 2 provided that

“51% of the entity is owned, managed and controlled”

by solicitors and/or members of other professions. It may have been difficult to define management and control in terms of percentages, which is perhaps why the Scottish Government has, in its amendment 46, rephrased the wording to a

“51% stake in the total ownership or control of the entity”.

Notwithstanding that the wording is weaker, we all accept that this is the basis for going ahead.

15:15

Fergus Ewing: Will Mr Brown confirm that the Law Society compromise position, which the
Government supports, was reached after years of difficult and bruising internal debate, whereas his proposal has never been debated and was not brought forward until two weeks ago? The legal profession has had no opportunity to debate his proposal.

Robert Brown: I hear what the minister says, but the debate has been around for a long time. The matter has been debated across the profession with different people putting forward a range of propositions at different stages.

My amendment 123 requires that the majority 51 per cent stake is held by solicitors alone, with other professionals and investors being the 49 per cent minority. That is the right solution, certainly at this stage. As the minister knows, under section 52(2A) of the bill, the percentage can, of course, be amended up or down by way of Scottish statutory instrument. The Law Society suggested that the proposal would prevent likely business models, such as firms of accountants or surveyors, employing solicitors. The fact is that it would not, but it would require things to be done in a certain way. If difficulties arise, there are powers under sections 99 and 99A to alter the percentage by statutory instrument to “make different provision for different purposes”.

I hope that the minister is prepared to accept my amendment 123. The entities will, in any case, be subject to the regulatory objectives, which among other things are to support the rule of law; protect and promote the interests of justice, consumers and the public interest generally; promote competition in the provision of legal services; and promote an independent, strong, varied and effective legal profession. I hope that the minister will confirm that he sees those noble aspirations not only as words but as a way to regulate robustly the new entities.

I hope that the Government will go to the extent of refusing registration and imposing stringent conditions on ownership and control beyond section 37A, where that is necessary. Ownership and control are not the same thing. I am not sure whether, among all the furore, we have analysed the issue fully. For the time being, amendment 123 in my name represents a satisfactory position across the profession, allows development and meets Richard Baker's important test of being able to move forward to an extent incrementally and cautiously. That is extremely important.

The Deputy Presiding Officer: I will need to limit the remaining speakers to no more than two minutes.

Bill Aitken: From the start, it was clear that there were fears about how the bill would impact on the Scottish legal system. Although some fears may have been exaggerated, there can be no doubt that they were held sincerely. Equally, there can be no doubt that the majority—if not the unanimous—view of those who were involved in the bill was that we do not want to see the application of so-called Tesco law in Scotland. On that basis, I for one felt that a 49 per cent restriction on external investment was appropriate, and I have heard nothing thus far to change my view. We need to bear in mind the enabling powers under which a Government could, in years ahead and on cause shown, amend the percentages.

Mr Baker's amendment 46A fails under several headings. It would leave the Scottish profession at a disadvantage within the UK single market. As we have heard in the debate, it would impact on smaller practitioners who seek to combine their operations.

Amendment 123, in the name of Robert Brown, and his consequential amendment 155 have a similar disadvantage. Mr Brown is genuinely concerned about access to justice, particularly in Scotland's smaller communities. I say to him that the bill as it stands will be of assistance. I accept in part his argument that there are ways in which two practitioners in a small county town could get around the situation, but it would be convoluted and difficult, and we would make life rather difficult for them.

I have heard nothing to change my original view. We have achieved a sufficient compromise.

Patrick Harvie (Glasgow) (Green): The minister knows that my concerns at stage 1 were sufficient for me to vote against the general principles of the bill. Since then, I have tried to listen to all sides. The changes that were made at stage 2 addressed my concerns somewhat. However, if I am to be persuaded to accept the Government's position in the amendments that are before us today, I would like the minister to reply to one specific question, which comes from the briefing that Thompsons Solicitors has provided to MSPs. In the first few bullet points of the briefing, Thompsons argues:

"The theory that underlies the Bill is untried and untested".

It likens passing the bill to opening Pandora's box and says that “the consequences are irretrievable”. There are those who regard the bill as something of an experiment. Every experiment should have failure criteria. What are the failure criteria for this experiment? Is Thompsons wrong when it says that the consequences would be irretrievable? Are the changes that we would make by passing the bill reversible?

Dave Thompson: Mr Baker was a wee bit frightened to take an intervention from me—he had plenty of time to do so. Given the compromise
on external ownership that was agreed at stage 2 and the position of the Law Society after many months of debate, it is odd that Mr Baker is now trying to overturn the agreed position and impose additional restrictions. I wonder why he is doing that.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The answer to Mr Thompson’s question is that this is democracy and stage 3 consideration of the bill. Richard Baker is perfectly entitled to lodge amendments on any subject relating to the bill.

I support amendment 46A, in the name of Richard Baker, and encourage members to do so. Like other members who have spoken today, I welcome the minister’s move at earlier stages from 100 per cent to 51 per cent on the ownership issue. However, this is an important matter, and we should not take a leap in the dark. We are changing the way in which law firms have operated for years. We cannot do that if we have any doubts in our mind. I still have doubts about the people who will introduce capital to legal firms. I want us to be able to regulate and control that activity.

Amendment 46A is a measured amendment that takes a cautious approach. The bill and the changes that were made at stage 2 will still allow ministers to move the ownership percentage up and down. Let us put a toe into the water and see whether the arrangement works. If it does, the minister will have the opportunity to raise the percentage.

I agree totally with Patrick Harvie’s comment that the arrangement “is untried and untested”. Amendment 46A would give us a way of trying it and of testing whether the market works. I urge members not to take a step into the unknown, to take a cautious approach and to support amendment 46A.

Nigel Don (North East Scotland) (SNP): Cathie Craigie’s remarks sum up the problem that we have. Rightly, she is concerned about taking a step into the dark. The issue is who will bring their money in. However, the issue that is before us now is the structure of the people who will run the businesses, which is a different matter. We address the issue of who puts money into businesses by ensuring that they are fit and proper people, not by deciding what fraction of the population are lawyers or anyone else.

Cathie Craigie: Will the member take an intervention?

Nigel Don: I fear that I do not have time.

Cathie Craigie: Will the member give way?

The Deputy Presiding Officer: Order.

Nigel Don: I am sure that Mr Baker will be able to wind up.

I am concerned about another issue. I understand where amendment 123, in the name of Robert Brown, is coming from; the Justice Committee debated the issue on many occasions. However, I am concerned that, as the minister pointed out, Mr Brown has lodged an amendment that is untried and has not even been consulted on. We have talked about 51 per cent of ownership being in the hands of professionals, but we have never talked about its being in the hands of lawyers. That is not ICAS’s position or the Law Society’s position. Does it worry the member that he has lodged an amendment that has not been consulted on and is no one’s policy?

James Kelly: There is no doubt that the debate on this issue has been heated throughout the process. It has been characterised on one side by people who are concerned about the independence of the legal profession; about the impact on small firms, particularly in rural areas; and about the potential for undesirable elements to enter the profession. That has been countered on the other side by people who have argued in favour of the 100 per cent ABS position, saying that it would promote jobs and opportunity and would help to grow the Scottish economy. Richard Baker’s constructive amendment balances out both sides, taking into account the concerns on both sides of the argument.

Patrick Harvie makes a valid point: the Justice Committee found that there was a complete lack of evidence in support of the 100 per cent ABS position. That is why we should adopt an incremental position, taking things cautiously and a step at a time, but giving the present and future Governments the power, under Scottish statutory instruments, to make changes to the structures.

On the minister’s point about business models, I reject the notion that the proposal would be anti-business. McGrigors, under its current format, has expanded into Northern Ireland. Earlier this year, it opened a tax office in Manchester. Under the model that Richard Baker has proposed, it could continue to expand. That is the correct route to go down. It would support economic growth, and it would also protect the independence of the Scottish legal profession.

Fergus Ewing: The Scottish Government entirely respects the very strongly held views, both within and outwith Parliament, in the debate that has taken place on this issue.

With regard to the two principal amendments in this group, it is fair to say that Mr Baker’s amendment 46A was substantially considered by the profession, but it was clearly rejected. Robert Brown’s proposal, on the other hand, has not been
debated within the profession. I am not being unfair to Mr Brown when I say that I extracted that from him in my intervention.

The profession has been considering this thorny issue for years—years of bruising, turbulent, divisive internal debate. That process of debate resulted in a compromise that was hard won by the proponents of 100 per cent ABS, who thought that that was best, but who, in the interests of a unified profession, decided to approve the compromise.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): Is not our role here in Parliament to protect the interests of the public, rather than those of any particular profession?

Fergus Ewing: Patently it is to protect the interests of the public. I was just coming on to that.

We should not throw away years of hard work, which has seen a very difficult debate being concluded with a majority position that we have moved towards by compromising.

As regards protecting the public, consumer bodies have lobbied every member of the Parliament, as Mr Rumbles knows, arguing that the proposal will deliver a better deal for consumers. Relatively small practitioners, such as Austin Lafferty, have argued that it will serve as a quality control test for lawyers in providing a better, perhaps even cheaper, service for their clients, something which, I respectfully suggest, the public might welcome—speaking as a former practising solicitor.

Patrick Harvie asks whether the changes that are to be made are reversible. Section 99A says yes. The percentages relating to ownership can be changed. That means that they can be reduced or increased. The procedure is available. If Mr Harvie’s fears were proven true, the Parliament could consider the matter again and act to reverse the situation.

Patrick Harvie: I am aware of the text of the bill in that regard, but could the minister comment on the practicality of reversing the provision and reducing the proportion to zero, should serious unintended consequences be identified at a later stage?

15:30

Fergus Ewing: We would act as we do in every other way, in committees of the Parliament, by considering the matter as swiftly as possible after proper consultation and debate. The approach is practical. That is what the bill, which has nearly 100 sections and nine schedules, provides.

After a debate that has been fought so hard and for so long, within and outwith the Parliament, if we join together and support the compromise that is supported by the Law Society of Scotland, ICAS and consumer bodies that represent the public interest, we will be doing a good thing for Scotland. I strongly believe that there will be new opportunities, businesses and jobs for many young people in the next generations in this country. The ingenuity that McGrigors and other firms have shown in taking advantage of business opportunities, to which Mr Kelly referred, will lead to many of our constituents having the chance to pursue new careers, new opportunities and new jobs. That is good for Scotland.

Amendment 45 agreed to.

Section 37A—Majority ownership

Amendment 46 moved—[Fergus Ewing].

Amendment 46A moved—[Richard Baker].

The Deputy Presiding Officer: The question is, that amendment 46A be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Maryln (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

No.
Alexander, Michael (Glasgow Shettleston) (Lab)
McKay, Hugh (Glasgow Gorbals) (Lab)
McKay, Hugh (Glasgow Gorbals) (Lab)
McKay, Hugh (Glasgow Gorbals) (Lab)
McKay, Hugh (Glasgow Gorbals) (Lab)

The Deputy Presiding Officer: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Maryln (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
Stevenson, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whiton, David (Strathkelvin and Bearsden) (Lab)

Against
Adam, Brian (Aberdeen North) (SNP)
Altkin, Bill (Glassgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glassgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glassgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie,Rose (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glassgow) (Green)
Hepburn, James (Mid Scotland and Fife) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glassgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glassgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paton, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweddle, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, John (Central Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (SNP)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glassgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 40, Against 76, Abstentions 0.

Amendment 46A disagreed to.

Amendments 46B and 46C not moved.

Amendments 46D to 46F moved—[Fergus Ewing]—and agreed to.

Amendment 46, as amended, agreed to.

Amendment 123 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 123 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glassgow) (LD)
Butler, Bill (Glassgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glassgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glassgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glassgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
James, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glassgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glassgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glassgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glassgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McIntosh, Mr Brian (Livingston) (Lab)
McInnes, Alison (North East Scotland) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
Mein, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
O’Donnell, Hugh (Central Scotland) (LD)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlson, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamies (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mathew, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Penrinds) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stur gep, Nicola (Glasgow Gowan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 56, Against 61, Abstentions 0. Amendment 123 disagreed to.

Section 39—Head of Legal Services
Amendment 47 moved—[Fergus Ewing]—and agreed to.

Section 40—Head of Practice
Amendment 48 moved—[Fergus Ewing]—and agreed to.

Section 41—Practice Committee
Amendment 49 moved—[Fergus Ewing]—and agreed to.

Section 46—Conditions for disqualification
The Deputy Presiding Officer: Group 9 is on references to penalties and offences. Amendment 50, in the name of the minister, is grouped with amendments 51, 128, 53, 54, 75 and 84.

Fergus Ewing: Amendments 50, 51, 53 and 54 will make changes to sections 46 and 50, which set out the levels of fines and terms of imprisonment that can lead to disqualification from named positions within licensed providers or to a presumption that a person is unfit to invest in such an entity.

I have some concerns—which are shared by the Law Society—that the levels of fines and the terms of imprisonment that are specified in those sections are not consistent. Amendments 50 and 51 will alter section 46 to specify a fine that is equivalent to level 4 or more on the standard scale instead of level 3, and a sentence of imprisonment of one year or more instead of two years. Amendments 53 and 54 will do the same for section 50.

Amendment 128, which was lodged by Bill Aitken and is supported by James Kelly, provides that a non-solicitor investor should be presumed to be unfit if he or she has been convicted of an offence that involves violence, in addition to offences that involve dishonesty as the bill currently specifies. The bill refers specifically to
dishonesty because it has relevance—as is obvious—for legal work. Violence does not, and would in any event fall under the general provisions in the bill that relate to crimes. A person is presumed to be unfit if they are sentenced to a specified term of imprisonment or fined an amount that is equivalent to the relevant level on the standard scale, so convictions for serious violent offences would already lead to a presumption of unfitness. However, I have some sympathy with Bill Aitken’s position, and I will listen carefully to what he says on the matter.

Amendments 75 and 84 will insert new sections that provide for corporate offences, to ensure that responsible officials as well as organisations commit an offence under parts 2 and 3 if the act in question involves their connivance, consent or negligence.

I move amendment 50.

Bill Aitken: I am pleased that the Government lodged amendment 51 to reduce the specified term of imprisonment from two years to one year, although in a less consensual debate I might have commented that one has to do an awful lot that is bad under the soft-touch approach that currently applies in Scotland to get a sentence of that dimension.

More seriously, the amendment of the financial penalty to level 4 is sensible. It is possible to impose substantial fines under road traffic legislation—for example, in lieu of disqualification where the court has the option of disqualifying under totting-up procedures—which would unfairly preclude someone from participating in the legal profession.

Amendment 128 in my name, which I am gratified that James Kelly supports, seeks to insert in the appropriate section the word “violence”. My thinking in that regard is that someone who has a conviction that involves significant violence should not be considered as an appropriate investor in a firm that provides legal services.

At the committee stage, and again today, Cathie Craigie suggested that there were concerns that some persons of dubious character might insinuate themselves in the legal profession. It is clear that we seek to do everything that is possible to prevent that from happening, and the Government is to be congratulated on taking steps to make it tougher—indeed virtually impossible, I would hope—for such individuals to enter the profession. Although the concept of the Corleone brothers being involved in a legal firm is undoubtedly far-fetched, we need to ensure that the bill is as robust as possible.

James Kelly: I support amendment 128, which was lodged by Bill Aitken.

As Bill Aitken said, the Justice Committee raised a concern in considering the bill that in opening up the ownership potential there is potential for those who have links to serious and organised crime to have access to legal firms. Clearly, it is important in that regard to disbar people who have been found guilty of crimes of dishonesty, and Bill Aitken’s amendment seeks to extend that pool to cover those who have committed crimes of violence. That is entirely logical and will help to ensure that only appropriate people enter such firms.

Fergus Ewing: I have listened carefully to what Bill Aitken and James Kelly have said, although I am not entirely sure that I agree with the remarks about soft-touch justice—an issue on which I imagine I would have the support of Ken Clarke and Ed Miliband. However, setting aside that point as it is not directly relevant to the matters before us, I have some sympathy for amendment 128. In the light of the arguments by Mr Aitken and Mr Kelly, I am minded to support it.

Amendment 51 agreed to.

Amendment 50 agreed to.

Section 47—Designated persons

The Deputy Presiding Officer: Group 10 is on designated persons. Amendment 124, in the name of Bill Aitken, is grouped with amendments 125, 52 and 127.

Bill Aitken: Amendment 124 seeks to tighten up a definition. Section 47(2) states basically that a designated person is a person who is designated “by the licensed provider to carry out legal work”, but it is not clear what is meant by the term “legal work”. Some aspects are easily definable—the conveyance of property, the preparation of wills and so on—but, as legal work can include giving advice or providing representation, lawyers often prepare documents and complete forms. Would that be included in the definition? In my view, probably not. The amendment makes the matter clearer, and it links to the definition of legal services in section 3.

Amendment 125, which is also in my name, seeks to tighten the legislation. The criteria for eligibility as a designated person is made clear under section 47: basically, employees, managers and investors are all eligible. What happens, however, when someone who has been disqualified from being head of legal services, head of practice or a member of the practice committee is also eligible for designation? There are many instances in which that would apply. Clearly we do not wish a disqualified person to be
capable of appointment as a designated person, and amendment 125 would prevent such an event from occurring. The Government may argue that disqualification under section 44 would deal with the matter, but the application of section 46 depends on some action being taken by the approved regulator while section 47 applies automatically. I will listen to the minister with some interest.

I move amendment 124.

Fergus Ewing: Amendments 124 and 127 would change the words “carry out legal work” to “provide legal services” in connection with designated persons. That may seem like a subtle change, but it is not. There is an important distinction between the provision of legal services by an entity and the connected work performed by those within it. Legal work covers the broad range of work that is done by solicitors, paralegals and other staff. Legal work, especially that which is performed by paralegals, may be technical and specific; it might not be classed as the provision of legal services as set out in section 3.

To ensure that designated persons can do the same work as they would do in a traditional firm, the current drafting should be maintained. If it were not maintained, the danger would be that they could not continue to do what they legitimately do at the moment. That would plainly be an unintended consequence. I have several other pages of objections, but that is perhaps one of the most telling, so I move on to my amendment 52.

Amendment 52 will remove the provision that allows an investor who does not work in the licensed provider to be a designated person. Robert Brown lodged a similar amendment at stage 2, which I opposed because I was concerned that it might have unintended consequences. After having reflected, I am now satisfied that it will not, and I therefore agree that there is no need for section 47(3)(b)(ii).

In light of that truncated version of my objections to Mr Aitken’s amendments, I respectfully invite him to withdraw amendment 124 and not to move the other amendments in the group in my name.

Amendment 124, by agreement, withdrawn.

Amendment 125 not moved.

Amendment 52 moved—[Fergus Ewing]—and agreed to.

Amendment 127 not moved.

Section 50—Factors as to fitness

Amendment 128 not moved.

Amendments 53 and 54 moved—[Fergus Ewing]—and agreed to.

15:45

The Deputy Presiding Officer: Group 11 is on investors. Amendment 55, in the name of the minister, is grouped with amendments 59, 61 and 62.

Fergus Ewing: Section 53A was inserted at stage 2 to ensure that questionable investors could not hide behind the corporate veil. However, the phrase “control or substantial influence in the body’s affairs”, which was inserted by an amendment that was lodged by Robert Brown, presents some difficulty, as no indication is given of how those terms are to be measured. Amendment 55 seeks to substitute Mr Brown’s term with “ownership or control of the body, or ... any other material interest in it”.

That will ensure that when it considers a non-solicitor body’s fitness to be an investor, a regulator must consider the fitness of those persons who have, to any extent, “ownership or control of the body, or ... any other material interest in it”.

Section 52(2) allows the Scottish ministers to make regulations about interests in licensed providers and to make provision for licensing rules about persons who have an interest in a licensed provider. Amendment 59 seeks to clarify that such regulations may include further provision about what counts as an interest in a body that has an interest in a licensed provider. That might be necessary to ensure that when the fitness of a body that is investing in a licensed provider is considered, the fitness of those persons who are involved in that body may also be considered.
Amendment 61 seeks to extend the definition of a solicitor investor to include firms of solicitors and incorporated practices. Amendment 62 seeks to extend it to include registered foreign lawyers. Those who can own law firms in Scotland should not be subject to the fitness test. Amendment 62 seeks to correct the omission of registered foreign lawyers that was effected at stage 2.

I move amendment 55.

Amendment 55 agreed to.

Section 50A—Ban for improper behaviour

Amendment 56 moved—[Fergus Ewing]—and agreed to.

Section 51—Behaving properly

Amendment 57 moved—[Fergus Ewing]—and agreed to.

Section 52—More about investors

Amendments 58 to 63 moved—[Fergus Ewing]—and agreed to.

Section 54—Ceasing to operate

The Deputy Presiding Officer: Group 12 is on ineligibility to be a licensed provider. Amendment 64, in the name of the minister, is grouped with amendments 129, 66 to 68 and 130.

Fergus Ewing: Following the insertion at stage 2 of provisions that require majority solicitor or other regulated profession ownership, the Law Society of Scotland raised concerns about temporary situations that would result in the failure of a licensed provider to meet the majority ownership criteria. That could happen, for instance, following the death of a solicitor owner. It is clear that revoking a licence in such a situation would be disproportionate. Therefore, amendment 64 will give approved regulators the discretion not to revoke a licence when they are satisfied that the situation is temporary and that clients are sufficiently protected.

Additionally, I think that it would be useful to give approved regulators further flexibility, so amendment 66 will allow an approved regulator to suspend a licence pending rectification of the situation, if that is appropriate.

Bill Aitken’s amendment 129 is not strictly necessary—there is no need to state that a licensed provider continues to be licensed if its licence is not revoked under section 54.

I move amendment 64.

Bill Aitken: Amendment 64 has merit in that, when taken together with amendments 67 to 68, it will allow some protection against a lacuna that might arise when there is a temporary lack of eligibility. Clearly there could be serious difficulties for a business if there is a short-term difficulty that could, in certain circumstances, prejudice the business. There is merit in all the amendments in that respect, and it should be supported. Amendment 129 seeks to restrict the period involved, and having heard the minister on that, I have nothing to add.

Amendment 64 agreed to.

Amendment 65 moved—[Fergus Ewing]—and agreed to.

Amendment 129 moved—[Bill Aitken]—and agreed to.

Amendments 66 to 68 moved—[Fergus Ewing]—and agreed to.

Amendment 130 not moved.

Section 55—Safeguarding clients

Amendment 69 moved—[Fergus Ewing]—and agreed to.

Section 65—Complaints about providers

The Deputy Presiding Officer: Group 13 is on complaints against licensed providers. Amendment 131, in the name of Bill Aitken, is grouped with amendments 70 to 74, 132 and 80 to 83.

Bill Aitken: Amendment 131 seeks to expand upon the bill by adding to the category of individuals about whom a conduct complaint can be made. Section 65 will insert a new section 57A into the Legal Profession and Legal Aid (Scotland) Act 2007. That new section concerns complaints about licensed providers, and new section 57A(4) of the 2007 act will say:

“A conduct complaint may not be made about a licensed provider, but—

(a) such a complaint may be made about a practitioner within such a provider”.

It might be thought that I am being slightly pedantic but—

George Foulkes (Lothians) (Lab): No!

Bill Aitken: I am pleased to hear my colleagues contradicting me, Presiding Officer.
The 2007 act defines a practitioner as “a firm of solicitors”, “an incorporated practice” and “a solicitor”. On the basis of that wording, new section 57A of the 2007 act will mean that conduct complaints will relate only to the legal profession. Given that the raison d’être for the bill is to allow the legal profession to enter into partnerships with other persons, it is imperative that conduct complaints can be made about designated persons. The effect of my amendment is to make it clear that such complaints can be made to the regulator in respect of that particular discipline. The other amendments are not objectionable.

I move amendment 131.

Fergus Ewing: Amendments 131 and 132, in the name of Bill Aitken and supported by James Kelly, would allow conduct complaints against designated persons to be made to the Scottish Legal Complaints Commission. That is not appropriate. The commission deals with complaints about legal practitioners who are regulated by professional bodies, such as solicitors and advocates. It does not deal with complaints about other members of staff who are working for traditional law firms, such as paralegals; such complaints would be dealt with internally by the firm. It would be odd if a paralegal were to take the rap for his boss; that does not seem to be a principle that many of us would support, and it is not the system at the moment. The current position is proportionate and complaints about designated persons who are not solicitors or other legal professionals should be treated in the same way.

Amendment 70 will require approved regulators to pass on any complaints that they receive about legal practitioners to the SLCC to ensure that such complaints are dealt with. That mirrors a similar requirement on professional organisations, such as the Law Society or the Faculty of Advocates, in the Legal Profession and Legal Aid (Scotland) Act 2007.

The other amendments make minor adjustments relating to how approved regulators and approving bodies deal with regulatory and conduct complaints. That is to ensure that the relevant parts of the said act apply, following some minor concerns that were raised by the SLCC.

Amendments 71, 80 and 83 are minor drafting amendments.

In light of my earlier remarks, I respectfully invite Bill Aitken to withdraw amendment 131 and not to move amendment 132.

Bill Aitken: Although I do not entirely share the minister’s fairly optimistic approach regarding the running of legal firms nor think that it is unheard of for paralegals and others to “take the rap”, I am persuaded that, in the vast majority of firms, responsibility for the error or any misconduct would revert to the partner concerned, who would, no doubt, take disciplinary action against his underling. On that basis, I seek permission to withdraw amendment 131 and I will not move amendment 132.

Amendment 131, by agreement, withdrawn.

Amendments 70 to 74 moved—[Fergus Ewing]—and agreed to.

Amendment 132 not moved.

After section 70A

Amendment 75 moved—[Fergus Ewing]—and agreed to.

Section 74—Certification of bodies

Amendments 76 to 78 moved—[Fergus Ewing]—and agreed to.

Section 81C—Certification of bodies

Amendment 79 moved—[Fergus Ewing]—and agreed to.

Section 83—Complaints about agents and writers

Amendments 80 to 83 moved—[Fergus Ewing]—and agreed to.

After section 84A

Amendment 84 moved—[Fergus Ewing]—and agreed to.

After section 85

The Deputy Presiding Officer: Group 14 is on regulation of estate administrators. Amendment 133, in the name of Richard Baker, is grouped with amendment 153.

Richard Baker: I lodged these amendments as a result of discussions with the Society of Trust and Estate Practitioners. It considers that, for the purposes of adequate consumer protection, the administration of an estate in its entirety should be a regulated activity. It argues that fraud and incompetence are most likely to occur during the administration of the estate when the deceased’s funds are being handled and when the provisions of the will are being implemented.

Those areas are currently unregulated in the bill and, as the bill is drafted, the regulation of confirmation agents would cover only the preparation and submission of the application for confirmation of the deceased person’s estate. That is a significant but small part of the estate administration process. Significant issues regarding the administration of an estate will arise
in other aspects of estate administration—for example, in the administration of the correct division of assets among the beneficiaries. That activity is not currently within the scope of confirmation services as described in the bill; therefore, my amendments seek to broaden its scope to include the activities of estate administrators and to provide a definition of that term.

The Society of Trust and Estate Practitioners has made strong arguments for expanding the provisions of the bill in that way, including providing examples of fraudulent activity that has occurred at points of the process that, as the bill stands, would not fall within the compass of its provisions for regulation. On that basis, I hope that my amendments will be supported by ministers and by Parliament.

I move amendment 133.

**Fergus Ewing:** Amendment 133 would allow the Scottish ministers to make regulations for the regulation of estate administrators. There have been suggestions from various parties, including the Scottish Law Agents Society, that, as Richard Baker has said, our regulation of confirmation agents and non-lawyer will writers does not go far enough and that regulation should be extended to the whole executry process, not all of which is a reserved matter requiring the involvement solely of solicitors.

However, additional regulation in those areas would be a significant expansion of the regulatory regime in part 3 and would require further consultation to allow an assessment to be made of the potential impact on those who are currently involved in the process. For example, extending regulation to executors could catch a huge number of people who are involved in administering estates, perhaps including relatives of the deceased, who are often named as the executors. I am sure that it is not Richard Baker's plan that an ordinary individual who is winding up his dad’s or his mother’s estate, which may not involve a lot of money, should be involved in regulation or additional expense. There is no reason why people in that situation should have to incur additional burdens and costs. They can do the work themselves, often with a bit of help from sympathetic court staff and others. However, regulation could potentially prevent such people from being involved, leading to the additional cost of employing appropriately qualified persons to wind up an estate in every case.

The matter has not been debated. In considering the bill, we have pursued an approach of avoiding pushing through things that have not been properly debated and consulted on. This is an example of an area in which more thought and consultation is needed before we act. For those reasons, I do not support Richard Baker's amendments and respectfully invite him to withdraw amendment 133 and not to move amendment 153.

**Richard Baker:** The minister raises valid issues, but I am not quite convinced that they are impediments to making this change, which he says that they are. To be fair to the Society of Trust and Estate Practitioners, it raised the issues with members prior to stage 2 and stage 3, and they have been carefully considered. Once more, I will err on the side of caution when it comes to regulation. I think that the bill is a logical vehicle by which we can address the issues that the society has raised. I think that there is not a huge gulf between us in terms of getting to the right position, but the bill would be made more robust by the inclusion of the provisions, so I will press the amendment.

**The Deputy Presiding Officer:** The question is, that amendment 133 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

For

Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Edie, Helen (Dunfriemuir East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Aberdeen Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
The amendment would allow not only for the creation of a level playing field for licensed providers, but for a consistent approach to be taken to levies relating to all practice units, irrespective of type, and would allow the Law Society to ensure a fair distribution of the costs that are involved in running the society by relating those costs to the type of practice that benefits from the regulatory and representational roles that the society fulfills.

Amendment 138 would modify subparagraph (2A) of paragraph 1 of schedule 3 to the 1980 act by inserting into it the words, “partners in a registered firm of solicitors, or ... in a case where the registered firm of solicitors is a sole practitioner, a single solicitor practising under the solicitor’s own name or a solicitor otherwise practising as a sole practitioner.”

The amendment is consequential on the earlier amendment.

The Law Society should be able to attract income from specific courses that it might run for the benefit of solicitors. It is only appropriate that it should be able to charge accordingly.
If I receive assurances from the minister that the existing regime is permissive of that, I will seek to withdraw the amendment.

I move amendment 134.

Robert Brown: I am not particularly enthusiastic about amendments 134, 138 and 139. I know that the Law Society’s position is that bills that affect the solicitor profession do not come along very often so it needs to take advantage of the opportunity, but the amendments are significant in allowing change to the basis of contributions to the society and the Scottish solicitors guarantee fund, and they have not been consulted on by the Government or, I think, the Law Society itself. I believe that the ground should be prepared before the Parliament is asked to approve the changes. I will be interested to hear the minister’s response, but I believe that the matter should be dealt with at another time.

James Kelly: I oppose amendment 134. I am not convinced that the provision should be in the bill or that the Law Society should have the powers that would be vested in it by the change. Specifically, I am concerned about proposed new paragraph 6C of schedule 1 to the 1980 act, which would allow the Law Society to impose a special subscription and, further to that, different types of special subscription. There is no description of why it would do that. There have been tensions recently within the Law Society and allowing it to impose such subscriptions could undermine the harmony that we hope will break out if the bill is passed later today.

Fergus Ewing: Amendment 134 would allow the Law Society to make rules that require firms of solicitors to register with the council and to charge an entity-level fee for that registration. That is in addition to the individual practising certificate fee.

First, solicitors are under a duty to inform the society of their place of business and any changes to it, so a list of firms should already be available to the society. Secondly, given the permissive nature of the bill and the undertaking that I have given throughout that it will not have a significant impact on traditional firms that do not choose ABS, I have serious concerns about making such a fundamental change to the society’s fee-charging structure. Regardless of any requirement for the profession to vote on such a change before implementation, it would appear to be a significant new levy imposed by a bill that I have repeatedly argued will not significantly affect those who choose not to form licensed providers. Indeed, I understand that certain members of the profession have already expressed some reservations about the new fee.

I understand that the society has discussed its proposals with certain groups within the profession. I have discussed the amendment in a meeting with the president of the Law Society and his colleagues and I understand his position and their concerns on these matters. However, I respectfully believe that a more comprehensive consultation should be carried out before significant changes are made. My experience is that changes to fee structures are almost inevitably more complex than they first appear to be, and that they often have unforeseen consequences. Therefore, without proper consideration being given to the implications of the change, I cannot support amendment 134.

Amendments 138 and 139 would allow the Law Society to gather guarantee fund contributions from registered firms at an entity level rather than from individual principals. As with the proposed entity-level fee, I have concerns about that, given the lack of consultation with the profession, especially as it might result in some firms being charged more than at present. I say that having made robust representations to the SLCC that resulted in its reducing the levy by £40 for each solicitor in Scotland, which resulted in a saving of £0.5 million for the profession. In that regard, we have some good form in saving solicitors some cash.

I invite Bill Aitken to withdraw amendment 134 and not to move amendments 138 and 139.

Bill Aitken: I am sure that the legal profession will sleep easier in their beds of a night knowing that the minister is enthusiastically pursuing savings in that respect.

I have listened to the views of my colleagues. There was some value in the amendments and it was appropriate to canvass views on them, but I will not press amendment 134 or move amendments 138 and 139.

Amendment 134, by agreement, withdrawn.

Section 91D—Use of Guarantee Fund

The Deputy Presiding Officer: Group 16 is on guarantee fund contributions. Amendment 85, in the name of the minister, is grouped with amendments 87 and 90 to 93.

Fergus Ewing: Amendments 85, 87, 91 and 92 make minor technical changes to provisions relating to the guarantee fund in the Solicitors (Scotland) Act 1980. They ensure that individual solicitors who are members of incorporated practices are referred to where appropriate. Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Law Society is obliged to maintain a compensation fund in relation to independent conveyancing and executry practitioners. Under a memorandum of understanding, the Scottish ministers currently underwrite claims on the fund. The society has
recently confirmed that there is little money in the fund and that it is not fit for purpose. As there is only one such practitioner, and no further practitioners are possible in future, further contributions to the fund will be extremely limited.

The Scottish Government and the Law Society agree that an acceptable solution is to allow the sole remaining practitioner to contribute to and be covered by the guarantee fund. That would result in the present liability on the Government being removed, thereby saving public money. Amendments 90 and 93 extend the guarantee fund to cover such practitioners and require them to contribute to it, while repealing the relevant section of the 1990 act.

I move amendment 85.

Amendment 85 agreed to.

Amendments 86 and 87 moved—[Fergus Ewing]—and agreed to.

The Deputy Presiding Officer: Amendment 135, in the name of Bill Aitken, has already been debated. If amendment 135 is agreed to, I cannot call amendment 88.

Amendment 135 moved—[Bill Aitken].

The Deputy Presiding Officer: The question is, that amendment 135 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Finnie, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Park, John (Mid Scotland and Fife) (Con)
Peacock, Peter (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

Against
Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Alieen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Graeme, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 67, Against 44, Abstentions 0.

Amendment 135 agreed to.

Amendment 136 moved—[Bill Aitken].

The Deputy Presiding Officer: The question is, that amendment 136 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McIntosh, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
O’Neill, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, John (Ayr) (Con)
Smith, Margaret (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matther, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAteery, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Torn (Hamilton Central) (Lab)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McManus, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McInty, Des (Clydebank and Milngavie) (Lab)
Milligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Patterson, Andrew (South of Scotland) (SNP)
Patterson, Dr Richard (Mid Scotland and Fife) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)

Against
Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumfriesshire) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingston, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAteery, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Torn (Hamilton South) (Lab)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McManus, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McInty, Des (Clydebank and Milngavie) (Lab)
Milligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Patterson, Andrew (South of Scotland) (SNP)
Patterson, Dr Richard (Mid Scotland and Fife) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 29, Against 82, Abstentions 0.

Amendment 136 disagreed to.
Amendment 89 moved—[Fergus Ewing]—and agreed to.
Amendment 137 not moved.
Amendment 90 moved—[Fergus Ewing]—and agreed to.

Section 91E—Contributions to the Fund
Amendment 91 moved—[Fergus Ewing]—and agreed to.
Amendment 138 not moved.
Amendments 92 and 93 moved—[Fergus Ewing]—and agreed to.
Amendment 139 not moved.

After section 91G

16:15

The Deputy Presiding Officer: Group 17 is on operation of the Law Society. Amendment 141, in the name of Bill Aitken, is grouped with amendments 142 to 144 and 150.

Bill Aitken: Amendment 141 seeks to modify the provisions of the Solicitors (Scotland) Act 1980 relating to membership of the Law Society.

The Law Society has been carrying out an exercise in which it seeks to modernise and revise its constitution. A number of problems have come to light as a result of that exercise. It is not clear who can become an honorary member of the society or whether it can have as associate members solicitors, students or other legally qualified persons. Amendment 141 seeks to remedy that.

Amendments 142 to 144 are consequential on amendment 141.

My amendment 150 seeks to amend schedule 1 by clarifying for the avoidance of doubt that the Law Society can change certain functions that it carries out. The amendment is merely to clarify that those powers exist and are in statute rather than implied.

I move amendment 141.

Fergus Ewing: Amendments 141 to 144, in the name of Bill Aitken, would make changes to the Solicitors (Scotland) Act 1980. They relate to membership of the Law Society. I understand that the society is currently revising its constitution and that those changes have been included in the latest draft, which is yet to be debated and voted on. I am not clear why the membership provisions in the 1980 act are thought to be insufficient or why the society wishes to extend its membership to include non-solicitors. That came as something of a surprise to me. I understand that there has been a consultation on the draft constitution, but it is still to be determined whether the profession will be in favour of the changes. The proposals may therefore be subject to further change. Given that the policy behind them is unclear, at least to the Scottish Government, I cannot support amendments 141 to 144.

Amendment 150, which is also in the name of Bill Aitken, would allow the Law Society to charge fees "in respect of the discharge of the Society’s functions.”

The society has indicated that such fees would not be charged for services that are currently funded by the practising certificate fee, but would be charged in connection with other solicitor or non-solicitor services that are provided. The society currently has the power to charge fees in certain situations, including for the provision of training under section 5 of the 1980 act, so I am unsure about exactly which services it wishes to be able to charge for. Therefore, I do not support amendment 150. In view of the society's current powers, the lack of clarity that exists and the lack of a concluded and resolved debate within the profession, I respectfully invite Mr Aitken to withdraw amendment 141 and not to move the rest of the amendments in the group.

Bill Aitken: There is a lack of clarity in the position, although I could suggest a circumstance in which a non-solicitor might be considered as a member of the Law Society. The society might wish to have on board an academic professor of law who may not be a solicitor and may not have either a practising certificate or a qualification in that direction. However, I take the minister's point that the consultation exercise is not yet complete, and as a result, I will not pursue the matter.

I was gratified to hear from the minister that the Law Society has the ability to make the appropriate charges for specific courses or work that is carried out for a number of specific clients rather than generally. That deals with the point on which I wished to canvass opinion, and I will not pursue the matter now that that is on the record.

Amendment 141, by agreement, withdrawn.

Section 92—Council membership
Amendments 142 to 144 not moved.

Section 93—Regulatory committee
The Deputy Presiding Officer (Trish Godman): Group 18 is on the regulatory committee. Amendment 94, in the name of the minister, is grouped with amendments 95, 145, 96, 97, 146, 147, 98, 148, 149 and 99 to 104.

Fergus Ewing: This group relates to the regulatory committee. To give brief background information, section 93 makes provision requiring a regulatory committee to be established by the council of the Law Society and for all regulatory functions of the council to be delegated to it. Section 93 also sets out rules relating to the committee, which will ensure that it performs its regulatory functions independently. In all other respects, the committee will be the same as any other committee that is established by the council.

Amendment 95 will require the council to ensure that the regulatory committee carries out such functions as are delegated to it under proposed new section 3B(1) of the Solicitors (Scotland) Act 1980. That addresses the Law Society’s concerns that, although the council will remain legally responsible for such functions, it might not be able to ensure that they have been carried out, as such action could be classed as undue interference under proposed new section 3B(2A) of the 1980 act.

The policy intention in providing for a regulatory committee is that all regulatory matters that were previously dealt with by the council be transferred to that committee, which should operate independently of the council. A key part of that independence is that the regulatory committee alone should make decisions about regulatory matters. If the council retains the ability to exercise regulatory functions without reference to the committee or to revoke the delegation of functions to the committee, the whole concept of splitting off the regulatory functions would be undermined. Therefore, amendment 96 will clarify that, once the council has delegated its regulatory functions to the regulatory committee, it must not exercise such functions through any other means. However, amendment 97 will ensure that, when specific action is required by the council to ensure that its regulatory functions are achieved, the council has the ability to take such action, but only as explicitly directed by the regulatory committee.

Amendment 145, in the name of Bill Aitken, would remove the wording “(acting in any other capacity)” in proposed new section 3B(2A) of the 1980 act. That wording was inserted because the regulatory committee is part of the council and so, in prohibiting the council from interfering unduly in the regulatory committee’s affairs, it is important to clarify that that does not affect the council acting in its particular capacity as the regulatory committee. Therefore, I do not support amendment 145.

Amendments 146 to 149, in the name of Robert Brown, also relate to the regulatory committee. Amendment 146 would allow the council to set performance targets, standards and timescales for the regulatory committee, despite the prohibition on undue interference in the business of the regulatory committee. The Law Society has raised concerns about what would and would not be classed as undue interference in the regulatory committee’s business, so it might be worth setting out the intention behind that provision. The regulatory committee will in most respects be just another committee of the council, so the council will have a legitimate oversight role in relation to it. For example, requiring regular reports to be made, exercising proper financial control and the removal of members under certain circumstances are all reasonable actions and are consistent with the independent functioning of the regulatory committee. Those functions would not, in my opinion, be classed as undue interference.

On the other hand, some of the functions that the Law Society has in mind would likely be classed as undue interference. Examples would be setting the strategic direction of the committee or, as in amendment 146, setting targets, standards or timescales for the committee’s work. Such actions would in my view cast doubt on the regulatory committee’s independence. The committee must be able to set its own strategic direction, free from the influence of the council, and dictate the standards and timescales of its work.

Amendment 147 is unnecessary because, as I said, the prohibition on undue interference would not prevent the council from removing members of the regulatory committee in certain reasonable circumstances, such as the member being insolvent.

Amendment 148 would require the council to appoint one of its lay members as the convener of the regulatory committee, rather than allow the committee to appoint its convener. I do not agree with that proposal. It is vital that the regulatory committee be independent. I believe that removing its ability to appoint its convener would undermine that independence.

Amendment 149 is completely unnecessary, as the 1980 act already provides that any committee of the council can delegate functions to a sub-committee. The Law Society has raised concerns about whether a sub-committee of the new regulatory committee should be required to have a lay member as its chairperson and whether it should be able to co-opt members who are not on the regulatory committee. As a regulatory sub-committee might deal with technical issues, I
consider that it might be appropriate for a solicitor to chair it and for the committee to be able to co-opt those who are most able to deal with the issues that are under consideration. Accordingly, amendment 99 makes such provision.

However, I also consider it appropriate that Scottish ministers have a power to prescribe the maximum number of persons on any regulatory sub-committee and what proportion of the regulatory committee or sub-committee may be co-opted. New section 3E of the 1980 act, which will be inserted by amendment 103, provides for that. The society has also raised concerns about potential disputes between the council and the regulatory committee. New section 3D of the 1980 act, which will be inserted by amendment 103, therefore provides that arbitration be used to resolve such disputes, with an arbiter who is to be appointed by the Lord President should the parties fail to agree on one. I hope that that will never be necessary but, in the event of any problems, the provision allows a proportionate response to resolve the issue while avoiding recourse to the courts.

The definition of regulatory functions is expanded slightly in new section 3F of the 1980 act to include the society’s functions in respect of conveyancing, executive practitioners and registered European and foreign lawyers. Further examples are added to the list of particular regulatory functions to improve clarity.

New section 3G of the 1980 act provides that if the society becomes an approved regulator, its regulatory functions include any relevant functions in relation to that role. Amendment 104 defines the regulatory committee for the purposes of the 1980 act.

I respectfully invite Mr Aitken and Mr Brown not to move their amendments.

I move amendment 94.

Bill Aitken: Amendment 145, in my name, seeks to improve the drafting of the bill and takes out the phrase:

“(acting in any other capacity)”. 

I consider the phrase to be imprecise because the Law Society has only one capacity. I have not yet heard sufficient from the minister to enable me not to move amendment 145.

Amendments 146 and 147 might have some merit and I shall listen to Robert Brown’s arguments. Amendment 148 seems to tidy up some wording, although the difference between “non-solicitor members” and “lay persons” is a little obscure and defeats me at present.

Amendment 149, in my name, would simply enable the regulatory committee to delegate its authority to a sub-committee. It would correct what seems to be a deficiency in that the bill envisages that there will be sub-committees of the regulatory committee, but makes no provision for delegation from the regulatory committee to such sub-committees. I need to hear the minister being a little more persuasive under that heading before I decide where to take my amendment.

Robert Brown: This is a significant group of amendments that would affect the working of the council of the Law Society and its relationship with the regulatory committee. I agree entirely with the minister’s assessment of the need to define clearly the relationship between the two bodies. That is one of the difficulties that lie behind some of today’s amendments.

I am unenthusiastic about Government amendment 103, which seems too elaborate. I note in particular provision for arbitration in new section 3D of the 1980 act. We will have lost the plot entirely if the council and the regulatory committee fall out, and I think that the minister agrees with that. I understand that the Law Society takes the view that the provision on arbitration is a disproportionate response. It is fair to say that, where an arbitration arrangement is in place, it acts as a slight disincentive to sorting the problem directly. I will not vote against the amendment because it contains lots of other measures, but I will be interested in the minister’s response to my comments.

I am also bothered by amendment 97, which provides for the regulatory committee not just to decide things in its remit but to give directions to the council on such matters. As the minister suggested, that might follow from the society’s independent statutory status, but it does not sound right. I hope that the minister will elaborate on the need for that provision and the circumstances in which it might apply. It seems a trifle odd that the provision has been thought of only at stage 3; I do not think that we considered it at an earlier stage.

The Law Society’s view is that the regulatory committee should be independent of the council, but I agree with it that that does not mean that the regulatory committee should be unaccountable or unconnected to the council. Amendments 146 to 148 are designed to allow the council to set standards of performance for the regulatory committee. I do not agree with the minister that that would impinge on its independent role. They also provide for what happens if a member of the committee becomes unable to discharge their functions, or unsuited to doing so. In that regard, given the confusion that surrounds this issue, it does no harm to have that specifically laid out, against the background of the other things that say that the council cannot interfere with the regulatory committee.
It is important to link the committee properly with the council by providing that it be convened by a lay member of the council. At present, that is not required. The difference between a lay member and a non-solicitor member is not really the issue; the point at issue is that the committee should be convened by a member of the council who is not a solicitor.

I accept that this is a tricky area and that there is a sometimes delicate balance between the regulatory and representative functions of the Law Society. It has been said that there is a degree of tension in the Law Society following the debates about the bill in general. There need to be appropriate linkages to improve confidence, facilitate good working and produce a corporate response on some of these issues. The amendments in my name, which, subject to the minister’s comments, I intend to pursue, will help.

16:30

**Richard Baker:** It is important that disputes between the regulatory committee and the council of the Law Society can be resolved. Of course, ultimately the council is the accountable body of the society, including the regulatory committee. There must be clear provision for the council to resolve any dispute that it might have with the regulatory committee.

We understand why the society has promoted amendments that would give the council a limited ability to intervene in the function of the regulatory committee but, ultimately, we do not agree with that approach.

We have raised the issue that the Law Society is now to be a representative, disciplinary and regulatory body. We believe that the regulatory role should at least be clearly separate from the society’s other functions.

We lodged amendments at stage 2 that would have created even clearer delineations between the different functions and committees.

We support the model for resolving disputes in the amendments in the name of the minister and we believe that he has proposed the right approach. However, we do not support the approach that is proposed in the amendments from Robert Brown and Bill Aitken.

We heard Bill Aitken’s argument about sub-committees and, like him, we will be interested to hear the minister’s response on that issue.

**Fergus Ewing:** I took some time to set out the arguments on this matter—longer than I took in debates on previous groupings—because of the importance of getting it right. Section 93 is a significant, important section. Along with the consideration of the guarantee fund issue, there has been a lot of debate, thought and work on this issue over the summer.

I appreciate the points that Mr Brown made and the Law Society’s position. The amendments that we have lodged offer the correct approach. As Mr Baker has said, the regulatory committee needs to have a measure of independence and to be able to operate separately. That will be possible under the provisions that we have introduced.

I want to respond in detail to some of the points that have been made. First, Mr Aitken raised a point about amendment 145. This is a somewhat technical and legalistic argument, but amendment 145 would remove the words “(acting in any other capacity)” from new section 3B(2A) of the 1980 act, which is inserted by section 93 of the bill. That wording was inserted because the regulatory committee is part of the council and so, when prohibiting the council from interfering unduly in the affairs of the regulatory committee, it is important that that does not include the section of the council that is legitimately carrying out those regulatory functions—the regulatory committee. Therefore, we do not support amendment 145, as the removal of those words could lead to some ambiguity about the different roles of the council.

I think that I addressed some of Mr Brown’s arguments in my lengthy opening remarks. Suffice it to say that I do not think that providing for arbitration is disproportionate. We in the Government encourage arbitration. It need not be a long or complex procedure. The role of the Lord President is to appoint an arbiter, not to adjudicate. Arbitration will not be conducted before him or the inner house of the Court of Session. It will be conducted by an arbiter. It is a simple process that avoids litigation and going to court.

That is the point of arbitration. I do not believe that providing for it is disproportionate and I do not believe the argument that creating a provision for arbitration is a disincentive to use it. That is a surprising proposition and we do not support it.

I do not believe that confusion surrounds this section, which is straightforward, clear cut and based on principle. I commend it to the Parliament. I respectfully invite Mr Brown not to move the amendments in his name. I invite Bill Aitken not to move amendment 145.

Amendment 94 agreed to.

Amendment 95 moved—[Fergus Ewing]—and agreed to.

Amendment 145 moved—[Bill Aitken].

The Deputy Presiding Officer: The question is, that amendment 145 be agreed to. Are we agreed?
Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dundee East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Hendry, Peter (Mid Scotland and Fife) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Con) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Graham, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 70, Against 43, Abstentions 0.

Amendment 145 agreed to.

Amendment 96 moved—[Fergus Ewing]—and agreed to.

Amendment 97 moved—[Fergus Ewing].

The Deputy Presiding Officer: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
The Deputy Presiding Officer: The result of the division is: For 85, Against 29, Abstentions 0.

Amendment 97 agreed to.

Amendment 146 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (Lothians) (SNP)
Mcleod, David (Edinburgh Pentlands) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Rumbles, Mike (West Ayrshire and Inverclyde) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (East Lothian) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Deputy Presiding Officer: The result of the division is: For 85, Against 29, Abstentions 0.

Amendment 97 agreed to.

Amendment 146 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Bob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
Mcken, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gill (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Russell, Michael (South of Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 13, Against 100, Abstentions 0.

Amendment 146 disagreed to.

Amendment 147 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 147 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)

For
Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)

The Deputy Presiding Officer: The result of the division is: For 13, Against 100, Abstentions 0.

Amendment 146 disagreed to.

Amendment 147 moved—[Robert Brown].

The Deputy Presiding Officer: The question is, that amendment 147 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.
Against

Adam, Brian (Aberdeen North) (SNP)
Aiken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Branik, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Ann (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Fergusson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame South) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Graeme, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John ( Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeil, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Russell, Michael (South of Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Surgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 14, Against 100, Abstentions 0.
Amendment 147 disagreed to.
Amendment 98 moved—[Fergus Ewing]—and agreed to.
Amendment 148 moved—[Robert Brown].
The Deputy Presiding Officer: The question is, that amendment 148 be agreed to. Are we agreed?

Members: No.
The Deputy Presiding Officer: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Hume, Jim (South of Scotland) (LD)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brookebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (Lab)
Matheson, Michael (Falkirk West) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Russell, Michael (South of Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swimney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitlefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 14, Against 100, Abstentions 0.
Amendment 148 disagreed to.
Amendment 149 not moved.
Amendments 99 to 104 moved—[Fergus Ewing]—and agreed to.

Section 94A—Notification if suspension lifted

The Deputy Presiding Officer: Group 19 is on disciplinary provision. Amendment 105, in the name of the minister, is grouped with amendments 106 to 110, 112 and 113.
Fergus Ewing: The amendments in the group relate to discipline.

Members: Oh!

Fergus Ewing: I hear that members are listening—that is encouraging.

At stage 1, an amendment was lodged that sought to alter the Solicitors (Scotland) Act 1980 so that a solicitor’s practising certificate would automatically be suspended if they had been convicted by any court of an act involving dishonesty or had been sentenced to a term of imprisonment. Such suspensions are already possible in those circumstances, but the Law Society wishes to prevent convicted solicitors from practising without waiting for the completion of the Scottish Solicitors Discipline Tribunal process.

The amendment was not moved at stage 2, but I undertook to discuss the issue further with the Law Society, which has agreed that automatic suspension is not appropriate and that a discretionary power for the council of the society to suspend practising certificates in such
circumstances is more suitable. We have also agreed that there should be a right of appeal to the court. Amendments 105 to 107, 112 and 113 make necessary amendments to achieve those objectives.

I move amendment 105.

Amendment 105 agreed to.

Amendments 106 to 110 moved—[Fergus Ewing]—and agreed to.

After section 94A

The Deputy Presiding Officer: Group 20 is on the accounts fee. Amendment 111, in the name of the minister, is the only amendment in the group.

Fergus Ewing: During my discussions with the Law Society, it was suggested that it might make the purpose of the guarantee fund clearer if the society could charge a separate fee to cover financial compliance work. The society suggested that, as with the guarantee fund fee, only principals and incorporated practices should pay. The guarantee fund contribution would be reduced accordingly and would cover only the costs of administration of the fund and grants from it. Amendment 111 inserts new section 37A into the Solicitors (Scotland) Act 1980 to make provision for the new accounts fee.

I move amendment 111.

Amendment 111 agreed to.

Amendment 112 moved—[Fergus Ewing]—and agreed to.

Amendment 150 not moved.

Before section 98

Amendment 113 moved—[Fergus Ewing]—and agreed to.

After section 98

16:45

The Deputy Presiding Officer: Group 21 is on amendments to the 1980 act. Amendment 151, in the name of Bill Aitken, is grouped with amendment 156.

Bill Aitken: These two amendments seek to amend the 1980 act, and they are in consequence of or in connection with the amendments that were made to the complaints procedure in the 2007 act. Amendment 156, the principal amendment of the two, is necessary in order to dovetail the new complaints procedure into the 1980 act and to make it work more effectively. That is the crux of the argument, and I shall listen to the minister with interest.

I move amendment 151.

Fergus Ewing: Bill Aitken’s amendments 151 and 156 make certain changes to the 1980 act that were proposed by the Law Society of Scotland some time ago. They were said to be consequential to the Legal Profession and Legal Aid (Scotland) Act 2007.

Although such changes could ordinarily have been made using the power to make ancillary provision that is contained in the 2007 act, that power is currently limited in scope, owing to changes made through the UK Legal Services Act 2007. However, I lodged a stage 2 amendment to amend the Legal Aid (Scotland) Act 2007 to ensure that the power to make ancillary provision can be used as intended, including in areas that have been altered by the UK Legal Services Act 2007. That stage 2 amendment now appears in the bill as section 98A.

Given that the issues can be addressed through that section, and that I undertake to consider addressing them in subordinate legislation, I respectfully invite Bill Aitken—if he agrees that that deals with the issues adequately—to withdraw and not move amendments 151 and 156 respectively.

Bill Aitken: On the basis of the ministerial undertaking that has been provided, I will not proceed with the amendments.

Amendment 151, by agreement, withdrawn.

Section 99—Regulations

Amendment 152 moved—[Richard Baker].

The Deputy Presiding Officer: The question is, that amendment 152 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craw, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Amendment 152 agreed to.

Amendment 114 moved—[Fergus Ewing]—and agreed to.

Amendment 153 not moved.

Section 99A—Further modification

Amendments 154 and 155 not moved.

Amendments 115 and 116 moved—[Fergus Ewing]—and agreed to.

Schedule 3—Censure

Amendment 117 moved—[Fergus Ewing]—and agreed to.

After schedule 8

Amendment 156 moved—[Bill Aitken].

The Deputy Presiding Officer: The question is, that amendment 156 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John ( Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy ( Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Jamie (Gaithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Carlaw, Jackson (West of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Hume, Jim (South of Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Against

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constable, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Margaret (Glasgow Baillieston) (Lab)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Heburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McArthur, Liam (Orkney) (LD)
McAteer, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeill, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thomson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whilton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 15, Against 99, Abstentions 0.

Amendment 156 disagreed to.

Schedule 9—Index of expressions used

Amendment 118 moved—[Fergus Ewing]—and agreed to.

Long Title

The Deputy Presiding Officer: Group 22 is on the long title. Amendment 119, in the name of the minister, is grouped with amendment 120.

Fergus Ewing: Amendments 119 and 120 will amend the long title so that it reflects the provisions that were inserted at stage 2 in relation to the regulation of non-lawyer will writers and lay representation.

I move amendment 119.

Amendment 119 agreed to.

Amendment 120 moved—[Fergus Ewing]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.
The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S3M-7105, in the name of Fergus Ewing, on the Legal Services (Scotland) Bill.

16:53

The Minister for Community Safety (Fergus Ewing): I am delighted to open the final debate on the bill, and I thank members for their contributions this afternoon. I especially thank members of the Justice Committee, which was so ably convened by Bill Aitken. They bore the brunt of the work and we are grateful. We are also grateful for the discussions that have taken place during the past several days and which have allowed the relatively swift transaction of business this afternoon, although that swiftness might not have been evident to all members who were here.

When the bill was introduced in the Scottish Parliament last year, I recall one member saying that it would be a straightforward, simple and uncontroversial bill. How wrong he was. It turned out to be more complicated than that, and the debate in the legal profession has been heartfelt, especially during the past year.

When I took responsibility for the bill it seemed to me necessary, reasonable and fair to meet the people who had strong objections to and reservations about the bill on grounds of principle as well as pragmatic argument. I met those people and I respect their views.

The debate has been turbulent and bruising at times, but it has always been conducted by those who are ultimately concerned for the continued success and independence of the legal profession in Scotland, and for the importance of Scots law and the Scottish legal system—a view that we all hold.

The late Donald Dewar, who was remembered earlier this week in a marvellous piece of work, said that Scotland was the only country in the world that had a legal system but lacked its own Parliament. I think that as a proud Scottish solicitor he would have been interested in taking part in this debate.

The debate has been difficult and has aroused strong emotions that have not waned entirely. Discussion will no doubt continue after the bill is passed, but I believe that a measure of consensus on the compromise position that was so long fought for has been reached today by the Parliament and the Law Society of Scotland. The legislative process can perhaps be viewed as an informal, unwritten partnership between the Parliament and the Law Society acting in tandem, as well as involving other professions and individuals.

It could be said—and some believe—that the profession has driven the legislation, as it reached a compromise that we adopted as our own. Richard Baker and Robert Brown have today rightly expressed strong strands of argument and views that are no doubt still held and argued among significant minority sections of the legal profession. It was right, and I am pleased, that we debated those today. I am somewhat pleased, not to say relieved, about the outcome for those particular amendments, but I pay tribute to everyone who played a part in drafting them.

The bill has the potential to modernise the legal profession, and it will expand the opportunities that are available to solicitors, especially, as I have said on many occasions, to young solicitors in the generations to come. I am entirely confident that solicitors in Scotland—mainly, although not exclusively, those from larger firms—will take advantage of the opportunities that will, if the bill is passed, be available to them. I firmly and fervently believe that those opportunities would not be available if it was not for the bill.

I am particularly pleased that the creation of those opportunities costs very little in taxpayers’ money. The bill will allow business to create business, and will enable the business ingenuity of the Scottish legal profession to be employed to that end. It will enable Scottish solicitors to compete with ever greater success with their counterparts south of the border, especially if we as an institution go on—as I hope, believe and expect that we will—to reform the courts in Scotland and deliver a civil court system that is capable of acting more swiftly and involves less expense.

There are huge advantages to be obtained from the bill, and I hope that businesses will embrace rather than fear the changes. In addition to allowing the big firms to deploy opportunities at that end of the market in commercial and technical areas of law, and in significant bodies of law in which the profession has perhaps lost out to England, I fervently believe that the bill will benefit high-street solicitors. They will be able to join with chartered accountants—provided they are approved, as they will—and other professionals to share premises and costs, and to offer an improved service to their clients and to new clients. I believe that that is all to the good.

I will say in closing that the bill makes other provisions—subordinate but significant—for the regulation of non-lawyer will writers. That was given overwhelming support in our public consultation and I am pleased to say we have taken a lead on England in that area. The bill gives new and important functions to the Scottish Legal
Aid Board, which has been praised by, for example, Scottish Women’s Aid, and it also makes provision that will allow court rules to be made to permit lay representatives, or McKenzie friends, to make oral submissions in court.

I am pleased to speak in support of the bill, which I commend to the chamber.

I move,

That the Parliament agrees that the Legal Services (Scotland) Bill be passed.

17:00

Richard Baker (North East Scotland) (Lab):

This has not been a straightforward process. It has been a rather arduous one, and the reforms, while important, have been subject to much greater debate than we might have anticipated. Like the minister, I thank for their work the Justice Committee and all those who have worked on the bill or been involved in making representations on it.

As the minister said, a great deal of effort has gone into the work to improve the bill and to try to forge a greater consensus between those with differing views on it, who see it as either a threat or an opportunity for the legal services industry in Scotland. As I stated earlier, the problem is that we are working on predictions of how we hope the reforms will work. The evidence does not exist at the moment because the long-anticipated movement to 100 per cent external ownership of legal services businesses south of the border will not now come into effect until the end of next year at the earliest.

The key for us has been to try to move to allowing new investment into our legal services sector, which has been through challenging conditions due to the global recession, while assuaging some of the concerns that have been expressed about how the system can be effectively regulated and about potential negative impacts on access to justice for consumers.

That is why we, like Robert Brown, have supported an incremental approach and sought to achieve a balance in setting in the bill a structure for legal services providers that allows for multidisciplinary firms and external investment and, in advance of potentially varying the percentages on ownership on the basis of evidence of the reforms’ success, provisions that enable ministers to introduce regulations to do just that.

Far from falling behind the situation in England and Wales, we have now moved to a position in which non-solicitors can own greater percentages of legal services firms than is currently the case south of the border. That was the case not only with the position reached at stage 2, which as the minister rightly said was a concession from the Government’s previous position, but in the amendments that Robert Brown and I pursued today.

I could not take Dave Thompson’s intervention because of a lack of time—nothing else, I assure him. Much as he may have thought that he was going to ask me a good question, I was not particularly troubled or intimidated. I say to him that it is important to acknowledge the Law Society’s current position and welcome the input that we have had from it, but its position has been a moveable feast and a hotly debated issue. I am sure that the Law Society will be pleased that the bill has come to a resolution—we have all heard from Michael Clancy, who has worked hard on it—but I am sure that there will be a lot of debate on how it will be implemented.

We have always said that, in reforming our legal services sector in Scotland, the first principle must be to maintain and improve access to justice. We must now be vigilant about whether that comes to pass with the new framework for the sector that will be implemented as a result of the bill.

I am pleased that the minister supported my amendments on the number of regulators, which allayed my fears. Robert Brown and Bill Aitken did not share them, but they were fears for me so the minister’s move was welcome and important.

I concede again that the minister made concessions at stage 2. Although the bill is not in the form for which we have argued, I hope that it proves to be the case that access to legal advice and representation in small and rural communities is not disadvantaged. I hope that benefits from new capital in existing firms will accrue to the sector, and that there will be benefits for social enterprise. However, we must monitor developments carefully so that the issues about which concerns have been raised do not come to pass.

In the final analysis, instead of objecting to the principle of the bill, we have sought a consensus position, whereby the reforms can be agreed to, but they will start at a more cautious level. On that basis, albeit with the reservations to which I have referred, we will support the passing of the bill at decision time. An issue that is crucial in giving us comfort in doing so is the potential that exists to vary the percentages of ownership through regulation, which was agreed to at stage 2. I make it clear that if we were to form the Administration after the election, we would look at the situation as it developed and would have one eye on developments in England and Wales.

The fact that we will enable the bill to go through does not mean that we concede the argument on
majority ownership that we pursued through my amendment on the issue earlier today. We stand ready to bring regulations back to Parliament in the next session that would give effect to that proposal, should we conclude that the circumstances suggest that that is necessary. However, the important caveat, as I have said, is that we will allow the bill to be enacted. We can but hope that it will bring the benefits that the minister is bullish about. The consideration process has at times been difficult because of the technical and complicated nature of what is an important bill, but Parliament has undoubtedly devoted significant energy to its scrutiny, as the minister said.

We may have different views on how best to reach the goal of ensuring access to justice and a thriving legal profession in this country, but that is what we all want, and we recognise that it is the intention behind the minister’s approach to the bill. Despite the reservations that I have expressed, we hope that that will be achieved once the bill is passed.

17:06

Bill Aitken (Glasgow) (Con): As the member who was somewhat optimistic about how the debate would proceed, it is with some inhibition that I rise to speak.

Matters were made particularly difficult because the legal profession was—for the best of all possible reasons—deeply divided, and we were not able, until comparatively recently, to get a consensus view. That is why I took the view that the 51 per cent/49 per cent restriction on the ownership of licensed providers would provide a degree of reassurance, and I am pleased that that reassurance has been provided in respect of certain members of the legal profession.

Although the lobbying has been relentless, it has been done in an entirely appropriate manner, with great courtesy and moderation. Everyone who gave evidence to the Justice Committee or who approached party spokesmen and party representatives directly did so in a highly courteous and constructive manner, and I congratulate them on that.

Of course, the bulk of the work on the bill came to the Justice Committee, and I thank my colleagues on the committee, who looked at the bill remarkably thoroughly and achieved a degree of compromise as the legislative process proceeded. That does them a great deal of credit.

There are certain aspects of the bill that should be stressed. The first is its permissive nature. No one requires to avail themselves of the benefits of the bill unless they wish to do so; no one is compelling law firms to go down the alternative business structure route. However, I have absolutely no doubt that it will make business easier and that it might make viable businesses that might not otherwise be viable—particularly those in rural areas and smaller towns, where joint operational working, which can be done at the moment by sharing the back-room facilities, would not provide what is required.

In addition, the bill is flexible, as Richard Baker said. In the years ahead, Governments may look at the arrangements for which it provides and say that they are working well; if they are not working, the percentages can be adjusted accordingly. That flexibility exists.

The bill offers tremendous opportunities. Every business nowadays requires to look at the opportunities and to deal with the threats that confront it.

There can be no doubt that, if we do not pass the bill, some of Scotland’s law firms could find themselves in difficulty and at a serious disadvantage to firms down south as they seek to avail themselves of the provisions in the Legal Services Act 2007, which was passed by the Westminster Parliament. The Scottish legal profession is a significant contributor to the Scottish economy and we could not take that risk. However, because of the permissive nature of the bill, those who do not wish to go down that route need not do so.

The process has been long, complex and convoluted. Some members now know much more about the running of law firms than they did—with the exception of Robert Brown, who ran one. The debate has been carried out entirely appropriately. The legislation is worth while, and the law profession in Scotland, of which we are rightly proud, can now move forward with confidence.

17:11

Robert Brown (Glasgow) (LD): As everyone has agreed, the bill, which began as a technical bill, became increasingly more convoluted as it progressed, but it has been significantly improved by input from witnesses and following parliamentary scrutiny.

Most significantly, we now have a simple, non-bureaucratic solution that allows citizens advice bureaux and other advice agencies to employ a solicitor if they wish without getting entangled in the main provisions of the bill.

The regulatory and professional principles have been tightened up and improved, as have the role of the Lord President, protections against fraud, penalties on defaulting entities and individuals, and the fitness test for investors. The definition of a designated person has been sorted out.
Provision has been made to regulate will writers, and the Scottish Legal Aid Board has a more comprehensive role in providing information about, monitoring and ensuring access to justice, which, as everyone has said, is a key issue across Scotland. All those provisions are good and worthy of support at stage 3.

At stage 1, I reserved the Liberal Democrat position on our attitude to the bill. I am aware that there was a considerable outcry when it became known that we had doubts about the attitude that we should take to the bill at stage 3. If Michael Clancy, who is in the public gallery, did not already have grey hairs, he will have them as a result of the bill’s progress. I make no apologies for that, because in many ways, the bill goes to the heart of the legal profession in which I and others in the chamber spent many years of our professional careers.

Undoubtedly, the climate in which the debate was conducted has become much frostier since the banking crisis. We saw the downside when cautious bankers with 300 years of Scottish prudence and banking ethics in their genes were replaced by whizz-kid salesmen whose job was to sell financial products as if they were cans of beans. To be quite honest, at stages 1 and 2, no one on the Justice Committee would have supported the bill had such arrangements not already been approved in England. That is, of course, part of the backcloth to the bill.

The case for the bill was less than overwhelming. It is not enough to aver baldly that competition is a good thing or that we need to have a level playing field with England. Competition can lead to monopoly and entities that are too large or dominant, and there can be interference with the ethics and independence of the profession. The level playing field could mean not just Scottish firms advancing in England, but Scottish firms being swallowed up by larger English predators. It is worth noting that McGrigors, one of the large firms that supported the bill, now has more lawyers in London than it has in Glasgow, which is a trend that it anticipates will accelerate. That has come about under the current arrangements. In August, out of a total of 420, McGrigors had 160 lawyers in London and 140 lawyers in Glasgow.

That reflects a general trend. Research by IFSL Research in 2009 identified that Scottish law firms have grown in recent years, not only consolidating their hold over the domestic market, which is a good thing, but increasingly becoming involved in international work. It is interesting to note that the largest international firms in London base between 45 and 65 per cent of their lawyers outside the United Kingdom, which is a reflection of the dominance of English law in international commerce and dispute resolution. Again, all that is part of the backcloth to the bill.

Parliament’s job is to do its best to get the structures right to maximise opportunities for the Scottish economy and to get higher standards, more efficient practice and more satisfaction for clients. We want firms to remain headquartered in Scotland, so that Scottish lawyers have maximum business and job opportunities, and so that the brand of the Scottish solicitor is a top one that can straddle the English common law and the continental civil law systems to best effect. The bill should be judged on those criteria, but that judgment is surrounded by unpredictability. However, ultimately, and with the caveats and restrictions that are in the bill, Liberal Democrats have concluded that we should support it.

The dominant view of the large firms must be taken into account. In the public interest, we have subjected the proposition to close examination, and we are persuaded that cautious movement in that direction is appropriate.

The bill makes provision to adjust the ownership percentages up or down, and the regulatory powers should be enough, in principle, to control and monitor untoward development. The motivation, however, must be advantage to the Scottish economy, not the interests of individual firms. Central to that argument remain the issues of independence and professional ethics. The large firms and the Law Society of Scotland have taken on a considerable responsibility. They and the Government must show that the new flexibilities will be used wisely and in the public interest. There is a very large element of suck it and see in this debate.

Nigel Don (North East Scotland) (SNP): I am grateful to Robert Brown for that summary of the bill’s provisions, as it saves me having to say one or two things that I would otherwise have said. I will pick over some of the issues that members have not said much about.

I reinforce the view that the bill is a facilitating piece of legislation and remind the profession that there is no requirement for anybody to do anything at all. I commend the minister for ensuring that—in his own words—the bill “will not have a significant impact on traditional firms” and for generally resisting the temptation to lodge further amendments. That is good in principle. Although I understand why the Law Society would have liked to have had lots of amendments lodged along the way, I think that we have the right things separated out in the bill. Nevertheless, we must be prepared to return to the issue at some stage, to
give the Law Society the help that it has been looking for.

Like the minister, I acknowledge the concerns of some folk within the profession about the competence and appropriateness of the bill. Some of those people are in the public gallery this afternoon, seriously outnumbering the press. Perhaps that reflects the fact that they understand what we have been doing and the press do not.

I am glad that we have sorted out the guarantee fund, which should be open to all. I am particularly pleased that we have established that it does not cover the non-legal services that businesses may provide. I can see some difficulty—even the odd court case arising—in sorting out what are legal services and what are not, but at least we have made that principle clear.

I turn to the Law Society’s powers of inspection, the powers of regulators themselves and all the issues of external ownership and how the businesses might work. However well we have drafted the provisions in the bill—let us do ourselves the honour of assuming that we have framed the powers in it perfectly—it is only as good as the use that people make of those powers to reflect what is going on around them, to regulate, to inspect and to control. I say that partly because, in recent crises, institutions such as the Financial Services Authority have had the powers to do all sorts of things but have somehow failed to use them. We must ensure that the powers that the bill invests in folk are properly used and that soft-touch regulation is used only where a soft touch is appropriate. It is hugely important that we have the right people doing that.

My final point has been raised on several occasions but has been ducked. As far as I can see, there is no specification regarding the description of the new organisations. If a firm is predominantly lawyers but happens to have an accountant and a surveyor, what will it call itself? If a firm is predominantly accountants but happens to have a lawyer and a surveyor, what will it call itself? If a firm is a bunch of surveyors who have taken on a lawyer and an accountant, what will it call itself? I suspect that common sense will come up with some decent answers in those cases. However, when firms are composed of very mixed combinations of professions, I wonder whether the public will get confused and whether there will be an opportunity for sleight-of-hand representation. Perhaps we should think about having proper descriptions somehow or other.

17:19

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Like other members, I would like to thank everyone who has taken part in the parliamentary process of the bill, including the clerks and all the people who gave written and oral evidence to the committee. As our convener Bill Aitken said, all the members of the committee know more about legal services now than they did at the start. In fact, it is a pity that we have only four minutes each in which to speak, as we could all go on and on, sharing our detailed knowledge.

A great deal of bartering has gone on in the Justice Committee, and every party that is represented on the committee has made concessions. That is what the Parliament was supposed to be about: discussion and an attempt to reach consensus where possible, as well as recognising when you are beaten and accepting what the majority says.

Throughout this process, I have attempted to widen access to legal services that are available to the constituents whom we all represent, while maintaining the independence and security of solicitors firms, particularly small and well-established independent solicitors firms that have roots in their local communities.

Tonight, I want to focus on two areas that will come as no surprise to anyone. The first is the issue of citizens advice bureaux now being able directly to employ solicitors, and the second is the issue of external investors staking a claim in solicitors firms.

I welcome the proposals that will, if the bill is passed tonight, apply in relation to the legal options for organisations such as citizens advice bureaux, the Cumbernauld unemployed workers centre, which I talked about last week, and other organisations that give advice to our constituents. Those organisations provide a valuable service across our constituencies by offering our constituents an independent, accessible and effective service on a wide variety of subjects.

However, despite dealing with more than 24,000 legal issues last year, citizens advice bureaux are limited when it comes to giving comprehensive legal advice to the people who knock on their doors. The changes that the bill will introduce will permit citizens advice bureaux and other advice and law centres to employ solicitors. That is a good way forward. I just hope that the citizens advice bureaux and other organisations do not lose the links that enable them to benefit from the pro bono work that local solicitors do for them.

I know that we are short of time, so I will throw away some of my speaking notes.

The other part of the bill that I am interested in relates to external ownership of solicitors firms. There was a question about whether solicitors firms should be able to be completely owned by non-solicitors, whether they be individuals or larger organisations. Everyone in the committee
and the chamber knows the concerns that I have in that regard. I have expressed my fears about the groups or individuals who might seek to infiltrate the legal firms and the fact that we might be opening the door to them. I still have concerns about what will happen if the bill is voted through tonight. However, because there are many good things in the bill, I will support it, but I am entitled to state my concerns.

I acknowledge that the minister has come a long way from a position of allowing 100 per cent non-solicitor ownership to allowing only 49 per cent non-solicitor ownership, and I believe that he has handled the bill in the way in which the Scottish Parliament should be dealing with legislation, but I still have doubts about the matter, and I take comfort from the fact that the bill contains powers to adjust that percentage. As I said, the bill contains so many good things that the concerns that I have about that element will not stop me supporting it at decision time.

17:25

**Dave Thompson (Highlands and Islands) (SNP):** The Legal Services (Scotland) Bill will introduce a long-needed change to allow Scotland’s legal professionals to compete on a level playing field in the international marketplace. That is to be welcomed. In recent years, our law firms have been hampered by an inability to present potential customers with the same complete package of professional services that rival firms from other European nations are able to offer.

The changes that are set out in the bill will help our lawyers to join forces with accountants, estate agents, property surveyors and other professionals to present potential clients with the complete package of professional services that is needed for any major business deal. That coordinated approach is far more attractive to any major company from overseas that wants to do business in Scotland and it is the type of service that they are used to being offered in the majority of countries in which they operate. However, it is not just big business that stands to benefit from the changes that the bill seeks to introduce; consumers will also benefit. The new way of delivering a wider range of professional services will also bring welcome benefits for smaller private clients.

At present, unless a business is big enough to be able to employ its own in-house team of solicitors, actuaries, management accountants, architects and taxation specialists, it is at a disadvantage. When Scotland’s small businesses are pursuing a major project, they are forced to put together a group of professionals who then have to work together as an ad-hoc team. Any football manager will tell you that that is not a recipe for success. With the introduction of the changes that are contained in the bill, our small businesses and private clients will, for the first time, be able to access in their local communities the same comprehensive range of advice and services that their larger competitors have long been able to draw upon.

**Richard Baker:** Mr Thompson makes the point that our firms here in Scotland will be able to compete with firms overseas on the same basis. What other country in Europe has the structure of legal services providers that is proposed in the bill? Where is it operating at present, as far as Mr Thompson knows? As I understand it, it does not operate anywhere else in Europe.

**Dave Thompson:** The point is that we are creating a structure that will allow solicitors, lawyers and others to work together for the benefit of consumers, small businesses and others. The bill will give us a real competitive advantage in that.

The advantages of the changes in the bill do not end there. Buying or selling a home is probably the most important transaction that most private citizens will ever undertake, and the bill will allow the public access to a wider range of professional services from a single provider. Many of those services would not have been available through a traditional lawyer’s office.

**Robert Brown:** Will the member take an intervention?

**Dave Thompson:** No, thanks.

I am pleased to note that the bill also includes proposals for the Scottish Government to appoint regulators to oversee the sector and guarantee the good conduct of those involved. I and other members of the Justice Committee will, I am sure, take great interest in watching to ensure that the arrangements are sufficiently robust to ensure that the good name of Scotland’s legal establishment is undiminished by the new arrangements.

I have been encouraged to hear that organisations that represent the interests of the public, and also the Law Society of Scotland, have given their support to the changes. Consumer Focus Scotland has taken a close interest in the formulation of the bill and its director Marieke Dwarshuis today urged members to back the bill, which, in her words, “will support the development of a more open, innovative and competitive legal services market in Scotland, which better meets the needs of those using legal services.”

That appears to me to be good advice from an independent but informed source.
I am pleased that the Opposition now plans to support the bill. I am sure that the minister, Fergus Ewing, is looking forward to introducing various regulations under the new legislation after the next election.

17:29

Bill Butler (Glasgow Anniesland) (Lab): I say to Mr Thompson that I think we will leave the next election to the electorate.

My colleagues on the Justice Committee will recall that, at first sight, the bill’s policy objectives appeared to be worthy and relatively uncontroversial, not to say somewhat dry and even esoteric. How wrong we all were.

The bill has excited passionate debate in the legal profession—particularly relating to outside investment and ownership—the like of which has not been seen in modern times. The controversy provoked a referendum and a number of special general meetings, which demonstrated the depth of feeling and division of opinion within the legal profession. It even moved Mr Michael Clancy, in his letter of 26 April this year to members of the Law Society, to note with admirable diplomacy and restraint that

“these expressions of democracy ... show ... there is no consensus in the profession on two important areas—external ownership; and solicitor participation in a minority role in an entity with other professional participants.”

Quite so.

One of the most prominent opponents of the bill, Mr Mike Dailly of the Govan Law Centre, put it rather more robustly. Members will recall his briefing in April this year, which said:

“We do not believe the Bill as presently drafted contains appropriate safeguards”.

He went on to say that

“the particular concept of Alternative Business Structures adopted in the Bill does not lend itself to acceptable safeguards for those citizens requiring access to justice or a legal service.”

Indeed, according to Mr Dailly, safeguards need to be put in place to

“protect the public interest and the independence and professional ethics of solicitors subject to ABS.”

That division of opinion in the legal profession in respect of that fundamental but controversial provision has been understandably mirrored throughout the bill’s parliamentary consideration. At stage 2, I had—and still have, to some degree—real sympathy for the concerns of those who adopt Mr Dailly’s argument. I lodged amendment 227 and 77 consequential amendments, the effect of which would have been to limit to 25 per cent non-solicitor ownership of a law firm. The discussion that followed was robust, considered and worth while. However, I accept that the majority of my colleagues felt that such a limit would be too restrictive, and incompatible with the policy intention of the bill. My amendment was disagreed to. Given my respect for my colleagues on the Justice Committee, I did not move the 77 consequential amendments in the group. I considered that it was merciful not to do so.

In the end, the committee agreed to amendment 317, in the name of Robert Brown, which would create a cap of 49 per cent on external ownership of a licensed legal services provider. Despite the minister’s robust arguments in favour of 100 per cent ownership by external investors, in order that firms could more easily develop innovative new business models, go into partnership with other professionals and raise external capital, the committee—correctly, in my view—supported Robert Brown’s compromise.

Today, we have debated fairly energetically further refinements in respect of that provision. Although my clear preference was for the compromise in amendment 46A, in the name of Richard Baker, and my fallback position was for amendment 123, in the name of Robert Brown, both amendments were disagreed to. So be it. As a democrat, I accept the will of Parliament. Given the welcome movement in the Government’s stance at stage 2, we have at least arrived at a rational compromise on the matter, especially since the Government’s amendment 378, which was agreed to at stage 2, will allow Scottish ministers to amend, by statutory instrument, the percentage of majority ownership that is permissible, and to repeal the threshold requirement, if circumstances change. That is an entirely sensible position.

I hope that when we come to decision time shortly, Parliament will accept that we have arrived, at long last, at journey’s end, and agree to the bill as amended today.

The Presiding Officer (Alex Fergusson): We come to closing speeches. Decision time will be at 6 o’clock, so members can have slightly longer than was indicated. I call Mike Pringle. You have about 6 minutes, Mr Pringle.

17:34

Mike Pringle (Edinburgh South) (LD): I am not sure that I will need it, Presiding Officer.

I am pleased to confirm what my colleague Robert Brown said in his conclusion, which is that the Liberal Democrats will support the bill when we vote tonight.

I add to the congratulations to Bill Aitken and the Justice Committee. I have no doubt that the bill
was a marathon. Bill Butler referred to that, too. I think that committee members thought that they were all in for a bit of a canter. My colleague Robert Brown spent a huge amount of time on the bill, so it is perhaps a relief that we have only one justice committee in this session of Parliament or it might have been a justice committee such as I was on in the previous session that considered the bill. I congratulate Robert Brown on the huge amount of work that he did during the progress of the bill.

At stage 1, the Justice Committee concluded that the advantages of the bill are less clear for smaller Scottish firms and consumers, so we were concerned at the outset that the bill might benefit larger firms at the expense of smaller practices and of consumer access. However, we were and are aware of the view that, due to the changes that have occurred in England and Wales, the bill is necessary to allow Scottish firms to innovate and compete in the modern market.

Many representations from all sides have been made to all members about the merits or otherwise of the bill. Bill Aitken was absolutely right to say that the arguments have been short, long, varied and well argued. I congratulate everybody who lobbied members, because that was the right thing to do.

Members have alluded to the fact that the Law Society of Scotland has been divided over external ownership and solicitor participation in a minority role in an entity with other professional participants. As we have heard, the society has taken a number of votes on the alternative business structure as proposed in the bill. The vote went one way, then the other and then back again. The society finally agreed to adopt a compromise position: it supported majority ownership, with 51 per cent of a law firm having to remain with solicitors or solicitors with other regulated professionals. Of course, I preferred, perhaps like Bill Butler, the Liberal Democrat position, which Robert Brown has exposed at stage 3. However, as Bill Aitken said, we all live in a democracy, and we are where we are. I hope that the progress towards ABS proves to be a success. I am sure that many people, including in the Law Society, will keep a close eye on that progress.

Of course, the bill is not just about ABS. There are other good things in it, which I will come back to later.

It was generally agreed by the committee and by those who gave evidence to it, including the minister and the Law Society, that the main opportunities that the bill will provide will be for the larger firms in Scotland, or at least three or four of them. I understand that one firm—perhaps the biggest in Scotland—is still against the bill. It is clear that there could be benefits in ABS for the larger Scottish law firms, as outlined by the minister. Bill Aitken was right that legal firms do not have to go down the ABS line, but I hope that the aspirations of larger firms that have lobbied hard for the bill and ABS will be realised.

It is much less clear that there will be obvious benefits for other users or smaller Scottish law firms, for which the bill could create more risk as a consequence of other competitors being able to enter the market. The committee concluded that, although the bill may be of significant importance for the larger Scottish law firms, the advantages for smaller Scottish law firms and, indeed, for consumers are less clear.

As I said, the bill is not just about ABS; it successfully tackles a number of other issues. Perhaps the argument about ABS has meant that those issues seem to have got lost. Because of lack of time, I will briefly mention just a few of them.

On access to justice, in the light of concerns that rural areas will be disproportionately affected by increasing competition, a Scottish Government amendment that aimed to strengthen the duty of the Scottish Legal Aid Board to monitor the availability and accessibility of legal services in Scotland was agreed to. The bill will, of course, allow for the employment of solicitors by charities—I congratulate Cathie Craigie on going into that matter in considerable detail. That will allow solicitors who are employed by citizens advice bodies and others to give advice directly to third parties.

The bill includes the first regulated framework for will-writing services. Two constituents of mine lobbied me on that, and I welcome that framework. Finally, I am pleased about the acceptance of McKenzie friends, which have been available south of the border for a considerable time. Many of us have been lobbied on McKenzie friends for a considerable time, from well before the Justice Committee dealt with the bill. I think that many people will benefit from McKenzie friends. That is an excellent provision.

The bill is important and, as Robert Brown rightly said, it is much about what will happen—he used the term “suck it and see”. The bill has tackled a number of important issues, and I am pleased to confirm that the Liberal Democrats will support it at decision time tonight.

17:40

Bill Aitken: This small debate ends a long and convoluted process, but there have been a number of worthwhile comments, some of which I will refer to. Nigel Don stressed the importance of regulation and the very real duties that will fall on
the Law Society, the Institute of Chartered Accountants of Scotland or any other body that is appointed as a regulator. Members are well aware of the problems of ill-considered regulation and the approach that was adopted to the regulation of the banks, which has had the most appalling consequences. I am certain that those who regulate the legal profession and legal services will ensure that nothing of that type happens.

Mr Don also raised the issue of designation, which is a matter that must be addressed. People who go into a shop on a main street in any of Scotland’s communities must know what they are going to get, and there must be no subterfuge. The bill should certainly assist us in travelling in that direction.

Cathie Craigie referred to the fact that the bill will enable citizens advice bureaux, for the first time, to have legal representatives on their staff, which is entirely worth while. Throughout the process, she has rightly been concerned about the danger of criminal elements becoming involved in the legal profession. I have no basis in fact for saying this, but it would not be impossible for that to happen under the existing system. Certainly, we must safeguard against that, which is why I was particularly keen to ensure that the bill was as tight as possible, a view that was shared by all members of the Justice Committee and which has been reflected in the will of the Parliament.

Bill Butler took some responsibility for the initial view that the bill would not be controversial. He was proved to be significantly wrong. However, as he always does, he pursued the democratic process in a remarkably fair and measured manner. He lodged an amendment for consideration by the committee that would have lowered the allowed proportion of outside investment in firms. Having lost that argument, he sportingly eschewed the opportunity to move the 77 consequential amendments. I assure members that that left him in high regard with his convener and other committee members.

Mr Butler stated that we are now at the end of the process. Like all democrats, he accepts that the arguments that were canvassed well by Mr Baker and Mr Brown did not succeed. I know that those in the legal profession who fought robustly in opposition to the bill will now realise that we have come to the end of the process. They will continue to serve the legal profession of Scotland in the manner that they have done, in some cases for many years, and they will continue to be a credit to that profession.

The Scottish legal profession has an opportunity to move on from the divisions that have arisen in the past couple of years. The profession, like every section of the economy, faces challenging times. I return to the point that the profession would have been extremely exposed if we had not introduced legislation. That has been a major concern to us. I hope that the profession can now build on the provisions in the bill.

Mike Pringle was correct to point out that, although ABS was the predominant issue in the deliberations, the bill has other important aspects. He highlighted the enlightened McKenzie friend provision, which will enable persons—sometimes very vulnerable persons—to attend court with much more confidence than they might otherwise have done.

The McKenzie friend provision is one of many provisions that were in the Lord Justice Clerk’s recommendations on the civil justice system. I make the worthy suggestion—although it might not be entirely relevant to the debate—that we must get moving with the civil justice reforms. Unless we do so, dissatisfaction will continue with the number of days involved and the inappropriate procedures that are being followed.

The afternoon has been long and the process has been very long, but we have reached a satisfactory conclusion. We are justifiably proud of the Scottish legal profession, which makes an outstanding and important contribution not only to the Scottish economy but to Scottish civic life. It can now move forward with confidence, in the knowledge that it has the opportunity to organise its business systems to enable it to continue to succeed.

17:46

James Kelly (Glasgow Rucherglen) (Lab): I am delighted to make the closing speech for the Scottish Labour Party. As other members have said, the process has been long and arduous. I pay tribute to the Justice Committee clerks, the Government’s bill team and all those who have worked on the passage of the bill, which is complicated and technical—and that is before we get to the politics.

As I said in the stage 1 debate, the start of the process last November was my first outing as a member of the Justice Committee. A couple of people—perhaps even the committee’s convener, Bill Aitken—told me privately that the bill would not be controversial, although we would see how it went. That did not turn out to be the case.

As many members have said, the Law Society has had heated discussions, annual general meetings, special general meetings and extraordinary motions. At times, I thought that I had been transported back to the Labour Party in the 1980s.

Bill Butler: Hear, hear. [Laughter.]
James Kelly: So much so that when Bill Aitken moved amendment 141, to allow associate membership of the Law Society, I was tempted to support it on the basis that I could join up and join in.

To be serious, the situation has been difficult for the Law Society. We must record our admiration for its past president Ian Smart, and for people such as Michael Clancy, who have put in an enormous amount of work to try to heal the wounds, reach a compromise solution that the Law Society can support and have a bridge to Parliament, to keep the process going—the minister touched on that. That has helped us to reach where we are.

The big issue that divided us in the Parliament—although I am sure that we will not be divided at decision time—was ownership. It is recognised that the Government has moved from its original position of allowing 100 per cent ownership of ABSs by others to 51 per cent ownership by regulated professionals and 49 per cent by others. Other members, including my colleague Richard Baker and Robert Brown, have promoted other positions and advanced the arguments articulately. However, as Bill Butler said, we are democrats and we need to accept the will of Parliament. The Labour Party will support the bill at decision time. It is recognised that the Government has moved from allowing 100 per cent ABS ownership by others and tried to address the concerns of lawyers and individuals throughout communities in Scotland.

I also recognise the move that has been made to enhance the role of the Lord President. One of the early concerns was that the bill vested too much power in the hands of ministers. The enhanced role for the Lord President in the bill will ensure that there is a counterbalance, which I am sure will help Government ministers, whether the current team or another that is elected in future.

I welcome the fact that the number of regulators has been limited to three. I agree with Robert Brown, who said earlier that there is the potential for too much complexity. We do not want to be overburdened with regulators, which could make the system too cumbersome and not effective for good market processes.

I support the fact that the arrangements around the guarantee fund have been resolved. There will be a guarantee fund administered by the Law Society, but there will also be the option of a compensation fund for other regulators that enter the field. That will address some of the concerns. The guarantee fund, which provides guarantees to customers who suffer wrongdoing at the hands of unscrupulous solicitors, is held in high esteem in the Scottish legal system.

I agree with the points that my colleague Cathie Craigie made about citizens advice bureaux and unemployed workers centres being able to take on solicitors. That is a positive aspect of the bill. She managed to mention the Cumbernauld and Kilsyth unemployed workers centre for the second week in a row, for which she is to be commended. That shows what a doughty fighter she is for her constituency, which I am sure will lead to her re-election next May.

One concern that I have raised throughout the process relates to the financial memorandum—I see the minister smiling. The sums in the financial memorandum, of £37,000 for the approval of regulators and £29,000 for monitoring, are not really adequate. At one point, someone pointed out—I do not know whether it was the minister—that, on the Legal Services Bill in England, the £6 million for regulation was like an overpriced Rolls-Royce. It seems to me that we have a 1970s Hillman Imp for our regulation and monitoring, which is not adequate.

Where does the process leave us? Let us hope that as we move forward, legal firms throughout Scotland will be able to take advantage of the bill in order to grow, enhance their services, build the Scottish economy, create jobs throughout Scotland and enhance the role of Scottish legal firms on the international stage. Let us also hope that we will deliver an enhanced service and access to justice for legal services customers throughout Scotland.

17:53

Fergus Ewing: As members will appreciate, I have absolutely no desire to repeat myself and repeat the arguments that I made in opening the debate. Instead, I will start by paying tribute to the fact that, throughout the chamber, members have mentioned the other parts of the bill—the parts that concern not the future regulation of solicitors but other matters, all of which are important. Mr Pringle, Cathie Craigie, Bill Butler and most other members covered some of those areas.

I will mention one measure that I do not think was referred to specifically: the duty that section 96 imposes on the Scottish Legal Aid Board to monitor the availability of legal services. That was included at my suggestion, because, among other reasons, I attended a Scottish Women’s Aid conference recently and heard Sheriff Mackie make the impassioned and effective argument that there are gaps in legal provision for women who are subjected to violence in this country, which is an absolute scandal. Those women do not have access to legal aid, and the solicitors who do the work do not have sufficient training, expertise or experience. The Scottish Legal Aid Board will now have a duty to monitor those gaps, and Scottish
Women’s Aid will be on the access forum that will help to inform advice to ministers. My late wife, Margaret Ewing, played a huge part in the campaign to address domestic abuse, which still goes on today. The good work that is being done in this country to tackle that scourge that we all deplore should not pass unremarked.

I will respond to one or two points that have been raised—I do not really have to, but I am that kind of minister. [Laughter.] Nigel Don always asks the questions that ministers hope will not be posed in debates. That is a rare talent, which we are grateful that he possesses. His question was, “What will they be called?” I reassure him that we have thought about that. Under section 90(3), LLSPs will not be able to call themselves solicitors without clearance from the Law Society, but they will be able to do so with its agreement. I hope that Mr Don’s mind is now at rest.

I will not repeat my earlier points on ABSs, but I will address questions that were raised on the subject. Sporadic references were made to whether ABSs are in operation in other countries, particularly other European countries. My information is that the introduction of ABSs is not limited to England, Wales and Australia as was suggested. I understand that ABSs are part of an international trend. Indeed, across Europe they are being considered in some form—albeit, I concede, mostly limited—or they already exist. I have much more detail on that. Happily, I will spare members an exposition of the detail.

Members: Hear, hear.

Fergus Ewing: It seems that that is another very popular move on my part.

Many members fairly expressed their reservations about the bill that we will pass today, which we recognise. I know of Cathie Craigie’s hard work on the Justice Committee. She articulated the views that many have expressed. Likewise, Robert Brown and Mr Aitken expressed the common view that none of us has the divine prescience that would enable us to predict how the provisions of the bill will operate. Ministers are most certainly not complacent in thinking that we have produced a work of total perfection and that the bill will help the Scottish legal profession to reach the sunny uplands of business opportunity. However, I am convinced that we have produced a Scottish solution to an issue that needs to be dealt with right now. Mr Aitken was absolutely right to say that if we had not dealt with the matter now, Scottish solicitors could have been at severe disadvantage. I think that all members recognised that from the Justice Committee’s stage 1 report.

As I said, we are not complacent; we understand the reservations. We cannot predict with certainty how the bill will turn out. That said, we are convinced that it will create many new opportunities, jobs and employment, particularly for young Scottish lawyers in the generations to come.

I thank all the members who took part in the debate, particularly the party spokespeople: Richard Baker and James Kelly, Robert Brown and Mike Pringle, Bill Aitken and John Lamont, and Patrick Harvie. I have to say that Robert Brown kept us very busy over the past fortnight. We are very grateful to him for all the additional work, which we had not entirely anticipated would be necessary, but that is parliamentary scrutiny, that is why we are here, and that is the lot of ministers.

I thank my officials who have produced a system that will not—as in England—cost several million pounds with a new quango. We may have produced a regulatory model that is not a Rolls-Royce but a Hillman Imp. I had a Hillman Imp once; it was a marvellous car. It broke down only once, on the way to catch the ferry to Mull. The system will cost only a very small amount of money. That is a good thing, particularly when money is tight. I am proud that that Scottish solution has been applied.

I thank the Law Society; its current president Jamie Millar; its past president Ian Smart; and last, but certainly not least, Michael Clancy, who has spent so much time in the Scottish Parliament that we might make him an honorary MSP, had we the powers so to do. I commend the bill to the chamber and thank all members for the courteous and constructive way in which they have participated in its consideration.
CONTENTS

Section

PART 1
THE REGULATORY OBJECTIVES ETC.

Introduction

1 Regulatory objectives
2 Professional principles
3 Legal services

Role of Ministers

4 Ministerial oversight
4A Consultation by Ministers

PART 2
REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1
APPROVED REGULATORS

Approved regulators

5 Approved regulators
6 Approval of regulators
6A Pre-approval consideration
6B Lord President’s agreement
7 Authorisation to act
7A Request for authorisation

Regulatory schemes

8 Regulatory schemes
9 Reconciling different rules

Licensing rules

10 Licensing rules: general
11 Initial considerations
12 Other licensing rules
13 Licensing appeals
Practice rules

14 Practice rules: general
15 Financial sanctions
16 Enforcement of duties
17 Performance report
18 Accounting and auditing
19 Professional indemnity

Compensation arrangements

19A Choice of arrangements
19B Compensation rules: general
19C More about compensation arrangements

Internal governance

20 Internal governance arrangements
21 Communicating outside
22 More about governance

Regulatory functions etc.

23 Regulatory and representative functions
24 Assessment of licensed providers

Relationship with other bodies

25 Giving information to SLAB
25A Reporting to Law Society
25B Steps open to society
25C Financial inspection by Society

Performance and measures

27A Review of own performance
28 Monitoring by Ministers
29 Measures open to Ministers

Ceasing to regulate

30 Surrender of authorisation
31 Cessation directions
32 Transfer arrangements
33 Extra arrangements

Change of regulator

34 Change of approved regulator
35 Step-in by Ministers

Additional functions etc.

26 Additional powers and duties
27 Guidance on functions
CHAPTER 2
LICENSED LEGAL SERVICES PROVIDERS

Licensed providers
36 Licensed providers
37 Eligibility criteria
37A Majority ownership

Key duties and positions
38 Key duties
39 Head of Legal Services
40 Head of Practice
41 Practice Committee

Appointment to position etc.
42 Notice of appointment
43 Challenge to appointment
44 Disqualification from position
45 Effect of disqualification
46 Conditions for disqualification

Designated persons
47 Designated persons
47A Working context
48 Listing and information

Non-solicitor investors
49 Fitness for involvement
49A Exemption from fitness test
50 Factors as to fitness
50A Ban for improper behaviour
51 Behaving properly
52 More about investors

Discontinuance of services
53 Duty to warn
54 Ceasing to operate
55 Safeguarding clients
56 Distribution of client account

Professional practice etc.
57 Employing disqualified lawyer
58 Concealing disqualification
59 Pretending to be licensed
60 Professional privilege

CHAPTER 3
FURTHER PROVISION

Achieving regulatory aims
61 Input by the OFT
62 Role of approved regulators
63 Policy statement

Complaints
64 Complaints about regulators
64A Levy payable by regulators
65 Complaints about providers

Registers and lists
66 Register of approved regulators
67 Registers of licensed providers
68 Lists of disqualified persons

Miscellaneous
69 Privileged material
70 Immunity from damages
70A Appeal procedure
70B Corporate offences
71 Effect of professional or other rules

PART 3
CONFIRMATION AND WILL WRITING SERVICES

CHAPTER 1
CONFIRMATION SERVICES

Regulation of confirmation agents
72 Confirmation agents and services
73 Approving bodies
74 Certification of bodies
75 Regulatory schemes
76 Financial sanctions
76A Review of own performance
77 Pretending to be authorised

Other regulatory matters
78 Revocation of certification
79 Surrender of certification
80 Register and list

Ministerial functions
81 Ministerial intervention

CHAPTER 2
WILL WRITING SERVICES

Regulation of will writers
81A Will writers and services
81B Approving bodies
81C Certification of bodies
81D Regulatory schemes
81E Financial sanctions
81F Review of own performance
81G Pretending to be authorised

Other regulatory matters

81H Revocation of certification
81I Surrender of certification
81J Register and list

Ministerial functions

81K Ministerial intervention
81L Step-in by Ministers

CHAPTER 3
FURTHER PROVISION

82 Regard to OFT input
83 Complaints about agents and writers
84 Privilege and immunity
84A Appeal procedure
84B Corporate offences
85 Consequential modification

PART 4
THE LEGAL PROFESSION

CHAPTER 1
APPLYING THE REGULATORY OBJECTIVES

86 Application by the profession

CHAPTER 2
FACULTY OF ADVOCATES

87 Regulation of the Faculty
88 Professional rules
89 Particular rules

CHAPTER 3
SOLICITORS AND OTHER REPRESENTATIVES

Removal of practising restrictions

90 Licensed providers as qualified persons
91 Practice rules for licensed providers
91A Citizens advice bodies

Lay representation

91B Court of Session rules
91C Sheriff court rules
Guarantee Fund

91D Use of Guarantee Fund
91E Contributions to the Fund
91F Cap on individual claims

The Law Society

91G Acting as approved regulator
92 Council membership
93 Regulatory committee

The 1980 Act: further modification

93A Keeping the solicitors roll etc.
93B Removal from the roll etc.
94 Restoration to the roll
94A Suspension from practice
94B Accounts rules fee
94C Powers of Tribunal

CHAPTER 4
OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance
96 Availability of legal services
97 Information about legal services

Scottish Legal Complaints Commission

97A Relevant practitioners
98 Minor amendments
98A The 2007 Act: Further provision

PART 5
GENERAL

99 Regulations
99A Further modification
100 Ancillary provision
101 Definitions
102 Commencement and short title

Schedule 1—Performance targets
Schedule 2—Directions
Schedule 3—Censure
Schedule 4—Financial penalties
Schedule 5—Amendment of authorisation
Schedule 6—Rescission of authorisation
Schedule 7—Surrender of authorisation
Schedule 8—Investors in licensed providers
Schedule 9—Index of expressions used
Legal Services (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to regulate will and other testamentary writing by non-lawyers; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; to allow court rules to permit the making of oral submissions by lay representatives in civil cases; and for connected purposes.

PART 1
THE REGULATORY OBJECTIVES ETC.

Introduction

1 Regulatory objectives
For the purposes of this Act, the regulatory objectives are the objectives of—
(a) Supporting—
(i) the constitutional principle of the rule of law,
(ii) the interests of justice,
(b) protecting and promoting—
(i) the interests of consumers,
(ii) the public interest generally,
(c) promoting—
(i) access to justice,
(ii) competition in the provision of legal services,
(d) promoting an independent, strong, varied and effective legal profession,
(e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
(f) promoting and maintaining adherence to the professional principles.
2 Professional principles

For the purposes of this Act, the professional principles are the principles that persons providing legal services should—

(a) support the proper administration of justice,

(b) act with independence in the interests of justice,

(ba) act with integrity,

(c) act in the best interests of their clients (and keep clients’ affairs confidential),

(d) maintain good standards of work,

(e) where—

(i) exercising before any court a right of audience, or

(ii) conducting litigation in relation to proceedings in any court,

comply with such duties as are normally owed to the court by such persons,

(f) meet their obligations under any relevant professional rules,

(g) act in conformity with professional ethics.

3 Legal services

(1) For the purposes of this Act, legal services are services which consist of (at least one of)—

(a) the provision of legal advice or assistance in connection with—

(i) any contract, deed, writ, will or other legal document,

(ii) the application of the law, or

(iii) any form of resolution of legal disputes, or

(b) the provision of legal representation in connection with—

(i) the application of the law, or

(ii) any form of resolution of legal disputes.

(2) But, for those purposes, legal services do not include—

(a) judicial activities,

(b) any other activity of a judicial nature,

(c) any activity of a quasi-judicial nature (for example, acting as a mediator).

(3) In subsection (1)(a)(iii) and (b)(ii), “legal disputes” includes disputes as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or obligations.

Role of Ministers

4 Ministerial oversight

(1) Subsections (2) and (3) apply in relation to the exercise by the Scottish Ministers of their functions—

(a) under Parts 2 and 3, or
Legal Services (Scotland) Bill  
Part 2—Regulation of licensed legal services 
Chapter 1—Approved regulators 

(b) under section 91A(3) or otherwise arising by virtue of Part 4 (except sections 96(c) and 98A(1)).

(2) The Scottish Ministers must, so far as practicable, act in a way which—
   (a) is compatible with the regulatory objectives, and
   (b) they consider most appropriate with a view to meeting those objectives.

(3) The Scottish Ministers must adopt best regulatory practice under which (in particular) regulatory activities should be—
   (a) carried out—
       (i) effectively (but without giving rise to unnecessary burdens),
       (ii) in a way that is transparent, accountable, proportionate and consistent,
   (b) targeted only at such cases as require action.

4A Consultation by Ministers

(1) Subsection (2) applies in relation to the exercise by the Scottish Ministers of their functions—
   (a) under Parts 2 and 3, or
   (b) under section 91A(3) or otherwise arising by virtue of Part 4 (except sections 96(c) and 98A(1)).

(2) Where (and to the extent that) the Scottish Ministers consider it appropriate to do so in the case of an individual function, they must consult such persons or bodies as appear to them to have a significant interest in the particular subject-matter to which the exercise of the function relates.

(3) The general requirement to consult under subsection (2) has effect in conjunction with, or in the absence of, any particular consultation requirement to which the Scottish Ministers are subject in a specific (and relevant) context.

PART 2

REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1

APPROVED REGULATORS

Approved regulators

5

(1) For the purposes of this Part, an approved regulator is a professional or other body which is approved as such by the Scottish Ministers under section 6.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approved regulator must include—
   (a) a copy of the applicant’s proposed regulatory scheme (see section 6(1)(c)),
   (b) a copy of its proposed statement of policy under section 63(1),
Legal Services (Scotland) Bill
Part 2—Regulation of licensed legal services
Chapter 1—Approved regulators

(c) a description of—

(i) the applicant’s constitution and composition (including internal structure),
(ii) its internal governance arrangements,
(iii) its representative functions (if any),
(iv) its other activities (if any).

(4) The applicant—

(a) must provide the Scottish Ministers with such other information as they may reasonably require for their (or the Lord President’s) consideration of its application,
(b) may withdraw its application at any time by giving them written notice to that effect.

(5) No more than 3 approved regulators may exist at any time.

(5A) The Scottish Ministers may—

(a) with the agreement of the Lord President, and
(b) after consulting such other person or body as they consider appropriate,
by regulations amend the number specified in subsection (5).

(6) The Scottish Ministers may by regulations prescribe fees that they may charge—

(a) an applicant to become an approved regulator,
(b) approved regulators.

6 Approval of regulators

(1) The Scottish Ministers may approve the applicant as an approved regulator if they are satisfied that—

(a) for regulating licensed legal services providers in accordance with this Part, the applicant has—

(i) the necessary expertise as regards the provision of legal services (including as deriving from that of the persons within it),

(ii) a thorough understanding of the application of the regulatory objectives and the professional principles,

(ii) sufficient resources (financial and otherwise),

(iii) the capability in other respects,

(b) the applicant will always exercise its regulatory functions—

(i) independently of any other person or interest,

(ii) properly in other respects (in particular, with a view to achieving public confidence),

(c) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 8),

(d) the applicant’s internal governance arrangements are, or will be, suitable (as determined with particular reference to section 20).
(2) The Scottish Ministers may give their approval subject to conditions.

(2C) Their approval may be given—

(a) with restrictions imposed by reference to particular categories of—

(i) licensed providers,

(ii) legal services,

(b) either—

(i) without limit of time, or

(ii) for a fixed period of at least 3 years.

(2D) The Scottish Ministers may, after consulting the approved regulator, vary (including by addition or deletion) any conditions or restrictions imposed under subsection (2) or (2C).

(7) The Scottish Ministers may by regulations make further provision about approval under this section, including (in particular)—

(a) the process for seeking their approval,

(b) in relation to capability to act as an approved regulator, the criteria for their approval (including things that applicants must be able to demonstrate).

(8) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.

6A Pre-approval consideration

(1) Before deciding whether or not to approve the applicant as an approved regulator under section 6, the Scottish Ministers must consult—

(a) the Lord President,

(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(c) such other person or body as they consider appropriate.

(2) In consulting under subsection (1), the Scottish Ministers—

(a) must send a copy of the application to the consultees,

(b) may send a copy of any revised application to any (or all) of them.

(3) The Scottish Ministers must, with reasons, notify the applicant if they intend to—

(a) refuse to approve it as an approved regulator, or

(b) impose conditions or restrictions under section 6(2) or (2C).

(4) If notification is given to the applicant under subsection (3), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—

(a) make representations to the Scottish Ministers,

(b) take such steps as it may consider expedient.
6B Lord President’s agreement

(1) Despite section 6(1), the Scottish Ministers must not approve the applicant as an approved regulator unless the Lord President agrees to its being approved as such.

(2) The Scottish Ministers are to impose under section 6(2) such particular conditions relating to the expertise mentioned in section 6(1)(a)(i) as are reasonably sought by the Lord President when (and if) notifying them of the Lord President’s agreement for the purpose of subsection (1).

(3) The Lord President’s agreement is required for—

(a) the imposition of any—

(i) conditions under section 6(2) (apart from conditions to which subsection (2) relates),

(ii) restrictions under section 6(2C),

(b) the variation of any such conditions or restrictions under section 6(2D).

7 Authorisation to act

(1) An approved regulator may not exercise any of its regulatory functions unless it is authorised to do so by the Scottish Ministers under this section.

(2) The Scottish Ministers may give their authorisation if they are satisfied (or continue to be satisfied)—

(a) as mentioned in subsection (1) of section 6,

(b) as regards any criteria provided for under subsection (7)(b) of that section.

(3) Their authorisation may be given with restrictions imposed by reference to particular categories of—

(a) licensed provider,

(b) legal services.

(4) Their authorisation may be given—

(a) either—

(i) without limit of time, or

(ii) for a fixed period of at least 3 years,

(b) subject to conditions.

(5) The Scottish Ministers may, after consulting the approved regulator, vary (including by addition or deletion) any restrictions or conditions imposed under subsection (3) or (4)(b).

(10) The Scottish Ministers may by regulations make further provision about authorisation under this section including (in particular) the process for requests for their authorisation.

7A Request for authorisation

(1) A request for authorisation under section 7 may be—
(a) made at any reasonable time (including at the same time as applying for approval under section 6),
(b) withdrawn by the approved regulator (or applicant) at any time by giving the Scottish Ministers written notice to that effect.

(2) The Scottish Ministers must, with reasons, notify the approved regulator (or applicant) if they intend to—
(a) withhold their authorisation, or
(b) impose conditions under section 7(4)(b).

(3) If notification is given to the approved regulator (or applicant) under subsection (2), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(4) The approved regulator (or applicant) must provide the Scottish Ministers with such information as they may reasonably require for their consideration of its request for their authorisation.

(5) In section 7 and this section, a reference to authorisation means initial or renewed authorisation.

Regulatory schemes

8 Regulatory schemes

(1) An approved regulator must—
(a) make a regulatory scheme for licensing and regulating the provision of legal services by its licensed legal services providers, and
(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—
(a) contain—
(i) the licensing rules (see section 10),
(ii) the practice rules (see section 14),
(iii) the compensation rules (see sections 19B and 19C(1)),
(b) include provision for reconciling different sets of regulatory rules (see section 9),
(c) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify).

(3) The regulatory scheme may—
(a) relate to—
(i) one or more categories of licensed provider,
(ii) some or all legal services,
(b) make different provision for different cases or types of case.

(4) An approved regulator may amend its regulatory scheme (or any aspect of it), but—
Legal Services (Scotland) Bill
Part 2—Regulation of licensed legal services
Chapter 1—Approved regulators

(a) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(b) the Scottish Ministers may not give their approval without—
   (i) the Lord President’s agreement, and
   (ii) consulting such other person or body as they consider appropriate.

(5) The Scottish Ministers may by regulations—
   (a) confer authority for the regulatory schemes of approved regulators to deal with the provision by their licensed providers of such other services (in addition to legal services) as the regulations may prescribe, and
   (b) specify the extent to which (and the manner in which) the regulatory schemes may do so.

9 Reconciling different rules

(1) The provision required by section 8(2)(b) to be in the regulatory scheme is such provision as is reasonably practicable (and appropriate in the circumstances) for—
   (a) preventing or resolving regulatory conflicts, and
   (b) avoiding unnecessary duplication of regulatory rules.
(2) For the purposes of this section, a regulatory conflict is a conflict between—
   (a) the regulatory scheme of an approved regulator, and
   (b) any professional or regulatory rules made by any other body which regulates the provision of legal or other services.
(3) The Scottish Ministers may by regulations make further provision about regulatory conflicts (such as may involve an approved regulator).
(4) Before making regulations under subsection (3), the Scottish Ministers must have the Lord President’s agreement.

10 Licensing rules: general

(1) For the purposes of this Part, the licensing rules are rules about—
   (a) the procedure for becoming a licensed provider, including (in particular)—
      (i) the making of applications,
      (ii) the criteria to be met by applicants,
      (iii) the determination of applications,
      (iv) the issuing of licences,
   (b) the terms of licences and attaching to licences of conditions or restrictions,
   (c) the—
      (i) renewal of licences,
      (ii) circumstances in which licences may be revoked or suspended,
Legal Services (Scotland) Bill
Part 2—Regulation of licensed legal services
Chapter 1—Approved regulators

(d) licensing provision affecting non-solicitor investors in licensed providers,
(e) licensing fees that are chargeable by the approved regulator.

(2) Rules made in pursuance of subsection (1)(a) to (c) must allow for review by the approved regulator of any decision made by it under the rules that materially affects an applicant for a licence or (as the case may be) a licensed provider.

(3) Licensing rules may include such further licensing arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(4) See also sections 43(6)(b), 45(3A), 49(2), 49A(3) and 52(2)(b) and paragraph 3A(2) of schedule 8 (as well as sections 11 and 12).

11 Initial considerations

(1) Licensing rules must provide for—

(a) consultation with the OFT, where appropriate in accordance with subsection (2), in relation to a licence application,

(b) how the approved regulator is to deal with a licence application where it believes that granting it would cause (directly or indirectly) a material and adverse effect on the provision of legal services.

(2) For the purpose of subsection (1)(a), it is appropriate to consult the OFT where the approved regulator believes that the granting of the licence application may have the effect of—

(a) preventing competition within the legal services market, or

(b) significantly restricting or distorting such competition.

12 Other licensing rules

(1) Licensing rules may allow for—

(a) an applicant to be issued with a provisional licence—

(i) in anticipation of its becoming (or becoming eligible to be) a licensed provider, and

(ii) whose full effect as a licence is conditional on its becoming a licensed provider (and such other relevant matters as the rules may specify), or

(b) a licensed provider to be issued with a provisional licence—

(i) in anticipation of its transferring to the regulation of the approved regulator, and

(ii) whose full effect as a licence is conditional on the transfer occurring (and such other relevant matters as the rules may specify).

(2) Licensing rules must—

(a) state that a licence application may be refused on the ground that the applicant appears to be incapable (for any reason) of complying with the regulatory scheme,

(b) provide for grounds for non-renewal, revocation or suspension of a licence where the licensed provider is breaching (or has breached) the regulatory scheme.
13 Licensing appeals

(1) An applicant for a licence or (as the case may be) a licensed provider may appeal against a relevant licensing decision taken by virtue of this Part—

(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which that decision is intimated to it.

(2) A relevant licensing decision is a decision to—

(a) refuse the licensed provider’s application for—

(i) a licence, or
(ii) renewal of its licence,
(b) attach conditions or restrictions to its licence, or
(c) revoke or suspend its licence.

Practice rules

14 Practice rules: general

(1) For the purposes of this Part, the practice rules are rules about—

(a) the—

(i) operation and administration of licensed providers,
(ii) standards to be met by licensed providers,
(b) the operational positions within licensed providers,
(c) accounting and auditing (see section 18),
(d) professional indemnity (see section 19),
(e) the making and handling of any complaint about—

(i) a licensed provider,
(ii) a designated or other person within a licensed provider,
(f) the measures that may be taken by the approved regulator, in relation to a licensed provider, if—

(i) there is a breach of the regulatory scheme, or
(ii) a complaint referred to in paragraph (e) is upheld.

(2) Rules made in pursuance of subsection (1)(f) must allow a licensed provider to make representations to the approved regulator before it takes any of the measures available to it under the rules.

(3) Practice rules may include such further arrangements as to the professional practice, conduct or discipline of licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(4) See also sections 43(6)(a), 45(4) and 50A(4) (as well as sections 15 to 19).
15 Financial sanctions

(1) Practice rules made in pursuance of section 14(1)(f) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their approval under section 6.

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approved regulator may collect it on their behalf).

(4) A licensed provider may appeal against a financial penalty (or the amount of a financial penalty) imposed on it by virtue of this section—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the penalty is intimated to it.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

16 Enforcement of duties

(1) Practice rules must include provision that it is a breach of the regulatory scheme for a licensed provider to—

(a) fail to comply with section 38, or

(b) fail to comply with its—

(i) other duties under this Part, or

(ii) duties under any other enactment specified in the scheme.

(2) Practice rules must require a licensed provider to—

(a) review and report on its performance (see section 17), and

(b) have its performance and that report assessed by the approved regulator.

17 Performance report

(1) Practice rules made by reference to section 16(2)(a) are (in particular) to give the Head of Practice of a licensed provider the functions of—

(a) carrying out an annual review, and

(b) sending a report (in a specified form) on the review to the approved regulator.

(2) The review must include an examination of—

(a) the licensed provider’s compliance with section 38(1), and

(b) the involvement of any non-solicitor investors in the licensed provider.

(3) Practice rules made by reference to section 16(2)(b) may describe the approved regulator’s functions under section 24.
Accounting and auditing

Practice rules must—

(a) require licensed providers to keep in place proper accounting and auditing procedures,

(b) include provision corresponding to that applying under sections 35 to 37 (accounts rules) of the 1980 Act in relation to an incorporated practice.

Professional indemnity

Practice rules must—

(a) require licensed providers to keep in place sufficient arrangements for professional indemnity,

(b) include provision corresponding to that applying under section 44 (professional indemnity) of the 1980 Act in relation to an incorporated practice.

Choice of arrangements

(1) An approved regulator must proceed with either option A or option B as regards a compensation fund from which to make good such relevant losses as may be suffered by reason of dishonesty on the part of its licensed legal services providers.

(2) Option A is for the approved regulator to maintain its own compensation fund (separate from the Guarantee Fund) in relation to its licensed providers.

(3) If option A is proceeded with, the compensation fund is to be—

(a) held by the approved regulator for such purpose as corresponds to the purpose for which the Guarantee Fund is held under section 43(2)(c) of the 1980 Act in relation to licensed providers,

(b) administered by it in such way as corresponds to the administration of the Guarantee Fund in accordance with section 43(3) to (7) of, and Part I of Schedule 3 to, the 1980 Act (so far as applicable in relation to licensed providers).

(4) Option B is for the approved regulator, by not maintaining its own compensation fund as mentioned in option A, to cause the Guarantee Fund to be administered as respects its licensed providers.

(5) For the purpose of option B, see section 43(2)(c) to (8) of, and Part I of Schedule 3 to, the 1980 Act.

(6) As soon as it has decided which of options A and B to proceed with, the approved regulator (where not the Law Society) must inform the Law Society of its decision.

Compensation rules: general

(1) For the purposes of this Part, the compensation rules are rules in pursuance of (as the case may be)—

(a) option A in section 19A, or

(b) option B in that section.
Part 2—Regulation of licensed legal services
Chapter 1—Approved regulators

(2) In pursuance of option A, the rules must—
   (a) state—
      (i) the purpose of the approved regulator’s compensation fund,
      (ii) as a minimum, the monetary amount to be contained in that fund,
   (b) describe the way in which that fund is to be administered by the approved regulator,
   (c) specify the criteria for qualifying for payment out of that fund,
   (d) provide for the procedure for—
      (i) making claims for such payment,
      (ii) determining such claims,
   (e) require the making of contributions to that fund by a licensed provider in accordance with the relevant scale of annual contributions fixed by virtue of section 19A(3)(b),
   (f) make provision for the destination (or distribution) of that fund in the event that the approved regulator ceases to operate.

(3) In pursuance of option B, the rules must require the making of contributions to the Guarantee Fund by a licensed provider in accordance with the relevant scale of annual contributions fixed under paragraph 1(3) of Schedule 3 to the 1980 Act.

19C More about compensation arrangements

(1) Compensation rules may include such further compensation arrangements as to licensed providers for which provision is (in the approved regulator’s opinion) necessary or expedient.

(2) The Scottish Ministers may by regulations make further provision about compensation arrangements as to licensed providers, including (in particular)—
   (a) for the content of compensation rules,
   (b) in connection with a compensation fund, for functions of approved regulators and licensed providers.

(3) In sections 19A and 19B and this section, the references to the Guarantee Fund are to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).

Internal governance

20 Internal governance arrangements

(1) The internal governance arrangements of an approved regulator must incorporate such provision as is necessary with a view to ensuring that the approved regulator will—
   (a) always exercise its regulatory functions—
      (i) independently of any other person or interest,
      (ii) properly in other respects (in particular, with a view to achieving public confidence),
(b) continue to allocate sufficient resources (financial and otherwise) to the exercise of its regulatory functions,
(c) review regularly how effectively it is exercising its regulatory functions (in particular, by reviewing the effectiveness of its regulatory scheme).

(2) In relation to an approved regulator which has representative functions, relevant factors in connection with subsection (1)(a) include (in particular) the need for—
(a) the approved regulator’s code of conduct (if any) for its members to be compatible with the regulatory objectives and the professional principles,
(b) the approved regulator to—
(i) exercise its regulatory functions separately from its other functions (in particular, any representative functions), and
(ii) avoid conflicts of interest in relation to its regulatory functions,
(c) the approved regulator to secure that a reasonable proportion of the individuals who are responsible for the exercise of its regulatory functions are not qualified legal practitioners.

(3) The approved regulator’s regard to the factor mentioned in subsection (2)(b) is demonstrable by (for example) its securing that within its structure its regulatory functions are clearly demarcated.

21 Communicating outside

(1) The internal governance arrangements of an approved regulator must not, in relation to the persons who are involved in the exercise of its regulatory functions, prevent the persons from engaging in consultation or other communication with—
(a) other approved regulators,
(b) the Scottish Ministers,
(c) the Scottish Legal Aid Board,
(d) the Scottish Legal Complaints Commission, or
(e) the OFT, or any other public body which has functions concerning the application of competition law.

(2) Where an approved regulator has representative functions, its internal governance arrangements must not, in relation to any person who—
(a) is involved in the exercise of its regulatory functions, and
(b) considers that the independence or effectiveness of the approved regulator’s exercise of its regulatory functions is being (or has been) for any reason adversely affected by the furtherance of its representative functions,
prevent the person notifying the Scottish Ministers accordingly.

(3) Subsections (1) and (2) are subject to any overriding prohibition or restriction arising by virtue of any relevant—
(a) enactment or rule of law, or
(b) rule of professional conduct or ethics.
More about governance

(1) The Scottish Ministers may by regulations make further provision about the internal governance arrangements of approved regulators.

(2) However, regulations under subsection (1) must relate to the regulatory functions of approved regulators.

(3) Before making regulations under subsection (1), the Scottish Ministers must—
   (a) have the Lord President’s agreement, and
   (b) consult any approved regulator that would be affected by the regulations.

(4) For the purposes of this Part, the internal governance arrangements of an approved regulator are its own organisational and operational arrangements for the carrying out of its activities.

Regulatory functions etc.

Regulatory and representative functions

(1) For the purposes of this Part, the regulatory functions of an approved regulator are the approved regulator’s functions of regulating its licensed legal services providers including (in particular) its functions—
   (a) in relation to its regulatory scheme, or
   (b) under section 24.

(2) For the purposes of this Part, the representative functions of an approved regulator are any functions that the approved regulator has, in that or any other capacity, of representing or promoting the interests of the individual persons (taken collectively or otherwise) who form its membership.

(3) Nothing in this Part permits the Scottish Ministers to interfere with an approved regulator’s representative functions (but this does not prevent the Scottish Ministers taking such action under this Part as they consider appropriate for the purpose of ensuring that an approved regulator’s regulatory functions are not prejudiced by its representative functions).

Assessment of licensed providers

(1) An approved regulator must assess the performance of each of its licensed providers at least once in every successive period of 3 years from (in each case) the date on which the approved regulator issued the licensed provider with its licence.

(2) The Scottish Ministers may require an approved regulator to carry out a special assessment of a licensed provider if the Scottish Legal Complaints Commission requests that they do so in a case where the Commission has significant concerns about how a complaint about a licensed provider has been dealt with.

(3) An assessment under this section must (in particular) concern—
   (a) the licensed provider’s compliance with section 38(1), and
   (b) such other matters as the approved regulator considers appropriate.

(4) When conducting the assessment, the approved regulator may—
Part 2—Regulation of licensed legal services

Chapter 1—Approved regulators

(a) require from the licensed provider the production of any—
   (i) relevant documents,
   (ii) other relevant information,
(b) interview any person within the licensed provider.

5 (5) The approved regulator must—
(a) prepare a report on the assessment, and
(b) send a copy of the report to the licensed provider (and, if the assessment was
    required under subsection (2), also send one to the Scottish Ministers and the
    Commission).

10 (6) But, before finalising the report, the approved regulator must—
(a) send a draft of the report to the licensed provider, and
(b) give it a reasonable opportunity to make representations about—
   (i) the findings of the assessment, and
   (ii) any recommendations contained in the report.

15 (7) If the assessment discloses (or appears to disclose) any professional misconduct by a
     member of a professional association, the approved regulator must notify that
     association accordingly.

(8) An approved regulator may delegate any of its functions under this section to any
     suitable person or body.

20 (9) The Scottish Ministers may by regulations make further provision about the assessment
     of licensed providers.

Relationship with other bodies

25 Giving information to SLAB

(1) An approved regulator must provide the Scottish Legal Aid Board with such information
     as the Board may reasonably require for the purpose mentioned in subsection (2).

25 (2) The purpose is the Board’s exercise of its function under section 1(2A) of the 1986 Act.

25A Reporting to Law Society

(1) This section applies in relation to any licensed legal services provider (whose approved
    regulator is not the Law Society) that is required, by compensation rules made by
    reference to section 19B(3), to make contributions to the Guarantee Fund.

(2) The approved regulator must report to the Law Society any—
(a) breach of the regulatory scheme by the licensed provider that the approved
    regulator discovers as regards the procedures arising under practice rules made by
    reference to section 18,

35 (b) suspicion held by the approved regulator that there is engagement in such
      financial impropriety as may (in the approved regulator’s opinion) give rise to the
      risk of a claim being made on the Guarantee Fund.
(3) The approved regulator must make available to the Law Society any report prepared by the approved regulator about an inspection carried out by it as regards compliance with—

(a) the procedures arising under practice rules made by reference to section 18,

(b) any other financial procedure as regards which the approved regulator has functions under this Part.

(4) The approved regulator must inform the Law Society of any further action that it intends to take (or has taken) in relation to any of the matters mentioned in subsections (2) and (3).

(5) In this section and section 25B, the references to the Guarantee Fund are to it as defined in section 19C(3).

25B Steps open to Society

(1) Where—

(a) section 25A applies, and

(b) the Law Society suspects that the approved regulator is failing to enforce under this Part any financial procedure to which that section relates,

the Society may refer the circumstances to the Scottish Ministers.

(2) But the Society may make a referral under subsection (1) only if—

(a) it has made representations to the approved regulator in respect of its suspicion, and

(b) in light of any response to them (or where none is received timeously), its suspicion is not relieved.

(3) In a referral under subsection (1), the Society may—

(a) request that the Scottish Ministers take such action under this Part as they consider appropriate,

(b) seek their consent to the Society’s taking of the step mentioned in subsection (5).

(4) That consent may be—

(a) sought only if the Society suspects that the suspected failure may be facilitating to any extent engagement in such financial impropriety as may (in the Society’s opinion) give rise to the risk of a claim being made on the Guarantee Fund,

(b) given only if the Scottish Ministers are satisfied (on information provided by the Society) that—

(i) the Society’s suspicions are reasonable, and

(ii) it is necessary (by way of investigation) that the step be taken.

(5) The step is that the Society inspect, at the licensed provider’s premises, any document, record or other information (in any form) found there which—

(a) relates to—

(i) the licensed provider’s client account, or

(ii) any other financial account held by it, and
(b) is relevant in relation to any financial procedure to which section 25A relates.

25C Financial inspection by Society

(1) If the relevant consent is given under subsection (4)(b) of section 25B, the Law Society may take the step mentioned in subsection (5) of that section.

(2) The licensed provider must co-operate with the Society in connection with the taking of the step.

(3) But the Society does not have authority to take the step (or enter the premises) unless the Society has—
   (a) consulted the approved regulator about the taking of it, and
   (b) given the licensed provider at least 48 hours notice of the taking of it.

(4) Following the taking of the step, the Society—
   (a) must report its findings to—
      (i) the approved regulator, and
      (ii) the Scottish Ministers,
   (b) in the report to the Scottish Ministers, may request that they take such action (or further action) under this Part as they consider appropriate.

(5) In this section, the references to taking the step mentioned in section 25B(5) are to its being taken by the Society’s representatives as appointed for the purpose of this section.

Performance and measures

27A Review of own performance

(1) An approved regulator must review annually its performance.

(2) In particular, a review is to cover the following matters—
   (a) the approved regulator’s compliance with section 62,
   (b) the exercise of its regulatory functions,
   (c) the operation of its internal governance arrangements,
   (d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) The approved regulator must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approved regulator’s annual accounts (but only so far as they are relevant in connection with its functions under this Part).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—
   (a) the review of approved regulators’ performance,
   (b) reports on reviews of their performance.
28 Monitoring by Ministers

(1) The Scottish Ministers may monitor the performance of approved regulators in such manner as they consider appropriate.

(2) Monitoring the performance of an approved regulator includes (in particular) doing so by reference to—

(a) its compliance with section 62,
(b) the exercise of its regulatory functions,
(c) the operation of its internal governance arrangements,
(d) its compliance with any measures applying to it by virtue of section 29(4)(a) or (b).

(3) An approved regulator must—

(a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
(b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

29 Measures open to Ministers

(1) The Scottish Ministers may, in relation to an approved regulator, take one or more of the measures mentioned in subsection (4) if they consider that to be appropriate in the circumstances of the case.

(2) When considering the appropriateness of taking any of those measures, or a combination of them, the Scottish Ministers must (except in the case of a measure mentioned in paragraph (f) of that subsection) have particular regard to the effect that it may have on the approved regulator’s observance of the regulatory objectives.

(3) Schedules 1 to 6 (to which subsection (1) is subject) respectively make provision concerning the measures mentioned in subsection (4).

(4) The measures are—

(a) setting performance targets,
(b) directing that action be taken,
(c) publishing a statement of censure,
(d) imposing a financial penalty,
(e) amending an authorisation given under section 7,
(f) rescinding an authorisation given under that section.

(5) The rescission of an authorisation by virtue of subsection (4)(f) has the effect of terminating the associated approval (of the approved regulator) given under section 6, except where it is stated under paragraph 5(3)(b) of schedule 6 that the approval is preserved.

(5A) The Lord President’s agreement is required for the taking of any of the measures mentioned in subsection (4) except paragraph (d).

(6) The Scottish Ministers may by regulations—
(a) specify other measures that may be taken by them,
(b) make further provision about the measures that they may take (including for the procedures to be followed),
in relation to approved regulators.

(7) Before making regulations under subsection (6), the Scottish Ministers must—
(a) have the Lord President’s agreement, and
(b) consult every approved regulator.

Ceasing to regulate

30 Surrender of authorisation

(1) An approved regulator may, with the prior agreement of the Scottish Ministers, surrender the authorisation given to it under section 7.

(2) Schedule 7 (to which subsection (1) is subject) makes provision concerning the surrender of such an authorisation.

(3) An approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of such an authorisation.

(4) The surrender of an authorisation by virtue of subsection (1) has the effect of terminating the associated approval (of the approved regulator) given under section 6.

31 Cessation directions

(1) This section applies where—
(a) an approved regulator amends its regulatory scheme so as to exclude the regulation of particular categories of licensed providers or legal services, or
(b) the authorisation of an approved regulator is to be (or has been)—
   (i) amended by virtue of section 29(4)(e) so as to exclude the regulation of certain categories of licensed providers or legal services,
   (ii) rescinded by virtue of section 29(4)(f), or
   (iii) surrendered by virtue of section 30(1).

(2) The Scottish Ministers may direct the approved regulator to take specified action (or refrain from doing something) if they consider that to be necessary or expedient for the continued effective regulation of a licensed provider.

(3) The approved regulator must (so far as practicable) comply with a direction given to it under subsection (2).

(4) For the purposes of this section, a reference to an approved regulator includes (as the context requires) a former approved regulator.

32 Transfer arrangements

(1) This section applies where—
(a) an approved regulator has amended its regulatory scheme so as to exclude the regulation of particular categories of licensed provider or legal services,

(b) the authorisation of an approved regulator is to be (or has been)—

(i) amended by virtue of section 29(4)(e) so as to exclude the regulation of particular categories of licensed provider or legal services,

(ii) rescinded by virtue of section 29(4)(f), or

(iii) surrendered by virtue of section 30(1), or

(c) the approved regulator is otherwise unable to continue to regulate some or all of its licensed providers.

(2) The approved regulator must (as soon as reasonably practicable)—

(a) notify each of its licensed providers of the relevant situation within subsection (1),

(b) do so by reference to any effective date.

(3) A notification under subsection (2) must inform each licensed provider as to whether it requires, in consequence of the relevant situation, to transfer to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(4) Each licensed provider that is so required to transfer to a new regulator must—

(a) within 28 days beginning with the date of the notification, or failing which as soon as practicable, take all reasonable steps so as to transfer to the regulation of a new regulator, and

(b) where it does so transfer, take (as soon as practicable) such steps as are necessary to ensure that it complies with the new regulator’s regulatory scheme before the end of the changeover period.

(5) For the purpose of subsection (4)(b), the changeover period is the period of 6 months beginning with the date on which the new regulator takes over the regulation of the licensed provider.

(6) On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

33 Extra arrangements

(1) The Scottish Ministers may by regulations make provision in connection with section 32 as to the arrangements for the transfer of licensed providers to the regulation of a different approved regulator (a “new regulator”).

(2) Regulations under subsection (1) may (in particular)—

(a) provide for a licensed provider which has not transferred to the regulation of a new regulator to be regulated by such new regulator as may be appointed by the Scottish Ministers with the new regulator’s consent,

(b) provide for the Scottish Ministers to recover on behalf of the new regulator, or a licensed provider, any fee (or a part of it) paid by the licensed provider to the former approved regulator in connection with the licensed provider’s current licence.
Change of regulator

34 Change of approved regulator

(1) A licensed legal services provider may transfer voluntarily to the regulation of a different approved regulator (a “new regulator”) from the one which issued its current licence (the “current regulator”).

(2) But the transfer requires the new regulator’s written consent (and its agreement to issue the licensed provider with a licence having effect from the date on which the transfer is to occur).

(3) Where a licensed provider wishes to do so, it must—

(a) give a notice which complies with subsection (4) to—

(i) the current regulator, and

(ii) the Scottish Ministers, and

(b) provide such further information as may reasonably be required by either of them.

(4) A notice complies with this subsection if it—

(a) explains why the licensed provider wishes to transfer to the regulation of a new regulator,

(b) specifies—

(i) the new regulator,

(ii) the date on which the transfer is to occur (which must be within 28 days of the date of the notice), and

(c) is accompanied by a copy of the new regulator’s written consent to the transfer.

(5) On the coming into effect of a licence issued to the licensed provider by a new regulator, the licence issued to it by the current regulator ceases to have effect.

(6) The Scottish Ministers may by regulations make further provision about the transfer by a licensed provider to the regulation of a new regulator.

35 Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approved regulator.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approved regulator in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Part to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2)—

(a) without the Lord President’s agreement, and

(b) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.
26 Additional powers and duties

(1) The Scottish Ministers may by regulations make provision conferring on approved regulators such additional functions as they consider appropriate for the purposes of this Part.

(2) Before making regulations under subsection (1), the Scottish Ministers must—
   (a) have the Lord President’s agreement, and
   (b) consult—
      (i) every approved regulator,
      (ii) such other person or body as they consider appropriate.

27 Guidance on functions

(1) In exercising its functions under this Part, an approved regulator must have regard to any guidance issued to approved regulators generally by the Scottish Ministers for the purposes of or in connection with this Part.

(2) Before issuing such guidance, the Scottish Ministers must consult—
   (a) every approved regulator,
   (b) such other person or body as they consider appropriate.

(3) The Scottish Ministers must publish any such guidance as issued (or re-issued).

CHAPTER 2

LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

(1) For the purposes of this Part, a licensed legal services provider is a business entity which, through the designated and other persons within it—
   (a) provides (or offers to provide) legal services—
      (i) to the general public or otherwise, and
      (ii) for a fee, gain or reward, and
   (b) does so under a licence issued by an approved regulator in accordance with the approved regulator’s licensing rules.

(2) An entity is eligible to be a licensed provider only if it has within it, for the provision of legal services, at least one solicitor who holds a valid practising certificate that is free of conditions (such as may be imposed under section 15(1)(b) or 53(5) of the 1980 Act).

(3) A licensed provider may not be regulated by more than one approved regulator at the same time.

(4) In this Part, a reference to a licensed provider is to a licensed legal services provider.
Eligibility criteria

(1) This section—
   (a) applies for the purposes of licensing an entity as a licensed legal services provider under this Part,
   (b) does so in conjunction with section 37A.

(2) The following are examples of arrangements which would make an entity eligible to be a licensed provider—
   (a) the entity has within it—
       (i) at least one solicitor as mentioned in section 36(2), and
       (ii) at least one individual practitioner of another type,
       for the carrying out of the sort of legal work for which each is qualified,
   (b) the entity has within it at least one solicitor as mentioned in section 36(2) but, through also having within it at least one person who is not a solicitor or other type of individual practitioner, additionally provides (or offers to provide)—
       (i) other professional services, or
       (ii) services of another kind,
   (c) the entity has within it at least one solicitor as mentioned in section 36(2) but not every person who has ownership or control of the entity, or another material interest in it, is a solicitor (or a firm of solicitors) or an incorporated practice.

(3) But an entity, to be eligible to be a licensed provider—
   (a) need not be a body corporate or a partnership,
   (b) requires, if it falls—
       (i) under the ownership or control of another entity, or
       (ii) within the structure of another entity,
       to be a separate part of the other entity or otherwise distinct from it.

(4) For the avoidance of doubt, an entity is not eligible to be a licensed provider if it—
   (a) consists of—
       (i) a single solicitor practising under the solicitor’s own name, or
       (ii) a solicitor otherwise practising as a sole practitioner,
   (b) is a firm of solicitors or an incorporated practice, or
   (c) is a law centre as defined in section 65(1) of the 1980 Act.

(5) In subsection (2)(a)(ii) and (b), a type of “individual practitioner” (apart from a solicitor) is—
   (a) an advocate,
   (b) a conveyancing or executry practitioner,
   (ba) a litigation practitioner, or
   (d) a confirmation agent or will writer within the meaning of Part 3.
(6) The Scottish Ministers may by regulations—
   (a) make—
      (i) provision specifying other categories of entity that are, or are not, eligible to be a licensed provider,
      (ii) further provision about criteria for eligibility to be a licensed provider,
   (b) modify—
      (i) section 36(2) so as to specify an additional type of legally qualified person (as an alternative to a solicitor as mentioned there),
      (ii) subsection (5) so as to add a type of legal practitioner to the list there.

(7) Before making regulations under subsection (6)(b), the Scottish Ministers must consult every approved regulator.

37A Majority ownership

(1) An entity is eligible to be a licensed provider only if the qualifying investors in it (taken together) have at least a 51% stake in the total ownership or control of the entity.

(1A) For the purpose of subsection (1), a “qualifying investor” is—
   (a) a solicitor investor, or
   (b) an investor who is a member of another regulated profession.

(1B) In subsection (1A)(b), a “regulated profession” is a profession the professional activities of whose members (and qualifications for membership of which) are, under statutory or administrative arrangements, regulated by a professional association.

(1C) Despite the generality of subsections (1A)(b) and (1B), the Scottish Ministers—
   (a) are by regulations to specify in connection with those subsections what is, or is not, to be regarded as a regulated profession,
   (b) may by regulations specify in connection with those subsections what is, or is not, to be regarded as a professional association, professional activities (or qualifications) or membership of a profession.

(1D) Before making regulations under subsection (1C), the Scottish Ministers must—
   (a) have the Lord President’s agreement, and
   (b) consult—
      (i) the Law Society,
      (ii) every approved regulator,
      (iii) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
      (iv) such other person or body as they consider appropriate.

38 Key duties

(1) A licensed legal services provider must—
(a) have regard to the regulatory objectives,
(b) adhere to the professional principles,
(c) comply with—
   (i) its approved regulator’s regulatory scheme,
   (ii) the terms and conditions of its licence.

(2) A licensed provider must seek to ensure that every designated or other person who is—
   (a) within the licensed provider, and
   (b) subject to a professional code of conduct,
complies with the code of conduct.

(3) A licensed provider must have within it—
   (a) a Head of Legal Services (see section 39), and
   (b) either—
      (i) a Head of Practice (see section 40), or
      (ii) a Practice Committee (see section 41).

(4) A licensed provider must ensure that the following positions are not left unoccupied—
   (a) that of its Head of Legal Services, and
   (b) that (as the case may be)—
      (i) of its Head of Practice, or
      (ii) within its Practice Committee by virtue of section 41(3).

(5) However, the same person may (at the same time) be a licensed provider’s Head of
Legal Services and also its Head of Practice.

39 Head of Legal Services

(1) It is for a licensed provider to make such administrative arrangements as it considers
    appropriate in respect of its Head of Legal Services.

(2) A person is eligible for appointment (and to act) as its Head of Legal Services only if the
    person is a solicitor who holds a valid practising certificate that is free of conditions
    (such as may be imposed under section 15(1)(b) or 53(5) of the 1980 Act).

(3) But a person becomes disqualified from that position if the person is disqualified from
    practice as a solicitor by reason of having been—
    (a) struck off (or removed from) the roll of solicitors, or
    (b) suspended from practice.

(4) A Head of Legal Services has the function of securing the licensed provider’s—
    (a) compliance with section 38(1)(a) and (b),
    (b) fulfilment of its other duties under this Part so far as relevant in connection with
        its provision of legal services.

(5) A Head of Legal Services is to manage the designated persons within the licensed
provider with a view to ensuring that they—
(a) have regard to the Head’s function under subsection (4),

(aa) adhere to the professional principles,
(b) meet their professional obligations.

(6) A Head of Legal Services is to take such reasonable steps as may be required for the purposes of subsection (4).

(7) If it appears to a Head of Legal Services that the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment, the Head is to report that fact to the Head of Practice.

(8) Where (and to the extent that) under this section and section 40 a function falls to both—

(a) a Head of Legal Services, and
(b) a Head of Practice,

they are jointly and severally responsible for exercising the function.

(9) The Scottish Ministers may by regulations—

(a) make further provision about—

(i) Heads of Legal Services,
(ii) the functions of such Heads (in their capacity as such),
(b) modify subsection (2) so as to specify an additional type of legally qualified person (as an alternative to a solicitor as mentioned there).

(10) Before making regulations under subsection (9), the Scottish Ministers must consult the Lord President.

### 40 Head of Practice

(1) It is for a licensed provider to make such administrative arrangements as it considers appropriate in respect of its Head of Practice.

(2) A person is eligible for appointment (and to act) as its Head of Practice only if the person—

(a) has such qualifications, expertise and experience as are reasonably required, and
(b) in other respects, is fit and proper for the position.

(3) A Head of Practice has the function of securing the licensed provider’s—

(a) compliance with section 38(1)(c),
(b) fulfilment of its other duties under this Part.

(4) A Head of Practice is to manage the designated and other persons within the licensed provider with a view to ensuring that they—

(a) have regard to the Head’s functions under this Part,
(b) meet any professional obligations to which they are subject.

(5) A Head of Practice is to take such reasonable steps as may be required for the purposes of subsection (3).

(6) If it appears to a Head of Practice that—
(a) the licensed provider is failing (or has failed) to fulfil any of its duties under this Part or another enactment,

(b) an investor in the licensed provider is—

(i) failing (or has failed) to fulfil any of the person’s duties under this Part or another enactment, or

(ii) contravening (or has contravened) section 51(1) or (2),

the Head is to report that fact to the licensed provider’s approved regulator.

(7) The Scottish Ministers may by regulations make further provision about—

(a) Heads of Practice,

(b) the functions of such Heads (in their capacity as such).

(8) Before making regulations under subsection (7), the Scottish Ministers must consult the Lord President.

41 Practice Committee

(1) It is for a licensed provider—

(a) to decide whether to have a Practice Committee (instead of having a Head of Practice),

(b) if it has one, to make such administrative arrangements as it considers appropriate in respect of it.

(2) A Practice Committee has the functions under this Part that would otherwise be exercisable by a Head of Practice (and the specification of any of those functions is to be read accordingly).

(3) A Practice Committee is to have among its members a person who would be eligible for appointment as its Head of Practice (if there were one).

(4) The members of a Practice Committee are jointly and severally responsible as regards the Committee’s functions.

(5) The Scottish Ministers may by regulations make further provision about—

(a) Practice Committees,

(b) the functions of such Committees.

(6) Before making regulations under subsection (5), the Scottish Ministers must consult the Lord President.

Appointment to position etc.

42 Notice of appointment

(1) Subsection (2) applies whenever a licensed legal services provider appoints a person as its—

(a) Head of Legal Services, or

(b) Head of Practice.

(2) The licensed provider must—
(a) within 14 days from the date of the appointment—
   (i) notify its approved regulator of that fact,
   (ii) give the approved regulator the name and other details of the person appointed,
(b) from that date give the approved regulator such further relevant information, and by such time, as it may reasonably require.

(3) Subsections (4) and (5) apply where a licensed provider sets up a Practice Committee.

(4) The licensed provider must—
   (a) within 14 days from the date on which the Committee is set up—
       (i) notify its approved regulator of that fact,
       (ii) give the approved regulator the names and other relevant details of the Committee’s members (including with specific reference to section 41(3)),
   (b) from that date give the approved regulator such other relevant information, and by such time, as it may reasonably require.

(5) The licensed provider must also—
   (a) whenever there is a change in the membership of the Committee, give the approved regulator—
       (i) notice of the change,
       (ii) the name and other relevant details of any new Committee member,
       within 14 days from the date on which the change occurs,
   (b) if it ever dissolves the Committee (in favour of having a Head of Practice), notify its approved regulator of that fact within 14 days from the date on which the dissolution occurs,
   (c) from the date mentioned in paragraph (a) or (b) (as the case may be) give the approved regulator such further relevant information, and by such time, as it may reasonably require.

43 **Challenge to appointment**

(1) An approved regulator may by written notice challenge the appointment by any of its licensed providers of a person (“P”)—
   (a) as its—
       (i) Head of Legal Services, or
       (ii) Head of Practice, or
   (b) as a member of its Practice Committee.

(2) A notice of a challenge under subsection (1)—
   (a) requires to be given by the approved regulator within 14 days of the relevant notification to it under section 42(2), (4) or (5)(a),
   (b) is to specify the grounds for the challenge.

(3) A challenge under subsection (1) may be made only if the approved regulator—
(a) believes that P is (or may be)—
   (i) ineligible, or
   (ii) unsuitable,
   for the appointment, or
(b) has other reasonable grounds for the challenge.

(4) If the approved regulator determines (after making a challenge under subsection (1)) that the grounds for the challenge are made out, it may direct the licensed provider to rescind P’s appointment.

(5) Before giving a direction under subsection (4), the approved regulator must give the licensed provider and P 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the licensed provider or P may consider expedient.

(6) Practice and licensing rules respectively must—
   (a) explain the basis on which P’s suitability for the appointment is determinable,
   (b) provide that the licensed provider’s licence is to be revoked or suspended if the licensed provider does not comply with a direction under subsection (4).

(6A) A licensed provider which or another person who is aggrieved by a direction under subsection (4) (or both jointly) may appeal against the direction—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the direction is given.

(7) For the purpose of subsections (1) to (6), an example of things relevant as respects P’s suitability for the appointment is whether P has a record of misconduct in any professional context.

**44 Disqualification from position**

(1) An approved regulator has the functions exercisable—
   (a) under this section and section 45, and
   (b) by reference to one or more of the conditions specified in section 46,
in relation to a person (“P”) who holds within any of its licensed providers any of the posts to which those sections relate.

(2) If the first condition is met in relation to P, the approved regulator must disqualify P from—
   (a) appointment (or acting) as the Head of Practice,
   (b) membership of a Practice Committee.

(3) If the second condition is met in relation to P, the approved regulator—
   (a) must disqualify P from—
      (i) appointment (or acting) as the Head of Legal Services or Head of Practice,
      (ii) membership of a Practice Committee,
(b) may disqualify P from being a designated person.

(4) If the third condition is met in relation to P, the approved regulator must disqualify P from—
   (a) appointment (or acting) as the Head of Legal Services or Head of Practice,
   (b) membership of a Practice Committee.

(5) If the fourth condition is met in relation to P, the approved regulator—
   (a) must disqualify P from—
       (i) appointment (or acting) as the Head of Legal Services or Head of Practice,
       (ii) membership of a Practice Committee,
   (b) may disqualify P from being a designated person.

(6) If the fifth condition is met in relation to P, the approved regulator may disqualify P from—
   (a) appointment (or acting) as the Head of Legal Services or Head of Practice,
   (b) membership of a Practice Committee,
   (c) being a designated person.

45 Effect of disqualification

(1) A disqualification under section 44—
   (a) may be—
       (i) without limit of time, or
       (ii) for a fixed period,
   (b) extends so as to apply in relation to every licensed provider (including a licensed provider that is subject to the regulation of a different approved regulator).

(2) Where a disqualification under section 44 is from being a designated person, the disqualification may be framed so as to be limited by reference to—
   (a) particular activities, or
   (b) activities carried out without appropriate supervision (for example, that of a senior solicitor).

(3) Before disqualifying P under section 44, the approved regulator must give the licensed provider and P 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the licensed provider or P may consider expedient.

(3A) Licensing rules must provide that the licensed provider’s licence may be revoked or suspended if the licensed provider wilfully disregards a disqualification imposed under section 44.

(4) Practice rules must—
   (a) set procedure (which the approved regulator is to follow) for imposing a disqualification under section 44,
(b) allow for review (and lifting) by the approved regulator of a disqualification imposed by it under that section.

(5) A person who is disqualified under section 44 may appeal against the disqualification—
(a) to the sheriff,
(b) within the period of 3 months beginning with the date on which the disqualification is imposed.

46 Conditions for disqualification

(1) This section applies for the purposes of section 44.

(2) The first condition is that—

(a) P—

(i) is subject to a trust deed granted by P for the benefit of P’s creditors,

(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay P’s creditors,

(iii) has been adjudged bankrupt and has not been discharged from bankruptcy, or

(iv) has been sequestrated (that is, sequestration of P’s estate has been awarded) and the sequestration has not been discharged, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(3) The second condition is that—

(a) P is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(4) The third condition is that—

(a) P—

(i) is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 or corresponding Northern Ireland legislation,

(ii) is disqualified by a court from holding, or otherwise has been removed by a court from, a position of business responsibility (for example, from being a director of a charity), and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(5) The fourth condition is that—

(a) P—

(i) has been convicted of an offence involving dishonesty, or

(ii) in respect of an offence, has been fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction) or sentenced to imprisonment for a term of 12 months or more, and

(b) the approved regulator is satisfied accordingly that P is unsuitable for the position.
(6) The fifth condition is that—
   (a) P (acting in the relevant capacity) has—
      (i) failed in a material regard to fulfil any of P’s duties under (or arising by
          virtue of) this Part, or
      (ii) caused, or substantially contributed to, a material breach of the terms or
           conditions of the licensed provider’s licence, and
   (b) the approved regulator is satisfied accordingly that P is unsuitable for the position.

(7) In subsections (3)(a) and (4)(a)(i), “Northern Ireland legislation” has the meaning given

Designated persons

47

(1) In this Part, a “designated person” within a licensed legal services provider is a person
     who is designated as such under subsection (2).

(2) Designation under this subsection is written designation by the licensed provider to
carry out legal work in connection with the licensed provider’s provision of legal

(3) For the purposes of subsection (2)—
   (a) designation by the licensed provider means designation on its behalf by its Head
       of Legal Services or Head of Practice (who has the function accordingly),
   (b) a person is eligible for designation only if the person is an employee of the
       licensed provider (or otherwise works within it under any arrangement),
   (c) it is immaterial whether the person is—
       (i) a member of a professional association, or
       (ii) paid for the work.

47A Working context

(1) A Head of Legal Services is, in furtherance of section 39(5)(aa) and (b), responsible for
    ensuring that there is (by or under the direction of the Head) adequate supervision of the
    legal work carried out by the designated persons within the licensed provider.

(2) Only a designated person within a licensed provider may carry out legal work in
    connection with its provision of legal services.

(3) Nothing in this Part affects the operation of—
   (a) section 32 of the 1980 Act or any other enactment which requires that a particular
       sort of legal work be carried out by an individual of a particular description (or in
       a particular way), or
   (b) any rule of professional practice, conduct or discipline (whether for solicitors or
       otherwise) which properly so requires.
48  Listing and information

(1) The Head of Practice of a licensed provider must—
   (a) keep a list of the designated persons within the licensed provider, and
   (b) give its approved regulator a copy of the list whenever the approved regulator requests it.

(2) The Head of Practice must give its approved regulator such information about the designated persons within the licensed provider as the approved regulator may reasonably request.

Non-solicitor investors

49  Fitness for involvement

(1) An approved regulator must—
   (a) before issuing a licence to a licensed legal services provider, or renewing it, satisfy itself as to the fitness of every non-solicitor investor in the licensed provider for having an interest in the licensed provider,
   (b) thereafter, monitor as it considers appropriate the investor’s fitness in that regard.

(2) Licensing rules must—
   (a) explain the basis on which a non-solicitor investor’s fitness for having an interest in a licensed provider is determinable,
   (b) provide that, where the approved regulator determines that the investor is unfit in that regard—
      (i) a licence is not to be issued to the licensed provider (or renewed),
      (ii) if issued, the licence is to be revoked or suspended.

(2A) But the approved regulator need not act as required by licensing rules made under subsection (2)(b) if, by such time as it may reasonably appoint, the licensed provider demonstrates to it that (following disqualification as required by section 50A(1) or otherwise) the investor no longer has the relevant interest.

(3) The approved regulator must, before making its final determination as to fitness, give the non-solicitor investor 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the investor may consider expedient.

(4) A person who is determined as unfit under this section may appeal against the determination—
   (a) to the sheriff,
   (b) within the period of 3 months beginning with the date on which the determination is made.

49A  Exemption from fitness test

(1) Section 49(1) is subject to this section.

(2) The approved regulator need not act as required by that section in relation to any exemptible investor in the licensed provider.
(3) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on subsection (2),

(b) any threshold below the percentage specified in subsection (4) by reference to which it proposes to rely on subsection (2),

(c) where it proposes to rely on subsection (2), its reasons.

(4) In subsection (2), an “exemptible investor” is an investor who has less than a 10% stake in the total ownership or control of the licensed provider.

Factors as to fitness

(1) This section applies for the purposes of section 49.

(2) The following are examples of things relevant as respects a non-solicitor investor’s fitness for having an interest in a licensed provider—

(a) the investor’s—

(i) financial position and business record,

(ii) probity and character,

(iii) family, business or other associations (so far as bearing on character),

(b) whether—

(i) the investor has ever caused, or substantially contributed to, a material breach of the terms or conditions of any licensed provider’s licence,

(ii) the investor’s involvement in the licensed provider may (in the approved regulator’s opinion) be detrimental to the observance of the regulatory objectives or adherence to the professional principles, or to the compliance with this Part or any other enactment, by any person or body,

(iii) the investor has ever contravened section 51(1) or (2) or there is (in the approved regulator’s opinion) a significant risk that the investor will ever contravene that section.

(3) A non-solicitor investor is to be presumed to be unfit for having an interest in a licensed provider if one or more of the following conditions is met—

(a) the first condition is that the investor—

(i) is subject to a trust deed granted by the investor for the benefit of the investor’s creditors,

(ii) is subject to an individual voluntary arrangement under the Insolvency Act 1986, to repay the investor’s creditors,

(iii) has been adjudged bankrupt and has not been discharged from bankruptcy, or

(iv) has been sequestrated (that is, sequestration of the investor’s estate has been awarded) and the sequestration has not been discharged,

(b) the second condition is that the investor is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 or corresponding Northern Ireland legislation,
(c) the third condition is that the investor—
   (i) is subject to a disqualification order or undertaking under the Company
       Directors Disqualification Act 1986 or corresponding Northern Ireland
       legislation,
   (ii) is disqualified by a court from holding, or otherwise has been removed by a
        court from, a position of business responsibility (for example, from being a
director of a charity),

(d) the fourth condition is that the investor—
   (i) has been convicted of an offence involving dishonesty, or
   (ii) in respect of an offence, has been fined an amount equivalent to level 4 on
        the standard scale or more (whether on summary or solemn conviction) or
        sentenced to imprisonment for a term of 12 months or more.

(3A) Where a non-solicitor investor is a body, it is relevant as respects the investor’s fitness
for having an interest in a licensed provider whether or not the persons having (to any
extent)—
   (a) ownership or control of the body, or
   (b) any other material interest in it,
would (if they were investors in the licensed provider in their own right) be held to be fit
in that regard.

(5) In subsection (3)(b) and (c)(i), “Northern Ireland legislation” has the meaning given in

50A Ban for improper behaviour

(1) Where an approved regulator determines that a non-solicitor investor in a licensed
provider has contravened section 51(1) or (2), the approved regulator must disqualify
the investor from having an interest in the licensed provider.

(2) A disqualification under subsection (1)—
   (a) may be—
       (i) without limit of time, or
       (ii) for a fixed period,
   (b) extends so as to apply in relation to every licensed provider (including a licensed
provider that is subject to the regulation of a different approved regulator).

(3) Before disqualifying an investor under subsection (1), the approved regulator must give
the investor 28 days (or such longer period as it may allow) to—
   (a) make representations to it,
   (b) take such steps as the investor may consider expedient.

(4) Practice rules must—
   (a) set procedure (which the approved regulator is to follow) for imposing a
disqualification under subsection (1),
   (b) allow for review (and lifting) by the approved regulator of a disqualification
imposed by it under that subsection.
(5) A person who is disqualified under subsection (1) may appeal against the disqualification—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the disqualification is imposed.

51 Behaving properly

(1) A non-solicitor investor in a licensed provider must not (in that capacity) act in a way that is incompatible with—

(a) the regulatory objectives or the professional principles,

(b) the licensed provider’s duties under section 38(1), or

(c) its—

(i) other duties under this Part,

(ii) duties under any other enactment.

(2) A non-solicitor investor in a licensed provider must not (in that capacity)—

(a) interfere improperly in the provision of legal or other professional services by the licensed provider,

(b) in relation to any designated or other person within the licensed provider—

(i) exert undue influence,

(ii) solicit unlawful or unethical conduct, or

(iii) otherwise behave improperly.

52 More about investors

(1) Schedule 8 provides for other—

(a) requirements to which licensed legal services providers are subject,

(b) functions of approved regulators,

in relation to interests in licensed providers.

(2) The Scottish Ministers may by regulations make further provision—

(a) relating to interests in licensed providers,

(b) for licensing rules in connection with persons who have an interest in a licensed provider.

(2A) The Scottish Ministers may by regulations—

(a) amend the percentage specified in section 49A(4) and paragraph 3A(3) of schedule 8,

(b) amend (by addition, elaboration or exception) a definition in subsection (4).

(2B) Regulations under subsection (2)(a) may (in particular)—

(a) impose requirements to which a licensed provider, or an investor in a licensed provider, is subject,
(b) specify criteria or circumstances by reference to which a non-solicitor investor is to be presumed, or held, to be fit (or unfit),

(c) set out—

(i) what amounts (to any extent) to ownership, control or another material interest,

(ii) what interest (or type) is relevant as regards a particular percentage stake in ownership or control,

(iii) by reference to a family, business or other association, what other interest (or type) also counts towards such a stake,

(d) for circumstances where an interest is held by a body, set out—

(i) what interest (or type) in the body counts towards the interest held by it,

(ii) the extent to which the interest in it so counts.

(2C) Before making regulations under subsection (2A), the Scottish Ministers must have the Lord President’s agreement.

(4) In this Part—

(a) an “investor” in a licensed provider is any person who has (to any extent)—

(i) ownership or control of the licensed provider, or

(ii) any other material interest in it,

(b) a “non-solicitor investor” in a licensed provider is an investor who is not entitled to practise—

(i) as a solicitor, a firm of solicitors or an incorporated practice,

(ii) in England and Wales or Northern Ireland, as a solicitor (outwith the meaning for this Act), or

(iii) as a registered European or foreign lawyer,

(c) the reference to a “solicitor investor” in a licensed provider is to be construed accordingly.

(5) In sections 49 to 51, this section and schedule 8, a reference to a licensed provider includes an applicant to become one.

**Discontinuance of services**

30  **Duty to warn**

(1) Subsection (2) applies where a licensed legal services provider—

(a) is in serious financial difficulty, or

(b) for any reason (except revocation or suspension of its licence under this Part)—

(i) intends to stop providing legal services, or

(ii) is likely to become unable to continue providing legal services.

(2) The licensed provider must—

(a) notify (without delay) its approved regulator accordingly,
(b) provide the approved regulator with such relevant information as the approved regulator may require,

(c) take all reasonable steps to mitigate such disruption to its clients as is likely to result from the difficulty or (as the case may be) its ceasing to provide legal services.

5

54  Ceasing to operate

(1) Subsections (2) to (5) apply where—

(za) through the application of section 37 or 37A or otherwise, a licensed provider is no longer eligible to remain as such,

(a) because of a vacancy within a licensed provider, the licensed provider has within it no person who is eligible to be (or act as) its—

(i) Head of Legal Services, or

(ii) Head of Practice,

(b) in respect of a licensed provider—

(i) a provisional liquidator, liquidator, receiver or judicial factor is appointed,

(ii) an administration or winding up order is made,

(iii) a resolution is passed by it for its voluntary winding up (except where that resolution is solely to facilitate reconstruction or amalgamation with another licensed provider), or

(c) for some other reason (except revocation or suspension of its licence under this Part), a licensed provider stops providing legal services.

(2) The licensed provider must—

(a) notify (without delay and no later than 7 days after an event referred to in subsection (1)) its approved regulator accordingly,

(b) provide the approved regulator with such information about the situation as the approved regulator may require.

(3) The approved regulator must revoke the licensed provider’s licence except where the approved regulator is satisfied that—

(a) the situation is temporary, and

(b) there are sufficient arrangements in place to safeguard the interests of the licensed provider’s clients until such time as the situation is rectified.

(3A) Even if the exception mentioned in subsection (3) is made out, the approved regulator may suspend the licence pending rectification of the situation.

(4) For the purpose of subsections (3) and (3A), the approved regulator must review the situation every 14 days (or, if it so chooses, more frequently).

(4A) For so long as the licensed provider’s licence is not revoked or suspended under subsection (3) or (3A) in connection with the situation, the situation alone does not prevent the licensed provider from continuing (or recommencing) to provide legal services.

(5) Where a licensed provider has ceased to exist—
Part 2—Regulation of licensed legal services

Chapter 2—Licensed legal services providers

(a) its functions under subsection (2)(a) and (b) fall to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, its function under subsection (2)(b) falls to a person nominated by its approved regulator.

(6) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

55 Safeguarding clients

(1) Subsections (2) and (3) apply where—

(a) a licensed provider—

(i) has given (or is required to give) notice to its approved regulator under section 53(2)(a) or 54(2)(a), or

(ii) has had (or is to have) its licence revoked or suspended under this Part, and

(b) the approved regulator has not informed it (or has not had an opportunity to do so) that the approved regulator is satisfied that it has made sufficient arrangements for the safeguarding of its clients’ interests.

(2) The licensed provider must—

(a) prepare—

(i) in the case of revocation, final accounts,

(ii) in the case of suspension, interim accounts,

which (in particular) detail all sums held on behalf of clients,

(b) comply with any directions given under subsection (3).

(3) The approved regulator may direct the licensed provider to take specified action (or refrain from doing something) if the approved regulator considers that to be necessary or expedient for safeguarding the interests of the licensed provider’s legal services clients.

(4) Directions given under subsection (3) may (in particular) require the licensed provider to make available to a relevant person or body any—

(a) document or information (of whatever kind) held in the licensed provider’s possession or control which—

(i) relates to, or is held on behalf of, a client of the licensed provider, or

(ii) relates to any trust of which the licensed provider (or one of the designated persons within it) is sole trustee or co-trustee only with other designated persons in the licensed provider,

(b) sum of money held by the licensed provider—

(i) on behalf of a client,

(ii) subject to any trust of the kind mentioned in paragraph (a)(ii).

(5) For the purposes of subsection (4), a relevant person or body is—

(a) the particular client,

(b) the approved regulator,
(c) a provider of legal services that is properly instructed by the licensed provider, or the approved regulator, to act in place of the licensed provider.

(6) The Court of Session may, on an application by the approved regulator, make an order—

(a) confirming that the licensed provider is required to comply with any direction given under subsection (3),

(b) varying the direction or imposing such conditions as the Court considers appropriate in the circumstances,

(c) that, without the leave of the Court, no payment be made by any bank, building society or other body named in the order out of any account (or any sum otherwise deposited) in the name of the licensed provider.

(7) Before making such an order, the Court must—

(a) give the licensed provider and any other person with an interest an opportunity to be heard,

(b) be satisfied that the direction (or, as the case may be, freezing of an account) represents an appropriate course of action in all the circumstances of the case.

(8) The approved regulator may recover from the licensed provider any expenditure reasonably incurred by the approved regulator in consequence of its taking action under this section.

(9) Where a licensed provider has ceased to exist, its functions under (or arising by virtue of) this section fall—

(a) to its former Head of Practice or (if unavailable) its former Head of Legal Services,

(b) if neither Head is available, to a person nominated by its approved regulator.

(10) The Scottish Ministers may by regulations make further provision about the steps that are, in the circumstances within subsection (1), to be taken to safeguard the interests of clients of licensed providers.

(11) In this section, a reference to a licensed provider includes (as the context requires) a former licensed provider.

56 Distribution of client account

(1) Any sums of the kind to which section 42 of the 1980 Act applies that are held in a client account (as referred to in that section) kept by a licensed provider are, in any of the events mentioned in subsection (2A) of that section, to be distributed in the same way as they would if they were subject to that section.

(2) For the purpose of subsection (1), any reference in that section to an incorporated practice is to be read as if it were a reference to the licensed provider.

Professional practice etc.

57 Employing disqualified lawyer

(1) Subsection (2) applies in relation to—
(a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,

(b) a person—

(i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or

(ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,

(c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—

(i) practising as an advocate,

(ii) acting as a conveyancing or executry practitioner,

(iia) acting as a litigation practitioner, or

(iv) acting as a confirmation agent or will writer within the meaning of Part 3,

(d) a body whose certificate of recognition as an incorporated practice has been revoked.

(2) A licensed legal services provider must not employ or remunerate as a designated person—

(a) the person while the person is so debarred (however described in subsection (1)), or

(b) the body while the revocation subsists.

(3) But subsection (2) is inoperative in relation to the person or (as the case may be) body if the licensed provider has its approved regulator’s written authority that it is so inoperative in the circumstances of the particular case.

(4) Any authority under subsection (3) may be given—

(a) for a specified period,

(b) with conditions attached.

(5) A licensed provider may appeal to the Court of Session if it is aggrieved by—

(a) the withholding of any such authority, or

(b) any conditions attached under subsection (4)(b).

(6) On an appeal under subsection (5)—

(a) the Court may direct the approved regulator on the matter as the Court considers appropriate,

(b) the Court’s determination is final.

(7) If a licensed provider wilfully contravenes—

(a) subsection (2), or

(b) any conditions attached under subsection (4)(b),

its approved regulator may revoke or suspend its licence.
58 **Concealing disqualification**

(1) Subsection (2) applies to—

(a) a person who has been struck off the roll of solicitors or suspended from practice as a solicitor,

(b) a person—

(i) who has been suspended from practice as a registered European lawyer or whose registration as a registered European lawyer has been withdrawn, or

(ii) who has been suspended from practice as a registered foreign lawyer or whose registration as a registered foreign lawyer has been withdrawn,

(c) a person who has been prohibited (including by reason of a disqualification or another removal of a right to provide services) from—

(i) practising as an advocate,

(ii) acting as a conveyancing or executry practitioner,

(iiia) acting as a litigation practitioner, or

(iv) acting as a confirmation agent or will writer within the meaning of Part 3.

(2) The person is guilty of an offence if, while the person is so debarred (however described in subsection (1)), the person seeks or accepts employment by a licensed provider without previously informing it of the debarment.

(3) A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Subsection (5) applies to a body whose certificate of recognition as an incorporated practice has been revoked.

(5) The body is guilty of an offence if, while the revocation subsists, the body seeks or accepts employment by a licensed provider without previously informing it of the revocation.

(6) A body which commits an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

59 **Pretending to be licensed**

(1) A person commits an offence if the person—

(a) pretends to be a licensed provider, or

(b) takes or uses any name, title, addition or description implying falsely that the person is a licensed provider.

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

60 **Professional privilege**

(1) Subsection (2) applies to any communication made to or by—

(a) a licensed provider in the course of its acting as such in its provision of legal services for any of its clients,
(2) The communication is, in any legal proceedings, privileged from disclosure as if the licensed provider or (as the case may be) the person had at all material times been a solicitor acting for the client.

(3) Subsection (4) applies to any special provision which—
   (a) is contained in an enactment or otherwise,
   (b) relates to a solicitor, and
   (c) concerns—
       (i) the disclosure of information with respect to which a claim of professional privilege could be maintained, or
       (ii) the production, seizure or removal of documents with respect to which such a claim could be maintained.

(4) The provision has effect in relation to a licensed provider, and any designated person (apart from a solicitor) within a licensed provider, as it does in relation to a solicitor but with any necessary modifications.

(5) This section is without prejudice to any other enactment or rule of law concerning professional or other privilege from disclosure (in particular, as applicable in relation to a solicitor).

CHAPTER 3
FURTHER PROVISION
Achieving regulatory aims

61 Input by the OFT

(1) The Scottish Ministers or (as the case may be) an approved regulator must, whenever consulting the OFT under this Part, request the OFT—
   (a) to give such advice as it considers appropriate in relation to the matter concerned,
   (b) in considering what advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are or (as the case may be) the approved regulator is to take account of any advice given by the OFT within—
   (a) the relevant consultation period, or
   (b) otherwise—
       (i) in the case of the Scottish Ministers, the period of 90 days beginning with the day on which they request the advice,
(ii) in the case of the approved regulator, the period of 30 days beginning on
the day on which it requests the advice or such longer period not exceeding
90 days as it may agree with the OFT.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

62 **Role of approved regulators**

(1) Subsections (2) to (4) apply in relation to the exercise by an approved regulator of its
functions under this Part.

(2) The approved regulator must, so far as practicable, act in a way which—
   (a) is compatible with the regulatory objectives, and
   (b) it considers most appropriate with a view to meeting those objectives.

(3) The approved regulator must adopt best regulatory practice under which (in particular)
regulatory activities should be—
   (a) carried out—
      (i) effectively (but without giving rise to unnecessary burdens),
      (ii) in a way that is transparent, accountable, proportionate and consistent,
   (b) targeted only at such cases as require action.

(4) The approved regulator must seek to ensure that its licensed legal services providers
have regard to the regulatory objectives.

63 **Policy statement**

(1) An approved regulator must prepare and issue a statement of policy as to how, in
exercising its functions under this Part, it will comply with its duties under section 62.

(2) The approved regulator—
   (a) may revise the policy statement,
   (b) if it does so, must re-issue the policy statement.

(3) The approved regulator may issue (or re-issue) the policy statement only with the
approval of the Scottish Ministers.

(4) The approved regulator must publish the policy statement as issued (or re-issued).

(5) In exercising its functions under this Part, the approved regulator must have regard to
the policy statement as issued (or re-issued).

Complaints

64 **Complaints about regulators**

(A1) Any complaint about an approved regulator is to be made to the Scottish Legal
Complaints Commission.

(A2) The Commission is to determine whether or not the complaint is—
   (a) one for which section 57D(1) of the 2007 Act makes provision,
   (b) frivolous, vexatious or totally without merit.
(A3) And—

(a) if the Commission determines that the complaint falls within subsection (A2)(a), the Commission is to proceed by reference to section 57D(1) of the 2007 Act,

(b) if the Commission determines that the complaint falls within subsection (A2)(b), the Commission—

(i) must notify the complainer and the approved regulator accordingly (with reasons),

(ii) is not required to take any further action.

(c) if the Commission determines that the complaint does not fall within subsection (A2)(a) or (b), the Commission must refer the complaint to the Scottish Ministers.

1. The Scottish Ministers must investigate any complaint about an approved regulator that is referred to them under subsection (A3)(c).

3. Where the Scottish Ministers do not uphold the complaint, they must notify the complainer and the approved regulator accordingly (with reasons).

5. Where the Scottish Ministers uphold the complaint, they must—

(a) notify the complainer and the approved regulator accordingly (with reasons), and

(b) decide whether to proceed under section 29.

6. The Scottish Ministers may delegate to the Commission any of their functions under subsections (1), (3) and (5)(a) (and, if they so delegate their function under subsection (1), they may also waive the referral requirement under subsection (A3)(c)).

7. The Scottish Ministers may by regulations make further provision about complaints made about approved regulators (and how they are to be dealt with).

64A Levy payable by regulators

(1) An approved regulator must pay to the Scottish Legal Complaints Commission—

(a) in respect of each financial year, an annual levy,

(b) if arising, a complaints levy.

(2) The amount of the annual levy or complaints levy payable by an approved regulator—

(a) is to be determined by the Commission,

(b) may be—

(i) different from any amount payable as an annual general levy or (as the case may be) a complaints levy under Part 1 of the 2007 Act,

(ii) in either case, of different amounts (including nil) in different circumstances.

(3) The complaints levy arises as respects an approved regulator where—

(a) the Scottish Ministers delegate to the Commission their function under section 64(1) in relation to a complaint made about the approved regulator, and

(b) the Commission upholds the complaint.

(4) Before determining for a financial year the amount of the annual levy or complaints levy, the Commission must consult—
Legal Services (Scotland) Bill
Part 2—Regulation of licensed legal services
Chapter 3—Further provision

(a) each approved regulator (with particular reference to the proposed amount to be payable by it),
(b) the Scottish Ministers.

65 Complaints about providers

In the 2007 Act, after Part 2 insert—

“PART 2A

SPECIAL PROVISION FOR LICENSED PROVIDERS

57A Complaints about licensed providers

(1) Parts 1 and 2 apply in relation to complaints made about licensed legal services providers as they apply in relation to complaints made about practitioners.

(2) Subsection (1) is subject to—

(a) subsections (3) and (4), and

(b) such further modification to the operation of Parts 1 and 2 as the Scottish Ministers may by regulations make for the purposes of—

(i) subsection (1),

(ii) section 57B(4) and (5).

(3) In relation to a services complaint about a licensed provider, its approved regulator is to be regarded as the relevant professional organisation.

(4) A conduct complaint may not be made about a licensed provider, but—

(a) such a complaint may be made about a practitioner within such a provider,

(b) the provisions relating to such a complaint remain (subject to such modification as those provisions as is made under subsection (2)(b)) applicable for the purposes of section 57B(4) and (5).

(5) Where an approved regulator receives (from a person other than the Commission) a complaint about the conduct of, or any services provided by, a practitioner within one of its licensed providers, the approved regulator must without delay send to the Commission the complaint and any material that accompanies it.

57B Regulatory complaints

(1) There is an additional type of complaint which applies only in relation to licensed providers (a “regulatory complaint”).

(2) A regulatory complaint is where any person suggests that a licensed provider is failing (or has failed) to—

(a) have regard to the regulatory objectives,

(b) adhere to the professional principles,

(c) comply with—

(i) its approved regulator’s regulatory scheme,
(ii) the terms and conditions of its licence.

(3) In relation to a regulatory complaint about a licensed provider, its approved regulator is to be regarded as the relevant professional organisation.

(4) The procedure in respect of a regulatory complaint is (by virtue of section 57A(4)(b)) the same as it would be for a conduct complaint about a licensed provider, subject to such modification as to that procedure as is made under section 57A(2)(b).

(5) The Commission and the approved regulator have (by virtue of section 57A(4)(b)) the same functions in relation to a regulatory complaint as they would have in relation to a conduct complaint about a licensed provider, subject to such modification as to those functions as is made under section 57A(2)(b).

57C Levy, advice and guidance

(1) A licensed provider must pay to the Commission—

(a) the annual general levy, and

(b) the complaints levy (if arising),

in accordance with Part 1 (and in addition to any levy payable under that Part by a solicitor or other person within the licensed provider).

(1A) Section 29 applies for the purposes of subsection (1) as it applies for the purposes of sections 27(1) and 28(1).

(1B) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) and (1A)—

(a) an approved regulator is to be regarded as a relevant professional organisation whose members are its licensed providers,

(b) a licensed provider is to be regarded—

(i) in connection with the annual general levy, as an individual person falling within the relevant category,

(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

(2) But the amount of the annual general levy for a licensed provider may be—

(a) different from the amount to be paid by individuals,

(b) of different amounts (including nil) in different circumstances.

(3) The Commission—

(a) must (so far as practicable) provide advice to any person who requests it as respects the process of making a regulatory complaint to the Commission,

(b) may issue guidance under section 40 to approved regulators and licensed providers as respects how licensed providers are to deal with regulatory complaints.
Part 2—Regulation of licensed legal services

Chapter 3—Further provision

57CA  Recovery of levy

(1) An approved regulator must—

(a) secure the collection by it, from its licensed providers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as it applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57C(1)(a) (including interest) as it applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57C(1)(b) (including interest) as it applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approved regulator is to be regarded as the relevant professional organisation,

(b) each of its licensed providers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57C(1) is subject to subsection (1).

57D  Handling complaints

(1) Parts 1 and 2 apply in relation to any complaint made about how an approved regulator has dealt with a regulatory complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those Parts as the Scottish Ministers may by regulations make for the purposes of that subsection.

57DA  Effectiveness of compensation fund

(1) Section 39 also applies in relation to a compensation fund of its own that is maintained by an approved regulator in furtherance of section 19A(2) of the Legal Services (Scotland) Act 2010.

(2) For the application of section 39 by virtue of subsection (1)—

(a) any such compensation fund is to be regarded as falling within subsection (1)(c) of that section,
(b) the approved regulator is to be regarded as the relevant professional organisation.

57E Interpretation of Part 2A

For the purposes of this Part—

“approved regulator”,
“licensed legal services provider” (or “licensed provider”),
“professional principles”,
“regulatory objectives”,
“regulatory scheme”,

are to be construed in accordance with Part 2 of the Legal Services (Scotland) Act 2010.”.

Registers and lists

66 Register of approved regulators

(1) The Scottish Ministers—

(a) must keep and publish a register of approved regulators,
(b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approved regulator—

(a) its contact details (including its address, website and telephone number),
(b) the date on which it was given the relevant approval under section 6,
(c) the date on which it was given the relevant authorisation under section 7 (and the duration of that authorisation (unlimited or the fixed period)),
(d) the categories of legal services to which that authorisation relates,
(e) details of any measure taken by the Scottish Ministers under section 29.

67 Registers of licensed providers

(1) An approved regulator must keep and publish a register of its licensed legal services providers.

(2) The register is to include the following information in relation to each licensed provider—

(a) its name and any place of business,
(b) the relevant details about its licence,
(c) the name of every non-solicitor investor in the licensed provider,
(d) the name of every person intimated to the approved regulator under paragraph 3 of schedule 8,
(e) the names and the dates of appointment of—
(i) its Head of Legal Services, and
(ii) its Head of Practice or, if applicable, each member of its Practice Committee (including with specific reference to section 41(3)),
(f) whether the licensed provider has been the subject of any disciplinary action and (if so) a description of that action.

(3) In subsection (2)(b), the relevant details about a licensed provider’s licence are—
(a) the date on which the licence was originally granted,
(b) the date on which it was most recently renewed,
(c) whether it is subject to any conditions,
(d) the date on which it will expire.

(4) But, in the case of a former licensed provider, the relevant details are instead—
(a) the date on which the licence was originally granted,
(b) the period for which the licensed provider held a licence,
(c) the reason for the licensed provider ceasing to hold a licence.

(5) The Scottish Ministers may by regulations—
(a) make further provision about the information to be contained in the registers of licensed providers, and
(b) prescribe the manner in which those registers are to be kept and published.

(6) In this section, a reference to a licensed provider includes a former licensed provider.

68 Lists of disqualified persons

(1) An approved regulator must keep a list of the persons whom it has disqualified under section 44 (that is, from holding a certain position in a licensed legal services provider).

(2) The list kept under subsection (1) must include the following information in relation to each person concerned—
(a) the person’s name,
(b) the—
   (i) name of any relevant licensed provider,
   (ii) any relevant position held by the person as at the date of the disqualification,
(c) each position from which the person is disqualified,
(d) the date of disqualification and its duration (unlimited or the fixed period),
(e) the reasons for the disqualification.

(3) An approved regulator must keep a list of the persons whom it has—
(a) determined as unfit under section 49 (that is, for being a non-solicitor investor in a licensed provider), or
(b) disqualified under section 50A(1) (that is, from having an interest in a licensed provider).
(4) The list kept under subsection (3) must include the following information in relation to each person concerned—

(a) the person’s name,
(b) the name of any relevant licensed provider,
(c) the date of the determination or (as the case may be) disqualification,
(d) the grounds for the determination or (as the case may be) disqualification.

(4A) A list kept under this section must not include information relating to a person in respect of whom the determination or (as the case may be) disqualification—

(a) has been reversed on appeal, or
(b) otherwise, no longer applies.

(5) The approved regulator must—

(a) publish the lists kept by it under this section, and
(b) notify the Scottish Ministers of any material alterations made to either of them.

(6) The Scottish Ministers may by regulations—

(a) make further provision about the information to be contained in the lists kept under this section,
(b) prescribe the manner in which those lists are to be kept and published.

Miscellaneous

69 Privileged material

(1) Subsection (2) applies to the publication under this Part of any—

(a) advice, report or notice, or
(b) other material.

(2) For the purposes of the law on defamation, the publication is privileged.

(3) But subsection (2) is ineffective if it is proved that the publication was made with malice.

70 Immunity from damages

(1) Neither an approved regulator nor any of its officers, members or employees is liable in damages for any act or omission occurring in the exercise (or purported exercise) of its functions under this Part.

(2) But subsection (1) is ineffective if it is shown that the act or omission was in bad faith.
70A Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.

(2) The appeal is to be made by way of summary application.

(3) In the appeal, the sheriff may—

(a) uphold, vary or quash the decision that is the subject of the appeal,

(b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.

70B Corporate offences

(1) Subsection (2) applies where—

(a) an offence under this Part is committed by a relevant organisation, and

(b) the commission of the offence—

(i) involves the connivance or consent of, or

(ii) is attributable to the neglect of,

a responsible official of the organisation.

(2) The official (as well as the organisation) commits the offence.

(3) For the purpose of this section—

(a) a “relevant organisation” is—

(i) a company,

(ii) a limited liability partnership,

(iii) an ordinary partnership, or

(iv) any other body or association,

(b) a “responsible official” is—

(i) in the case of a company, a director, secretary, manager or other similar officer,

(ii) in the case of a limited liability partnership, a member,

(iii) in the case of an ordinary partnership, a partner,

(iv) in the case of another body or association, a person who is concerned in the management or control of its affairs,

but in each case also extends to a person purporting to act in such a capacity.

71 Effect of professional or other rules

(1) Sections 88(5) and 91(3) respectively make provision (in connection with this Part) as to the effect of professional rules to which advocates and solicitors are subject.
(2) Nothing in this Part affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of other persons who provide professional services (in particular, as it may relate to their involvement in or with licensed legal services providers).

(3) This Part is without prejudice to any function of a person or body—

(a) arising by virtue of the application of another enactment (or a regulatory rule made under another enactment), and

(b) to regulate in any respect the provision of any professional or other services by licensed legal services providers.

PART 3
CONFIRMATION AND WILL WRITING SERVICES

CHAPTER 1
CONFIRMATION SERVICES

Regulation of confirmation agents

72 Confirmation agents and services

(1) For the purposes of this Part, confirmation services are services that are—

(a) described in subsection (2), and

(b) provided (or offered)—

(i) to members of the public, and

(ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing papers on which to found or oppose an application for the confirmation of a person as the executor nominate or dative in relation to the estate of a deceased person.

(3) It is immaterial for the description in subsection (2) whether or not the services also involve applying to the sheriff on behalf of the person so as to secure the person’s confirmation as such (or taking other related action).

(4) For the purposes of this Part, a confirmation agent is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide confirmation services is conferred.

73 Approving bodies

(1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section 74.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section 74(1)(b)),

(b) a description of—

(i) the applicant’s constitution and composition (including internal structure),
(ii) its activities.

(4) The applicant—
   (a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,
   (b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

10 74 Certification of bodies

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—
   (a) the applicant is suitable to be an approving body,
   (b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 75).

(2) The Scottish Ministers may certify the applicant as an approving body—
   (a) either—
      (i) without limit of time, or
      (ii) for a fixed period,
   (b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,
   (c) subject to conditions.

(2A) The Scottish Ministers may, after consulting the approving body, vary (including by addition or deletion) any conditions imposed under subsection (2)(c).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—
   (a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
   (b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
   (a) must send a copy of the application to the OFT,
   (b) may send—
      (i) to any other consultee, a copy of the application,
      (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
   (a) refuse to certify it as an approving body, or
   (b) certify it as such subject to conditions.
(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
   (a) make representations to the Scottish Ministers,
   (b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—
   (a) the process for seeking their certification,
   (b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

75 Regulatory schemes

(1) An approving body must—
   (a) make a regulatory scheme for—
       (i) conferring on any of the individual persons within its membership the right to provide confirmation services, and
       (ii) regulating the provision of confirmation services by the persons on whom (in accordance with the scheme) that right is conferred, and
   (b) apply the scheme in relation to them.

(2) The regulatory scheme is to—
   (a) describe the training requirements to be met by a prospective confirmation agent,
   (b) incorporate a code of practice to which a confirmation agent is subject,
   (c) require that a confirmation agent keep in place sufficient arrangements for professional indemnity,
   (d) include rules about—
       (i) the making and handling of any complaint about a confirmation agent,
       (ii) the measures that may be taken by the approving body, in relation to a confirmation agent, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the confirmation agent were a practitioner to whom that section relates)) about the confirmation agent is upheld,
   (e) allow a confirmation agent to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),
   (f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—
   (a) set out the standards to be met by confirmation agents,
   (b) make such further arrangements as to the professional practice, conduct or discipline of confirmation agents for which provision is (in the approving body’s opinion) necessary or expedient,
Part 3—Confirmation and will writing services

Chapter 1—Confirmation services

(c) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a confirmation agent to provide confirmation services if the agent contravenes the code of practice,

(ii) the suspension of that right of a confirmation agent if a complaint, suggesting that the agent is guilty of professional misconduct in relation to the provision of confirmation services, is made about the agent.

(4) A confirmation agent may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the agent’s right to provide confirmation services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the agent.

(5) An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.

76 Financial sanctions

(1) Rules included in a regulatory scheme in pursuance of section 75(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section 74.

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

(4) A confirmation agent may appeal against a financial penalty (or the amount of a financial penalty) imposed on the agent by virtue of this section—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which the penalty is intimated to the agent.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

76A Review of own performance

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

(a) the approving body’s compliance with section 75(5),

(b) the exercise of its functions in relation to its regulatory scheme,

(c) its compliance with any measures applying to it by virtue of section 81(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).
(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

(a) the review of approved bodies’ performance,

(b) reports on reviews of their performance.

77 Pretending to be authorised

(1) A person commits an offence if the person—

(a) pretends to be a confirmation agent (or otherwise pretends to have the right to provide confirmation services under this Part), or

(b) takes or uses any name, title, addition or description implying falsely that the person is a confirmation agent (or otherwise so implying that the person has the right to provide confirmation services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Other regulatory matters

78 Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section 81(3).

(2) The Scottish Ministers may—

(a) revoke the certification given to the approving body under section 74,

(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

79 Surrender of certification

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section 74.

(2) The approving body must—

(a) take all reasonable steps to mitigate such disruption to the clients of its confirmation agents as is likely to result from the surrender,

(b) in particular, take steps for ensuring that any relevant work is—

(i) completed, or

(ii) taken over by a suitably qualified person,

before the date from which subsection (5) is operative.
(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
   (a) for the purpose of subsection (2), or
   (b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
   (a) subsection (2), and
   (b) any directions given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its confirmation agents to provide confirmation services (so far as that right is conferred by the approving body in question).

80 Register and list

(1) The Scottish Ministers—
   (a) must keep and publish a register of approving bodies,
   (b) may do so in a such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
   (a) its contact details (including its address, website and telephone number),
   (b) the date on which it was given the relevant certification under section 74.

(3) An approving body must—
   (a) keep a list of its confirmation agents,
   (b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its confirmation agents as the Scottish Ministers may reasonably request.

Ministerial functions

81 Ministerial intervention

(1) An approving body must—
   (a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
   (b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
   (a) if directed to do so by the Scottish Ministers, must—
      (i) review its regulatory scheme (or any relevant part of it), and
      (ii) report to them its findings and (if appropriate) inform them of any proposed amendment to the scheme
(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—

(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,

(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—

(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,

(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(3A) An approving body must—

(a) review annually the performance of its confirmation agents,

(b) prepare a report on the review,

(c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—

(a) about the review of confirmation agents,

(b) so far as it appears to them to be necessary for safeguarding the interests of clients of confirmation agents—

(i) concerning the functions of approving bodies,

(ii) relating to confirmation agents.

CHAPTER 2

WILL WRITING SERVICES

Regulation of will writers

81A Will writers and services

(1) For the purposes of this Part, will writing services are services that are—

(a) described in subsection (2), and

(b) provided (or offered)—

(i) to members of the public, and

(ii) for a fee, gain or reward.

(2) The services are those of drawing or preparing wills or other testamentary writings.

(3) For the purposes of this Part, a will writer is a person on whom, in accordance with an approving body’s regulatory scheme, the right to provide will writing services is conferred.
81B Approving bodies

(1) For the purposes of this Chapter, an approving body is a professional or other body which is certified as such by the Scottish Ministers under section 81C.

(2) That is, following an application to them by the body under subsection (3).

(3) An application to become an approving body must include—

(a) a copy of the applicant’s proposed regulatory scheme (see section 81C(1)(b)),

(b) a description of—

(i) the applicant’s constitution and composition (including internal structure),

(ii) its activities.

(4) The applicant—

(a) must provide the Scottish Ministers with such other information as they may reasonably require for their consideration of its application,

(b) may withdraw its application at any time by giving them written notice to that effect.

(5) There is no restriction on the number of approving bodies that may exist at any time.

(6) The Scottish Ministers may by regulations prescribe fees that they may charge an applicant to become an approving body.

81C Certification of bodies

(1) The Scottish Ministers may certify the applicant as an approving body if they are satisfied that—

(a) the applicant is suitable to be an approving body,

(b) the applicant’s proposed regulatory scheme is adequate (as determined with particular reference to section 81D).

(2) The Scottish Ministers may certify the applicant as an approving body—

(a) either—

(i) without limit of time, or

(ii) for a fixed period,

(b) with reference to a specified date from which the approving body may exercise its functions in relation to its regulatory scheme,

(c) subject to conditions.

(2A) The Scottish Ministers may, after consulting the approving body, vary (including by addition or deletion) any conditions imposed under subsection (2)(c).

(3) Before deciding whether or not to certify the applicant as an approving body, the Scottish Ministers must consult—

(a) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,

(b) such other person or body as they consider appropriate.

(4) In consulting under subsection (3), the Scottish Ministers—
Legal Services (Scotland) Bill
Part 3—Confirmation and will writing services
Chapter 2—Will writing services

(a) must send a copy of the application to the OFT,
(b) may send—
   (i) to any other consultee, a copy of the application,
   (ii) to the OFT or any other consultee, a copy of any revised application.

(5) The Scottish Ministers must, with reasons, notify the applicant if they intend to—
(a) refuse to certify it as an approving body, or
(b) certify it as such subject to conditions.

(6) If notification is given to the applicant under subsection (5), it has 28 days beginning with the date of the notification (or such longer period as the Scottish Ministers may allow) to—
(a) make representations to the Scottish Ministers,
(b) take such steps as it may consider expedient.

(7) The Scottish Ministers may by regulations make further provision about certification under this section, including (in particular)—
(a) the process for seeking their certification,
(b) in relation to capability to act as an approving body, the criteria for their certification (including things that applicants must be able to demonstrate).

81D Regulatory schemes

(1) An approving body must—
(a) make a regulatory scheme for—
   (i) conferring on any of the individual persons within its membership the right to provide will writing services, and
   (ii) regulating the provision of will writing services by the persons on whom (in accordance with the scheme) that right is conferred, and
(b) apply the scheme in relation to them.

(2) The regulatory scheme is to—
(a) describe the training requirements to be met by a prospective will writer,
(b) incorporate a code of practice to which a will writer (and anyone acting on behalf of the will writer in relation to will writing services) is subject,
(c) require that a will writer keep in place sufficient arrangements for professional indemnity,
(d) include rules about—
   (i) the making and handling of any complaint about a will writer,
   (ii) the measures that may be taken by the approving body, in relation to a will writer, if a conduct complaint (as construed by reference to section 2(1)(a) of the 2007 Act (and as if the will writer were a practitioner to whom that section relates)) about the will writer is upheld,
(e) allow a will writer to make representations to the approving body before it takes any of the measures available to it by virtue of paragraph (d)(ii),

(f) cover such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as they may so specify).

(3) The code of practice mentioned in subsection (2)(b) must—

(a) set out the standards to be met by will writers (and persons acting on their behalf in relation to will writing services),

(b) except in such circumstances as the approving body considers appropriate, prohibit the drawing or preparation of a will or other testamentary writing by a will writer which provides for the writer to be a beneficiary,

(c) require a will writer who provides the service of storing wills or other testamentary writings to keep in place sufficient arrangements for the storage of such documents (including arrangements in the event of the writer ceasing to provide will writing services),

(d) make such further arrangements as to the professional practice, conduct or discipline of will writers for which provision is (in the approving body’s opinion) necessary or expedient,

(e) provide that it is a breach of the code of practice for a will writer to fail to comply with the writer’s duties under any enactment specified in the code,

(f) provide that a breach of the code of practice by a person acting on behalf of a will writer in relation to will writing services constitutes a breach of the code of practice by the writer,

(g) allow for—

(i) the rescission or suspension of, or attaching of conditions to the exercise of, the right of a will writer to provide will writing services if the writer contravenes the code of practice,

(ii) the suspension of that right of a will writer if a complaint, suggesting that the writer is guilty of professional misconduct in relation to the provision of will writing services, is made about the writer.

(4) A will writer may appeal against a decision taken under the regulatory scheme to rescind or suspend, or attach conditions to the exercise of, the writer’s right to provide will writing services—

(a) to the sheriff,

(b) within the period of 3 months beginning with the date on which that decision is intimated to the writer.

(5) An approving body must, so far as practicable when exercising its functions under this Chapter, observe the regulatory objectives.
81E  **Financial sanctions**

(1) Rules included in a regulatory scheme in pursuance of section 81D(2)(d)(ii) may provide for the imposition of a financial penalty.

(2) A financial penalty provided for by virtue of subsection (1) must not exceed the maximum amount permitted by the Scottish Ministers when giving their certification under section 81C.

(3) A financial penalty imposed by virtue of this section is payable to the Scottish Ministers (but the approving body may collect it on their behalf).

(4) A will writer may appeal against a financial penalty (or the amount of a financial penalty) imposed on the writer by virtue of this section—

   (a) to the sheriff,

   (b) within the period of 3 months beginning with the date on which the penalty is intimated to the writer.

(5) Where an appeal is made under subsection (4), no part of the penalty requires to be paid before the appeal is determined or withdrawn.

81F  **Review of own performance**

(1) An approving body must review annually its performance.

(2) In particular, a review is to cover the following matters—

   (a) the approving body’s compliance with section 81D(5),

   (b) the exercise of its functions in relation to its regulatory scheme,

   (c) its compliance with any measures applying to it by virtue of section 81K(3).

(3) The approving body must send a report on the review to the Scottish Ministers.

(4) The report must contain a copy of the approving body’s annual accounts (but only so far as they are relevant in connection with its functions under this Chapter).

(5) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

(6) The Scottish Ministers may by regulations make further provision about—

   (a) the review of approved bodies’ performance,

   (b) reports on reviews of their performance.

81G  **Pretending to be authorised**

(1) A person commits an offence if the person—

   (a) pretends to be a will writer (or otherwise pretends to have the right to provide will writing services under this Part), or

   (b) takes or uses any name, title, addition or description implying falsely that the person is a will writer (or otherwise so implying that the person has the right to provide will writing services under this Part).

(2) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
Other regulatory matters

81H Revocation of certification

(1) Subsection (2) applies where the Scottish Ministers are satisfied that an approving body has failed to comply with a direction under section 81K(3).

(2) The Scottish Ministers may—
(a) revoke the certification given to the approving body under section 81C,
(b) require the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient in connection with the revocation.

(3) The revocation under subsection (2) of the certification of an approving body has the effect, from the date on which the revocation becomes effective, of rescinding the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

81I Surrender of certification

(1) An approving body may, with the prior agreement of the Scottish Ministers, surrender the certification given to it under section 81C.

(2) The approving body must—
(a) take all reasonable steps to mitigate such disruption to the clients of its will writers as is likely to result from the surrender,
(b) in particular, take steps for ensuring that any relevant work is—
(i) completed, or
(ii) taken over by a suitably qualified person,
before the date from which subsection (5) is operative.

(3) The Scottish Ministers may direct the approving body to take specified action (or refrain from doing something) if they consider that to be necessary or expedient—
(a) for the purpose of subsection (2), or
(b) otherwise in connection with the surrender.

(4) Before the Scottish Ministers may agree to the surrender, they must be satisfied that the approving body has complied (or will comply) with—
(a) subsection (2), and
(b) any direction given to it under subsection (3).

(5) The surrender of an approving body’s certification under subsection (1) has, from the date on which the surrender becomes effective, the effect of extinguishing the right of each of its will writers to provide will writing services (so far as that right is conferred by the approving body in question).

81J Register and list

(1) The Scottish Ministers—
(a) must keep and publish a register of approving bodies,
(b) may do so in such manner as they consider appropriate.

(2) The register is to include the following information in relation to each approving body—
(a) its contact details (including its address, website and telephone number),
(b) the date on which it was given the relevant certification under section 81C.

(3) An approving body must—
(a) keep a list of its will writers,
(b) give the Scottish Ministers a copy of the list whenever they request it.

(4) An approving body must give the Scottish Ministers such information about its will writers as the Scottish Ministers may reasonably request.

10

81K Ministerial functions

Ministerial intervention

(1) An approving body must—
(a) provide such information about its performance in relation to its regulatory scheme as the Scottish Ministers may reasonably request,
(b) do so within 21 days beginning with the date of the request (or such longer period as the Scottish Ministers may allow).

(2) An approving body—
(a) if directed to do so by the Scottish Ministers, must—
(i) review its regulatory scheme (or any relevant part of it), and
(ii) report to them its findings and (if appropriate) inform them of any proposed amendments to the scheme,
(b) may amend its regulatory scheme so as to give effect to the proposed amendment, but—
(i) any material amendment is invalid unless it has the prior approval of the Scottish Ministers,
(ii) the Scottish Ministers may not give their approval before they have consulted such person or body as they consider appropriate.

(3) The Scottish Ministers may—
(a) if, after consulting such person or body as they consider appropriate, they consider that an approving body’s regulatory scheme is not (or is no longer) adequate, direct the approving body to amend the regulatory scheme in such manner as they may specify,
(b) if they are satisfied that an approving body has not complied with a requirement imposed on it by or under this Chapter, direct the approving body to take specified remedial action (or refrain from doing something).

(4) An approving body must—
(a) review annually the performance of its will writers,
(b) prepare a report on the review,
Part 3—Confirmation and will writing services

Chapter 3—Further provision

(c) send a copy of the report to the Scottish Ministers.

(5) The Scottish Ministers may by regulations make further provision—

(a) about the review of will writers,

(b) so far as it appears to them to be necessary for safeguarding the interests of clients of will writers—

(i) concerning the functions of approving bodies,

(ii) relating to will writers.

81L Step-in by Ministers

(1) The Scottish Ministers may by regulations make provision which establishes a body with a view to its becoming an approving body.

(2) The Scottish Ministers may by regulations make provision which allows them to act as an approving body in such circumstances as the regulations may prescribe.

(3) Regulations under subsection (2) may provide for this Chapter to apply with or subject to such modifications as the regulations may specify.

(4) No regulations are to be made under subsection (1) or (2) unless the Scottish Ministers believe that their intervention under this section is necessary, as a last resort, in order to ensure that the provision of will writing services by will writers is regulated effectively.

CHAPTER 3

FURTHER PROVISION

82 Regard to OFT input

(1) The Scottish Ministers, whenever consulting the OFT under section 74(3)(a) or 81C(3)(a), must request the OFT—

(a) to give such advice as it considers appropriate in relation to the matter concerned,

(b) in considering what (if any) advice to give, to have particular regard to whether the matter concerned would have (or be likely to have) the effect of preventing, or significantly restricting or distorting, competition within the legal services market.

(2) The Scottish Ministers are to take account of any advice given by the OFT within—

(a) the relevant consultation period, or

(b) otherwise, the period of 90 days beginning with the day on which they request the advice.

(3) The Scottish Ministers may publish any advice duly given to them by the OFT.

83 Complaints about agents and writers

In the 2007 Act, after Part 2A (inserted by section 65) insert—

“PART 2B

SPECIAL PROVISION FOR CONFIRMATION AGENTS AND WILL WRITERS

57F Complaints about agents and writers
(1) Parts 1 and 2 apply in relation to complaints made about confirmation agents and will writers as they apply in relation to complaints made about practitioners.

(2) Subsection (1) is subject to—

(a) subsection (3), and

(b) such further modification to the operation of Parts 1 and 2 as the Scottish Ministers may by regulations make for the purposes of subsection (1).

(3) In relation to a services or conduct complaint about a confirmation agent or will writer, the relevant approving body is to be regarded as the relevant professional organisation.

57G Handling complaints

(1) Parts 1 and 2 apply in relation to any complaint made about how an approving body has dealt with a conduct complaint as they apply in relation to a handling complaint (relating to a conduct complaint) made about a relevant professional organisation.

(2) Subsection (1) is subject to such modification to the operation of those Parts as the Scottish Ministers may by regulations make for the purposes of that subsection.

57H Levy payable

(1) A confirmation agent must pay to the Commission—

(a) the annual general levy, and

(b) the complaints levy (if arising),

in accordance with Part 1.

(1A) A will writer must pay to the Commission—

(a) the annual general levy, and

(b) the complaints levy (if arising),

in accordance with Part 1.

(1B) Section 29 applies for the purposes of subsections (1) and (1A) as it applies for the purposes of sections 27(1) and 28(1).

(1C) For the application of sections 27(1), 28(1) and 29 by virtue of subsections (1) to (1B)—

(a) an approving body is to be regarded as a relevant professional organisation whose members are its confirmation agents or (as the case may be) will writers,

(b) a confirmation agent or (as the case may be) will writer is to be regarded—

(i) in connection with the annual general levy, as an individual person falling within the relevant category,
(ii) in connection with the complaints levy, as an individual practitioner of the relevant type.

57I Recovery of levy

(1) An approving body must—

(a) secure the collection by it, from its confirmation agents or (as the case may be) will writers, of the annual general levy due by them, and

(b) pay to the Commission a sum representing the total amount which falls to be collected by it under paragraph (a) in respect of each financial year.

(2) Subsection (3) of section 27 applies in relation to any sum due under subsection (1)(b) (including interest) as its applies in relation to any sum due under subsection (2)(b) of section 27.

(3) Subsection (4) of section 27 applies in relation to any sum due under section 57H(1)(a) and (1A)(a) (including interest) as its applies in relation to any sum due under subsection (1) of section 27.

(4) Subsection (3) of section 28 applies in relation to any sum due under section 57H(1)(b) and (1A)(b) (including interest) as its applies in relation to any sum due under subsection (1) of section 28.

(5) For the application of sections 27(3) and (4) and 28(3) by virtue of subsections (2) to (4)—

(a) the approving body is to be regarded as the relevant professional organisation,

(b) each of its confirmation agents or (as the case may be) will writers is to be regarded—

(i) in relation to section 27(4), as an individual person falling within the relevant category,

(ii) in relation to section 28(3), as an individual practitioner of the relevant type.

(6) Section 57H(1) and (1A) is subject to subsection (1).

57J Interpretation of Part 2B

(2) For the purposes of this Part—

“approving body”,

“confirmation agent”,

“will writer”,

are to be construed in accordance with Part 3 of the Legal Services (Scotland) Act 2010.”.

84 Privilege and immunity

(1) For the purposes of the law on defamation, the publication under this Part of any material is privileged unless it is proved that the publication was made with malice.
Neither an approving body nor any of its officers, members or employees is liable in damages for any act or omission occurring in the exercise (or purported exercise) of its functions under this Part unless it is shown that the act or omission was in bad faith.

84A Appeal procedure

(1) This section applies in relation to an appeal to the sheriff under this Part.

(2) The appeal is to be made by way of summary application.

(3) In the appeal, the sheriff may—
   (a) uphold, vary or quash the decision that is the subject of the appeal,
   (b) make such further order (including for the expenses of the parties) as is necessary in the interests of justice.

(4) The sheriff’s determination in the appeal is final.

84B Corporate offences

(1) Subsection (2) applies where—
   (a) an offence under this Part is committed by a relevant organisation, and
   (b) the commission of the offence—
      (i) involves the connivance or consent of, or
      (ii) is attributable to the neglect of,
      a responsible official of the organisation.

(2) The official (as well as the organisation) commits the offence.

(3) For the purpose of this section—
   (a) a “relevant organisation” is—
      (i) a company,
      (ii) a limited liability partnership,
      (iii) an ordinary partnership, or
      (iv) any other body or association,
   (b) a “responsible official” is—
      (i) in the case of a company, a director, secretary, manager or other similar officer,
      (ii) in the case of a limited liability partnership, a member,
      (iii) in the case of an ordinary partnership, a partner,
      (iv) in the case of another body or association, a person who is concerned in the management or control of its affairs,

but in each case also extends to a person purporting to act in such a capacity.
Consequential modification

(1) In the Confirmation of Executors (Scotland) Act 1858, in section 2 (petition to commissary), after “1990” insert “or by a confirmation agent within the meaning of Part 3 of the Legal Services (Scotland) Act 2010”.

(2) In the 1980 Act—

(a) in section 32 (offence for unqualified persons to prepare certain documents)—

(i) in subsection (1), after paragraph (c) insert “or

(d) any will or other testamentary writing,”,

(ii) in subsection (2)(a), for “or papers” substitute “, papers, will or testamentary writing”,

(iii) in subsection (2C), after “1990” insert “or to a confirmation agent within the meaning of Part 3 of the 2010 Act”,

(iv) after subsection (2C) insert—

“(2D) Subsection (1)(d) does not apply to a will writer within the meaning of Part 3 of the 2010 Act.”,

(b) in paragraph 1A of Schedule 4 (constitution, procedure and powers of Tribunal), after head (b)(ii) insert—

“(iia) confirmation agents or will writers within the meaning of Part 3 of the 2010 Act;”.

(3) In section 12A (register of advice organisations) of the 1986 Act, after subsection (2)(b) insert—

“(ba) is a confirmation agent or will writer within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

(4) In paragraph 2 of schedule 1 (the Scottish Legal Complaints Commission) to the 2007 Act, after sub-paragraph (6)(b) insert—

“(ba) confirmation agents or will writers within the meaning of Part 3 of the Legal Services (Scotland) Act 2010;”.

PART 4

THE LEGAL PROFESSION

CHAPTER 1

APPLICATION OF THE REGULATORY OBJECTIVES

Application by the profession

(1) Each of the regulatory authorities mentioned in subsection (2) must, so far as practicable when exercising the authority’s regulatory functions (as defined in subsection (3)), act in a way which—

(a) is compatible with the regulatory objectives, and

(b) it considers most appropriate with a view to meeting those objectives.

(2) For the purpose of this section, the “regulatory authorities” are—
Legal Services (Scotland) Bill
Part 4—The legal profession
Chapter 2—Faculty of Advocates

(a) the Court of Session,
(b) the Lord President,
(c) the Faculty of Advocates,
(d) the Council of the Law Society,
(e) any other person who or body that has regulatory functions in relation to the provision of legal services by legal practitioners (of any type).

(3) For the purpose of this section, the “regulatory functions” of a regulatory authority—
(a) are its functions of regulating in respect of any matter the professional practice, conduct and discipline of legal practitioners (of any type),
(b) include its functions of making professional or regulatory rules to which legal practitioners (of any type) are subject.

(4) In subsections (2) and (3), “legal practitioners” means—
(a) solicitors (including firms of solicitors) or incorporated practices,
(b) advocates,
(c) conveyancing or executry practitioners, or
(ca) litigation practitioners.

CHAPTER 2
FACULTY OF ADVOCATES

87 Regulation of the Faculty

(1) The Court of Session is responsible—
(a) for—
(i) admitting persons to (and removing persons from) the office of advocate,
(ii) prescribing the criteria and procedure for admission to (and removal from) the office of advocate,
(b) for regulating the professional practice, conduct and discipline of advocates.

(2) The Court’s responsibilities within subsection (1)(a)(ii) and (b) are exercisable on its behalf, in accordance with such provision as it may make for the purpose, by—
(a) the Lord President, or
(b) the Faculty of Advocates.

88 Professional rules

(1) Subsections (2) and (3) apply to any rule which—
(a) prescribes the criteria or procedure for admission to (or removal from) the office of advocate, or
(b) regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(2) If the rule is made by the Faculty, the rule—
(a) is of no effect unless it has been approved by the Lord President (and may not be revoked unless its revocation has been approved by the Lord President),

(b) must be published by the Faculty.

(3) In any other case, the rule—

(a) is of no effect unless the Faculty has been consulted on it (and may not be revoked unless the Faculty has been consulted on its revocation),

(b) requires—

(i) where made by the Lord President, to be published,

(ii) where made by the Court of Session, to be contained in an Act of Sederunt.

(4) Neither this section nor section 89 affects the validity of any rule—

(a) that was in force immediately prior to the commencement of this section, and

(b) which regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(5) Nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of advocates (in particular, as it may relate to their involvement in or with licensed legal services providers).

89 Particular rules

(1) Subsection (2) applies to any rule—

(a) which regulates in respect of any matter the professional practice, conduct or discipline of advocates, and

(b) under which an advocate is prohibited from forming a legal relationship with another advocate, or any other person, for the purpose of their jointly offering professional services to the public.

(2) The rule is of no effect unless it has been approved by the Scottish Ministers after they have consulted the OFT.

(3) Subsection (2) is without prejudice to section 88(2) and (3).

(4) In section 31 (rules of conduct etc.) of the 1990 Act, subsection (1) is repealed.

CHAPTER 3
Solicitors and other representatives

Removal of practising restrictions

90 Licensed providers as qualified persons

(1) In section 26 (offence for solicitors to act as agents for unqualified persons) of the 1980 Act, in subsection (3), after “does not include” insert “a licensed legal services provider,”.

(2) In section 30 (liability for fees of other solicitor) of the 1980 Act—

(a) after “incorporated practice” in the second place where it occurs insert “or a licensed legal services provider”,

(3) In any other case, the rule—
(b) for “other solicitor or incorporated practice” substitute “employed party”,
(c) for “other solicitor’s or incorporated practice’s” substitute “party’s”.

(3) In section 31 (offence for unqualified persons to pretend to be solicitor or notary public) of the 1980 Act—

(a) the unnumbered block of text (from “In” to “practice.”) between subsections (1) and (2) is repealed,
(b) after subsection (2) insert—

“(2A) This section does not apply to an incorporated practice.
(2B) This section does not apply in relation to the taking or using by a licensed legal services provider of a name, title, addition or description if the licensed provider has the Society’s written authority for using it.
(2C) For the purpose of subsection (2B), the Council are to make rules which—
(a) set the procedure for getting the Society’s authority (and specify the conditions that the Society may impose if it gives that authority),
(b) specify the grounds on which the Society may refuse to give that authority (and require the Society to give reasons in writing if it refuses to give that authority).”.

(4) In section 32 (offence for unqualified persons to prepare certain documents) of the 1980 Act, after paragraph (e) of subsection (2) insert “; or

(ea) a licensed legal services provider;”.

(5) In section 33 (unqualified persons not entitled to fees etc.) of the 1980 Act—

(a) the first unnumbered block of text (from “Subject” to “matter.”) becomes subsection (1) and the second unnumbered block of text (from “This” to “cause.”) becomes subsection (2),
(b) in subsection (2) (as so numbered), after “incorporated practice” insert “or a licensed legal services provider”.

(6) In section 65(1) (interpretation) of the 1980 Act—

(a) after the entry for “the 2007 Act” insert—

“the 2010 Act” means the Legal Services (Scotland) Act 2010;”,
(b) at the appropriate alphabetical place insert—

“licensed legal services provider” (or “licensed provider”) is to be construed in accordance with Part 2 of the 2010 Act;”.

(7) In section 17 (qualified conveyancers) of the 1990 Act, in subsection (23)—

(a) after paragraph (b) insert—

“(ba) a licensed legal services provider within the meaning of Part 2 of the Legal Services (Scotland) Act 2010;”,
(b) after the subsequent “incorporated practice” insert “, licensed provider”.

91 Practice rules for licensed providers

(1) After section 33B of the 1980 Act insert—
“33C  Licensed legal services providers

(1) Subsection (2) applies to any rule made under section 34 which prohibits or unduly restricts the—

(a) involvement of solicitors in or with, or employment of solicitors by, licensed legal services providers,
(b) provision of services by licensed providers, or
(c) operation of licensed providers in other respects.

(2) The rule is of no effect in so far as it does so (and for this purpose it is immaterial when the rule was made).

(3) The reference in subsection (1)(a) to solicitors does not include a solicitor who is disqualified from practice by reason of having been—

(a) struck off (or removed from) the roll, or
(b) suspended from practice.”.

(2) In addition—

(a) in section 34 (rules as to professional practice, conduct and discipline) of the 1980 Act—

(i) in subsection (1A)(f), for “, or incorporated practices which, are partners in or directors of multi-disciplinary practices” substitute “have an interest in or are employed by (or otherwise within) licensed legal services providers”,
(ii) subsection (3A) is repealed,
(b) in section 64A(1) of that Act, paragraph (b) and the word “; or” immediately preceding it are repealed,
(c) in section 64B of that Act, the words “or such as is mentioned in section 34(3A)” are repealed,
(d) in section 64D(6) of that Act, for “sections 25A(9) or (10) and 34(3A)” substitute “section 25A(9) or (10)”,
(e) in section 65(1) of that Act—

(i) the definition of “multi-disciplinary practice” is repealed,
(ii) in the definition of “unqualified person”, the words “, other than a multi-disciplinary practice,” are repealed,
(f) in section 17(23) of the 1990 Act—

(i) paragraph (c) is repealed,
(ii) the subsequent words “, multi-disciplinary practice” are repealed,
(g) in paragraph 29(15) of Schedule 8 to that Act—

(i) in head (c), the insertion (into section 65(1) of the 1980 Act) of the definition of “multi-disciplinary practice” is repealed,
(ii) head (f) and the word “and” immediately preceding it are repealed.

(3) Subject to section 33C of the 1980 Act, nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of solicitors.
91A Citizens advice bodies

(1) In section 26 of the 1980 Act, in subsection (2), after “law centre” insert “or a citizens advice body”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

“citizens advice body” means an association which is formed (and operates)—

(a) otherwise than for the purpose of making a profit, and

(b) with the sole or primary objective of providing legal and other advice (including information) to the public for no fee, gain or reward;”.

(3) The Scottish Ministers may by regulations modify the definition of “citizens advice body” in section 65(1) of the 1980 Act.

(4) Before making regulations under subsection (3), the Scottish Ministers must consult—

(a) the Lord President,

(b) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate.

91B Court of Session rules

In the Court of Session Act 1988—

(a) in section 5 (power to regulate procedure), after paragraph (ee) insert—

“(ef) to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf.”,

(b) after section 5 insert—

“5A Rules for lay representation

(1) Rules under section 5(ef)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 5(ef) is subject to any enactment under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 5(ef) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or

(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.
91C Sheriff court rules

In the Sheriff Courts (Scotland) Act 1971—

(a) in section 32 (power of Court of Session to regulate civil procedure), in subsection (1), after paragraph (m) insert—

“(n) permitting a lay representative, when appearing at a hearing in any category of civil proceedings along with a party to the proceedings, to make oral submissions to the sheriff on the party’s behalf.”,

(b) after section 32 insert—

“32A Rules for lay representation

(1) Rules under section 32(1)(n)—

(a) are to apply to situations in which the party is not otherwise represented,

(b) may specify other conditions by reference to which the rules are to apply.

(2) Section 32(1)(n)—

(a) does not restrict the operation of section 36(1),

(b) is subject to any enactment (apart from section 36(1)) under which special provision may be made for a party to a particular type of case before the Court to be represented by a lay representative.

(3) In section 32(1)(n) and this section, a “lay representative” is a person who is not—

(a) a solicitor,

(b) an advocate, or

(c) one having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.”.

91D Use of Guarantee Fund

(1) In section 43 (Guarantee Fund) of the 1980 Act—

(a) in subsection (2)—

(i) the word “or” immediately preceding paragraph (b) is repealed,

(ii) after paragraph (b) insert “, member”,

(c) any licensed legal services provider or any person within it in connection with its provision of legal services (with the same meaning as for Part 2 of the 2010 Act), even if—

(i) the Society is not its approved regulator, or

(ii) subsequent to the act concerned it has ceased to operate.”,
Legal Services (Scotland) Bill
Part 4—The legal profession
Chapter 3—Solicitors and other representatives

(b) in subsection (3)—
   (i) in paragraph (cc), after “director” in the second place where it occurs insert, “member”,
   (ii) after paragraph (cc) insert—
   “(cd) to a licensed provider or any investor or person who owns, manages or controls or is within the licensed provider in respect of a loss suffered by it or any such person in connection with the licensed provider’s provision of legal services by reason of dishonesty on the part of any such persons;”,

(c) in subsection (7)(c), after “incorporated practice” insert “or a licensed provider”,

(d) after subsection (7) insert—
   “(8) In the case of licensed providers, this section and Part I of Schedule 3 apply in relation to (and only to) such licensed providers as are regulated by an approved regulator that in furtherance of section 19A(4) of the 2010 Act does not maintain its own compensation fund as referred to in that section.

(9) In this section and paragraph 1 of Schedule 3—
   “approved regulator”,
   “investor”,
   are to be construed in accordance with Part 2 of the 2010 Act.”.

(2) In section 43 of the 1980 Act—
   (a) in subsection (2), after paragraph (a) insert—
       “(aa) any conveyancing or executry practitioner or an employee of the practitioner in connection with the practitioner’s practice as such, even if subsequent to the act concerned the practitioner has ceased to provide conveyancing or executry services;”,
   (b) in subsection (3), after paragraph (c) insert—
       “(ca) to a conveyancing or executry practitioner in respect of a loss suffered by reason of dishonesty on the part of a partner or employee of the practitioner in connection with the practitioner’s practice as such;”.

(3) Section 21C of the 1990 Act is repealed, but—
   (a) the fund maintained under subsection (1) of that section immediately before its repeal by this subsection continues to be vested in the Council, and
   (b) the Council is to apply that fund to the Scottish Solicitors Guarantee Fund (which is vested in the Law Society under section 43(1) of the 1980 Act).

91E Contributions to the Fund

(1) In Schedule 3 (the Scottish Solicitors Guarantee Fund) to the 1980 Act, in paragraph 1—
   (a) in sub-paragraph (2A)—
       (i) the words “directors of incorporated practices” become head (a),
   (ia) after “directors” (in that head), insert “or members”,
(ii) after that head (as so numbered) insert “, or

(b) investors in licensed legal services providers.”,

(b) in sub-paragraph (2B)—

(i) the words from “by every” to the end become head (a),

(ii) in that head (as so numbered), for “scale of such” substitute “relevant scale of annual corporate”,

(iii) after that head (as so numbered) insert “, and

(b) by every licensed provider, in respect of each year during which or part of which it operates as such under the licence issued by its approved regulator, a contribution (also an “annual corporate contribution”) in accordance with the relevant scale of annual corporate contributions referred to in sub-paragraph (3).”,

(c) in sub-paragraph (3)—

(i) for “scale” in the first place where it occurs substitute “scales”,

(ii) the words from “, which scale” to the end are repealed,

(d) after sub-paragraph (3) insert—

“(3A) The scales of annual corporate contributions—

(a) are to be fixed under sub-paragraph (3) by reference to all relevant factors, including—

(i) in the case of incorporated practices, the number of solicitors that they have as directors, members or employees,

(ii) in the case of licensed providers, the number of solicitors that they have as investors or employees,

(b) may otherwise make different provision as between incorporated practices and licensed providers.”,

(e) in sub-paragraph (4), after “incorporated practice” insert “or a licensed provider”,

(f) in sub-paragraph (5), after “incorporated practice” insert “and licensed provider”,

(g) in sub-paragraph (8), after “incorporated practice” insert “or a licensed provider”.

(1A) In Schedule 3 to the 1980 Act, after paragraph 1B insert—

“1C (1) Paragraph 1 applies to a conveyancing or executry practitioner as it applies to a solicitor.

(2) But it does so with the following of its provisions to be disregarded—

(a) the reference in sub-paragraph (1) to an application for a practising certificate,

(b) sub-paragraphs (2), (2A), (6) and (9).

(3) If a conveyancing or executry practitioner fails to pay an annual contribution due by virtue of this paragraph, the Council may suspend (pending payment) the relevant entry in the register maintained by them under section 17(1) or 18(1) of the 1990 Act.
(4) For the purposes of section 43 and this paragraph, the references to a conveyancing or executry practitioner (or conveyancing or executry services) are to be construed in accordance with section 23 of the 1990 Act.”.

(2) In Schedule 3 to the 1980 Act, in paragraph 3(2)—

(a) for “and incorporated practices” substitute “, incorporated practices and licensed providers”,

(b) for “or incorporated practice or practices” substitute “, incorporated practice or practices or licensed provider or providers”.

91F Cap on individual claims

In Schedule 3 to the 1980 Act—

(a) in paragraph 4, after sub-paragraph (3) insert—

“(3A) The amount of an individual grant from the Guarantee Fund may not exceed £1.25 million.”,

(b) after paragraph 4 insert—

“(5) The Scottish Ministers may by regulations amend the sum specified in paragraph 4(3A).

(2) Before making regulations under sub-paragraph (1), the Scottish Ministers must consult the Council (and take account of sections 4 and 4A of the 2010 Act).

(3) The power to make regulations under sub-paragraph (1) is exercisable by statutory instrument; but a statutory instrument containing any such regulations is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.

The Law Society

91G Acting as approved regulator

After section 1 of the 1980 Act insert—

“1A Power to act as statutory regulator

The Society may—

(a) act as an approved regulator within the meaning of Part 2 of the 2010 Act,

(b) do anything that is necessary or expedient for the purposes of doing so.”.

92 Council membership

(1) In section 3 (establishment and functions of Council of Law Society) of the 1980 Act, in subsection (1), after “elected” insert “, co-opted or appointed”.

(2) In Schedule 1 to the 1980 Act—

(a) in paragraph 2 (the Council’s scheme)—

(i) in head (a), the word “, election,” is repealed,
(ii) after head (a) insert—

“(aa) election, co-option and appointment to the Council;”,

(b) in paragraph 3 (detail of the scheme), after head (b) insert—

“(bza) shall make provision for—

(i) the election or co-option of solicitor members to the Council,

(ii) the appointment of non-solicitor members to the Council;”,

(c) after paragraph 3 insert—

“This paragraph applies for the purpose of paragraph 3(bza).

(2) Persons are electable, or eligible to be co-opted as, solicitor members if they are members of the Society.

(3) Persons are appointable as non-solicitor members if they appear to the Council—

(a) to be qualified to represent the interests of the public in relation to the provision of legal services in Scotland, or

(b) having regard to the Society’s functions, to be suitable in other respects.”.

93 Regulatory committee

(1) In section 3A (discharge of functions of Council of the Law Society) of the 1980 Act, in subsection (11), for “is” substitute “is—

(a) subject to sections 3B to 3G, and

(b)”.

(2) After section 3A of the 1980 Act insert—

“3B Regulatory committee

(1) The Council must, for the purpose mentioned in subsection (2)—

(a) arrange under section 3A(1)(a) for their regulatory functions to be exercised on their behalf by a regulatory committee, and

(b) ensure that the committee continues so to exercise those functions (in particular, for the discharge of the Council’s responsibility as mentioned in section 3A(9)(a)).

(2) The purpose is of ensuring that the Council’s regulatory functions are exercised—

(a) independently of any other person or interest,

(b) properly in other respects (in particular, with a view to achieving public confidence).

(2A) Accordingly, the Council must not—

(a) exercise their regulatory functions through any other means, or

(b) interfere unduly in the regulatory committee’s business.

(2B) Subsection (2A)(a) is subject to—
(a) any determination made by the regulatory committee in a particular case that it is necessary, for ensuring that something falling within the Council’s regulatory functions is achieved appropriately, that specific action be taken otherwise than through the regulatory committee, and

(b) such directions as the regulatory committee gives the Council (acting in any other capacity) in connection with the determination.

3C Particular rules applying

(3) The following particular rules apply as respects the regulatory committee—

(za) the committee’s membership may include persons who are not members of the Council,

(a) at least 50% of the committee’s membership is to comprise lay persons,

(aa) lay persons, where they are not members of the Council, are appointable to the committee if they would be appointable to the Council as non-solicitor members (see paragraph 3A(3) of Schedule 1),

(b) the committee is to appoint one of its lay members as its convener,

(c) if the convener is not present at a meeting of the committee, another of its lay members is to chair the meeting.

(3A) Any sub-committee of the regulatory committee (formed under section 3A(2)(a)) is subject to the particular rules applying as respects the regulatory committee, except that—

(a) a meeting of the sub-committee need not be chaired by one of its lay members,

(b) it may co-opt members from outside the membership of the regulatory committee.

(4) Nothing done by the regulatory committee (or a sub-committee of it) is invalid solely because of a temporary shortfall in the number of its lay members.

(8) In subsection (3)(a), “lay persons” are persons who are not—

(a) solicitors,

(b) advocates,

(c) conveyancing or executry practitioners as defined in section 23 of the 1990 Act,

(d) those having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act, or

(e) confirmation agents or will writers within the meaning of Part 3 of the 2010 Act.

3D Resolving regulatory disputes

(1) This section applies in relation to any dispute arising between the regulatory committee and the Council (acting in any other capacity) with respect to the application of section 3B.
(2) If the dispute cannot be settled by the parties, it is to be submitted to (and resolved by) arbitration.

(3) The arbitrator is to be appointed—
   (a) jointly by the parties, or
   (b) in the absence of agreement for joint appointment, by the Lord President on a request made by either (or both) of them.

(4) The arbitrator’s resolution of the dispute is final and binding on the parties.

3E Further provision for section 3B etc.

(1) The Scottish Ministers may by regulations—
   (a) prescribe a maximum—
      (i) number of members that the regulatory committee, or any sub-committee of it, may have,
      (ii) proportion of the membership (of either) that may comprise co-opted members,
   (b) make further provision about the Council’s regulatory functions if they believe that such provision is necessary for ensuring that those functions are exercised in accordance with the purpose stated in section 3B(2),
   (c) modify (by elaboration or exception) the definition in sections 3F and 3G if they believe that such modification is appropriate.

(2) Before making regulations under subsection (1), the Scottish Ministers must consult the Council (and take account of sections 4 and 4A of the 2010 Act).

(3) The power to make regulations under subsection (1) is exercisable by statutory instrument; but—
   (a) a statutory instrument containing regulations under subsection (1)(a) is subject to annulment in pursuance of a resolution of the Scottish Parliament,
   (b) a statutory instrument containing regulations under subsection (1)(b) or (c) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament.

3F Meaning of “regulatory functions”

(1) For the purposes of sections 3B to 3E, the Council’s “regulatory functions” are their functions of regulating in respect of any matter the professional practice, conduct and discipline of—
   (a) solicitors (including firms of solicitors) and incorporated practices,
   (b) other legal practitioners, for example—
      (i) registered European or foreign lawyers,
      (ii) conveyancing or executry practitioners.

(2) Those functions include (in particular) their functions as to—
   (a) setting standards of qualification, education and training,
(b) admission of persons to the profession,
(c) keeping the roll and other registers,
(d) administering the Guarantee Fund,
(e) making regulatory rules under any relevant enactment.

(3) In subsection (1)(b)(ii), the reference to conveyancing or executry practitioners is to be construed in accordance with section 23 of the 1990 Act.

3G Extended meaning under section 3F

If the Society acts as an approved regulator as mentioned in section 1A, the Council’s “regulatory functions” for the purposes of sections 3B to 3E also comprise such regulatory functions as—

(a) fall within the meaning of that expression as given for the purposes of Part 2 of the 2010 Act (by section 23(1) of that Act), and
(b) are exercisable under that Part of that Act by the Society in its capacity as an approved regulator as so mentioned.”.

(3) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““regulatory committee” means the regulatory committee formed in accordance with section 3B(1);”.

The 1980 Act: further modification

93A Keeping the solicitors roll etc.

(1) In section 7 (keeping the roll) of the 1980 Act, after subsection (2) insert—

“(2A) The roll is also to record against the name of each enrolled solicitor the address of the place of business of that solicitor (as given under subsection (2) of that section).”.

(2) In section 12A (keeping the register) of the 1980 Act, after subsection (2) insert—

“(2A) The register is also to record against the name of each lawyer entered on it the address of the place of business of that lawyer and related information (as given under section 12B(1)).”.

93B Removal from the roll etc.

(1) In section 9 (removal of name from roll on request) of the 1980 Act—

(a) the existing text becomes subsection (1),
(b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
(c) after subsection (1) (as so numbered) insert—

“(2) But the Council are required to remove the name or annotation only if they are satisfied that—

(a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
(b) it is otherwise appropriate to do so.”.
(2) In section 12C (removal of name from register on request) of the 1980 Act—
   (a) the existing text becomes subsection (1),
   (b) in subsection (1) (as so numbered), the words from “on” to “hand,” are repealed,
   (c) after subsection (1) (as so numbered) insert—

   “(2) But the Council are required to remove the name or annotation only if they are satisfied that—
   (a) the solicitor has made adequate arrangements with respect to the business which the solicitor then has in hand, and
   (b) it is otherwise appropriate to do so.”.

94 Restoration to the roll

(1) In section 10 (restoration of name to roll on request) of the 1980 Act—
   (a) after subsection (1) insert—

   “(1ZA) Where the restoration of a solicitor’s name to the roll has been prohibited under section 53(2)(aa), the solicitor is entitled to have the solicitor’s name restored to the roll if (but only if) the Tribunal so orders—
   (a) on an application made to it by the solicitor, and
   (b) after such enquiry as it thinks proper.”,
   (b) in subsection (1A), after “section 9” insert “(except where subsection (1ZA) applies),
   (c) in subsection (2), after “subsection (1)” insert “or (1ZA)”.

(2) In section 53 (powers of Tribunal) of the 1980 Act, in subsection (2)—
   (a) after paragraph (a) insert—

   “(aa) if the solicitor’s name has been removed from the roll under section 9, by order prohibit the restoration of the solicitor’s name to the roll;”,
   (b) the word “or” where it occurs immediately after any of paragraphs (a) to (e) is repealed.

94A Suspension from practice

(A1) In section 18 (suspension of practising certificates) of the 1980 Act—
   (a) after subsection (1) insert—

   “(1ZA) The Council may suspend from practice a solicitor who—
   (a) has been convicted of an offence involving dishonesty, or
   (b) in respect of an offence, has been—
   (i) fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction), or
   (ii) sentenced to imprisonment for a term of 12 months or more.”,
   (b) in subsection (2), after “subsection (1)” insert “or (1ZA)”.
(1) In section 19 (further provisions relating to suspension of practising certificates) of the 1980 Act—
   (a) after subsection (5A) insert—
   “(5B) A suspension from practice arising by virtue of section 18(1ZA) expires if the grounds for it no longer apply.
   (5C) On the occurrence of any of the circumstances mentioned in subsections (4) to (5B), the solicitor concerned must notify the Council in writing (and without delay).”,
   (b) in subsection (6), after “section 18(1)” insert “or by virtue of section 18(1ZA)”.

(1A) In section 24F (suspension of registration certificate) of the 1980 Act—
   (a) after subsection (1) insert—
   “(1A) The Council may suspend from practice a registered European lawyer who—
   (a) has been convicted of an offence involving dishonesty, or
   (b) in respect of an offence, has been—
   (i) fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction), or
   (ii) sentenced to imprisonment for a term of 12 months or more.”,
   (b) in subsection (2), after “subsection (1)” insert “or (1A)”.

(2) In section 24G (further provisions relating to suspension of registration certificate) of the 1980 Act—
   (a) after subsection (4) insert—
   “(4A) A suspension from practice arising by virtue of section 24F(1A) expires if the grounds for it no longer apply.
   (4B) On the occurrence of any of the circumstances mentioned in subsections (2) to (4A), the lawyer concerned must notify the Council in writing (and without delay).”,
   (b) in subsection (5), after “section 24F(1)” insert “or by virtue of section 24F(1A)”.

94B Accounts rules fee

(1) After section 37 of the 1980 Act insert—

“37A Accounts fee

(1) An annual fee set in accordance with this section (the “accounts fee”) is to be paid by each—
   (a) solicitor who is required by paragraph 1 of Schedule 3 (as read with section 43(7)) to pay an annual contribution on behalf of the Guarantee Fund,
   (b) incorporated practice that is required by that paragraph of that Schedule to pay an annual corporate contribution on that behalf.

(2) The accounts fee is also to be paid by each—
(a) registered European lawyer or registered foreign lawyer who is required by virtue of paragraph 1A or 1B of that Schedule to pay an annual contribution on that behalf,

(b) multi-national practice to which the accounts rules apply by virtue of an enactment.

(3) The accounts fee is to be set by the Council for the purpose of funding the exercise of their function of securing compliance (by the categories specified in subsections (1) and (2)) with the accounts rules.

(4) The accounts fee is to be—

(a) set—

(i) no later than 30 September each year in respect of the 12 month period beginning with 1 November that year, or

(ii) by reference to such other dates as the Council may fix,

(b) paid to the Council by such date as they may fix.

(5) The accounts fee may be set—

(a) so as to involve different amounts (including nil) for different—

(i) categories (as specified in subsections (1) and (2)),

(ii) circumstances (by reference to all relevant factors),

(b) in the case of incorporated practices, by particular reference to the number of solicitors that they have as directors, members or employees.

(6) The Council may take such steps as they consider necessary for recovering the accounts fee due in accordance with this section.”.

(2) In section 65(1) of the 1980 Act, at the appropriate alphabetical place insert—

““accounts fee” has the meaning given by section 37A(1);”.

94C Powers of Tribunal

(1) In section 53 (powers of Tribunal) of the 1980 Act—

(a) in subsection (1)(b), for “sentenced to a term of imprisonment of not less than 2 years” substitute “fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction) or sentenced to imprisonment for a term of 12 months or more”,

(b) in subsection (2), after paragraph (bb) insert—

“(bc) where—

(i) an incorporated practice has been convicted, or has been found to have failed, as referred to in subsection (1)(c) or (d), and

(ii) the Tribunal consider that the complainer has been directly affected by any misconduct by the practice to which the conviction or failure is (to any extent) attributable,

direct the practice to pay to the complainer compensation (for loss, inconvenience or distress resulting from the misconduct) of such amount not exceeding £5,000 as the Tribunal may specify;”,
(c) in subsection (3A), for “subsection (2)(e), (d) and (e)” substitute “subsection (2)(bb) to (e),

(d) in subsection (7C), after “paragraph (bb)” insert “or (bc),”

(e) in subsection (9), after “subsection (2)(bb)” insert “and (bc)”.

(2) In section 54 (appeals from decisions of Tribunal) of the 1980 Act, in subsections (1C), (1D) and (1E), after “section 53(2)(bb)” in each place where it occurs insert “or (bc)”.

CHAPTER 4

OTHER BODIES

Scottish Legal Aid Board

95 Exclusion from giving legal assistance
In section 31 (solicitors and counsel) of the 1986 Act—

(a) in subsections (3), (4) and (5), for “relevant body” wherever appearing substitute “Board”,

(b) subsections (6) and (10) are repealed.

96 Availability of legal services
In the 1986 Act—

(a) in section 1 (the Scottish Legal Aid Board), after subsection (2) insert—

“(2A) The Board also has the general function of monitoring the availability and accessibility of legal services in Scotland (including by reference to any relevant factor relating particularly to rural or urban areas).”,

(b) in section 2 (powers of the Board), after subsection (2)(d) insert—

“(da) to give the Scottish Ministers such advice as it may consider appropriate in relation to the availability and accessibility of legal services in Scotland;”,

(c) in section 3 (duties of the Board), after subsection (2) insert—

“(2A) The Board is, 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.”.

97 Information about legal services
After section 35A of the 1986 Act insert—

“35AA Information about legal services

(1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.

(2) For the purpose mentioned in subsection (4)(b)—

(a) each of the bodies mentioned in subsection (3)(a) and (b) must—
(i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and

(ii) give the Board a summary of the relevant facts.

(b) the body mentioned in subsection (3)(d) must—

(i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and

(ii) give the Board a summary of the relevant facts.

(3) The bodies are—

(a) the Law Society,

(b) the Faculty of Advocates,

(c) the Scottish Court Service,

(d) the Scottish Legal Complaints Commission.

(4) The purposes are the Board’s exercise of its functions under—

(a) section 1(2A),

(b) section 31(3).

(5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.”.

---

Scottish Legal Complaints Commission

97A Relevant practitioners

In section 46(1) (interpretation of Part 1) of the 2007 Act—

(a) in the definition of “inadequate professional services”, after paragraph (a)(v) insert—

“(vi) a registered European or foreign lawyer, professional services that are in any respect not of the quality which could reasonably be expected of a competent lawyer of that type;”,

(b) in the definition of “practitioner”, after paragraph (g) insert—

“(h) a registered European or foreign lawyer, whether or not registered at that time and notwithstanding that subsequent to that time the lawyer’s registration has ceased to have effect or the lawyer has stopped practising;”,

(c) after the definition of “practitioner” insert—

“‘registered European or foreign lawyer’ is to be construed in accordance with section 65(1) of the 1980 Act;”,

(d) in the definition of “relevant professional organisation”, after paragraph (d) insert—

“(e) a registered European or foreign lawyer, the Council;”
(e) in the definition of “unsatisfactory professional conduct”, after paragraph (d) insert—

“(e) a registered European or foreign lawyer, conduct that is not of the standard which could reasonably be expected of a competent and reputable lawyer of that type;”.

98 Minor amendments

In the 2007 Act—

(a) in section 29—

(i) in subsection (4), after “members” insert “, and the Scottish Ministers,”,

(ii) in subsection (9), for “subsection (1)” substitute “subsection (8)”,

(b) in section 46(1), in paragraph (c) in the definition of “unsatisfactory professional conduct”, for “section 27 of this Act” substitute “section 27 of the 1990 Act”,

(c) in paragraph 13(2)(a) of schedule 1—

(i) for “the function of deciding” substitute “a decision”,

(ii) for “whether” substitute “that”,

(iii) for “exercised” substitute “taken”,

(d) in paragraph 1(h)(iii) of schedule 3 for “whether” substitute “that”.

98A The 2007 Act: further provision

(1) In section 78 (ancillary provision) of the 2007 Act, after subsection (1) insert—

“(1A) The Scottish Ministers may make such further provision as, having regard to the effect of the Legal Services Act 2007 so far as concerning the subject matter of Parts 1 and 2 of this Act (and applying in Scotland), they consider necessary or expedient in connection with this Act or any related provisions of the 1980 Act.”.

(2) In section 79 (regulations or orders) of the 2007 Act, in subsection (3)(c)(i), after “section 78(1)” insert “or (1A)”.

PART 5

GENERAL

99 Regulations

(1) Any power of the Scottish Ministers to make regulations under the preceding Parts of this Act is exercisable by statutory instrument.

(2) The regulations may—

(a) make different provision for different purposes,

(b) include such incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient for the purposes of or in connection with the regulations.

(3) But—
(a) a statutory instrument containing regulations under—

(ai) section 5(5A),
(ii) section 26(1),
(iii) section 29(6),
(iv) section 35(1),
(iva) section 37(6)(a)(i),
(ivab)section 37A(1C),
(ivb) section 52(2A),
(v) section 55(10),
(vi) section 75(2)(f),
(vii) section 81(5)(b),
(viii) section 81D(2)(f),
(ix) section 81K(5)(b), or
(x) section 81L(1),

is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament,

(b) a statutory instrument containing any other regulations under the preceding Parts of this Act is subject to annulment in pursuance of a resolution of the Parliament.

99A Further modification

(1) The Scottish Ministers may by regulations made by statutory instrument—

(a) amend the percentage specified in section subsection (1) of section 37A, or
(b) repeal section 37A (and consequentially the references in this Act to that section).

(2) But regulations may be made under subsection (1) only if the Scottish Ministers believe that the effect of the amendment or (as the case may be) repeal would be—

(a) compatible with the regulatory objectives, and
(b) appropriate in any other relevant respect.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the Lord President,
(b) the Law Society,
(c) every approved regulator,
(d) the OFT, and such other organisation (appearing to them to represent the interests of consumers in Scotland) as they consider appropriate,
(e) such other person or body as they consider appropriate.

(4) A statutory instrument containing regulations under subsection (1) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.
100 Ancillary provision

(1) The Scottish Ministers may by regulations made by statutory instrument make such—
(a) supplemental provision, or
(b) incidental, consequential, transitional, transitory or saving provision,
as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) But—
(a) a statutory instrument containing regulations under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament,
(b) a statutory instrument containing any other regulations under that subsection is subject to annulment in pursuance of a resolution of the Parliament.

101 Definitions

(1) In this Act (unless the context otherwise requires)—
“the 1980 Act” means the Solicitors (Scotland) Act 1980,
“the 1986 Act” means the Legal Aid (Scotland) Act 1986,
“the 1990 Act” means the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
“the 2007 Act” means the Legal Profession and Legal Aid (Scotland) Act 2007,
“Faculty” means Faculty of Advocates,
“Law Society” means Law Society of Scotland,
“Lord President” means Lord President of the Court of Session,
“OFT” means Office of Fair Trading.

(2) In this Act (unless the context otherwise requires)—
(a) the following expressions are to be construed in accordance with section 65(1) (interpretation) of the 1980 Act—
“advocate”,
“incorporated practice”,
“practising certificate”,
“registered European lawyer”,
“registered foreign lawyer”,
“solicitor”,
(b) the following expressions are to be construed in accordance with section 23 (interpretation) of the 1990 Act—
“conveyancing practitioner”,
“executry practitioner”,
“conveyancing practitioner”,
(c) a reference to a litigation practitioner is to a person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the 1990 Act.

(3) In this Act (unless the context otherwise requires), a reference to a professional association or body includes—

(a) the Law Society,

(b) any other organisation which serves a profession (for example, the Institute of Chartered Accountants of Scotland).

(4) Schedule 9 is an index of expressions introduced for—

(a) the whole Act,

(b) Parts 2 and 3.

102 Commencement and short title

(1) This section and sections 99 to 101 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on the day that the Scottish Ministers by order made by statutory instrument appoint.

(3) An order under subsection (2) may appoint different days for different provisions.

(4) An order under subsection (2) may—

(a) make different provision for different purposes,

(b) include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the commencement of this Act.

(5) The short title of this Act is the Legal Services (Scotland) Act 2010.
SCHEDULE 1

(introduced by section 29(3))

PERFORMANCE TARGETS

Application

1. This schedule applies where the Scottish Ministers—
   (a) are satisfied that an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or
   (b) consider that, for any other reason, it is necessary or expedient for one or more performance targets to be set as respects an approved regulator.

Power to set targets

2. (1) The Scottish Ministers may—
   (a) set one or more performance targets for the approved regulator in relation to its regulatory functions,
   (b) require the approved regulator to set one or more performance targets in relation to its regulatory functions.

   (2) The approved regulator must (so far as practicable) comply with a performance target set for it under sub-paragraph (1)(a) or (b).

Notice of intention

3. (1) Before setting a performance target, or requiring the approved regulator to do so, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

   (2) The notice of intention must—
   (a) state that the Scottish Ministers intend to—
       (i) set a performance target, or
       (ii) require that the approved regulator set such a target,
   (b) describe the proposed target (including the period within which it would have to be met),
   (c) specify—
       (i) the act or omission (or series of acts or omissions) to which the proposed target relates,
       (ii) any other facts which, in their opinion, justify the intended target-setting.

Consultation

4. (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed target.
(2) The Scottish Ministers must—
   (a) give a copy of the notice of intention to such persons or bodies as they consider appropriate,
   (b) consult them accordingly.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2), when deciding whether to proceed with the target-setting.

(2) The Scottish Ministers must—
   (a) send to the approved regulator a notice (a “decision notice”) of their decision,
   (b) notify the consultees under paragraph 4(2) of their decision,
   (c) publish any target set, or requirement made by them, under paragraph 2(1)(a) or (b) in such manner as they consider most appropriate to bring it to the attention of any relevant person or body.

(3) If the Scottish Ministers’ decision is in favour of target-setting, the decision notice must contain the target.

(4) An approved regulator must publish any target set by it following a requirement under paragraph 2(1)(b) in such manner as it considers most appropriate for bringing it to the attention of any relevant person or body.

(5) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.

SCHEDULE 2
(introduced by section 29(3))

DIRECTIONS

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

   (a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives,
   (b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act (including a direction imposed in accordance with this schedule),
   (c) an approved regulator has failed to adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
(d) an approved regulator has made a material amendment to its regulatory scheme under section 8(4).

Power to direct

2 (1) The Scottish Ministers may direct the approved regulator to take—

(a) in a case falling within paragraph 1(a), such action as they consider will counter the adverse impact, mitigate its effect or prevent its recurrence,

(b) in a case falling within paragraph 1(b) or (c), such action as they consider will remedy the failure, mitigate its effect or prevent its recurrence,

(c) in a case falling within paragraph 1(d), such action as they consider necessary or expedient in relation to such transitional matters as may arise from the amendment.

(2) A direction under sub-paragraph (1) may require the approved regulator to modify any part of its regulatory scheme.

(3) A direction under sub-paragraph (1) must not be framed by reference to—

(a) a specific disciplinary case, or

(b) other specific regulatory proceedings.

(4) A direction under sub-paragraph (1) may require the approved regulator to refrain from doing something.

(5) The approved regulator must (so far as practicable) comply with a direction given to it in accordance with this schedule.

Notice of intention

3 (1) Before giving a direction to an approved regulator under this schedule, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to give a direction,

(b) indicate the terms of the proposed direction (including the date by which it would have to be complied with),

(c) explain why the Scottish Ministers are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed direction.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of the notice of intention to such person or body as they consider appropriate,
(c) after the expiry of the period for representations—

(i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,

(ii) consult them accordingly in relation to the appropriateness of giving the direction.

(3) Where the Scottish Ministers consider that the proposed direction may have the effect of preventing competition within the legal services market, or significantly restricting or distorting such competition, they must (additionally)—

(a) send to the OFT—

(i) a copy of the notice of intention,

(ii) a copy of any representations received from the approved regulator,

(b) consult the OFT accordingly.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c) or (3), when deciding whether to proceed with giving a direction.

(2) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 4(2)(c) and (3) of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to give the direction, the decision notice must contain the direction.

(4) For the purposes of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

Extension of time to comply

6 (1) The Scottish Ministers may, on an application by an approved regulator made at any time after the giving of a direction, allow an approved regulator additional time to comply with the direction.

(2) Where such additional time is allowed, the Scottish Ministers must publicise that fact in such manner as they consider most likely to bring it to the attention of any relevant person or body.
Enforcement

7 (1) If at any time it appears to the Scottish Ministers that an approved regulator has failed to comply with a direction given under this schedule, they may make an application to the Court of Session for an order as described in sub-paragraph (2).

(2) On an application under sub-paragraph (1), the Court may (if it decides that the approved regulator has failed to comply with the direction) order the approved regulator to take such steps as the Court thinks fit for securing that the direction is complied with.

SCHEDULE 3
(introduced by section 29(3))

Censure

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

(a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, or

(b) an approved regulator has failed to comply with a requirement imposed on it by or under this Act.

Power to censure

2 The Scottish Ministers may make and publish a statement censuring the approved regulator for—

(a) the act or omission (or series of acts or omissions), or

(b) the failure.

Preliminary advice

3 Before making the statement, the Scottish Ministers must consult such person or body as they consider appropriate about the proposed statement.

Notice of intention

4 (1) If, after consulting under paragraph 3, the Scottish Ministers intend to proceed with making the statement, they must give the approved regulator a notice (a “notice of intention”) of that intention.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to publish the statement,

(b) specify the date on which they intend to publish the statement (which must be after the expiry of the period mentioned in paragraph 5(1)),

(c) set out the terms of the proposed statement,

(d) specify—
Schedule 4—Financial penalties

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed statement.

(2) The Scottish Ministers must—

(a) provide the consultees under paragraph 3 with a copy of any representations received from the approved regulator,
(b) seek their further views in light of the representations.

Decision

6 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 3, when deciding whether to proceed with publishing the statement.

(2) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,
(b) notify the consultees under paragraph 3 of their decision,
(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to publish the statement, the decision notice must contain the statement (and the statement need not be published separately).

(4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,
(b) providers of legal services,
(c) organisations representing the interests of consumers,
(d) members of the public.

SCHEDULE 4
(introduced by section 29(3))

FINANCIAL PENALTIES

Application

1 This schedule applies where the Scottish Ministers are satisfied that an approved regulator has failed to—

(a) adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
Power to impose penalty

2 (1) The Scottish Ministers may impose on the approved regulator a penalty, in respect of a failure mentioned in paragraph 1, of an amount not exceeding the prescribed maximum.  

5 (2) Here, the prescribed maximum is the maximum amount that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.  

(3) A financial penalty imposed under this paragraph is payable to the Scottish Ministers.

Amount of penalty

3 (1) When considering the appropriate amount of a penalty to be imposed under paragraph 2, the Scottish Ministers must have regard to—

(a) the seriousness of the failure,  
(b) the nature of the failure in other respects.  

(2) It is material for the purpose of sub-paragraph (1)—

(a) whether the failure was deliberate,  
(b) if the failure is attributable to recklessness or negligence, the degree involved.  

(3) The Scottish Ministers may consult such person or body as they consider appropriate when considering—

(a) whether to impose a penalty,  
(b) the appropriate amount of the penalty.

Notice of intention

4 (1) Before imposing a financial penalty, the Scottish Ministers must give the approved regulator a notice (a “notice of intention”) of their intention to do so.  

(2) The notice of intention must—

(a) state—

(i) that the Scottish Ministers intend to impose a financial penalty,  
(ii) the amount of the proposed penalty,  
(b) by reference to the failure concerned and any other relevant facts, explain why the Scottish Ministers consider that—

(i) it is appropriate to impose a penalty,  
(ii) the amount of the proposed penalty is appropriate.

Consultation

5 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed penalty.  

(2) The Scottish Ministers must—
(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,

(b) give a copy of that notice, and a copy of any representations received from the approved regulator, to any person whom or body that they consult under subparagraph (3).

(3) After the expiry of the period for representations, the Scottish Ministers may consult such person or body as they consider appropriate about the appropriateness of—

(a) imposing the penalty,

(b) its amount.

6 Decision

(1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, and any consultee under paragraph 5(3), when deciding whether to proceed with imposing the penalty.

(2) The Scottish Ministers must—

(a) give a notice to the approved regulator (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 5(3) of their decision,

(c) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) The decision notice must—

(a) state whether or not a financial penalty is being imposed,

(b) give the reason for the imposition (or otherwise) of a penalty,

(c) if a penalty is being imposed—

(i) state the amount of the penalty (and mention any allowance made for payment by instalments),

(ii) explain why the Scottish Ministers consider that amount to be appropriate,

(iii) specify the date by which the penalty requires to be paid in full.

(4) That date must not be within the 3 months beginning with the day on which the decision notice is given to the approved regulator (but this does not preclude earlier payment at the initiative of the approved regulator).

(5) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

7 Variation of penalty

(1) The Scottish Ministers may, on an application from an approved regulator received within 21 days beginning with the day on which the decision notice is given to the approved regulator—
Legal Services (Scotland) Bill
Schedule 4—Financial penalties

(a) vary the date by which the penalty requires to be paid,

(b) allow for the penalty to be paid by—
   (i) instalments (if not already allowed), or
   (ii) different instalments (if allowed).

(2) Where an application is made under sub-paragraph (1), no part of the penalty is required to be paid before the Scottish Ministers notify the approved regulator of their determination of the application.

Appeal

8 (1) An approved regulator on which a financial penalty is imposed under paragraph 2 may appeal to the Court of Session against the penalty on one or more of the appeal grounds.

(2) On an appeal under this paragraph—
   (a) the Court may—
      (i) uphold, vary or quash the decision that is the subject of the appeal,
      (ii) make such further order as is necessary in the interests of justice,
   (b) the Court’s determination is final.

Appeal grounds

9 The grounds for an appeal under paragraph 8 are—
   (a) that, in the circumstances of the case—
      (i) it was not appropriate to impose the penalty, or
      (ii) the amount of the penalty is excessive,
   (b) that the date specified under paragraph 6(3)(c)(iii) is unreasonable,
   (c) that the other arrangements for payment are unreasonable, including—
      (i) the absence of any provision for payment by instalments, or
      (ii) any provision for payment by instalments that has been allowed,
   (d) that—
      (i) the penalty was imposed otherwise than in accordance with this schedule, and
      (ii) the approved regulator’s interests have been substantially prejudiced as a result.

Time for appeal

10 (1) An appeal under paragraph 8 is to be made—
   (a) within the 3 months beginning with the day on which the decision notice is given to the approved regulator, or
   (b) where the ground of appeal is referable to something done under paragraph 7(1), within the 3 months beginning with the day on which the approved regulator is notified of the thing done.
(2) Where an appeal is made under paragraph 8, no part of the penalty requires to be paid before the appeal is determined or withdrawn.

Interest

11 (1) If the whole or part of a penalty is not paid as required in accordance with this schedule the unpaid amount carries interest at the prescribed rate.

(2) Here, the prescribed rate is the rate that is prescribed in regulations made by the Scottish Ministers for the purpose of this paragraph.

Default

12 (1) Sub-paragraph (2) applies where the whole or part of a penalty is not paid as required in accordance with this schedule.

(2) The Scottish Ministers may recover from the approved regulator, as a debt due to them—

(a) the penalty or (as the case may be) the part of it, and

(b) the interest that it carries.

SCHEDULE 5
(introduced by section 29(3))

AMENDMENT OF AUTHORISATION

Application

1 This schedule applies where the Scottish Ministers are satisfied that—

(a) an act or omission of an approved regulator (or a series of acts or omissions) has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, and

(b) the matter cannot be addressed adequately by the Scottish Ministers taking any of the measures mentioned in section 29(4)(a) to (d).

Power to amend

2 (1) The Scottish Ministers may amend the authorisation of the approved regulator (given under section 7).

(2) In particular, the Scottish Ministers may—

(a) impose restrictions as respects the authorisation by reference to particular categories of—

(i) licensed provider,

(ii) legal services,

(b) alter the duration of the authorisation (including by imposing a limit of time),

(c) impose new conditions, or vary any existing conditions, to which the authorisation is subject.
Notice of intention

3 (1) Before amending the approved regulator’s authorisation, the Scottish Ministers must give it a notice (a “notice of intention”) of their intention to do so.

(2) The notice of intention must—

(a) state that the Scottish Ministers intend to amend the approved regulator’s authorisation,
(b) specify the proposed amendments to the authorisation, and
(c) explain why they are satisfied as mentioned in paragraph 1.

Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed amendments.

(2) The Scottish Ministers must—

(a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,
(b) give a copy of the notice of intention to—
   (ii) the OFT,
   (iii) such other person or body as they consider appropriate,
(c) after the expiry of the period for representations—
   (i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,
   (ii) consult them accordingly in relation to the proposed amendments.

(3) When consulted under sub-paragraph (2)(c), the Lord President is to—

(a) give the Scottish Ministers such advice in respect of the proposed amendments as the Lord President thinks fit,
(b) in deciding what advice to give, have regard (in particular) to the likely impact of the proposed amendments on the operation of the Scottish courts.

(4) For the purpose of sub-paragraph (3)—

(a) the approved regulator, or
(b) any other person who holds information relevant in relation to proposed amendments,

must provide the Lord President with such information about the proposed amendments (or their likely consequences) as the Lord President may reasonably require.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with amending the authorisation.
(2) The Scottish Ministers must—
(a) give a notice of their decision (a “decision notice”) to the approved regulator,
(b) give reasons in the decision notice for their decision,
(c) notify the consultees under paragraph 4(2)(c) of their decision,
(d) publish the decision notice in such manner as they consider most appropriate for
bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to amend the authorisation, the decision notice must
specify the date from which the amendments are to be effective (which may be the date
on which that notice is given).

(4) For the purposes of this schedule, relevant persons or bodies include—
(a) other approved regulators,
(b) providers of legal services,
(c) organisations representing the interests of consumers,
(d) members of the public.

SCHEDULE 6
(introduced by section 29(3))
RESCISSION OF AUTHORISATION

Application
1 This schedule applies where the Scottish Ministers are satisfied that—
(a) an act or an omission of an approved regulator (or a series of acts or omissions)
has had, or is likely to have, an adverse impact on the observance of any of the
regulatory objectives, and
(b) the matter cannot be adequately addressed by the Scottish Ministers taking any of
the measures mentioned in section 29(4)(a) to (e).

Power to rescind
2 The Scottish Ministers may rescind the authorisation of the approved regulator (given
under section 7).

Notice of intention
3 (1) Before rescinding the approved regulator’s authorisation, the Scottish Ministers must
give it a notice (a “notice of intention”) of their intention to do so.
(2) The notice of intention must—
(a) state that the Scottish Ministers intend to rescind the approved regulator’s
authorisation,
(b) explain why they are satisfied as mentioned in paragraph 1.
Consultation

4 (1) The approved regulator has 28 days beginning with the date of receipt of the notice of intention (or such longer period as the approved regulator and the Scottish Ministers may agree) to make representations to the Scottish Ministers about the proposed rescission.

(2) The Scottish Ministers must—
   (a) publish the notice of intention in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body,
   (b) give a copy of the notice of intention to—
       (i) the OFT,
       (ii) such other person or body as they consider appropriate,
   (c) after the expiry of the period for representations, the Scottish Ministers must—
       (i) give the recipients under paragraph (b) a copy of any representations received from the approved regulator,
       (ii) consult them accordingly in relation to the proposed rescission.

Decision

5 (1) The Scottish Ministers must have regard to any representations made to them by the approved regulator, or any consultee under paragraph 4(2)(c), when deciding whether to proceed with rescinding the authorisation.

(2) The Scottish Ministers must—
   (a) give a notice of their decision (a “decision notice”) to the approved regulator,
   (b) give reasons in the decision notice for their decision,
   (c) notify the consultees under paragraph 4(2)(c) of their decision,
   (d) publish the decision notice in such manner as they consider most appropriate for bringing it to the attention of any relevant person or body.

(3) If the Scottish Ministers decide to rescind the authorisation, the decision notice must—
   (a) specify the date from which the rescission is to be effective (which may be the date on which that notice is given),
   (b) state, for the purpose of section 29(5), whether or not the approval of the approved regulator (given under section 6) is preserved.

(4) For the purposes of this schedule, relevant persons or bodies include—
   (a) other approved regulators,
   (b) providers of legal services,
   (c) organisations representing the interests of consumers,
   (d) members of the public.
SCHEDULE 7
(introduced by section 30(2))

SURRENDER OF AUTHORISATION

Application

1 This schedule applies where an approved regulator proposes to surrender its authorisation under section 30.

Surrender notice

2 (1) The approved regulator must give the Scottish Ministers a notice (a “surrender notice”) of its proposal to do so.

2 (2) The notice must—
(a) specify the approved regulator’s reasons for proposing to surrender its authorisation,
(b) be published (by the approved regulator) in such manner as the approved regulator considers most appropriate for bringing it to the attention of any relevant person or body.

Consultation

3 (1) The Scottish Ministers must, as soon as reasonably practicable after receipt of a surrender notice—
(a) send a copy of the notice to—
(i) the Lord President,
(ii) the OFT,
(iii) each of the approved regulator’s licensed providers,
(iv) such other person or body as they consider appropriate,
(b) consult them accordingly.

3 (2) The consultees under sub-paragraph (1) have 6 weeks beginning with the day on which they are sent the copy of the notice to make representations to the Scottish Ministers about the proposed surrender.

3 (3) When consulted under sub-paragraph (1), the Lord President is to—
(a) give the Scottish Ministers such advice in respect of the proposed surrender as the Lord President thinks fit,
(b) in deciding what advice to give, have regard to the likely impact of the proposed surrender on the operation of the Scottish courts.

3 (4) For the purpose of sub-paragraph (3)—
(a) the approved regulator, or
(b) any other person who holds information relevant to the proposed surrender,
must provide the Lord President with such information about the proposed surrender (or its likely consequences) as the Lord President may reasonably require.
Decision

4 (1) The Scottish Ministers must, within 28 days beginning with the day after the period mentioned in paragraph 3(2) ends, decide whether to agree to the proposed surrender.

(2) In making their decision, the Scottish Ministers must have regard to—

(a) any advice given to them by the Lord President,

(b) any representations made to them by the other consultees under paragraph 3(1),

(c) any further representation made to them by the approved regulator.

5 (3) The Scottish Ministers must—

(a) send to the approved regulator a notice (a “decision notice”) of their decision,

(b) notify the consultees under paragraph 3(1) of their decision,

(c) publish the decision notice in such manner as they consider appropriate for bringing it to the attention of any relevant person or body.

6 (4) For the purpose of this schedule, relevant persons or bodies include—

(a) other approved regulators,

(b) providers of legal services,

(c) organisations representing the interests of consumers,

(d) members of the public.

Date of surrender

5 (1) If the Scottish Ministers agree to the surrender of the authorisation, the decision notice must specify the date from which the surrender is to be effective (which must be within the period of 6 months beginning with the date of the decision notice).

(2) That date—

(a) is to be fixed having taken account of the wishes of the approved regulator,

(b) must allow a reasonable amount of time for the carrying out of such transitional arrangements as are necessary in connection with the surrender.

SCHEDULE 8

(introduced by section 52(1))

INVESTORS IN LICENSED PROVIDERS

Initial notification requirements

1 (1) An applicant for a licence (issuable in accordance with an approved regulator’s licensing rules) must give the approved regulator the standard information about non-solicitor investors when applying for the licence.

(2) The applicant must also—

(a) give (as soon as practicable) the approved regulator any standard information subsequently coming to light,
(b) notify (as soon as practicable) the approved regulator of any other change in the standard information.

(3) The standard information is—
(a) the name and other details of—
(i) every non-solicitor investor in the applicant,
(ii) any other person whom the applicant expects to be a non-solicitor investor in the applicant at such time as the licence may be issued,
(b) in each case, a description of the nature of the person’s interest.

2 (1) It is an offence for a person to fail to comply with a requirement imposed on the person by paragraph 1.

(2) A person who commits an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) It is a defence for a person prosecuted for an offence under sub-paragraph (1) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

Continuing notification requirements

3 (1) This paragraph applies where—
(a) a person takes, or proposes to take, a step to acquire such an interest as would result in the person becoming a non-solicitor investor in a licensed provider,
(b) a non-solicitor investor takes, or proposes to take, a step which would—
(i) significantly change the investor’s interest in the licensed provider, or
(ii) acquire an additional kind of interest in the licensed provider, or
(c) a person becomes a non-solicitor investor in a licensed provider—
(i) as a new investor, or
(ii) because the person, having ceased to be entitled to practise as mentioned in section 52(4)(b) (while remaining as an investor), comes within the definition there.

(2) In a case falling within sub-paragraph (1)(a) or (b), the licensed provider must (as soon as practicable) notify the approved regulator of the proposal including by giving it—
(a) the name and other details of the person concerned,
(b) the details of the interest concerned.

(3) In a case falling within sub-paragraph (1)(c)(i), the licensed provider must (as soon as practicable) notify the approved regulator of the acquisition including by giving it the name and other details of the investor.

(3A) In a case falling within sub-paragraph (1)(c)(ii), the licensed provider must (as soon as practicable) notify the approved regulator of the fact.

(4) Sub-paragraph (3) does not apply where sub-paragraph (2) has been complied with in relation to the acquisition.

(5) It is an offence for a person to fail to comply with a requirement imposed on the person by sub-paragraph (2), (3) or (3A).
(6) A person who commits an offence under sub-paragraph (5) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7) It is a defence for a person prosecuted for an offence under sub-paragraph (5) to show that at the relevant time the person had no knowledge, and could not reasonably be expected to have knowledge, of the information in question.

**Exemption from notification requirements**

3A (1) An approved regulator may in relation to any exemptible investor in a licensed provider waive the requirements to give it information (or notification) under paragraphs 1 and 3.

(2) Licensing rules must explain—

(a) any circumstances in which the approved regulator proposes to rely on sub-paragraph (1),

(b) any threshold below the percentage specified in subsection (3) by reference to which it proposes to rely on sub-paragraph (1),

(c) where it proposes to rely on sub-paragraph (1), its reasons.

(3) In sub-paragraph (1), an “exemptible investor” is (as the case may be)—

(a) an investor who has less than a 10% stake in the total ownership or control of the licensed provider, or

(b) a person whose intended acquisition of an interest in the licensed provider is of less than a 10% stake in the total ownership or control of the licensed provider.

**Requirement to notify investors**

4 (1) Where an applicant gives information under paragraph 1, the applicant must notify any person whom the information concerns—

(a) of—

(i) the making of the application, and

(ii) the fact that the identity of the person has been disclosed to the approved regulator,

(b) of the effect of paragraph 5.

(2) Where a licensed provider gives notification under paragraph 3(2) or (3), the licensed provider must notify any person whom the notification concerns—

(a) of—

(i) the giving of that notification, and

(ii) the fact that the identity of the person has been disclosed to the approved regulator,

(b) of the effect of paragraph 5.

(3) It is an offence for a person to fail without reasonable excuse to comply with a requirement imposed on the person by sub-paragraph (1) or (2).

(4) A person who commits an offence under sub-paragraph (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
Approved regulator may obtain information

5 (1) An approved regulator may require a person whose identity has been disclosed to it under paragraph 1 or 3 to provide it with such documents and other information as it may reasonably require.

5 (2) It is an offence for a person who is required to provide information by virtue of sub-paragraph (1)—
   (a) to fail without reasonable excuse to comply with the requirement, or
   (b) knowingly to provide false or misleading information.

(3) A person who commits an offence under sub-paragraph (2) is liable—
   (a) on summary conviction to a fine not exceeding the statutory maximum,
   (b) on conviction on indictment to a term of imprisonment not exceeding 2 years or a fine (or both).
SCHEDULE 9
(introduced by section 101(4))

INDEX OF EXPRESSIONS USED

<table>
<thead>
<tr>
<th>Whole Act expressions</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>5  regulatory objectives</td>
<td>all in Part 1</td>
</tr>
<tr>
<td>5  professional principles</td>
<td></td>
</tr>
<tr>
<td>5  legal services</td>
<td></td>
</tr>
<tr>
<td>10 the 1980 Act, the 1986 Act, the 1990 Act &amp; the 2007 Act</td>
<td>all in section 101(1) to (3)</td>
</tr>
<tr>
<td>10 advocate</td>
<td></td>
</tr>
<tr>
<td>10 conveyancing practitioner</td>
<td></td>
</tr>
<tr>
<td>10 executry practitioner</td>
<td></td>
</tr>
<tr>
<td>15 Faculty</td>
<td></td>
</tr>
<tr>
<td>15 incorporated practice</td>
<td></td>
</tr>
<tr>
<td>15 Law Society</td>
<td></td>
</tr>
<tr>
<td>15 litigation practitioner</td>
<td></td>
</tr>
<tr>
<td>15 Lord President</td>
<td></td>
</tr>
<tr>
<td>20 OFT</td>
<td></td>
</tr>
<tr>
<td>20 professional association or body</td>
<td></td>
</tr>
<tr>
<td>20 registered European lawyer</td>
<td></td>
</tr>
<tr>
<td>20 registered foreign lawyer</td>
<td></td>
</tr>
<tr>
<td>20 solicitor</td>
<td></td>
</tr>
</tbody>
</table>
## Part 2 expressions

<table>
<thead>
<tr>
<th>Expression</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approved regulator (of licensed provider)</td>
<td>section 5</td>
</tr>
<tr>
<td>approval and authorisation (of approved regulator)</td>
<td>sections 6 and 7</td>
</tr>
<tr>
<td>designated person (within licensed provider)</td>
<td>section 47</td>
</tr>
<tr>
<td>Head of Legal Services, Head of Practice and Practice Committee (of licensed provider)</td>
<td>sections 39 to 41</td>
</tr>
<tr>
<td>internal governance arrangements (of approved regulator)</td>
<td>section 20</td>
</tr>
<tr>
<td>investor, non-solicitor investor and solicitor investor (in licensed provider)</td>
<td>section 52</td>
</tr>
<tr>
<td>licensed legal services provider (and licensed provider)</td>
<td>section 36</td>
</tr>
<tr>
<td>licensing and practice rules (in regulatory scheme)</td>
<td>sections 10 and 14</td>
</tr>
<tr>
<td>regulatory and representative functions (of approved regulator)</td>
<td>section 23</td>
</tr>
<tr>
<td>regulatory scheme (of approved regulator)</td>
<td>section 8</td>
</tr>
</tbody>
</table>

## Part 3 expressions

<table>
<thead>
<tr>
<th>Expression</th>
<th>Relevant provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>approving body (of confirmation agent)</td>
<td>section 73</td>
</tr>
<tr>
<td>approving body (of will writer)</td>
<td>section 81B</td>
</tr>
<tr>
<td>confirmation agent and confirmation services</td>
<td>section 72</td>
</tr>
<tr>
<td>regulatory scheme (of approving body)</td>
<td>sections 75 and 81D</td>
</tr>
<tr>
<td>will writer and will writing services</td>
<td>section 81A</td>
</tr>
</tbody>
</table>
Legal Services (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to allow and to make provision for regulating the supply of certain legal services by licensed entities; to extend rights to obtain confirmation to the estates of deceased persons; to regulate will and other testamentary writing by non-lawyers; to make provision concerning the Law Society of Scotland and the Faculty of Advocates and for the professional arrangements to which solicitors and advocates are subject; to allow court rules to permit the making of oral submissions by lay representatives in civil cases; and for connected purposes.

Introduced by: Kenny MacAskill
On: 30 September 2009
Bill type: Executive Bill