Legal Services (Scotland) Bill

Bill Number: SP Bill 30
Introduced on: 30 September 2009
Introduced by: Kenny MacAskill MSP (Government Bill)
Passed: 6 October 2010
Royal Assent: 9 November 2010

Passage of the Bill

The Legal Services (Scotland) Bill [SP Bill 30] was introduced in the Parliament on 30 September 2009. The Justice Committee was designated as the lead committee at stage 1. The Committee published its stage 1 report on 12 March 2010, with the stage 1 debate on the general principles of the Bill taking place on 28 April 2010. Stage 2 proceedings commenced on 8 June 2010 and ended on 29 June 2010. Over 400 amendments were lodged at Stage 2. A further 156 amendments were lodged at stage 3. The Bill was passed following the stage 3 parliamentary debate on 6 October 2010.

The passage of the Bill coincided with a period of robust discussion and debate within the legal profession about the issue of alternative business structures (ABS) and, in particular, external ownership of law firms. The Law Society eventually adopted a compromise policy on ABS, supporting majority ownership of law firms remaining with solicitors, a position that was ultimately incorporated into the legislation.

Purpose and objectives of the Bill

The Bill concerns the provision and regulation of legal services in Scotland. The principal effect of the Bill will be 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. The Bill aims to enable new forms of service provision, improve efficiency and innovation within solicitors’ firms and allow access to different methods of capitalisation. In particular, the Bill seeks to enable solicitors to enter into business
relationships with non-solicitors, allows investment by non-solicitors in solicitors firms and allows external ownership of solicitors firms.¹

Provisions of the Bill

The Bill proposes various amendments to the Solicitors (Scotland) Act 1980 to remove restrictions on solicitors entering into business relationships with non-solicitors, to allow investment by non-solicitors and external ownership, and to create a regulatory framework in which the new types of business will operate (part 2).

Insofar as traditional business models will remain an option for those solicitors who choose to carry on practising within those structures, the Bill has been described as enabling rather than prescriptive (although the Bill will arguably alter the environment in which the whole legal profession operates).

The Bill will create a tiered regulatory framework in which the Scottish Government is responsible for approving and licensing regulators who, in turn, will regulate licensed legal services providers, as shown below:

- first, 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.

The Bill also includes:

- regulatory objectives and professional principles which will apply to legal professionals, whether or not they choose to join licensed providers (part 1)
- measures to reflect changes in the governance of the Law Society of Scotland (part 4)
- statutory codification of the framework for the regulation of the Faculty of Advocates (part 4)
- provisions enabling the Scottish Legal Aid Board to monitor the availability and accessibility of legal services in Scotland (part 4)
- a new regulatory complaint to be dealt with by the Scottish Legal Complaints Commission (part 2)

¹ The extent to which the Bill allows external ownership varied during the passage of the Bill.
• provisions to allow others to apply for rights to obtain confirmation to the estates of deceased persons (part 3)

• a new regulatory regime for will writers (part 3) (inserted at stage 2)

Parliamentary consideration

The impact of the reforms on consumers of legal services and/or the general public proved difficult to quantify at stage 1. It was generally acknowledged by those giving evidence to the Justice Committee that the main opportunities that the Bill would provide - certainly financially - would be for the larger law firms. It was also argued that the majority of traditional small or medium-sized law firms could, if they wished, remain largely unaffected by the Bill. However, some argued that the Bill would threaten small and rural firms.

Allowing multi-disciplinary practices would, it was argued, allow firms to bring a range of services, such as surveying, accountancy and legal services, under one umbrella. In addition, allowing ABS would enable firms to, for example, bring their office managers, accountants and paralegals into the partnership. However, evidence was also presented that multi-disciplinary practices could be formed under the existing business model.

The Bill (as introduced) did not seek to establish any restriction on the number of approved regulators that may exist at any one time. However, it was expected that only one or two bodies would apply (most probably the Law Society and the Institute of Chartered Accountants of Scotland). Some questioned how realistic it was, given Scotland’s small jurisdiction, to have more than one regulator. The Justice Committee was not persuaded that there would be any great benefit in having more than one or two approved regulators. At stage 3, amendments were agreed that would limit the number of approved regulators to no more than three.

Concerns were expressed about the Scottish Ministers having a direct role in regulating the legal profession and the extent to which this could, or could be seen to, undermine the independence of the legal profession. Some witnesses proposed a statutory advisory panel, whilst others proposed an enhanced role for the Lord President. The Justice Committee shared concerns about the extent of proposed ministerial involvement and the perceived threat to the independence of the legal profession. The Committee agreed, therefore, that the Lord President should have a greater role in the process of the approval of regulators. At stage 2, amendments were agreed to which provided an enhanced role for the Lord President in relation to certain aspects of the regulation of the legal profession.

One of the central policy intentions of the Bill was to allow outside investment in legal firms. In simple terms, the Bill sought to end the solicitor monopoly of the ownership of firms that provide legal services. The Bill, therefore, provides that one should not have to be a solicitor to own a firm that provides legal services and allows up to 100 per cent external ownership of law firms. This part of the Bill attracted the greatest degree of controversy and concern.
During the stage 1 debate, some discussion took place around the safeguards set out in the Bill in relation to outside investors, and a proposed co-ownership model with a 75:25 or 60:40 per cent split of lawyer to non-lawyer ownership was mooted. At stage 2, the Bill was amended to create a cap of 49 per cent ownership or control that an external investor could have over a licensed legal services provider. Although further discussion and refinement on this matter took place at stage 3, the compromise position was ultimately retained. Amendments had previously been accepted at stage 2 that would allow the Scottish Ministers to vary by regulation the percentage of external ownership permissible.

Concerns were expressed that the Bill would restrict the ability of not-for-profit organisations, such as citizens advice bureaux, to provide legal services to the public. At stage 2, amendments were agreed to allow solicitors employed by citizens advice bodies to give advice directly to third parties (a practice that is not currently permitted) and to exempt citizens advice bodies from the new regulatory regime.

Will writing is not a reserved activity under the Solicitors (Scotland) Act 1980. In other words, unqualified and unregulated individuals can provide will writing services to the public. Subsequent to the Bill’s introduction, the Minister wrote to the Committee to inform it of a proposed amendment to allow for the introduction of regulation of will writers. At stage 2, amendments were passed to provide a regulatory framework for non-lawyer will writers and to prevent any unregulated non-lawyers from drafting wills for fee, gain or reward. At stage 3, non-executive amendments were lodged which would allow the Scottish Ministers to make regulations for the regulation of estate administration. These amendments were not agreed to.

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. Following the introduction of the Bill, the Minister advised the Committee that he was considering whether those without a right of audience (such as McKenzie friends) should be able to address the court in certain circumstances. At stage 2, amendments were passed to enable a McKenzie friend to address the court on behalf of a party litigant in circumstances in which the court considers it appropriate to do so.

Richard Hough
Senior Researcher