

This document relates to the Solicitors in the Supreme Courts of Scotland (Amendment) Bill (SP Bill 55) as introduced in the Scottish Parliament on 26 September 2019

Solicitors in The Supreme Courts of Scotland (Amendment) Bill

Promoter's Memorandum

Introduction

1. This document relates to the Solicitors in the Supreme Courts of Scotland (Amendment) Bill introduced in the Scottish Parliament on 26 September 2019. It has been prepared by the promoter, the Society of Solicitors in the Supreme Courts of Scotland, to satisfy Rule 9A.2.3(b) of the Parliament's Standing Orders. The contents are entirely the responsibility of the promoter and have not been endorsed by the Parliament.
2. The following other accompanying documents are published separately by the Parliament:
 - statements on legislative competence by the Presiding Officer and the promoter (SP Bill 55–LC);
 - Explanatory Notes (SP Bill 55–EN);
 - a Promoter's Statement (SP Bill 55–PS).
3. The Promoter's Statement includes information about where these documents and other documents that are relevant to the Bill (but are not accompanying documents) can be inspected or purchased.

Objectives of the Bill

Background

4. From the sixteenth century the central courts in Scotland began to develop notably and the Faculty of Advocates can trace their origins to the provision made by the courts then for ten practising lawyers to appear

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before the Court of Session in 1532. The Society of Writers to the Signet have records existing from 1594. Thereafter, the developments in commerce and industry, and taken later with the Act of Union in 1707 and the legal business after the Jacobite rebellions, all added to the development of the legal profession in and around the Supreme Courts. A demarcation developed in regard to the precise role of each participant in the legal business of advice and representation.

5. It would seem that by the Acts of Sederunt (rules of court) dated 1 April 1754 and 10 March 1772 the existence of solicitors as a separate branch of the legal profession distinct from advocates came to be recognised by the courts.¹ The Acts of Sederunt put the responsibility of maintaining a high standard of entry on the professional representatives themselves. From that approach, the development of the profession of solicitor in the Supreme Courts expanded to cover many aspects of the profession and included was the place of preservation of privileges of Supreme Court lawyer and the place there of solicitors.

6. On 12 January 1784 at a general meeting of “the agents or solicitors admitted and enrolled by the Court” a form of contract was drawn up to incorporate the rather nebulous society that had evolved by then and the necessary bye-laws for the association were suggested. These were concluded as a Contract and Articles of Association.² Then, to consolidate the position of the Society, a Charter was sought to incorporate it into a Body Corporate. That was granted as a Royal Charter given under the Great Seal of Scotland at St. James’s on 24 January 1797 and sealed on 23 February 1797.³ It was at that point that the members of the society decided to call themselves thereafter “solicitors” in place of “agents or solicitors” as seems earlier to have been the practice: hence “the SSC Society”.

7. The evolution of the legal business continued and the Society of Solicitors in the Supreme Courts of Scotland again sought to consolidate its

¹ JB Barclay “The SSC Story, 1784-1984: two Hundred Years of Service in The College of Justice” (1984) p.6 and see pp. 307-311 for transcripts of the Acts of Sederunt referred to.

² For the details of these documents see Barclay, “The SSC Story”, pp. 293-301.

³ For details of the Royal Charter see Barclay, “The SSC Story”, pp. 302-6.

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position. To that end private legislation in 1871 confirmed and amended the charter of 1797. That has to be seen in the contemporary context of a Royal Commission having been established in 1870 to inquire into the courts of law in Scotland and legislation being introduced in 1872 by the Lord Advocate and eventually passed to establish a more uniform solicitor branch of the legal profession in Scotland.

The present need for change

8. In the earlier periods the pressures on the nebulous collection of assistants and later lawyers working with advocates came from the facts of an evolution of the elements that made up the legal profession and their respective attempts to achieve dominance on some area of legal business. Doubtless the history of the SSC Society illustrates that there has always been pressure on the legal profession to reform or pay the penalty, and reform has triumphed.

9. The proposed legislation for the SSC Society will allow the members to take decisions as to the future of the society itself and also the Widows' and Orphans Fund. The position of the society is that as a body it holds substantial assets in the form of a building, a library and other rooms with tenants, in the centre of Edinburgh and therefore in a World Heritage Site. The society also holds for the benefit of widows, widowers, civil partners and orphans as the case may be substantial investments which allow for the payment of the appropriate annuities. Currently, for example, there are 45 widows who are each paid an annuity of £3,000.

10. There are social changes at present that require to be acknowledged in the context of the SSC Society. First, membership of the SSC Society is entirely voluntary. The members include solicitors who practice in and around the Supreme Courts of Scotland, either as solicitors who have instructed advocates or in their own right with extended rights of audience which since 1993 have allowed solicitors with the additional qualification to appear in the Supreme Courts. The membership amounts at present to around 220 or so which is understood to be about the numbers a hundred years ago. If young solicitors recently qualified choose not to apply for membership of the SSC Society then there is nothing that can be done to force them to do so. The problem at present is the demographic balance with a predominantly older membership persisting with their membership but not being supplemented by newer and younger members in such numbers as would secure the future of the society. This is believed to be a

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not uncommon feature of many other societies of wildly different backgrounds today.

11. Secondly, there is no general or personal wish known by any member of the SSC Society amongst others in the society to close the society down. Yet, if the demographic balance continues it can be foreseen to be a real possibility that in the future, precisely when can only be guessed, the seriously diminished membership will be unable to continue with operating the SSC Society in its present form. There has always been administrative direction and that has been under the immediate supervision of the office-bearers and with the general and actual or tacit consent of the whole membership. The inevitable outcome of the passage of time means that the younger group of members on whom the responsibility of providing the administrative support or executive direction will fall is likely on present projection to get smaller and quite quickly so. The present membership has no wish to see a small group of very elderly members left in a generation or so with the unenviable task in their twilight years of winding up a long-established society and disposing of substantial assets perhaps in contentious circumstances.

12. Finally, the founders of the SSC Society seem not to have envisaged a time when the society did not exist. This ambivalence may of course be entirely in keeping with the comment by Alistair Brownlie SSC who noticed in 1978 that it is curious that none of the founding documents set out the purposes of the society. At any rate, the existing legislation of 1871 even as amended in 1979 is defective in not including certain powers or general authorities. Specifically, the SSC Society and the Widows' Fund are linked inextricably when it may be, after further consideration of advice on the point, that a separation of the two would be for the better. Further, closure of the Widows' Fund might also be considered or at least closure to new members: an associated authority to make capital payments in lieu of future annuity payments might also be acceptable. Additional powers are necessary before these possibilities might be considered further and realistically.

Summary

13. The overall objective of the Bill is to enable the SSC Society through the will of its members to be in a position in law to reflect more seriously on its future and implement some of the policies which are envisaged by the new statutory powers sought.

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14. The policies and therefore the objectives to which those powers relate might be said to be fourfold:

- The first objective is to allow the members to consolidate the substantial assets of the society as held at present and secure their future and that of the society on the basis of the law as it has been since at least 1871 but updated for modern conditions.
- The second objective is to better rationalise the future of the society by adopting a different scheme of administration of the Widows' Fund from that in place now with appropriate powers in place to allow members of the SSC Society to make the requisite decisions.
- The third objective is to develop the use of the SSC facilities, particularly the working library, by being able to offer different types of membership, such as corporate membership for firms or other agencies that would allow use of the facilities but without involving full personal membership.
- The fourth objective is essentially the unwanted one but which with the changing demographic balance amongst members is not an impossible one; the closure of the SSC Society cannot proceed now as there is no authority in law for the members to implement a decision to that effect. It is envisaged that such a decision would require to be unanimous or nearly so.

Alternative approaches

15. This section must necessarily be very restricted as some of the new law sought is really only a modernised version of the old law. Some of the new law sought is permissive in that bold economic decisions in the interests of the members of the society would still require to be taken and the new law needs to be in place for these decisions to be considered as realistic ones. Finally, the society through its members may not wish to continue in existence notwithstanding a long history to date. Such a decision may be forced on the members in a decade or more if the membership declines to levels that make the society in fact a shell and render the administration of the society impossible or unsustainable for long because of a lack of participation.

16. The President and Council of the SSC Society suggest as a principal alternative to the objectives of the bill, and perhaps the only realistic one,

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that absolutely nothing is done in any legislative sense. The existing legislation of 1871 has been applied in practice conscientiously for 146 years and amendment was only thought necessary as recently as 1978. The actual members of the society have through diligence in attending to the best legal practice developed a society that cannot be said to be poor or in need of any assistance. Membership rises and falls and has stabilised at around the 220 for many years. The demographic balance may be problematic now. That might be corrected by a public relations initiative and a forceful drive to encourage new members.

17. In fact, the President and Council of the SSC Society are likely to develop the possibility of a public relations initiative and a forceful drive to encourage new members in the broad context of new legislative powers. It would seem from anecdotal evidence that many other associations and societies covering many what might be called traditional social activities are also suffering from the demographic forces mentioned: it would seem that many sporting and social clubs are in this group. The differences that have to be identified immediately are the statutory basis of the SSC Society and its assets.

Cy pres

18. Under the common law, the doctrine of *cy pres* allows trustees to make an application to the Court of Session to have the terms of a public trust varied where the purposes of the trust are or have become impossible to fulfil or have become particularly inappropriate. The Widows' Fund of the SSC Society is extremely buoyant and the payment of annuities to the 45 recipients (as at 2 September 2019) is made easily. The fund can achieve in practice what it was established to do. The Trustees wish to have the authority to close, if agreed by the members, the fund or vary the payment of entitlements to lump sums against future entitlements and in these circumstances a *cy pres* scheme is very unlikely to be approved by the Court.

Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

19. Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 gives the Sheriff Court and the Court of Session powers to approve a scheme for the variation or reorganisation of the trust purposes in any public trust. As with a *cy pres* scheme, the Trustees consider that an

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application would not be possible or at least suitable because of the substantial changes that the members of the SSC Society *might* sanction in due course. Closure of the fund to new members or closure altogether with suitable lump sum payments against future entitlement seems to be beyond the contemplation of the 1990 Act. Section 9(2) provides that:

“The Court shall not approve a scheme [...] unless it is satisfied that the trust purposes proposed in the scheme will enable the resources of the trust to be applied to better effect *consistently with the spirit of the trust deed or other document constituting the trust*, having regard to changes in social and economic conditions since the time when the trust was constituted” [emphasis added].

Sections 39 and 40 of the Charities and Trustee Investments (Scotland) Act 2005

20. Sections 39 and 40 of the Charities and Trustee Investments (Scotland) Act 2005 allow charitable trusts to seek the approval of the Office of the Scottish Charities Regulator for a reorganisation of the trust purposes. The Trustees considered whether it might be possible for the Fund to become a charity and thereafter make use of those sections. However, section 42(5) of the 2005 Act provides that, in general, this option is not open to a charity constituted under any enactment, unless the charity is an endowment. In that context, “endowment” means:

“any property, heritable or moveable, dedicated to charitable purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society contributed or paid by the members of such incorporation or society by way of entry moneys or other fixed or stated payments, nor burgess or guildry fines paid to any such incorporation or society, nor funds bequeathed or given to any such incorporation or society for the benefit solely of members or widows or families of members of such incorporation or society.”

21. While it might be possible for the Trustees of the Fund to consent to it being treated as an endowment, the use of the Fund cannot be said to be dedicated to charitable purposes as such and so it would seem not to qualify.

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22. The Trustees are therefore not permitted to make use of sections 39 and 40 of the 2005 Act as a means of varying the Fund.

23. The Trustees have concluded that the only method of amending the objectives of the Fund or indeed closing it against new members and changing the powers of the Trustees is to promote a Private Bill in the Scottish Parliament.

24. The Trustees sought an independent view as to these matters by obtaining an Opinion of Counsel. The relevant material was put before an advocate and an Opinion dated 1 November 2018 was received. Counsel was of the view that the deficiencies in the existing legislation are that it provides no flexibility for different types of membership and that it makes no provision for the orderly winding up and dissolution of the Society or for the distribution of its assets and those of the Widows' Fund should that be necessary.

Consultation

25. Membership of the SSC Society is voluntary and the 220 or so members, as qualified solicitors in Scotland, come from many parts of the Scottish legal profession. Many are in private practice, either working as criminal or civil lawyers, and many are employed in government or other public services. Not all of the members live and work in the Edinburgh area. All members, in practice or retired, have been provided with all the relevant documents in support of the Bill and these are: (i) a Strategic Options Paper explaining the emerging issues in October 2017; (ii) a further Strategic Options Paper in December 2017 following discussions at the statutory meetings in December 2017; and (iii) a draft Bill with the relevant new provisions. These specific documents were sent out in advance of the meetings at which they were to be discussed (though the Bill now introduced has since been to some extent revised) and views invited from amongst those who were unable to attend the meetings.

26. Firstly, no member of the society has expressed a wish to close the society down absolutely so that it would in effect go out of business. The SSC Society has survived for more than 230 years because it has always fulfilled a purpose and, in the main, still does. It has to be recognised, however, that the demographic balance within the membership has changed markedly so that 40% of the current membership is now retired.

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That means that they pay very much reduced membership fees but more importantly they tend not to (or not to be able to) participate actively in the activities of the society.

27. The latter point is considered by the office-bearers to be important as a continuation of the mismatch demographically of the membership could conceivably result in a decade or two from now in a real but practical problem. There may well be a viable society in terms of a library and financial assets through the society funds and the Widows' Fund but insufficient members to contribute meaningfully to the administration of a society the assets of which are in any event notably underused.

28. Of course, it may be that the society does not come to be reduced to a few elderly members incapable of contributing to the society, and not using the assets. Doubtless there have been difficult times in the past but it is important to guard against the responsibility for closure arising with no relevant statutory powers in place. The consultation with the membership of the SSC Society has confirmed the desire to be prepared, even if the event guarded against does not come to pass.

29. Secondly, the membership is also minded to discuss the various possibilities that have come about as a result of changes in society. These changes include the development in law of civil partnership and, separately, cohabitation without formal or traditional ceremony or an agreement recorded contractually. The members are mindful of these changes in seeking clarification of the terms of the conditions for potential annuitants of the Widows' Fund. Indeed, in the modern era many people have private financial arrangements in place for their retirement and for their dependents. The members of the SSC Society would wish to consider the whole future (separately from the future of the society) of the Widows' Fund. It is not inconceivable if pressed to a decision that the Widows' Fund could be closed to new members with, as a separate issue, lump sum payments being offered to annuitants and potential annuitants at closure.

30. It is because of the legal developments mentioned in paragraph 29 that it is thought appropriate to change the name of the Widows' Fund to "the Dependents' Fund".

31. The consultation necessary before a decision is taken about the future of some or all of the elements of the SSC Society may later produce

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a different outcome once the new statutory powers sought are in place. For that reason, and for the avoidance of doubts as to purpose, what is sought now with the agreement of the membership is legislative change only. Once enacted that legislation would allow for decisions to be taken around what are now considered to be the most likely issues to arise later.

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