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 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

\(^\text{1}\) “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/
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statutory basis for the Society; the solicitors’ right to practice; and the conduct, discipline, professional practice, complaints 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.

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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:3

“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.

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5 http://www.legal-services-review.org.uk/content/report/report-chap.pdf
24. “Which?” submitted a super-complaint\(^7\) 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,\(^8\) 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,\(^9\) 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”\(^10\), 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.


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\(^7\) A super-complaint can be made to the OFT when a designated consumer body thinks that a feature, or combination of features, of a market is significantly harming consumers’ interests.


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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;
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- 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.

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.

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.

Part 5 contains general and ancillary provisions.

Schedules 1 to 6 set out how various powers and sanctions open to 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.
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 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, 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.”

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

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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/jt200506/jtselect/jtlegal/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.

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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. 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.

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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
licensed providers are acting in a way which is compatible with the regulatory objectives, professional principles and the approved regulator’s regulatory scheme. At the same time, as discussed at paragraphs 82 to 84, the methods of obtaining this assurance must be proportionate and not unduly burdensome on the firms being regulated.

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\(^\text{23}\) 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

• 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.24

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.

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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.
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.

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**

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.

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.

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.

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.

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.

However, in order to be a licensed provider, the entity must have at least one solicitor.

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 ICA S 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 rule \(^{25}\) 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 underpinning 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.
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

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.

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.

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%.

The proposal that the regulatory and representative functions should be separated was less widely supported.

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.

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.

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

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independent of any other person or interest and have at least 50% lay membership.\textsuperscript{29} The committee must have a lay convener 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.

\textsuperscript{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

POLICY MEMORANDUM


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