

Scottish Law Agents Society

Submissions to Justice Committee

Legal Services (Scotland) Bill

November 2009



The Scottish Law Agents Society is the largest voluntary national organisation of solicitors in Scotland representing all practitioners irrespective of their area of practice. We would welcome the opportunity to supplement these comments with oral evidence.

The need for high professional standards

The provision of legal services is a classic example of information asymmetry. Consumers instruct lawyers because they do not have the necessary knowledge and experience to conduct their own legal affairs. That knowledge and expertise resides with qualified lawyers who have trained for years before being licensed to practise. Consumers rely on their lawyers and their services - they are 'credence goods'.

Typically the qualification process will involve a four year honours degree, a one year postgraduate Diploma in Legal Practice and a two year traineeship before being admitted to practise and a further three years before they may practise as an independent principal. This qualification process is not intended to restrict access to the profession but exists because of regulations put in place by the Law Society of Scotland to ensure high standards in order to safeguard the public in terms of its statutory duties under section 1 of the Solicitors (Scotland) Act 1980. Solicitors are required to comply with the requirements of primary legislation and Rules, Guidelines and Practice Statements issued by the Law Society of Scotland which presently extend to over 560 pages. They are obliged to maintain compulsory professional indemnity insurance through the Law Society's Master Policy and to provide an unlimited guarantee against the dishonesty of their fellow professionals through the Scottish Solicitors Guarantee Scheme. They are subject to the alternative dispute resolution mechanisms of the Scottish Legal Complaints Commission [SLCC] and subject to the disciplinary sanctions, of the Law Society including fines, suspension and striking off which are independently assessed and enforced by the Scottish Solicitors Discipline Tribunal which includes significant lay participation.

Information Asymmetries in the provision of Legal Services and the long term consequences

Consumers of legal services may be aware where they are not getting service because of a failure to communicate, for example. That is subject to specific rules in the Scottish Solicitors Standards of Conduct 2008 and Scottish Solicitors Standards of Service 2008 and may be the subject of a finding of inadequate professional service by the SLCC. However information asymmetry is such that consumers are often not in a position to make an informed assessment of the quality of the services they have received. For example in the course of a conveyancing transaction a failure to discover a

title condition which impedes the use of a property may only come to light years later. The failure to accurately provide for the testator's wishes in a will might only come to light after the death of the testator. In relation to a divorce action a failure to properly consider pensions provision again may only come to light years later. This is because of the complex and long term nature of the consequences of legal advice and transactional work.

That there are so few claims against solicitors and the low and declining numbers of complaints in relation to inadequate professional service offers testimony to the high standards to which Scottish solicitors, in general, operate. Where the provision of legal services is opened up to non-solicitor providers the problems of information asymmetry will exist for the reasons set out above. We refer to this further below in relation to our discussion of 'execution only' legal services. If the standards of education and training including the developing of ethical standards of putting the interests of clients above those of the practitioners are not written into any scheme which comes into operation as result of the Bill then there is a significant risk that there will be detriment to consumers. That is likely to become apparent over a number of years and in the meantime more consumers are likely to be adversely affected.

Claims Management companies

In England, following the withdrawal of legal aid from personal injuries actions, and the opening up of contingency fees, there was a growth of claims companies. The practices of those companies were often not in the interests of consumers and led to third parties facing many claims which were spurious or completely fictitious. Third parties including many local authorities were obliged to investigate these complaints at considerable expense. There is presently evidence of consumer detriment occurring as a result of the activities of claims management companies soliciting claims in relation to bank charges which are allegedly unfair to consumers and according potentially recoverable. Consumers are being invited to pay fees up front and then receive no service whatever. The clear evidence of consumer detriment led to the Compensation Act 2006 and the regulation of such companies by the Ministry of Justice. We are not convinced by the statements in the accompanying policy memorandum that there is no need to regulate claims companies in Scotland simply because there are not a significant number operating in Scotland at present. In recent years a number of claims companies have come and gone in Scotland dealing with mis-sold endowment claims and now bank charges. Personal Injuries claims management companies regularly advertise for claims on UK-wide television.

We note that in relation to England and Wales, for reasons which are very similar to those we set out above, the Hunt Committee recommended that claims management companies which are already regulated in England are brought fully under the regulation of the Legal Services Commission [recommendation 48]. See

<http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf>

Will writers

Evidence is building of consumer detriment through the growth of completely unregulated will writing services. Some of these services are using commercial practices which are outlawed by the Unfair Commercial Practices Directive such as 'bait and switch'. An advertised fee is often £30 but the customer is then told that their circumstances are more complex and a fee of £400 is charged when the value of the work is less. Advice is given on English law rather than Scots succession rights. In some cases extravagant claims are made in relation to saving Inheritance Tax and/or liability for care home fees without it being explained that the scheme proposed is, at best, doubtful and may be wholly unnecessary. Examples are situations where complex trusts are being sold suitable for IHT saving where the total estate falls well short of the IHT threshold. In other cases, there is evidence of will writers undertaking conveyancing business, usually completely ineffectively, which is a reserved matter where this is necessary to give effect to their scheme. Such will writers are not required to have professional indemnity insurance, have no alternative dispute resolution mechanism in relation to inadequate service or negligence, no protection against fraud and no professional body which has disciplinary powers nor any scheme for safeguarding stored wills where the will writer ceases trading for whatever reason. One recent example in the press relates to an English Will writer who misappropriated the estate leaving the beneficiaries with no compensation.

See:

<http://www.thisisgloucestershire.co.uk/gloucestershireheadlines/Financial-advisor-scammed-163-800k-wills/article-1418414-detail/article.html>

This is not a case of self interest by lawyers. The links below show these concerns being articulated by Which? and CABx share our concerns see:

<http://www.which.co.uk/news/2008/02/steer-clear-of-will-writing-scams-132136>

http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20080208.htm

We also draw attention to the Report of the Hunt Committee in England and Wales on implementation of the Legal Services Act 2007. This recommends that will writers be fully regulated for essentially the same reason as we have stated above- [recommendation 47]. The report is obtainable at

<http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf>

Continuing powers of attorney

This area of law and practice has grown since the passage of the Adults with Incapacity (Scotland) Act 2000. The nature of the business has many similarities with the preparation of wills and trusts and managing the estate of an incapax is analogous to trust and executry work. Many will writers are now offering these services as well. The client grouping here is more vulnerable than the makers of wills alone. The absence of any inspection regime and the safeguards offered by a clients account and the Guarantee fund are absent. The ability to restrict or dispense with caution in this area makes the risks even greater. This area should also be fall within the regulated perimeter and we set out more detail in this connection at :

http://www.slas.co.uk/news_detail.php?newsID=653&slas=ec60713470aec63e803b090012921fb2

Confirmation Services

We note the terms of the Bill in relation to Confirmation Services. At present the only reserved matter is in relation to the presentation of the inventory to court for confirmation and any petitions for appointment of executor. The acts of investigation, ingathering and realisation of estate are not reserved. We note that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 permitted the creation of a new breed of licensed conveyancing practitioners and executry practitioners or executry practitioners alone. That profession did not thrive and those few practitioners as qualified are now regulated by the Law Society of Scotland. We note that the former regulator, the Scottish Conveyancing and Executry Services Board, required an undergraduate law degree for the conveyancing practitioner and a two year full time undergraduate Diploma in Law as a requirement for those qualifying as executry practitioners alone. The Bill s75(2)(a) provides that a regulator of confirmation agents must describe the training requirements to be met by a prospective confirmation agent. We accept that the Bill is enabling rather than prescriptive of rules but there is no mention here of the educational requirements nor continuing professional development, only training. There is nothing about the length or nature of that training. The Bill, at the very least, must specify that prior education is required, the exact requirements of which might be left to the regulatory scheme. SCESB existed as regulator and operated wholly in the public interest. It reached its decision on qualifications on sound grounds. It is necessary in winding up an estate to understand the rules for validity of a will, the rules applying on intestacy, the interpretation of wills, questions of the legal concept of domicile private international law and generally all aspects of the law of succession and its interaction with family law, property law and taxation. Things can be more complex where the deceased owned a business. We consider that the SCESB requirement was perhaps on the low side and we would encourage the amendment of the Bill to make adequate provision for the education and continuing professional development of licensed Confirmation Agents.

We note that the Bill as presently drafted refers to the regulatory scheme approved by a regulator to require a confirmation agent to have sufficient

professional indemnity insurance [s75(2)(c)]. One of the central feature of the solicitor regime which applies generally is the requirement to maintain a client account and ensure that the sums in the client account are sufficient to meet all clients claims in full. Solicitors are required to certify their compliance submitting returns every six months and are subject to inspection approximately every two years to ensure compliance. In the event of insolvency of the practitioner the client account is a separate fund held in trust for the clients. This is underpinned, in the case of Scottish Solicitors by the Guarantee Fund, an unlimited guarantee against misappropriation underwritten by all solicitors. The Bill is silent on such requirements and, if a regulator is empowered only by the Bill to regulate in terms of the scheme contained in the Bill, then providing protections similar to those enjoyed by clients of solicitors would be *ultra vires*. In any event, the regulator would only be acting *intra vires* in relation to the reserved acts of obtaining confirmation itself and not in relation to presently unregulated areas of ingathering and distribution where the opportunity for misfeasance may occur. We note that SCESB required separate client accounts for each matter but did not offer a protection equivalent to the Guarantee Fund.

We observe that banks have for many years offered a complete package of services in winding up estates which are generally much more expensive than using solicitors alone. In our view there is already competition in this area and the need for a further new breed of professionals is at best doubtful.

It needs little imagination to figure situations in the future, with licensed Confirmation Agents, where this can lead to consumer detriment. We note that in England, the Hunt Committee Report, mentioned above, recommends in relation to England and Wales that the whole probate services area not just the equivalent of obtaining confirmation be brought within the regulated perimeter [recommendation 47.

<http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf>

'Execution only' legal services

We are very concerned about the growth of 'execution only' legal services that is a legal service where a technical operation is performed but where no advice is given. This is true, for example, of Which? Legal Services - their terms and conditions in relation to Wills provide inter alia :*"The Service does not provide legal advice". "The Service uses software for the assembly and drafting of a Will based on the answers you have given in your Will Interview Questionnaire. Your Will will therefore be generated automatically to reflect the answers you have given. You alone are responsible in ensuring that the answers and information you provide are correct and accurate, and warrant this to be the case."* [emphasis added]

The full terms and conditions offered are available at <http://www.whichlegalservice.co.uk/our-services/make-a-will/terms--conditions>

The price charged for a will where they provide no advisory service is £89. This is around the figure which the majority of our members would charge for a will that is individually professionally written to meet the client's exact requirements and where advice is offered. Which? advertise no internal complaints procedure nor specify one in their terms and conditions. There is no external regulator to complain to about their conduct or service. They make no statement about professional indemnity insurance, standards etc. At least they do state in the terms and conditions that they only offer wills which are good under English law. This may be contrasted with the terms of engagement which Scottish Solicitors are obliged to provide.

A consumer may well be attracted by Which? or similar providers and, given the nature of credence goods, such as legal services, be unable to make an informed choice as to the absence of advice and liability dealing with a consumer organisation compared with the full service offered by a Scottish solicitor for the same price which is subject to the full range features which are standard features of consumer facing professional services such as indemnity insurance and alternative dispute resolution procedures available to a consumer without charge.

The growth of 'execution only' services is an almost inevitable consequence of the proposals contained in the Bill and one where consumers are likely to suffer detriment because of the nature of those services. This can be described as market failure.

The regulated perimeter

The Bill offers what is likely to be a once in a generation opportunity, to get the regulatory framework right and that opportunity is being squandered by the failure to regulate businesses which can cause and are presently causing consumer detriment which in many cases will not become apparent for years. The Bill defines legal services in s3 :

“the provision of legal advice or assistance in connection with—

(i) any contract, deed, writ, will or other legal document,

(ii) the application of the law, or

(iii) any form of resolution of legal disputes, or

15 (b) the provision of legal representation in connection with—

(i) the application of the law, or

(ii) any form of resolution of legal disputes.”

It, however, does not extend the reserved areas which are set out in s32 of the Solicitors (Scotland) Act 1980. It is provided in s32(1) that it is a criminal offence for an unqualified person to draw or prepare

*“(a) any writ relating to heritable or moveable estate or
(b) any writ relating to any action or proceedings in any court or
(c) any papers on which to found or oppose an application for a grant of
confirmation in favour of executors”.*

Writ is defined to exclude wills and other testamentary writings, missives or mandates, letters or powers of attorney, or stock transfer forms.

In other words will writers, banks and other financial institutions can prepare and charge for wills. Claims companies can operate without any regulatory regime applying whatsoever. The Financial Services and Markets Act 2000, in contrast to this Bill starts from a general proposition, providing a general prohibition on engaging in the provision of financial services or advice concerning financial services with the exception of those who are authorised or exempt. Those which are regulated are then set out by statutory instrument, the Regulated Activities Order, which can and has been varied from time to time. It is a criminal offence under the Financial Services and Markets Act to undertake such work unless the person undertaking it is authorised or exempt from authorisation. The layout and style of that Act provided the inspiration for the Legal Services Act in England. Such an approach could be adopted in the Bill. It would be a comparatively easy change to make to the Bill to permit the Scottish Ministers by subordinate legislation to extend the current regulatory perimeter to other areas of legal services such as those outlined above. This might also be used to modernise the old-fashioned and out of date references in the 1980 Act -e.g. ‘writ’ seems out of place in a world of e-commerce.

We there would welcome (a) restatement of areas of legal services which are reserved to qualified practitioners and (b) a refining of those areas to include (i)the preparation of wills and testamentary trusts and (ii) the activities of claims negotiation and management.

The introduction of ABSs

We have conducted a survey of our members and they are overwhelmingly (over 85%) opposed to the introduction of external ownership of legal firms. This and other similar concerns are addressed in the SPICe briefing paper of 5th Nov at page 10.

We find the justification for the introduction of ABS as set out in the policy memorandum confusing and contradictory. Para 37 sets out what we believe to be correct, that there has been a polarisation of legal firms with a large number of small ‘high street’ firms which provide a range of legal services, largely within the reserved areas to individual consumers and a small number of very large commercial firms which provide services to business and the public bodies ‘the great majority of which is not subject to legal reservation to Scottish Solicitors’[para 40]. It is then suggested that Scottish Solicitors will be increasingly unable to compete with English Legal firms who have access to external capital and the ability to offer combined

services with other professionals and that Scottish legal firms would either re-register as English legal firms or be bought out by English firms [para 40].

Since the advent of incorporated practices and LLPs firms have been able to offer security by way of floating charges over their moveable assets including receivables and goodwill. - i.e. loan capital. So called external capital is in reality external ownership. As the 'great majority' of commercial firms' practise is outwith the reserved areas there have been no barriers to practising as non-solicitor legal advisers with external shareholders or external ownership. There have been two high profile failures where major legal firms engaged in multi-disciplinary practices with international accounting firms. Both ended in dissolution.

That directors of finance, HR and IT cannot be partners in legal firms at present is true. With a little ingenuity, such persons can introduce loan capital secured by floating charge and be remunerated in such a way as they receive a bonus which would represent a share of profits without contravening any existing restrictions. Internally an incorporated practice or LLP can organise its affairs so that such persons can take an active and equal part in the management of the entity.

The policy memorandum fails completely to address the prospect that with external ownership it more likely that Scottish firms will re-register in England or be taken over by English legal firms should the Bill be enacted.

The policy memorandum identifies that there are aspects of the current legal services market where there is limited competition: clients can have difficulty in accessing services, including in the areas of family law and debt, welfare and housing law [para 41]. The evidence base for this was carried out before the recession and it now appears that many newly qualified solicitors have been made redundant and what was true two years ago is no longer true. It may be that as a result of very specialised training some lawyers are not in a position to practise in such areas - but they can undertake additional training.

New non-lawyer providers are unlikely to move into areas where there may be demand if these areas are not profitable. These are not areas in which the commercial firms by and large practice. One of the consequences of the Bill will be that third party providers seek to provide services from which they can make generate profits. This is likely to be in the case in relation to conveyancing and private client business such as the making of wills and executries. That would impact on the profitability of high street legal firms. Over time that will reduce the availability of such services on the high street. Access to justice is unlikely to be a significant factor with third party providers and high street firms striving to compete the may withdraw from unprofitable areas of practice or be themselves forced out of business leaving legal services less obtainable than at present. We regard this as a real danger over the medium term.

There may be other ways in which SLAB might wish to fund the provision of legal services in relation to housing and welfare matters with a greater role for the not-for-profit sector. This however does not require the scale of changes or complexity of the Bill. And if this is the intention behind the Bill then we do not consider the response proportionate.

The European Commission in its 2004 Report suggests that the introduction of ABSs and removal of current regulations will help protect services in rural areas.

“For example, these regulations might inhibit lawyers and accountants from providing integrated legal and accountancy advice for tax issues or prevent the development of one-stop shops for professional services in rural areas.”[para 60].

For a solicitor who is a sole general practitioner offering services in a rural community there will be little cross over with the practice of an accountant in the same community who will not deal with family law, crime, conveyancing or wills and succession. The complexity of the arrangements provided for in the Bill, which themselves will require to be fleshed out by considerable further rules which require to be complied with should the two practice within an ABS structure in addition to those a solicitor has currently to adhere to. The Commission’s comments show no appreciation of the administrative burden and it is accordingly hard to imagine small legal firms being remotely interested in taking advantage of the proposed reforms. They are likely to be forced into trying to protect their existing business from new entrants in the shape of ABS providers.

The independence of the legal profession.

We are very concerned at the direct involvement of the Scottish Ministers in the processes required by the Bill. The Scottish Ministers do so directly whereas in the Legal Services Act 2007 there is the establishment of a Legal Services Board in England which provides regulation at arms length from Government. The policy memorandum para 51 deals with this in these terms :

“The Scottish Ministers will fulfil the regulatory role fulfilled by the LSB in England and Wales. This maintains oversight of bodies seeking to regulate ABS. However, the Scottish approach achieves this aim without the complication and expense of establishing a nondepartmental public body. The Scottish Government believes this is more proportionate to the Scottish legal market. It also reflects the Scottish Government’s aims in terms of simplification of the public.

While ‘proportionate’ is one of the terms which appears in the Report of the Better Regulation Task Force it has become a word which is devoid of any meaning and there is no context stated and no evidence of what the debate might be in relation to the Scottish Legal Market. It is very disappointing, considering the statement in s1(a) of the Bill that one of the regulatory

objectives is supporting the constitutional principle of the rule of law. It is not clear how the direct role of the Scottish Ministers meets this objective. The UN High Commission on Human Rights *Declaration on the Role of Lawyers in Society* [1990] states :

“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; ... and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”. [para 16] and

“Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.” [para 24].

The Council of Europe Recommendation R(2000)/21 provides :

Decisions concerning the authorisation to practise as a lawyer or to accede to this profession should be taken by an independent body. [art 2].

Further in Principle V 2 the Council of Europe recommend :

“Bar associations or other professional lawyers’ associations should be self governing independent of the authorities or the public.”

The European Parliament Resolution 23 March 2006 Point E opposed ABSs states :

“...the duties of legal professionals to maintain independence, to avoid conflicts of interest and to respect client confidentiality are particularly endangered when they are authorised to exercise their profession in an organisation which allows non-legal professionals to exercise or share control over the affairs of the organisation by means of capital investment or otherwise, or in the case of multidisciplinary partnerships with professionals who are not bound by equivalent professional obligations.”

The European Parliament was also supportive of the rule of law as being a fundamental characteristic of the legal profession.

These are high level views which command respect and the dismissal of any such arguments as not proportionate illustrate a fundamental failure to appreciate the constitutional significance of an independent and free legal profession which cannot be guaranteed where the Scottish Ministers directly authorise regulators. We are strongly of the view that there must be an intermediary body such as a Legal Services Board to satisfy the requirements

of these international and European statements. Section 4 of the Bill is simply not enough.

The supposed imperative for ABSs at European level.

The policy memorandum refers to the European Commission's Report on Competition in the Professions [2004] as being the genesis of reform in this area. We quote from the Commission's Report:

"In the Commission's view business structure regulations appear to be least justifiable in cases where they restrict the scope for collaboration between members of the same profession. Collaboration between members of the same profession would appear less likely to reduce the profession's independence or ethical standards." [para 63]

And :

"Business structure regulations appear to be more justifiable in markets where there is a strong need to protect practitioners independence or personal liability." [Para 64]

Even the Commission acknowledges therefore there are some professions where independence and ethical standards may outweigh the benefits to consumers. In our submission lawyers are such a profession and there the case for ABSs has not been made out. We find it difficult to understand why the Scottish Ministers have reached the view standing the terms of para 63 that it is unnecessary to seek to impose changes on advocates. We find this particular at odd with the lengthy and arcane procedures which are required to admit a solicitor advocate who already has rights of audience to the Faculty when an advocate seeking to move in the opposite direction can do so seamlessly. This point has simply not been addressed.

This distinction is borne out in the jurisprudence of the European Court of Justice [ECJ]. The decisions in *Apothekerkammer des Saarlandes v Deutscher Apothekerverband eV* ECJ 19/05/09 and *Commission v Italy* of the same date both reach the conclusion that there may grounds of public policy which override the interests of competition law. While these cases deal with public health as the overriding factor, in our view, the rule of law has an even stronger claim to override competition law requirements.

The Services Directive 2006/123/EC provides for the free movement of service providers [art 16] but [in art 17] provides a derogation for lawyers as defined by the Lawyers Directive 1977/249/EC again recognising the special position of legal services. The Qualification Directive 2005/36EC also makes provision for free movement of services [art 5] and again exempts regulated professions such as lawyers [art 7] and places the duties on the professional bodies to make reasonable adjustments. In relation to establishment provision is made for compensation measures, either a period of adaptation or an aptitude test [art 14] for professionals such as lawyers. The provision of legal services is therefore not treated, as yet, by the European

Commission or the ECJ as commoditised in a way which can be dealt with as other services. We say more about free movement rights below.

Professional privilege

The Bill deals with professional privilege in s60. This is wholly inadequate. There are two aspects to legal professional privileges (a) the litigation privilege and (b) the advice privilege. The former needs no explanation but the latter clearly does. Any advice given by a lawyer to a client that is made in the course of his professional practice whether, it relates to any present litigation, an anticipated litigation, or any transaction or organisation of affairs is privileged. See for example the House of Lords case *Three Rivers DC v Bank of England* [No6] [2004] and *Balabel v Air India* [1988]. It is also important to bear in mind that it is confidential and is therefore immune from seizure even before any proceedings are commenced. See for example *Andre v France* ECtHR [2008] - a useful illustration before the European Court of Human Rights - the papers in the hands of a lawyer were privileged and ought not to have been seized by the tax authorities in seeking to build a case against a client. **As drafted the Bill [s60 (2)] only applies the privilege in the course of proceedings - not at an earlier stage of anticipated proceedings and not in relation to advice in relation to transactions. This would therefore not be compliant with the European Convention on Human Rights and would not correspond to the current scope of legal professional privilege.**

The view of the ECJ expressed in the AMS and AKZO Nobel cases is that lawyers employed by third parties do not possess legal professional privilege. The Bill would therefore provide professional privilege in proceedings to non-lawyers, assuming that the intention in relation to the proposed wording of a 'solicitor acting for a client' is intended to refer to a solicitor in private practice and yet the very lawyers employed by the non-lawyer ABSs would not be entitled to professional privilege. The result is the Bill is inconsistent.

Free movement rights

As Walter Semple has convincingly argued there is a real danger that the passage of the Bill into law would hamper those Scottish solicitors who wish to practise abroad. The Establishment of Lawyers Directive 98/5/EC permits the competent authority in host member states to refuse to recognise lawyers employed by non-lawyer firms [article 11.5]. Such lawyers are almost certainly going to be from those very commercial firms which are likely to seek external ownership. This is surely an unintended consequence of the Bill.

For a fuller discussion of Walter Semple's argument see:

http://www.slas.co.uk/news_detail.php?newsID=691&slas=ec60713470aec63e803b090012921fb2

Conclusions

While the Justice Secretary is on record as promising Scottish solutions to Scottish issues in relation to legal services, the Bill is no more than a poor reflection of the English Legal Services Act 2007.

The Bill as introduced does not offer a principled approach to the regulation of legal services. It pays no attention to the interests of consumers which is the only reason which justifies regulation in the first place. There is no consideration of the present perimeters of regulated legal services, nor is there provision to prevent actual or potential consumer detriment in adjacent areas.

The incompatibility of certain proposals in the Bill with European Community Law and Human Rights law has not been satisfactorily resolved.

The Commission's competition policy does recognise that other factors may override that the provisions of articles 81 and 82 of the Treaty of Rome. The rule of law and the administration of justice are such reasons and the European Court of Justice has recognised exceptions in the greater public interest. There has been, as far as we are aware, any demand from real consumers for the proposed changes. We simply observe that the supercomplaint which was in some ways the catalyst for this Bill was made by a body with a vested interest, as it is a provider of legal services.

While the Bill may offer some competitive advantage for a small number of legal firms it offers nothing but an uncertainty for the vast majority of legal practices operating in high street practice.