

# Scottish Government debate: competition, regulation and business structures in the Scottish legal services market

15 November 2007

## **Introduction**

The Scottish Consumer Council (SCC) has long believed that there is a need to open up competition in the market for legal services in Scotland, and to look at new ways of delivering legal services. The SCC was a member of the Research Working Group on the Legal Services Market in Scotland, which published its final report in May 2006.<sup>1</sup> That report identified a number of restrictions on competition in the Scottish legal services market, which both the SCC and the Office of Fair Trading (OFT) agreed should be removed.

### ***Restrictions on Business Structures***

These restrictions include those against:

- solicitors and advocates providing services jointly ('legal disciplinary partnerships' or LDPs)
- partnerships between solicitors and other professionals, such as surveyors, accountants or IT professionals ('multi-disciplinary practices' or MDPs)
- solicitors employed by non-legal firms to give advice direct to the public (commonly referred to as 'Tesco law')
- partnerships between advocates
- direct access by members of the public to advocates, without having to go through a solicitor

In July 2007, the Office of Fair Trading published a report<sup>2</sup> which concluded that these restrictions put Scottish consumers at a disadvantage compared to those in England and Wales, where similar restrictions will soon be lifted by the Legal Services Bill. It therefore recommended that the Scottish Government should publish a statement detailing:

- its policy views on how legal services in Scotland should be regulated
- how the restrictions identified should be lifted
- the timeframe for this

The Cabinet Secretary for Justice said recently that the Scottish legal profession should take the lead in identifying distinctively Scottish solutions to meet the challenges of the future, and the Law Society of Scotland has now issued a consultation paper on alternative business structures within the profession.

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<sup>1</sup> *Report by the Research Working Group on the Legal Services Market in Scotland*, Scottish Executive, May 2006

<sup>2</sup> *Response to Which's Super-complaint: Restrictions on Business Structures and Direct Access in the Scottish Legal Profession*, Office of Fair Trading, July 2007

It is vital that these developments lead to the opening up of a market that has for too long neglected consumers and put the interests of lawyers first. The SCC supports the radical liberalisation of the legal services market in Scotland, subject to the necessary consumer protections being put in place.

### ***Governance of the legal profession***

If the current restrictions on business structures are lifted, there will be a need to examine how the legal professional bodies - the Law Society of Scotland and the Faculty of Advocates - are governed. It is important that appropriate Scottish solutions are found for Scotland, rather than necessarily following the England and Wales model. Aside from the issue of complaints-handling, which will be dealt with by the independent Scottish Legal Complaints Commission from late 2008, we support the concept of self-regulation / co-regulation of the profession. This support is, however, subject to a radical restructuring of the governance arrangements of both professional bodies, to allow the perspective of the non-lawyer to be more clearly expressed.

At present, the Law Society of Scotland's governance arrangements reflect the interests of a membership body, rather than a regulator in the public interest. The Society's decision-making Council has up to 53 members, all of them solicitors. Despite the fact that it has a statutory responsibility to promote the public interest,<sup>3</sup> the Society's present structure leaves it open to criticism that its view of what is in the public interest is not sufficiently informed by opinions from outside the profession.

While the Society has increased non-solicitor involvement in its client relations committees, and has recently appointed four non-solicitor observers to its Council, this is not enough. The Society itself recognises this, and we recently supported an amendment put forward by the Society to the Legal Services Bill, which would give it power to appoint non-solicitors to be full members of its governing Council for the first time.

If the Society is to continue to regulate the solicitors' profession, its governing Council requires radical restructuring to introduce a significant majority of non-solicitors, with an independent chair. The current size of the Council makes it unwieldy, and would need to be reduced.

These changes would allow the Society to demonstrate clearly that it was acting in the public interest in its regulatory functions, as its decisions would need to have the approval of a governing body structured to take account of the public interest.

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<sup>3</sup> Section 1(2) Solicitors (Scotland) Act 1980

The Faculty of Advocates should also take steps to represent the public interest on its governing body. Unlike the Society, the Faculty has no statutory role to promote the public interest, but it does at present both represent and regulate the advocate's profession. The Faculty should also take steps to include a significant majority of non-advocates on its governing Council, which is at present made up entirely of advocates.

These changes should give the professional bodies the chance to regulate the professions effectively, and increase public confidence in that regulation. Should this prove not to be the case in practice, the professional bodies should be stripped of their powers of self regulation and co-regulation, and left only with the role of representing the interests of the profession.

### **Key issues**

- There is a need to remove existing barriers to competition in the legal services market in Scotland. The overarching principle should be that, unless there is a clear and valid justification for retaining a restriction on competition, it should be scrapped.
- The primary concern of consumers is with the standard and quality of service they receive from those who provide legal services, not the ownership structure through which it is delivered.
- Contrary to concerns among some sectors of the legal profession, no-one is suggesting that providers should be *forced* to change their structures, simply that they should be able to set up new structures should they wish to. If they choose to do so, this will help to increase competition between providers of legal services.
- Access to justice is a very real concern, but there are real difficulties with this at present. There is actually potential for changes to business structures to improve the situation.
- The current regulatory governance arrangements for the legal profession are not sustainable, and must be reformed to include significant non-lawyer involvement.

## **Advantages which alternative business structures would bring for consumers**

- **Increased choice** in deciding where to go for legal and some non-legal services
- **Reduced prices** through economies of scale and reduced transaction costs
- **Better access to justice** for some consumers in rural areas and poor communities. There may be an increased role for the not-for-profit sector, with lawyers and non-lawyers working together to improve legal advice provision in such areas
- **More consumer-focused service** through external finance, specialist non-legal expertise and approachability
- **Greater convenience** through 'one-stop shopping' and increased opening hours
- **Increased consumer confidence** through improved reputation and branding of legal services

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## ***The Scottish Consumer Council***

The purpose of the Scottish Consumer Council is to make all consumers matter. For more information on what we are doing visit our website at [www.scotconsumer.org.uk](http://www.scotconsumer.org.uk). The website gives free access to all our reports, campaigns and policy work in progress. SCC reports in printed formats are available from our office at the address below. We are often able to make our publications available in alternative formats.

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