

response to the office of fair trading  
relating to the which? super-complaint  
about restrictions on business structures  
and direct access in the scottish legal  
profession

July 2007

## About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

Please check our web site at [www.scotconsumer.org.uk](http://www.scotconsumer.org.uk) for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

### ACCESS

Can consumers actually get the goods or services they need or want?

### CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

### INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

### REDRESS

If something goes wrong, can it be put right?

### SAFETY

Are standards as high as they can reasonably be?

### FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

### REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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## **1. Introduction**

The Scottish Consumer Council has been of the view for many years that there is a strong case for opening up competition in the market for legal services in Scotland. We welcome the broad thrust of this super-complaint, which builds on the in-depth work conducted by the Scottish Consumer Council revealing systematic problems in the way legal services are structured and regulated.

Our own discussions with the Office of Fair Trading have focused on the urgent need for greater competition in Scottish legal services. We hope that any action taken by the OFT in response to the super-complaint will help to open up a market that has for too long neglected consumers and put the vested interests of lawyers first. We hope that it will result in more consumer friendly, high quality legal services in Scotland.

It is important that the issues raised in the super-complaint are viewed in the wider context of the trend within the professions in general. There has in recent years been a general move away from self-regulation of professions, as the consumer interest has come to have greater prominence. There has also been a trend towards removing restrictions within the professions, and towards multidisciplinary working across related professions.

The Scottish Consumer Council was represented on the Research Working Group on the Legal Services Market in Scotland set up by the Scottish Executive. We welcomed the publication of the group's final report in May 2006, which we saw as an important step in the right direction.

At that time, we said that there was a need to open up the market for legal services in Scotland to greater competition, and to look at new ways of delivering legal services. We said then that it was imperative that any future work building on the conclusions in the report should follow as a matter of urgency, to ensure that Scottish consumers were not left behind compared to those in England and Wales, where major reforms were already underway.

Some of the issues identified by the working group report have now been addressed. Sections 25-29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 were recently commenced, extending rights of audience in the courts to suitably qualified non-lawyers, and ending the monopoly previously enjoyed by solicitors and advocates. The Faculty of Advocates has also relaxed both its restrictions on advertising by advocates, and its rules prohibiting direct access to advocates, without the need to instruct a solicitor first.

However, there remain significant problems within the legal services market in Scotland which need to be dealt with. There is still a need to remove existing barriers to competition in that market. The overarching principle should be that, unless there is a clear and valid justification for retaining a restriction on competition, it should be removed. Legal services need to be modernised,

bringing them into the 21st century and discarding those old-fashioned and outmoded practices that still exist.

The market for legal services is changing fast, and new models of delivery are becoming the norm. General practice among both branches of the profession is less prevalent than in the past, while specialisation is increasing. A significant proportion of the solicitors' profession now works 'in-house', whether for public authorities, companies or other organisations. The public defender service is expanding, while some solicitors choose to work in law centres, and a small number of solicitors are directly employed by the Scottish Legal Aid Board to deliver a number of innovative projects. Forthcoming changes to be brought in under the Legal Profession and Legal Aid (Scotland) Act mean that further solicitors will soon be employed by the Board to deliver publicly funded legal assistance on civil matters.

We believe that there is a need to look at further novel ways of delivering legal services, such as allowing lawyers to go into partnership with other non-legal professionals such as surveyors and accountants, and allowing solicitors employed by companies to give advice to members of the public. The latter approach, often referred to as 'Tesco law', is perhaps the most significant aspect of the Legal Services Bill currently going through the Westminster Parliament, which will open up the legal services market in England and Wales. The people of Scotland, meantime, will not have access to the same range of legal services that their counterparts in England and Wales will soon be able to use.

Given that the vast majority of those who require legal services will deal with a solicitor, the main focus of our concerns about the legal services market is the solicitor branch of the profession. While advocates have an important part to play in ensuring that consumers have access to justice, research shows that only a small minority of those with justiciable disputes end up in formal court or tribunal proceedings.<sup>1</sup> Solicitors, whether in private practice or otherwise employed, have a central role in providing legal services to the public.

Most people in Scotland will use a solicitor at some point during their life. Various studies in recent years have consistently found that around 1 in 4 people in Scotland have experienced one or more 'justiciable problems' during the previous five years,<sup>2</sup> and for many a solicitor is their first point of contact. Meanwhile, almost two-thirds of Scottish households are now owner-occupied.<sup>3</sup>

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<sup>1</sup> *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001 found that 14% of those with justiciable problems ended up in formal legal proceedings

<sup>2</sup> *Paths to Justice Scotland*, *ibid* found that 26% of people had a justiciable problem within the previous 5 years; *The Public Perspective on Accessing Legal Advice and Information*; Scottish Executive Central Research Unit, 2001 found a prevalence rate of 25%; *Community Legal Service: Assessing Need for Legal Advice in Scotland*; Scottish Executive Central Research Unit, 2004 found that the prevalence rate across four areas of Scotland varied between 28-32%

<sup>3</sup> 66% of households in Scotland are now owner occupied. Source: *Headline Results from the 2006 Scottish Household Survey*, published June 2007

The majority of people are therefore likely to need the services of a conveyancing solicitor at some point: the available research suggests that between half and two-thirds of people who employ a solicitor use their services for this purpose.<sup>4</sup>

## **2. Title of Queen's Counsel**

One issue which is not raised in the super-complaint, and which we believe merits further investigation, is the system of awarding the title of Queen's Counsel to advocates. This issue was raised during the discussions of the Working Group, and we agreed with the OFT that this matter should be examined further, as recorded in the Group's report.<sup>5</sup> We believe that there is a need to consider whether such a quality mark is needed, whether it is in the interests of consumers and whether it distorts competition.

## **3. Solicitors' fees and the taxation process**

Another issue which we raised concerns about during the discussions of the Working Group was the current system of taxation, which is intended to provide an independent assessment of a solicitor's fees. As stated in the Working Group report, while we believe that in theory taxation could provide consumer protection for solicitor's clients, we are concerned that it is not widely used, and that the potential costs involved may deter consumers for using it.<sup>6</sup>

We also had concerns about the complexity of the process and the lack of transparency as to how it works. We understand that the process is currently under investigation by the Scottish Executive, but we think that this issue merits investigation by the OFT when looking at the Scottish legal services market. As it presently operates, the taxation system may be seen to operate in favour of the service providers rather than consumers.

## **4. Specific comments on issues raised in the super-complaint**

First and foremost, it is our view, as stated above, that the starting point in relation to existing restrictions on competition should be that they should be removed unless there are clear and justifiable reasons for retaining them.

## **Part 2: The Problem**

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<sup>4</sup> *Report on General Public Opinion Survey*, prepared by System 3; Law Society of Scotland, October 1998; *Client Care: A report of a survey on the client care provided by solicitors in Scotland*; Scottish Consumer Council, 1995

<sup>5</sup> Report by the *Research Working Group on the Legal Services Market in Scotland*, Scottish Executive, May 2006, at paragraph 11.13

<sup>6</sup> At paragraph 10.28

### ***Restrictions on advocates' business structures***

While few members of the public will use the services of an advocate in comparison to the numbers that will use solicitors, we believe that advocates should be permitted to go into partnership, should they choose to do so. Our view on this issue remains as recorded in the *Report by the Research Working Group on the Legal Services Market in Scotland*.<sup>7</sup> Although we have some concerns about the small size of the Scottish bar and the potential impact on consumer choice, we agreed on balance with the arguments put forward by the OFT in favour of permitting partnerships between advocates. We believe that, if the restriction on partnerships between advocates were lifted, the OFT could if necessary use its competition powers to ensure that concentration did not distort the market.

### ***Restriction on direct access to advocates***

This restriction is not one of our major concerns here, as we do not envisage that many consumers would take advantage of direct access if this were available. That said, while we have welcomed the recent relaxation of the Faculty's rules, allowing direct access to a wider range of organisations, we would like to see the prohibition on direct access lifted, as recorded in the *Report by the Research Working Group on the Legal Services Market in Scotland*.<sup>8</sup>

### ***Restrictions on solicitors and advocates providing services jointly***

We believe in principle that lifting this restriction would be in the interests of consumers. This would open up the possibility of new and innovative ways of providing legal services, which some legal professionals may wish to offer.

We are aware that concerns have been expressed regarding the regulation of non-lawyer proprietors of such firms, although we are unclear as to why it might be thought likely that such firms would be owned by non-lawyers. We would imagine that in most cases, the proprietors would be either solicitors or advocates, both of whom are regulated by their respective professional bodies. As the *Report by the Research Working Group on the Legal Services Market in Scotland* observed,<sup>9</sup> there would not necessarily be any link between such 'legal disciplinary partnerships' or LDPs and external ownership of law firms.

That said, we accept that these concerns over third party ownership do exist, but we do not think that they are impossible to overcome. We consider that the 'fit to own' test proposed by Sir David Clementi would be a useful starting point here.

We also acknowledge that there are other issues which would require to be addressed if such partnerships were to be allowed. There would be a need to ensure that consumers are referred to the most appropriate advocate for their needs, rather than simply the 'in-house' advocate. There is also concern that the advent of such partnerships may have an adverse impact on access to justice,

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<sup>7</sup> At paragraph 8.24

<sup>8</sup> At paragraph 7.15

<sup>9</sup> At paragraph 8.56

should sufficient lawyers with a particular specialism all join the same LDP, for example.

We consider that these difficulties are not insurmountable, and that, on balance, the restriction should be removed. In relation to the latter point, similar issues apply as in the case of partnerships between advocates. As discussed above, if these fears about access to justice were realised, the OFT could, if necessary, use its competition powers to ensure that concentration did not distort the market.

We do not accept the argument put forward by the Society in the *Report by the Research Working Group on the Legal Services Market in Scotland* that there is little evidence of consumer demand for such practices.<sup>10</sup> Changes in the ways in which professional services are delivered are rarely demand-led at the outset, and we do not consider that the assertion that the Scottish public is not crying out for services provided by such partnerships is a valid argument for not permitting them to exist.

In the context of LDPs, it should be borne in mind that there may also be scope in the future for other types of legal practitioners, such as those non-solicitors and non-advocates who may acquire rights of audience under the recently enacted sections 25-29 of the Law Reform (Miscellaneous Provisions) Act 1990, to enter into such partnerships.

### ***Restrictions on third party entry***

This heading appears to conflate two separate, but related issues, both of which are central to the opening up of the legal services market in Scotland. Firstly, there is the possibility of multi-disciplinary practices (or MDPs) involving solicitors and other professionals. Secondly, there is an issue about employed solicitors acting for third parties, commonly referred to as 'Tesco law'.

#### ***a) Multi-disciplinary partnerships***

We have long been in favour of the removal of restrictions on the formation of MDPs, which would allow non-lawyers to become partners in legal firms. As pointed out in the introduction to this response, multidisciplinary working across different professions has become more common in recent years in other disciplines, and we believe that it is time the legal profession moved in this direction.

Some of the same arguments have been made against MDPs as have been made against LDPS, as outlined above. These include concerns about non-lawyer ownership, lack of consumer demand, and conflict of interest. While we accept that some of these concerns are valid, we do not believe that they cannot be addressed, for the same reasons as we have set out above in relation to LDPs.

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<sup>10</sup> At paragraph 8.36

Examples of MDPs do already exist in Scotland, to the extent that some firms of solicitors employ other professionals, such as accountants, financial advisers and insurance professionals. The difference is that these people are not permitted to become partners within a firm. There are also examples of 'parallel partnerships', such as solicitors' firms which are linked to estate agents, which have the same branding, but are in fact separately run businesses. The issue, then, is primarily about ownership, rather than the principle of a variety of professionals working together within the same business.

We believe that many consumers would welcome a 'one stop shop' in relation to house purchase, for example, where they could receive all of the various professional services required under one roof. This would build on the existing model where Scottish solicitors offer both estate agency and conveyancing services. In addition to convenience, this should benefit consumers financially as a result of the cost savings made by the partnership in reduced overheads.

We are not convinced that the existence of MDPs would lead to reduced choice for consumers. While there are potentially issues to be addressed in relation to rural and remote areas, there may well be a lack of services at present, which might even be improved by a branch of a multi-disciplinary partnership moving into a particular area.

We entirely accept that, before multi-disciplinary practices are permitted, there is a need to ensure that adequate protection mechanisms are in place to protect consumers. Ways would need to be found of ensuring that potential issues surrounding conflict of interest and confidentiality are addressed, and that adequate indemnity arrangements and complaints procedures are in place in relation to all professionals within the practice.

*b) Employed solicitors acting for third parties*

As recorded in the *Report by the Research Working Group on the Legal Services Market in Scotland*,<sup>11</sup> we believe that the removal of this restriction would potentially open up a variety of new and more convenient methods of providing legal services, thereby increasing consumer choice.

We are not convinced by the argument put forward by the Law Society of Scotland in the report that the solicitor's duty to the client would be in conflict with their loyalty to an employer.<sup>12</sup> It is already very common for employed solicitors to give advice to clients. Almost half of all solicitors in private practice are assistants or associates employed by a solicitors' firm,<sup>13</sup> yet it has never been suggested that they experience such conflict. Moreover, solicitors working for the Public Defence Solicitors' Office, or for the Scottish Legal Aid Board under Part V of the Legal Aid (Scotland) Act 1986, are also already directly employed to give advice to the public.

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<sup>11</sup> At paragraph 8.30

<sup>12</sup> At paragraph 8.31

<sup>13</sup> In 2005, there were 3592 partners in private practice, 1011 associates and 2101 assistants. Source: *Law Society of Scotland Annual Report and Accounts 2005*

It is also worth noting the observation set out in the Working Group report that potential providers of legal services such as supermarkets would have a strong incentive to provide a high quality service, as failure to do so would result in adverse publicity which would affect their reputation more broadly.

## **Part 5: The Solutions**

### ***Proposed regulatory options***

The Law Society of Scotland has a dual statutory role: firstly, to promote the interests of the solicitors' profession in Scotland, and secondly, to promote the public interest in relation to the solicitor profession.<sup>14</sup> While it is clear that there is potential for conflict between these roles, we believe that self-regulation (and in reality, as the Society itself points out, co-regulation with a number of other bodies) brings a number of benefits to consumers. These include:

- access to the professional body's detailed knowledge and understanding of the needs and problems of the sector
- the flexibility to develop rules of conduct which take account of changing circumstances
- the benchmarking of best practice over and above the basic minimum requirements

However, we also believe that external intervention is justified where competition alone is not capable of delivering consumer satisfaction. The market for legal services requires regulation for various reasons:

- the complexity and sophistication of the service provided
- the consumer's difficulty in making an informed judgment about choice of service provider
- the dangers of unfair competition and cartels
- the need to ensure that legal services funded through the legal aid scheme are of an appropriate quality

In the past, our main focus, and that of both the Scottish Executive and Scottish Parliament, has been on the primary public-facing role of the professional bodies: the handling of complaints about legal practitioners. We have successfully argued that external intervention was required in relation to complaints handling, as our research had demonstrated a lack of consumer confidence in the ability of the Law Society of Scotland to adjudicate impartially on complaints. We have therefore very much welcomed the planned establishment of an independent Scottish Legal Complaints Commission, which we believe will greatly increase consumer confidence in how complaints are handled.

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<sup>14</sup> Section 1(2) Solicitors (Scotland) Act 1980

While the handling of complaints has been central to the debate, we consider that it is now time to turn to the issues surrounding how the professional bodies are governed. In considering this, we believe that it is important that appropriate Scottish solutions are found for Scotland, rather than necessarily following the England and Wales model. We continue to support the concept of self-regulation (and indeed co-regulation) in relation to issues other than complaints-handling, subject to a radical restructuring of the Law Society of Scotland's governance arrangements, to allow the perspective of the non-solicitor to be more clearly expressed.

At present, the Society's governance arrangements reflect the interests of a membership body, rather than a regulator in the public interest. The Council of the Society has up to 53 members, all of them solicitors. It is a considerable drawback for a professional organisation which has a statutory responsibility to promote the public interest that its decision-making body has no non-solicitors among its membership.

The Society's present structure leaves it open to the criticism that its view of what is in the public interest is not sufficiently informed by opinions from outwith the solicitor profession. The Society has responded over the years to external pressure from the Scottish Consumer Council to increase non-solicitor involvement in its client relations committees, and has recently appointed four non-solicitor observers to its Council, but we do not believe that this is 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, we consider that its governing Council requires to be radically re-structured to introduce a majority of non-solicitors, with an independent chair. We also believe that the current size of the Council makes it unwieldy, and that its overall size would therefore need to be reduced.

Such a change in structure would give the Society the opportunity to demonstrate clearly that it was acting in the public interest in its regulatory functions, because all decisions relating to such matters would need to have had the approval of a governing body structured to take account of the public interest. This should lead to increased public confidence, transparency and effectiveness.

While our primary focus has been on the Law Society of Scotland, we consider that 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 majority of non-advocates on its governing Council, which is at present made up entirely of advocates.

We would hope that these changes would in themselves 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, however, 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.