Stage 3 proceedings on the Legal Services (Scotland) Bill are expected to take place in October 2010.

This briefing considers some key recommendations made by the Justice Committee in its Stage 1 Report, the Scottish Government’s response to those recommendations and other issues raised during Stage 1 proceedings. The main Stage 2 amendments, as well as other relevant developments since the Bill was introduced in September 2009, including a summary of the ongoing debate within the legal profession itself, are also considered.
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INTRODUCTION

The Scottish Government introduced the Legal Services (Scotland) Bill on 30 September 2009. The Bill concerns the provision and regulation of legal services in Scotland. The Policy Memorandum which accompanies the Bill states that the legal profession in Scotland is facing significant challenges, including competition from English firms entering the Scottish market and the effects of the economic downturn. The Bill aims to enable new forms of service provision, improve efficiency and innovation within solicitors’ firms and allow access to different methods of capitalisation. In particular, the Bill enables solicitors to enter into business relationships with non-solicitors, allows investment by non-solicitors in solicitors firms and allows external ownership of solicitors firms.

The Bill proposes a system of licensed legal services providers (“LLSPs”), overseen by regulators approved and licensed by the Scottish Government (“approved regulators”). The Bill also includes related measures, for example, to:

- support the modernisation of the governance of the Law Society of Scotland
- give the Scottish Legal Aid Board the duty of monitoring the availability and accessibility of legal services.

Further background to the introduction of the Bill is provided in the Justice Committee’s Stage 1 Report (Scottish Parliament Justice Committee 2010a, paras 5 to 26) and in the SPICe Briefing on the Bill (as introduced).

The Justice Committee (“the Committee”) was designated as the lead committee at Stage 1 (consideration of general principles). The Committee’s Stage 1 Report was published on 12 March 2010. The Committee agreed, albeit with some reservations, to recommend to the Parliament that the general principles of this Bill be agreed to. The Scottish Government provided a written response to the Stage 1 Report on 16 April 2010 (Ewing 2010). The Bill completed Stage 1 with the Stage 1 debate on 28 April 2009. The general principles of the Bill were agreed to, by division, by Parliament (For 92, Against 2, Abstentions 0) (Scottish Parliament 2010).

Stage 2 (detailed consideration and amendment of the Bill) was carried out by the Justice Committee over 4 committee meetings in June 2010 and was completed on 29 June 2010.

Stage 3 proceedings are scheduled to take place towards in October 2010.

STAGE 1
The Committee issued a call for written evidence in October 2009. Thirty written submissions were received by the Committee (these submissions are available on the Justice Committee’s website). Between December 2009 and January 2010, the Committee took oral evidence from a range of stakeholders, including the Office of Fair Trading (OFT), the Faculty of Advocates (the Faculty), the Society of Solicitor Advocates, the Law Society of Scotland (the Law Society), the Scottish Law Agents Society (SLAS), the WS Society, the Scottish Legal Aid Board (SLAB), the Institute of Chartered Accountants of Scotland (ICAS), Consumer Focus Scotland, the Minister for Community Safety (“the Minister”) and Scottish Government officials.

The following paragraphs consider some of the main issues that arose during Stage 1 consideration of the Bill and the Scottish Government’s response to these issues (for full
consideration of these issues and details of all the evidence taken, see the Committee’s [Stage 1 Report](#).

**Impact of the Bill**

Aside from a general assumption that increased competition will drive down prices and increase efficiency, and that one-stop shops will offer greater convenience to the consumer, the impact of the reforms on consumers of legal services and/or the general public has proved difficult to quantify (see, for example, [Scottish Parliament Justice Committee 2010a](#), para 55). There is certainly little, if any, tangible evidence of public demand for reform of the legal services market along the lines proposed. Nor has much evidence been presented to suggest that the reforms will have a significant direct impact on consumers of legal services (see, for example [Scottish Parliament Justice Committee 2010a](#), para 41). On the other hand, the Committee recognised that, without the Bill, Scottish law firms may be less able than their competitors to take advantage of the opportunities arising in areas of law not reserved to Scottish solicitors (see, for example [Scottish Parliament Justice Committee 2010a](#), para 102).

It was generally acknowledged by those giving evidence to the Committee (including the Minister and the Law Society) that the main opportunities that the Bill would provide—certainly financially—would be for the larger firms. It was also argued (including by the Minister) that the majority of traditional small or medium-sized firms could, if they wished, remain largely unaffected by the Bill (the Bill has been described as “permissive” or “enabling”, rather than prescriptive). However, others argued that the Bill would threaten small and rural firms. As Robert Brown MSP remarked during the Stage 1 Debate, “the bill has different implications for different parts of the legal profession” ([Scottish Parliament 2010](#), col 25766) but “the reality is that wider arrangements for funding ownership and partnership with other professions will affect everyone” ([Scottish Parliament 2010](#), col 25767).

It has also been suggested that, if the Bill is not passed, the Scottish legal profession will face some very real risks because, while solicitors in England and Wales will, through the Legal Services Act 2007, be entitled to enter into alternative business structures, solicitors in Scotland will not ([Scottish Parliament Justice Committee 2010a](#), para 93).

**Alternative business structures, one-stop shops and multi-disciplinary practices**

Allowing multi-disciplinary practices will, it is argued, allow firms to bring a range of services, such as surveying, accountancy and legal services, under one umbrella. In addition, allowing Alternative Business Structures (ABS) will enable firms to, for example, bring their office managers, accountants and paralegals into the partnership. However, the Committee also heard evidence that multi-disciplinary practices could be formed under the current business model, so long as solicitors retain formal ownership of the business (see, for example, the evidence of Prof. Alan Paterson, [Scottish Parliament Justice Committee 2009](#), col 2452). The Justice Committee concluded that “although increased competition in the legal services market could bring about gains for consumers, increased competition can be seen as a risk for local or high street firms and, in the longer term, for the consumer interest as a result of the diminished competition, if banks or supermarkets enter the legal services market” ([Scottish Parliament Justice Committee 2010a](#), para 56).

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1 At Stage 2, Robert Brown reiterated this view, saying: “In technical terms it [the Bill] is [permissive], but in practical terms, it is likely to alter substantially the environment in which the legal profession operates” ([Scottish Parliament 2010c](#), col 3272).
Regulation of LLSPs and the role of the Lord President

Part 2 of the Bill establishes the regulatory framework within which ‘Approved Regulators’ and ‘Licensed Legal Services Providers’ will be expected to operate. The Bill provides that the Scottish Ministers will be responsible for approving applications to be an approved regulator but, before doing so, must consult with the Lord President, the OFT and other organisations representing the consumer interest in Scotland, and any other person or body that the Scottish Ministers consider appropriate.

The Bill does not propose any restriction on the number of approved regulators that may exist at any one time (although it is expected that only one or two bodies will apply, most probably the Law Society and ICAS). Some respondents to the consultation (including Walter Semple and Catriona Walker) questioned how realistic it is, given Scotland’s small jurisdiction, to have more than one regulator. The Justice Committee was not persuaded that there would be any great benefit in having more than one or two approved regulators. The Committee was particularly concerned about the prospect of bodies external to Scotland becoming approved regulators and sought assurances from the Scottish Government on this point (Scottish Parliament Justice Committee 2010a, para 123).

In the case of a body from outside Scotland applying to become an approved regulator, the Scottish Government responded by noting that any applicant would have to demonstrate to the Scottish Ministers that they have the appropriate skills and knowledge necessary to effectively regulate legal services in Scotland (Ewing 2010). In relation to regulation more generally, the Scottish Government indicated that it thought it unlikely that many bodies will feel it is worthwhile or sustainable to apply to become an approved regulator (Ewing 2010).

It was observed during the Stage 1 Debate that the faults of light-touch regulation, and the acceptance into that market of those with no relevant background, in relation to the financial services industry contributed to the difficulties experienced by that sector, and that such mistakes should not be repeated in relation to the legal services market (see, for example, Scottish Parliament 2010, col 25766).

Independence of the legal profession and role of the Scottish Ministers

The Bill (unlike the approach taken by the Legal Services Act 2007 for England and Wales) does not create a “super regulator” with responsibility for the oversight of front-line regulators. The creation of a super regulator was generally considered to be unnecessarily expensive, given the small size of Scotland as a legal jurisdiction. However, the absence of a super regulator means that the Scottish Ministers are to exercise the role of oversight similar to that of the super regulator in England and Wales. For example, Schedules 1 to 6 to the Bill give the Scottish Ministers the power to set performance targets for authorised regulators, give directions to them, censure them, impose financial penalties on them or amend or rescind their authorisation. This has given rise to concerns about the Scottish Ministers having a direct role in regulating the legal profession and the extent to which this could, or could be seen to, undermine the independence of the legal profession.

In order to address concerns about the independence of the legal profession and the role of Scottish Ministers, some witnesses (including Which?, the OFT and Consumer Focus Scotland) proposed a statutory advisory panel, whilst others (including the Law Society) proposed an enhanced role for the Lord President. Although the Justice Committee did not consider that the case had been made for establishing a new super regulator, it shared concerns about the extent of proposed ministerial involvement and the perceived threat to the independence of the legal profession. It agreed, therefore, that the Lord President should have a greater role in the process of the approval of regulators (Scottish Parliament Justice Committee 2010a, para 162).
In the absence of a suitable approved regulator, section 35 provides that the Scottish Ministers may, by regulations, either establish a new regulator or set themselves up as an approved regulator, “where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by the licensed providers”. The Committee agreed with the Law Society that the Bill should detail when this provision might be used; that that there should be an obligation on the Scottish Ministers to consult on any regulations made under this section; and that the use of any such power should be for as short a period as is practicable (Scottish Parliament Justice Committee 2010a, para 192). In its response to the Committee, the Scottish Government indicated that it had given this section further consideration and was drafting an amendment for Stage 2 which would emphasise the “last resort” nature of this power (Ewing 2010).

With regard to the role of the Scottish Ministers in overseeing the regulatory system, the Scottish Government’s response indicated that it considered this to be an appropriate and proportionate solution. The Scottish Government indicated that it had listened to those who had called for the Lord President to have a role equal to that of the Scottish Ministers, particularly in relation to this approval process, and to those consumer bodies who are against such an enhanced role, and indicated that it was considering an amendment at Stage 2 to give the Lord President a greater role in the process of approving approved regulators (Ewing 2010).

Compensation fund

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

The Bill does not require licensed legal services providers to contribute to a guarantee fund, which would protect consumers in the event of the misappropriation of funds by dishonest practitioners. The Committee expressed surprise that this important area of consumer protection was not included in the Bill (Scottish Parliament Justice Committee 2010a, para 186). The Scottish Government, in its response to the Justice Committee’s Stage 1 Report, indicated its intention to insert appropriate provisions to give such protection to consumers at Stage 2 (Ewing 2010).

Employment of solicitors by charitable bodies

The Committee noted that section 36 of the Bill imposes a restriction on eligibility to be a LLSP, as the entity in question must provide legal services to the public for “a fee, gain or reward” (whereas charitable providers would not generally seek payment for their services). The Committee expressed concern at this restriction, suggesting that it contradicted the Bill’s main aim of expanding the business models open to those providing legal services (Scottish Parliament Justice Committee 2010a, para 52). In particular, the Committee was concerned that it would restrict the ability of not-for-profit organisations, such as citizens advice bureaux, to provide legal services to the public.

In response to the Committee’s Stage 1 Report, the Scottish Government emphasised that its intention when drafting the Bill was to ensure that charitable bodies were not burdened by unnecessary regulation and cost. However, on the basis of the concerns raised during the Committee’s evidence sessions, the Scottish Government indicated that it would give this issue further consideration (Ewing 2010).
Outside investment/ownership

One of the central policy intentions of the Bill is to allow outside investment in legal firms. In simple terms, the Bill seeks to end the solicitor monopoly of the ownership of firms that provide legal services. The Bill, therefore, provides that one should not have to be a solicitor to own a firm that provides legal services. It has been observed that this part of the Bill has attracted the greatest degree of controversy and concern (Scottish Parliament Justice Committee 2010c, col 3279).

Section 49 requires that an approved regulator must satisfy itself as to the fitness of every outside investor in a LLSP. Section 50 sets out factors as to fitness and gives examples of matters that would be deemed relevant when considering an outside investor’s fitness for having an interest in a LLSP. Section 51 requires that outside investors “behave properly”, which would include acting in a way that was compatible with the regulatory objectives and professional principles. These areas of the Bill provoked many comments in the evidence received by the Committee (see Scottish Parliament Justice Committee 2010a, paras 208 to 222).

The Committee recognised and had sympathy with much of the concern expressed around the fitness for involvement test, arguing that it must be as robust as possible. The Committee asked the Scottish Government to consider again the relevant provisions and sought assurances that the Bill would provide the highest levels of safeguards and checks (Scottish Parliament Justice Committee 2010a para 223). The Committee also expressed concern about how the sanctions applicable to outside investors would operate in practice and what the effects on the LLSP and its clients could be. In particular, the Committee recommended that consideration be given to a more targeted approach to sanctions for outside investors (Scottish Parliament Justice Committee 2010a, para 248). While the Scottish Government, in its response to the Committee, indicated that it believed the sanctions available to be robust, it also indicated that it was giving further consideration to introducing a sanction which could be used in relation to individual outside investors which would allow such individuals to be disqualified from acting in that capacity (Ewing 2010).

During the Stage 1 debate, some discussion took place around a proposed co-ownership model with, for example, a 75:25 or 60:40 per cent split of lawyer to non-lawyer ownership (see, Scottish Parliament 2010, col 25763 or 25771). Cathie Craigie MSP expressed concern that “felonious individuals, entrenched in organised crime or the drug trade, would invest and become the majority owners of legal practices” (Scottish Parliament 2010, col 25773).

In its response to the Committee’s Stage 1 report, the Scottish Government indicated that it had given the relevant sections of the Bill further consideration but that it believed that the safeguards set out in the Bill in relation to outside investors were robust and that changes were not necessary (Ewing 2010).

Regulation of will writers

Will writing is not a reserved activity under the Solicitors (Scotland) Act 1980. In other words, unqualified and unregulated individuals can provide will writing services to the public. Recently, bodies including the Law Society of Scotland and the Scottish Law Agents Society have called for non-lawyer will writers to be regulated. A Scottish Government consultation on regulating non-lawyer will writers took place in early 2010. The majority of respondents supported the introduction of regulation for non-lawyer will writers (Scottish Government 2010).

Subsequent to the Bill’s introduction, the Minister wrote to the Committee to inform it of the main Stage 2 amendments which were under consideration (Ewing 2009). One of these was an
amendment to allow for the introduction of regulation of will writers. The Committee agreed that unregulated will writing is an issue that requires to be addressed and welcomed the Minister’s undertaking to consider what amendments should be lodged at Stage 2 (Scottish Parliament Justice Committee 2010a, para 258).

Rights of audience – McKenzie friends

A “McKenzie friend” is a lay person who assists someone who is representing themselves in court. A McKenzie friend can help by giving advice, taking notes and providing moral support. Following the introduction of the Bill, the Minister advised the Committee that he was considering whether those without a right of audience (such as McKenzie friends) should be able to address the court in certain circumstances (Ewing 2009).

Advocates - participation in ABS and direct access

Faculty rules prevent advocates from entering into partnership with other advocates. All advocates are, in effect, self-employed sole practitioners. The Policy Memorandum indicated that, on balance, the Scottish Government was not persuaded to remove this restriction (provided transfer between the two branches of the profession can be a straightforward procedure which does not involve substantial detriment to the practitioner). The Faculty also opposed participation of its members in ABS. Others (including Consumer Focus Scotland) were not convinced that there was sufficient justification for retaining the current restrictions on advocates participating in ABS.

The Committee agreed with the Scottish Government that, in a jurisdiction the size of Scotland with a relatively small number of advocates, there is no need to impose ABS on the Faculty (Scottish Parliament Justice Committee 2010a, para 271).

Consumers do not currently have direct access to the services of advocates (instead they must generally employ an advocate through their solicitor). The Committee was not persuaded by arguments that there would be any benefit to the public in changing the current arrangements and did not, therefore, make any recommendation for such a change (Scottish Parliament Justice Committee 2010a, para 276).

Financial impact

The Committee noted concern in some quarters about the robustness of the estimates in the Financial Memorandum. The Committee shared some of these concerns and invited the Scottish Government to reconsider the figures used and to provide a clearer justification for the assumptions made in arriving at the illustrative costs (Scottish Parliament Justice Committee 2010a, para 305).

Regulation of no-win, no-fee companies

During the Stage 1 debate, Richard Baker MSP expressed disappointment that the Scottish Government did not agree to regulation of no-win, no-fee companies (Scottish Parliament 2010, col 25763). In response, the Minister indicated that the Scottish Government had “no fixed position on the matter” (Scottish Parliament 2010, 25787).
Stage 1 – the general principles

The Conservative Party indicated its support for the Bill, as did the Labour Party, albeit on the basis that there needed to be an extensive debate about the changes that were required at Stage 2. The Liberal Democrats supported the general principles of the Bill at Stage 1, but with the caveat that a “fundamental rethink is required of some of the details, which might involve substantial and radical surgery of the Bill at Stage 2” (Scottish Parliament 2010, col 25768). The Green Party members voted against the Bill at Stage 1.

DISCUSSION WITHIN THE SOLICITOR PROFESSION

Within the solicitor profession, there has been an ongoing discussion and debate about the proposed reforms. In particular, the legal profession has been divided over the issue of alternative business structures. The Law Society, in a letter to the Committee of 26 April 2010, summarised the position thus:

“there is no consensus in the profession on two important areas – external ownership; and solicitor participation in a minority role in an entity with other professional participants” (Clancy 2010).

The following paragraphs are intended to summarise the evolving position of the Law Society, both prior to and during the passage of the Bill (the Law Society’s website also provides a useful timeline of the development of the ABS policy at ABS updates and news).

In April 2008, the Law Society published a policy paper, the Public Interest: Delivering Scottish Legal Services, which argued that it was in the interests of the public and profession to permit ABS for a more modern and competitive legal service (Law Society 2007). The Society’s AGM approved the policy on 22 May 2008 (of those present at the AGM, the vote was 49 to 18 in favour, the result of the proxy vote was 801 to 132 in favour).

A Bill reference group, which included representatives from the Law Society, was set up in autumn 2008 to support policy development and inform public consultation. Minutes of the Group’s meetings can be found on the Scottish Government website (Legal Services (Scotland) Bill reference group papers).

At the Law Society’s Annual General Meeting on 28 May 2009, reports outlining work on alternative business structures were debated by delegates (Special and Annual General Meetings 2009).

On 25 March 2010, the Law Society held an SGM to debate a motion by the Scottish Law Agents Society to reverse the Law Society’s policy supporting alternative business structures. The SGM was adjourned for further debate on legal services reform. The proxy votes gathered prior to the SGM were carried forward to a reconvened SGM to be held on 21 April 2010 (SGM - 25 March 2010).

A Law Society referendum, the results of which were announced on 7 April 2010, supported the proposals in the Bill, albeit by a narrow margin (2,245 voted in favour of the introduction of ABS and 2,221 voted against). On a second question, 81% of votes were in favour of the Society applying to be a regulator of ABS if these arrangements are introduced. A total of 4,466 solicitors, 43% of the Society’s membership, the biggest turnout in a Society referendum, voted

2 The SGM held on 24 September 2009 considered matters unrelated to the Bill.
in the secret ballot ("Close vote in referendum for Law Society policy on alternative business structures").

At the reconvened SGM on 21 April 2010, members of the Law Society voted against the introduction of ABS. The vote, including proxy votes, was 1,817 in favour of the motion against ABS, with 1,290 against the motion and five abstentions. A compromise amendment, proposed by Richard Masters from McRigors, was rejected. The hand vote of those at the meeting was 74 in favour of the amendment proposed by Mr Masters, with 18 against, but the number of proxies carried the vote against ("Solicitors reject compromise on ABSs at Law Society SGM").

The SGM vote opposing the introduction of ABS was then put to the Society’s Council. The Council considered both this SGM vote and the narrow vote in favour of ABS in the referendum. On 30 April 2010, the Council of the Law Society of Scotland adopted a compromise policy on ABS. The new policy supported majority ownership (51%) of law firms remaining with solicitors or solicitors with other regulated professionals (replacing its original position to allow any form of ABS). The decision was informed by the recent referendum on ABSs and the SGM (which produced contrasting results) (Council Meeting, 30 April 2010, Alternative Business Structures).

At its Annual General Meeting on 27 May 2010, members of the Law Society voted for the compromise policy on ABS. However clear divisions remained within the profession, particularly on external investment. Two motions allowing forms of ABS were backed and a third motion opposing all forms of new structures was defeated. The first successful motion, proposed by the Law Society, suggested allowing 51% ownership of firms by solicitors or solicitors with other regulated professionals and 49% external capital. It was carried by 1,486 votes to 1,465, with one abstention. The other successful motion would permit 25% non-solicitor ownership of firms but no external investment. It was proposed by Mike Dailly, of Govan Law Centre in Glasgow. A total of 1,550 votes were cast in favour of the motion, with 1,404 against and three abstentions. The defeated motion, by the Scottish Law Agents Society (SLAS), was opposed by 1,503 votes, with 1,450 in favour and two abstentions ("Solicitors vote to allow minority non-lawyer ownership of law firms at Law Society AGM").

The Society’s Council later ratified the compromise policy that supports majority ownership, control and management of law firms remaining with solicitors or solicitors with other regulated professionals (Council Meeting, 27 May 2010, Alternative Business Structures).

**STAGE 2**

Stage 2 proceedings took place over 4 committee meetings in June 2010 and were completed on 29 June 2010.

Over 400 amendments were lodged at Stage 2 (including a number of amendments to amendments). The following paragraphs consider some of the main issues that were debated during Stage 2 proceedings. Those amendments that attracted less discussion and debate, including minor and consequential amendments, are not considered here (instead refer to the relevant Official Report).

Following the conclusion of Stage 2 proceedings, the Bill [As amended at Stage 2] was published.
Regulatory objectives and profession principles

The first group of amendments to be considered by the Justice Committee related to the regulatory objectives (Part 1 of the Bill). Amendment 219 by Robert Brown MSP adds a new regulatory objective of protecting and promoting “the interests of justice”. Amendment 220, also by Robert Brown would, in case of regulatory conflict, have prioritised the regulatory objectives in order of importance. Amendment 221, also by Robert Brown, amends the professional principles to refer to the “interests of justice”. These amendments were designed to strengthen the ethical content of the regulatory objectives and the professional principles (as set out in sections 1 and 2 of the Bill). Amendments 219 and 221 were opposed by the Minister but were agreed to (by division) by the Committee. Amendment 220 was not moved.

Government amendment 1 would have inserted a specific reference to keeping clients’ affairs confidential, within the statutory professional principle of acting in the clients’ best interests. This amendment was disagreed to (by division) by the Committee. Instead, the Committee agreed (by division) to amendment 224 by Richard Baker MSP, which adds a specific duty to “treat the affairs of their clients as confidential and act in conformity with professional ethics”.

Outside investment/ownership

Outside investment/ownership is one of the principal, and most controversial, issues in the Bill. A significant number of amendments on this issue were considered by the Committee.

Amendment 227 by Bill Butler MSP (and the other 77 consequential amendments in this group) related to outside investment/ownership of law firms. In particular, the effect of these amendments would be to limit to 25% non-solicitor ownership of a law firm. Those arguing against the amendments said that such a limit would be restrictive and incompatible with the policy intention of the Bill. Amendment 227 was disagreed to (by division) by the Committee and consequential amendments 228 and 229 (also by Bill Butler) were not moved (the other amendments in this group were subsequently withdrawn).

Two subsequent groups of Scottish Government amendments (“Definitional reference to non-solicitor investors” and “Exemption from fitness test”) sought to address concerns about criminals or other inappropriate individuals gaining control of licensed providers. These amendments were all agreed to.

A subsequent group of Scottish Government amendments (“Ban for improper behaviour”) and other consequential amendments are designed to provide more robust safeguards in respect of external ownership and, in particular, enable approved regulators to disqualify non-solicitor investors where they are deemed to have acted improperly. The amendments were agreed to.

A group of executive and non-executive amendments under the heading “Ownership of licensed providers” sought to resolve the degree of external ownership that should be permitted of a LLSP. Amendment 317 (by Robert Brown) would create a cap of 49% on the percentage of ownership or control that an external investor could have over a LLSP, limiting the extent to which law firms could be taken over by outside interests. The Minister argued that external ownership offered significant benefits to legal professionals and consumers and that 100% ownership by external investors would allow firms to develop innovative new business models, go into partnership with other professionals and raise external capital. Amendment 317 was agreed to (by division). Executive amendment 378 would allow Scottish Ministers to amend, by statutory instrument, the percentage of majority ownership that is permissible and repeal the threshold requirement. Amendment 378 was subsequently agreed to (without division).
Executive amendment 110 by the Minister, debated in a later group of amendments (“Outside investors”) relates to the fitness-for-involvement test. In particular, it provides that a non-solicitor’s associations (family, business or other associations) are relevant to that investor’s fitness for involvement in a LLSP. Amendment 110 was agreed to by the Committee. Amendment 113 by the Minister (in the same group of amendments) seeks to ensure that individuals are not able to avoid the fitness test by hiding behind a company or a number of companies. It provides that, where a non-solicitor investor is a body, it is relevant for the approved regulator to consider whether the person(s) who own and control that body would meet the fitness-for-involvement test if they were investing individually. An amendment to amendment 113 by Robert Brown (amendment 113A) widens the group of people who can be subjected to the fitness test from those persons “controlling the body’s affairs” to include those who have “substantial influence” in the body. Amendment 113 (as amended by 113A) was agreed to by the Committee.

Employment law services providers

The purpose of the amendments by Richard Baker in this group (“Employment law services providers”) was to introduce regulation for employment law services providers.

Those arguing against these amendments suggested that there was insufficient evidence of malpractice to justify a change to the regulatory regime at this stage. However, there was agreement amongst some Committee members that further discussions regarding the regulation of claims management companies more generally should take place in advance of Stage 3 proceedings. The amendments in this group were not agreed to.

Regulation of LLSPs and the role of the Lord President

Amendment 235 (“Approval of regulators”) by Robert Brown would require any regulatory body operating in Scotland to be based in Scotland. The Minister argued that a geographical restriction on the bodies that could act as approved regulators was neither necessary nor desirable. The amendment was disagreed to (by division).

Amendment 233 (“Approval of regulators”) by Robert Brown would require that fees charged for applying to be an approved regulator must not exceed the cost incurred by the Scottish Ministers in determining such an application. The Minister argued that this amendment was unnecessary and the amendment was not moved.

Scottish Government amendments 4 to 9 and 14 (“Role of the Lord President in approval of regulators”) provide an enhanced role for the Lord President in the consideration of applications to be an approved regulator, effectively giving the Lord President a veto over who could become an approved regulator. The Lord President’s veto would be limited to the matter of the applicant’s expertise in the provision of legal services (the Lord President could not, for example, veto an application on the grounds of financial viability). These amendments were agreed to.

Non-Executive amendments by Robert Brown and Bill Aitken sought to further enhance the role of the Lord President in relation to applications to be an approved regulator. Amendment 236 by Robert Brown, which requires the consent of the Lord President to the approval of regulators, was agreed to (by division). Amendment 244, also by Robert Brown, requires the Scottish Ministers to consult the Lord President before making new regulations regarding the approval of regulators. Amendment 244 was agreed to (by division). Bill Aitken’s amendments 238 and 240, which enhance the role for the Lord President in relation to approving regulators, were agreed to (by division). Robert Brown’s amendment 250, which was debated in a later group of
amendments (“Regulatory schemes”), enhances the role of the Lord President by requiring his/her consent in relation to any changes to a regulatory scheme. Amendment 250 was subsequently agreed to (by division). Robert Brown’s amendment 252, also debated in a later group (“Regulatory conflicts”), enhances the role of the Lord President by requiring his/her consent in relation to regulations making further provision about regulatory conflicts. Amendment 252 was subsequently agreed to (by division).

Amendment 278 by Robert Brown, debated in a later group of amendments (“Regulatory functions”), requires the Scottish Ministers to have the consent of the Lord President before making provision by regulation to confer additional functions on approved regulators. The Minister argued that such a requirement did not fall within the Lord President’s expertise. Amendment 278 was agreed to (by division).

Amendment 283 by Robert Brown and consequential amendments (“Performance of approved regulators”) requires the Scottish Ministers to obtain the consent of the Lord President before imposing sanctions on an approved regulator. Amendment 284 in the same group and also by Robert Brown, and consequential amendments, requires the Scottish Ministers to obtain the consent of the Lord President in relation to any regulations which create new sanctions to be used against an approved regulator where it is considered it is not performing its functions adequately. Again, the Minister argued that he did not consider it appropriate for the Lord President to have the same role as the Scottish Ministers in this regard, as this would amount to a duplication of work. However, these amendments were agreed to (by division).

Amendments 319, 321 and 323 by Robert Brown require the Scottish Ministers to consult the Lord President before making regulations about heads of legal services, heads of practice and the practice committee (“Operational positions”). Noting the Committee’s position on the role of the Lord President more generally, the Minister indicated at this stage (22 June 2010) that he was no longer minded to oppose those amendments which sought to enhance the role of the Lord President and the SNP members abstained in these and subsequent divisions in this area (see also amendment 175A on the Lord President’s role in relation to regulations made regarding outside investors and 357 and 358 on the Lord President’s role in approving applicants as an approving body for confirmation agents).

Step-in by Ministers

Amendments in the group “Ceasing to regulate” related to the ministerial step-in procedure in the event that no approved regulator is able to regulate some or all licensed providers. Amendment 38 by the Minister provides that Scottish Ministers should only intervene if it is necessary as a last resort. Amendment 38 was agreed to (by division), amendment 38A by Robert Brown was disagreed to (by division) and amendment 307 by Bill Aitken was pre-empted and, therefore, not moved.

Compensation fund

The amendments in the group “Compensation” related to compensation arrangements for those who receive legal services from LLSPs and who suffer loss because of the dishonesty of that provider. In particular, the Scottish Government amendments in this group are intended to provide equality of protection for all clients of LLSPs by allowing all approved regulators (not just the Law Society of Scotland) to access the Guarantee Fund or requiring them to establish their own guarantee fund-type arrangements. Robert Brown expressed reservations about allowing other regulators to access the Guarantee Fund administered by the Law Society, and argued that any new regulator should establish their own compensation fund or equivalent (his amendments 261 and 268 sought to do that).
The Scottish Government amendments in this group (169, 170, 171, and 172) were disagreed to. Robert Brown’s amendment 261 was agreed to (by division), but his amendment 268 was disagreed to (by division). Scottish Government amendments 210 and 211 were subsequently agreed to (by division). Amendments to these amendments by Bill Aitken (210A, 210B, 211A), which sought to limit the use of the Guarantee Fund to LLSPs that are regulated by the Law Society of Scotland, were subsequently debated but not agreed to.

Scottish Government amendment 212 places a cap on the Guarantee Fund of £1.25 million per claim. Amendment 212 was agreed to (without division).

Further amendments to these provisions may be necessary at Stage 3 as amendments 210 and 211 (which allow the Guarantee Fund to be used in respect of all licensed providers), relate to Scottish Government amendments which were not agreed to.

Practice Rules – conflict of interests

Amendments in the group “Practice rules” related to the practice rules which will govern how LLSPs operate. In particular, amendment 260 by Robert Brown proposed that the issue of conflict of interest should be specifically covered by the practice rules. The Minister argued that, as the issue of conflict of interest is dealt with in the rules and codes of practice of all professional bodies and by other provisions in the Bill, this amendment was not necessary. Amendment 260 was disagreed to (by division).

Confirmation agents and services

“Confirmation” is part of the process of winding up the estate of a deceased person. Part 3 of the Bill creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation.

Amendment 380 by James Kelly would require the Scottish Ministers to consult the OFT and other appropriate bodies before either imposing conditions on an applicant to be a regulator of confirmation agents, or amending, adding or deleting any such conditions. The Minister argued that this amendment was unnecessary and potentially inappropriate. Amendment 380 was disagreed to (by division).

Amendment 384 by James Kelly would require that only suitably qualified and experienced members may be granted the right to provide confirmation services. Again, the Minister argued that this amendment was unnecessary. Amendment 385, also by James Kelly, would require that the regulatory scheme of an approving body must describe the qualifications required to be a confirmation agent. The Minister also argued that this amendment was unnecessary. Amendment 386 by James Kelly would require annual renewal of certification for confirmation agents and amendment 387, also by James Kelly, would require that a confirmation agent keeps in place sufficient arrangements for compensating persons who suffer loss by reason of dishonesty. The Minister did not support these amendments. These amendments were all disagreed to (by division).

Regulation of will writers

Amendments were lodged to provide a regulatory framework for non-lawyer will writers and to prevent any unregulated non-lawyers from drafting wills for fee, gain or reward (“Will writing services”). In particular, amendments 203 and 204 by the Minister amend section 32 of the Solicitors (Scotland) Act 1980 to make will writing an activity that is reserved to solicitors unless it is carried out by a person that is otherwise regulated under the Bill. Other amendments in this
group provided a new framework of regulation for will writers. The amendments were generally supported by the Committee and agreed to without division.

Branding

Amendment 72 by the Minister relates to the branding of LLSPs and follows concerns expressed by the Law Society that a LLSP that primarily provides non-legal services (such as a large accountancy firm that employs only a few solicitors) could, nevertheless, brand itself as a firm of solicitors. Amendment 72 requires a LLSP to have the Law Society’s written permission before labelling itself as a solicitor or firm of solicitors. Amendment 72 was agreed to by the Committee. Robert Brown’s amendment in this group (amendment 365) raised the question of whether protection should be extended beyond the term ‘solicitor’ to include, for example, the term ‘lawyer’. Although the Minister agreed to review the matter in advance of Stage 3, Mr Brown moved his amendment 365, which was disagreed to (by division).

Suspension of a solicitor’s practising certificate

Amendments 359, 360 and 361 by Bill Aitken would amend the Solicitors (Scotland) Act 1980 and provide that a solicitor’s practising certificate must be suspended on conviction of dishonesty or imprisonment, or on disqualification under the Company Directors Disqualification Act 1986 (“Practising rules”). The Minister argued that these amendments represented a change in policy without any evidence to indicate that there was a problem or any relevant consultation and did not, therefore, support them. Following discussion, the amendments were not moved.

Employment of solicitors by charitable bodies

Amendment 75 by the Minister amends the Solicitors (Scotland) Act 1980 to allow solicitors employed by citizens advice bodies to give advice directly to third parties (a practice that is not currently permitted). Citizens advice bodies will also be exempt from the new regulatory regime. Amendment 75 was agreed to without division.

Rights of audience – McKenzie friends

Amendments 208 and 388 by the Minister implement the recommendation of the Scottish Civil Courts Review that a person without a right of audience (a ‘McKenzie friend’) should be entitled to address the court on behalf of a party litigant (i.e. a person representing themselves in court) in circumstances in which the court considers it appropriate to do so. Amendments 208 and 388 were agreed to without division.

Role of the Law Society

Amendment 373 by James Kelly relates to the on-going debate surrounding the Law Society’s dual representative and regulatory functions. In particular, amendment 373 sought to remove from the Council of the Law Society its representative functions and to establish a separate representative council to take over those functions. The Minister argued that amendment 373 was unnecessary because the Bill already requires that an approved regulator, such as the Law Society, must exercise its regulatory functions separately from its representative functions. Amendment 373 was disagreed to (by division).
Access to justice

In the light of concerns that particular areas (i.e. rural areas) will be disproportionately affected by any increase in competition, amendment 379 by the Minister is intended to strengthen the duty of the Scottish Legal Aid Board to monitor the availability and accessibility of legal services in Scotland. The amendment was agreed to.

Stage 2 - conclusion

During Stage 2 proceedings, the Minister indicated that further dialogue would take place between the Scottish Government and relevant stakeholders (including the Law Society of Scotland) in advance of Stage 3 proceedings. The Convener of the Justice Committee also observed that there were quite a number of matters that remain outstanding and that he anticipated a fairly significant dialogue between the Scottish Government and the Law Society over the summer in order to resolve these matters in advance of Stage 3 proceedings.
SOURCES


RELATED BRIEFINGS

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