

ABS - SUMMARY OF ISSUES

The Legal Services Bill currently before parliament proposes to make radical changes to the provision of legal services in Scotland mainly by authorising (a) multi disciplinary practices so that solicitors could become partners with accountants, surveyors etc and (b) the ownership of legal practices by non-lawyers and even by investment interests. The following are some of the issues which have arisen

1. Where did these proposals come from? It has been suggested that, because similar changes have already taken place in England that it follows that they must take place in Scotland although many others would argue that the Scottish legal system has always been recognised as distinct and separate to that of England. There is also some concern as to how the AGM of the Law Society of Scotland came to pass a resolution in favour of ABS. At the AGM in 2008, there were less than 200 votes, in total, cast by persons present at the AGM but there were some 800 proxy votes in place in favour of the motion and it is understood that the vast majority of these proxy votes came from a very small number of firms and there is a feeling that the decision may not have been representative of the profession as a whole. This Society conducted an opinion survey of its members and their colleagues during 2009 and this brought in a 75% rejection of ABS in principle and an 80% rejection of external ownership of law practices, in particular.

2. Conflict of interests. There is an apprehension that, once a legal practice comes to be owned by non solicitors, the lawyers practising in that firm shall face a conflict between the interests of their clients and the interests of the owners of the business. In particular, where the firm is owned by a registered company, there may be a conflict between the profit motive of the company and the best interests of the clients of the company.

3. Confidentiality. While every practising solicitor has been trained in the requirements of professional confidentiality, it is not clear that the non solicitor, owner of a law practice shall either be bound by the same requirements, notwithstanding that they shall have physical control of the clients' information, or even be capable of understanding the requirements of professional confidentiality. Public trust in the legal profession is hard won and is substantially based upon the public understanding that their information in the hands of the legal profession is subject to confidentiality and it is difficult to accept that the public could repose similar trust in non qualified owners of law practices.

4. Legal professional privilege. Again, practising solicitors are entitled to certain privileges but only on behalf of their clients and it is difficult to envisage

how non legally qualified owners of legal practices could be entitled to similar privilege. At the same time, without that privilege, it is impossible for clients to receive the legal representation to which they are entitled in terms of both general constitutional law and ECHR.

5. De-regulation and the loss of the Scottish banking sector. Many members observe a parallel between the proposed de-regulation of legal services and the previous de-regulation of the financial services sector and, when the 2008 AGM of the Law Society accepted the principle of such de-regulation, this was prior to the collapse of financial institutions and the complete loss of the Scottish banking sector which took place towards the end of 2008 and into 2009. Many members feel that similar de-regulation should not take place in the legal services sector.

6. European law and competition. While, for many years, the legal profession has been forced to provide services on a more competitive basis due to the requirements of European law, it has more recently been recognised in European law that there may be a conflict between the maintenance of high professional standards and the provision of professional services in a freely competitive market and that, in such a conflict, the public interest in high professional standards should prevail.

7. Comparison with the medical profession. When interest emerged in the external ownership of legal practices, a similar interest in the commercial exploitation of GP services also emerged, quite logically. However, the Public Health etc (Scotland) Bill was hastily amended effectively making it impossible for commercial companies to be involved in operating doctors' practices in Scotland. Instead, health boards will only be able to enter into contracts with individual GPs or with partnerships of health professionals including at least one qualified doctor. The question arises as to whether the provision of access to justice is more closely to be equated with the provision of public health or with the marketing of consumer products. Clearly, the policy of the Legal Services Bill points in the direction of the latter.

8. If so many solicitors are opposed to ABS, why was ABS approved at the AGM 2008? See paragraph 1 above. In addition, the ABS issue had been a live issue since about 2003 when the Clementi report came out in England. Although this report had no application to Scotland, there was apprehension that it would influence the future development of the Scottish legal system and the report was widely rejected in Scotland and, in particular by the Law Society of Scotland. The Law Society maintained that position from 2003 until 2007. The members of the Law Society who were opposed to the Clementi developments were therefore lulled into a false sense of security that their professional body was also similarly opposed. What the majority of the profession did not realise was that a small number of firms were seeking to change Law Society policy and this they did

between November 2007 and May 2008. The majority of the profession was unaware also that these same small number of firms were arranging a large number of proxies to take the 2008 AGM in favour of ABS. What the Scottish Law Agents Society wishes to do now is simply to provide the profession with an opportunity to express its majority view on the issue of ABS and external ownership of legal practices.

9. Message from Dumfries Please take the time to read this - it is important if we are to remain a profession as we all understand it.

As you all know, the question of Alternative Business Structures (ABS) has been vexing the Law Society (and therefore the profession), the government, and various lobbying groups for quite some time now. It is simply not possible to open a copy of the Journal (assuming you do) without there being something said about it.

The arguments for and against are numerous, but on the "for" side, we have the government, consumer groups and large firms. They argue that allowing business ownership other than the traditional ones will allow more choice for the "consumer", allow different means of supplying certain legal services, allow "one-stop shops" - partnerships of different professionals such as accountants, surveyors etc as well as solicitors - and that it will allow big firms to get bigger through external investment and compete internationally, thus benefiting the economy.

The Law Society is in favour, probably because of the sheer numbers of votes and practising certificate subscriptions the big firms (and those which think they could become big) can muster, and are seeking to persuade the rest of the profession that ABS is a good idea. They are restructuring their organisation and priorities to comply with government pressure and ensure that the Law Society remains the regulator of the solicitor branch of the profession. This has involved several controversial concessions.

The arguments against relate to professional independence (how can a professional be independent if someone else is holding the purse strings and calling the shots), values (what happens to things like client confidentiality), economic realities (the Tesco syndrome: if big non-legal organisations can supply legal services, what is to stop them simply squeezing everyone else out the market, thus actually reducing client choice) and regulation (how on earth do you regulate a heterogenous organisation, possibly consisting of different professions, through one identifiable code of values).

Clearly this is mostly going to affect areas of practice where there is money involved, and any potential competitors can make a profit, so financial services,

estates, private client and conveyancing (particularly when they start to recover from the recession) are under major threat. It is unlikely that much of the civil court work we see here will be affected directly in the short term, and highly unlikely that any speculators will see any opportunity to move into criminal law unless any of these areas can be commoditised and paid for in ways that we cannot foresee at the moment. If, however, your practice relies for income on any of the more attractive areas, this issue will affect you, either directly through your own work, or indirectly through the work your colleagues and partners do.

If you work in the public sector, it will, in the longer term, affect who you are dealing with and, possibly the way in which you deal with them due to the manner in which your colleagues are instructed to practice by larger organisations or business owners.

The effect of this debate has been to polarise (and perhaps irreperably split) the profession, and to effect a radical change in the approach of the Law Society, particularly since the days when we argued against the Scottish Legal Complaints Commission and had profession wide support for opposition to any form of government interference in the regulation of the profession. The Law Society is now adopting a much cosier and more co-operative approach towards the government and other external bodies than any of us would previously have found comfortable. As a result, the Law Society's priorities have changed so that their main focus is regulation rather than representation, although the Law Society will deny this.

Various other bodies also feel that the Law Society is not representing the profession in the way that the profession should be represented. I have been contacted by the Scottish Law Agents Society, who are opposing ABS, and they are trying to requisition a Special General Meeting of the Law Society to argue against ABS, Inevitably, they have their work cut out for them in mustering enough votes (either in person or in proxy) to out-gun the block votes that the big firms will muster, and are campaigning for proxies.

As Dean, I am not going to go into my views any more than I have probably pretty clearly implied in this e-mail. If you really want to know, contact me. But this is an issue of which you need to be aware and it is only right that you have as much information as possible about an issue that will, one way or another affect you and your colleagues to a greater or lesser extent in ways that we probably cannot even imagine.

I am therefore attaching a copy of the letter from the SLAS calling for support for an SGM and setting out their requisition, together with their proxy form which they are asking to be completed. Obviously we are past the time limit for proxies

in support of an SGM requisition, but, assuming they have been successful in that, they will still be looking for proxies to vote at the meeting.

Over to you.

All the best

Ranald
Ranald Lindsay
Dean, Faculty of Procurators of Dumfriesshire

10. Press Release by Scottish Law Agents Society on ABS. President of SLAS, Mike Scanlan, warns of the dangers in the Legal Services (Scotland) Bill

In their evidence to the Justice Committee at the Scottish Parliament the Scottish Law Agents Society (SLAS) spoke to their detailed Submission.

Mike Scanlan, President, and Ken Swinton, the author of the Submission gave the evidence which covered several issues and expressed their concern at the Legal Services (Scotland) Bill as presently drafted.

Concerns raised included

- 1) Lack of specification of the Qualification of other providers and the problems caused by Claims Management companies, unregulated Will writers and Confirmation service providers (others)
- 2) The dangers posed to the public by such unregulated and unqualified others
- 3) The dangers posed to the public by "Execution Only" legal services by others.
- 4) The need for extension of the reserved areas of legal work to include Will writing and the winding up of estates not just the application for confirmation.
- 5) The lack of support for ABS in the SLAS poll of solicitors 85% of whom were against ABS in principle. There were over 400 responses far larger than any other poll.
- 6) Independence. Concern was raised at the proposed direct involvement of the Scottish Ministers undermining this and the rule of law.
- 7) Professional privilege. The Bill covers that in proceedings but not that in relation to advice in relation to transactions.

8) Danger of loss of Free movement rights as EC law permits refusal to recognise lawyers in non-lawyer firms.

This Submission is publicised in the December issue of the Society's Scottish Law Gazette produced quarterly to members but the Submission is also available to non members at the Society's website www.slas.co.uk

Mike Scanlan, as President of SLAS, said "I call on all solicitors, particularly young solicitors with their careers before them, to awake to the real dangers within the Legal Services (Scotland) Bill as presently drafted. Make your voice heard to MSPs, us, other representative bodies and the Law Society "

11. WALTER SEMPLE ON ABS. The following article was written by Walter Semple and published in the Scottish Review online on 27th October 2009. Walter writes as follows:-

EXTERNAL OWNERSHIP OF LAW FIRMS IN SCOTLAND

A Legal Services Bill has been introduced to the Scottish Parliament. It would allow law firms in Scotland to be owned by persons not qualified to practice law and would allow solicitors to enter into business with other professionals. High standards of professional ethics are essential to the effective delivery of legal services by solicitors. The Bill claims to support these high standards by introducing a device to ensure that the core values of solicitors are maintained in the new regime. The core values include maintaining independence, avoiding conflicts of interest and ensuring that information given to solicitors by clients remains confidential. The device involves a system of licensing investors in law firms. Observing the core values would be a condition of keeping the licence. At present external ownership of law firms and "multi-disciplinary firms" are forbidden so as to maintain the requirement for independence of solicitors and a system which provides a tried and tested arrangement for core values of the legal profession to be respected.

This proposed change has caused deep controversy amongst solicitors in Scotland. Those who favour the change say that it will make it easier to finance law firms and to find new ways of offering legal services to the public. They point out that there is no compulsion on solicitors to accept external investment. Those who oppose the change say that external ownership of law firms fundamentally contradicts the principle of independence. It will lead to a lowering of professional standards and will prejudice the standing of all solicitors in Scotland contrary to the public interest.

Until now those who support the change have won the argument. The Law Society's Council and members in general meeting have supported the proposal. Those opposed to the change are concerned that because the proposal seems to

offer to solicitors to sell their firm's goodwill at a high price to investors, this gives some solicitors a potential financial interest which affects their objectivity.

This controversy well illustrates why the issue is too important to be left to solicitors to decide. Whilst MSPs must take note of what the Law Society has agreed to, the decision is one of public interest, and not for the profession. The public has a fundamental interest in the rule of law and an effective system to maintain it. The legislation governing solicitors in Scotland requires the Law Society of Scotland "to promote the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession". The statute imposes two potentially conflicting duties on the Society. It has kept faith fairly well with the public interest despite challenges implied and experienced. However the Law Society should not be the final arbiter of the public interest.

Recent experience in the financial services industry does not indicate confidence that investors with a purely financial interest in maintaining ethical rules can be relied on to do so. Yet this is what is proposed by the Legal Services Bill. Solicitors need to respect professional rules to maintain their livelihood. Investors in a law firm which breaches its licence conditions can sell their stake in the firm and move on.

Confidentiality of information given by clients to solicitors is an essential feature of a fair system of administering justice. It is protected from disclosure to the courts. It is hard to understand how owners of a law firm who are not qualified to practice law can be prevented from acquiring this information if they demand it and yet keep it from the courts.

Does the public want a system where law firms are under the control of this or that commercial interest? Is it better to keep a system where independence of solicitors' ownership and control is maintained? The bill would allow advocates to maintain their existing rules requiring independence. Solicitors take part in much more litigation in Scotland than advocates do. Is it good public policy to allow solicitors to compromise their independence?

It is said that these changes will better allow Scottish solicitors to compete internationally. Examination of this claim suggests that the opposite is likely to be true. Similar changes are being introduced in England. There is a strong incentive in Scotland to follow England. However no such changes are proposed in USA. Other Member States in the European Union have consistently refused to accept this type of change. An EU Directive on the Right of Establishment of Lawyers (98/5/EC at Article 11.5.) specifically allows a host Member State to refuse to admit to practice any lawyer qualified elsewhere who is a member of a law firm where some of the owners are not members of the legal profession. These changes would pose a threat to international legal practice by Scottish solicitors.

It is said that these changes will benefit consumers by allowing legal services to be offered in new ways. Examination of this claim suggests that here also the opposite is likely to be true. We have a system where legal advice can normally be provided where it is economically possible to do so or where support is given from public funds. The areas of law where legal services are hard to find are generally those where clients cannot afford to pay. It is difficult to understand how this basic fact can be overcome by the provision of service by supermarket companies, banks or insurers. Solicitors have provided a network of offices throughout Scotland where legal services are available locally. If the financially viable parts of legal services are taken over by large commercial providers this will lead to increasing centralisation, and a loss for local consumers. It is true that the internet has changed the way of delivering many products and services. It is also true that most legal services do not readily adapt to this form of delivery any more than providing medical services does. The threat to local solicitors firms is a threat to consumers.

To allow solicitors to work in "multi-disciplinary practices" seems superficially to be attractive. However the history of this type of activity is not encouraging. High profile joint ventures between lawyers and accountants in Scotland have been tried. They failed. Lawyers and Accountants have different roles to perform. In consequence their ethical rules are different. No-one has shown how they can be reconciled. Which rules take precedence? Either would cause unacceptable problems for the other.

We live in a time where so much change happens that we are tempted to think that all change is good. The Legal Services Bill seems to increase the options for solicitors and clients. MSPs are will have to consider whether the opposite may not be true and whether despite the support of the Law Society, its proposals may damage the public interest.

Walter Semple 21/10/2009

12. ABS – A Question from the PCC We have recently completed the delivery of another Professional Competence Course programme at the Royal Faculty of Procurators at Glasgow and found, as usual, as much wisdom on the trainee side of the programme as on the trainers' side. In particular, one of the trainees, perhaps a little older than the average, it has to be said, posed a question which we now pose as an open question to our Society's membership, to the profession at large and, more particularly, to the Scottish Parliament. Our colleague explained that he had chosen, as a mature student, to pursue a career in the legal profession with the objective of becoming a solicitor in his own practice. He understood that, in order to achieve this objective, he would require to undertake (and finance) a law degree for four years followed by a further year at university

doing a practical diploma and that he would thereafter undergo two years as a trainee solicitor during which period he would undertake a compulsory Professional Competence Course following which period of traineeship, he would require to serve a further three years as an employed solicitor before he would even have sight of the holy grail of being a self employed solicitor. Throughout that period, he would require to remain free of serious offending and bankruptcy, the latter objective being somewhat more daunting, given the long period of nil or low earning that the process would involve. He was now well down his chosen road and labouring arduously with the traineeship period when he was informed that the law was about to change so that a person could become the owner of a law practice by simply putting up the money. He therefore asked the question how it could be possible for the law tomorrow to permit the financial acquisition of a legal practice when it had previously been recognised and established that all the foregoing training, qualification and practical experience had to be undertaken in order to achieve that objective?

Fit and proper person test? You must be absolutely joking.